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## Overreaching English-Only Policies Spell Trouble For Employers

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On May 12, 2011, eight Hispanic employees of the City of Rochester filed an action against the City, among other defendants, for implementing a sweeping English-only policy that prohibited Spanish to be spoken at all times, including breaks and whether it was within or outside the presence of non-Spanish speaking employees.<sup>1</sup> According to the complaint, the employees' manager told them that "if you want to speak Spanish, do it at home and not at the workplace."<sup>2</sup>

Rochester is a thriving economic metropolitan city home to heavy-hitting corporations such as Xerox, Kodak, GM, and Bausch & Lomb. According to the 2010 census, it is the third largest city in New York, with a population of approximately 211,000 people, 16.4% of which identify themselves as Hispanic.<sup>3</sup> Therefore, hearing a co-worker speak Spanish in the workplace should be not only commonplace but expected. Employers should realize that these overreaching policies are illegal, bad for employee

See *ENGLISH-ONLY*, page 10

## Associational Disability – Overlooked and Underutilized?

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The Americans with Disabilities Act has received renewed attention lately and rightfully so. Enacted on September 25, 2008, the ADA Amendments Act of 2008 ("ADAAA") made significant changes to the definition of "disability" in an effort to reinstate the Act's broad scope of protection, and in doing so, rejected the Supreme Court's narrow interpretations of the term. The final EEOC implementing regulations were approved by a bipartisan vote and published on March 25, 2011; they went into effect on May 24, 2011. The ADAAA and its implementing regulations shift the focus of ADA claims back to its original statutory intent: whether disability discrimination actually took place, rather than whether an individual's disability fits within the narrow confines of the Court's definition.

As attorneys begin to understand and appreciate the impact of the ADAAA for their disabled clients, they should also keep in mind its impact on nondisabled clients who have relationships or associations with disabled individuals. The often overlooked<sup>1</sup> "associational disability" provision of the ADA gives nondisabled employees a cause of action where an employer "exclud[es] or otherwise den[ies] equal jobs or benefits to a qualified individual because of the

known disability of an individual with whom the qualified individual is known to have a relationship or association."<sup>2</sup> The newly expansive interpretation of "disability" applies with equal force to such claims.

The associational disability provision is broad. It covers a wide range of associations beyond immediate family and spousal relationships, described in the regulations as "family, business, social or other relationship[s]."<sup>3</sup> It does not require that the nondisabled employee be related to the disabled individual by blood, marriage, adoption, or guardianship to be protected.<sup>4</sup> Significantly, individuals in lesbian and gay partnerships are protected,<sup>5</sup> as are individuals in less formal social relationships, including both romantic relationships and friendships.<sup>6</sup>

Although "[t]he paradigmatic case is that of the parent of a disabled child, whose employer may fear that the child's disability may compromise the employee's ability to perform his or her job," this provision may also provide essential

See *ASSOCIATIONAL DISABILITY*, page 4

<sup>2</sup> 42 U.S.C. § 12112(b)(4).

<sup>3</sup> 29 C.F.R. § 1630.8 (2008).

<sup>4</sup> Travis, *supra* n. 1, at 368 n.344 (citing H.R. Rep. No. 101-484(III), at 38-39 (1990), reprinted in 1990 U.S.C.C.A.N., 445, 461-62 (rejecting an amendment that would have restricted the ADA's association provision only to nondisabled employees related to a disabled individual by blood, marriage, adoption, or guardianship)).

<sup>5</sup> *Id.* at 370, n.352.

<sup>6</sup> *Id.* at 370, n.353.

<sup>1</sup> Michelle Travis, *Lashing Back at the ADA Backlash: How the Americans With Disabilities Act Benefits Americans Without Disabilities*, 76 Tenn. L. Rev. 311, 369 (Winter 2009) (describing the prohibition against associational discrimination as "little known" and collecting cases).

protections for the increasing number of employees who are caring for elderly parents. The EEOC Technical Assistance Manual explains that pursuant to the association provision, "an employer may not assume that the individual will be unreliable, have to use leave time, or be away from work in order to care for the family member with a disability."<sup>7</sup>

This provision is particularly relevant to employees who have relationships with someone with a disability, like HIV/AIDS, that has historically been the subject of stigma and discrimination. In fact, the legislative history of this provision reveals that it was "inspired in part by testimony before House and Senate Subcommittees pertaining to a woman who was fired from her long-held job because her employer found out that the woman's son, who had become ill with AIDS, had moved into her house so she could care for him." *Den Hartog v. Wasatch Acad.*, 129 F.3d 1076, 1082 (10th Cir. 1997) (quoting H. R. Rep. No. 101-485, pt. 2, at 30 (1990), reprinted in 1990 U.S.C.A.N. 303, 312 (citing this testimony as evidence of the need for the association provision)). Further, an employer may not fire, refuse to hire, or deny benefits to a nondisabled employee who provides care for someone with HIV/AIDS, including employees who volunteer at AIDS clinics during non-working hours.<sup>8</sup> In *Saladin v. Turner*, 936 F. Supp. 1571 (N.D. Okla. 1996), the plaintiff won his ADA association claim against an employer that had suspended and discharged him because customers were concerned about his long-term relationship with a man who had HIV/AIDS. The court noted that "[u]nder the ADA, effect may not be given to the public's fears or stereotypes." *Id.* at 1581.

In order to establish a prima facie case of associational discrimination under the ADA, a plaintiff must demonstrate

that:

1) the plaintiff was "qualified" for the job at the time of the adverse employment action; 2) the plaintiff was subject to adverse employment action; 3) the plaintiff was known by his employer at the time to have a relative or associate with a disability; and 4) the adverse employment action occurred under circumstances raising a reasonable inference that the disability of the relative or associate was a determining factor in the employer's decision.

*Dollinger v. State Insurance Fund*, 44 F. Supp. 2d 467, 480 (N.D.N.Y. 1999). Courts apply the *McDonnell-Douglas* burden-shifting framework to ADA association claims; if the plaintiff

2d 467 (plaintiff sufficiently alleged a causal connection between defendants' awareness of his association with individuals with HIV/AIDS and adverse employment actions, which included denials of promotions); *Abdel-Khalek*, 1999 WL 190790 (defendant's motion for summary judgment denied where plaintiff asserted she was terminated and not hired by successor company because she had a disabled daughter); *Morgenthal ex rel. Morgenthal v. Am. Tel. & Tel. Co., Inc.*, 1999 WL 187055 (S.D.N.Y. Apr. 6, 1999) (plaintiff sufficiently alleged standing to sue, claiming that employer denied him insurance benefits to treat his son's autism); *Pardilla v. Buffalo State College Found.*, 958 F. Supp. 124 (W.D.N.Y. 1997) (gen-

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establishes these elements, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action. *Abdel-Khalek v. Ernst & Young LLP*, 1999 WL 190790, at \*4 (S.D.N.Y. 1999) (citing *Den Hartog v. Wasatch Academy*, 129 F.3d 1076, 1085 (10th Cir. 1997)). Once such a reason is articulated, the burden shifts back to the plaintiff to prove that the employer's stated reason is pretextual and that the employer intentionally discriminated against plaintiff. *Dollinger*, 44 F. Supp. 2d at 480.

Only a handful of cases have been brought in the Second Circuit asserting claims under this provision, with varying degrees of success. Several cases have survived defendants' dispositive motions. See *Dollinger*, 44 F. Supp.

2d 467 (plaintiff sufficiently alleged a causal connection between defendants' awareness of his association with individuals with HIV/AIDS and adverse employment actions, which included denials of promotions); *Abdel-Khalek*, 1999 WL 190790 (defendant's motion for summary judgment denied where plaintiff asserted she was terminated and not hired by successor company because she had a disabled daughter); *Morgenthal ex rel. Morgenthal v. Am. Tel. & Tel. Co., Inc.*, 1999 WL 187055 (S.D.N.Y. Apr. 6, 1999) (plaintiff sufficiently alleged standing to sue, claiming that employer denied him insurance benefits to treat his son's autism); *Pardilla v. Buffalo State College Found.*, 958 F. Supp. 124 (W.D.N.Y. 1997) (gen-

uine issue of material fact existed as to whether defendant's withdrawal of its offer was a result of plaintiff's association with her disabled daughter). While other cases have failed to sustain claims under the association provision, many of these cases sought protection for associations with tenuous relationship ties. *Manigault v. C.W. Post of Long Island Univ.*, 659 F. Supp. 2d 367 (E.D.N.Y. 2009) (concluding that amending plaintiff's complaint to add a Title I claim alleging associational discrimination would be futile "because Title I of the ADA does not allow relief for a teacher alleging an adverse employment action resulting from 'advocacy' on behalf of his disabled students"); *Valenti v. Massapequa Union Free Sch. Dist.*, 2006 WL 2570871 (E.D.N.Y.

See ASSOCIATIONAL DISABILITY, page 7

<sup>7</sup> U.S. Equal Emp. Opportunity Comm'n, A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act, at ch. 7, § 7.4 (1992)

<sup>8</sup> Interpretative Guidance, 29 C.F.R. pt. 1630, app. § 1630.8; H.R. Rep. No. 101-485(III), at 38-39 (1990), reprinted in 1990 U.S.C.A.N., 445, 461-62; *id.* at ch. 7, § 7.4.

Sept. 5, 2006) (complaint dismissed where plaintiff asserted he experienced adverse employment action after advocating for his disabled students). Additional cases failed because the alleged disability was not covered by the ADA. *See, e.g., Simmons v. Woodycrest Ctr. for Human Devel.*, 2011 WL 855942 (S.D.N.Y. Mar. 9, 2011) (defendant's motion for summary judgment granted where plaintiff conceded that child was never diagnosed with any condition that could be interpreted as a disability); *Sacay v. Research Found. of City Univ. of New York*, 193 F. Supp. 2d 611 (E.D.N.Y. 2002) (associational discrimination claim failed because plaintiff's mother was not disabled under law); *Rome v. MTA/New York City Transit*, 97-CV-2945 (JG), 1997 WL 1048908 (E.D.N.Y. Nov. 18, 1997) (failure to sufficiently allege inference of discrimination in the employer's decision not to cover plaintiff's speech therapy).

The association provision's coverage

is limited in at least one important respect. It covers those circumstances in which an employer discriminates based on the *unfounded* belief that an employer may need additional time off, a flexible

individual with a disability.<sup>9</sup> In these circumstances, a claim under the Family Medical Leave Act, if available, is the better legal avenue to pursue.

The ADA and its implementing

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work arrangement, or other job modifications. If the employee's relationship with a disabled individual *actually* impacts job performance or results in absences or tardiness, the employee is not protected by the ADA. In other words, a disabled employee's right to request a reasonable accommodation under the ADA does not extend to a nondisabled employee who may need to care for an

regulations will undoubtedly expand the scope of disability discrimination claims and will reshape how they are litigated. It is important to recognize that it will impact both employees with disabilities and employees who have associations and relationships with individuals with disabilities. ■

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<sup>9</sup> EEOC Guidance, 29 C.F.R. app. § 1630.8.