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DISCRIMINATION BY ASSOCIATION: ANOTHER PITFALL FOR EMPLOYERS

By Jesús J. Villa, Esq.

Most employers understand that they are prohibited by law from making employment decisions based on someone's disability. But employers may be less familiar with the legal prohibitions on discrimination with a person or persons with a disability or of a certain race based on an employee's or applicant's association.

A recent example of disability association discrimination was presented in [Dewitt v. Proctor Hospital](#). This case was brought by a nurse manager against the hospital from which she was terminated. The hospital did not give the nurse manager a clear reason for her termination. However, the termination coincided with efforts by the hospital to cut costs, including the rising costs of the hospital's partially self-insured health insurance plan.

Throughout Dewitt's employment, her husband (who was not employed by the hospital) suffered from prostate cancer. A few years into Dewitt's employment, her husband began undergoing costly medical procedures. In effort to take control

of rising medical costs, hospital management began confronting Dewitt about her husband's treatment and related costs. The hospital told Dewitt a committee was reviewing the medical expenses because they were "unusually high," and suggested that she and her husband consider less expensive alternatives to the cancer treatments, such as hospice care. After several such discussions between Dewitt and the hospital, the hospital terminated Dewitt's employment. Dewitt's husband died a little over a year later. Dewitt sued the hospital for age and gender discrimination, and disability association discrimination.

Although the district court granted the hospital summary judgment on all of Dewitt's claims, a majority of the Seventh Circuit Court of Appeals reversed on the association discrimination claim, finding that Dewitt established direct evidence that association discrimination may have motivated the hospital's decision to fire Dewitt. That direct evidence, explained the court, was the timing of the termination decision, along with the several direct communications in the preceding months regarding the need to address the high costs of Dewitt's husband's medical treatments. Given this evidence, the majority felt the question of association discrimination should be presented to a jury.

Section 12112(b)(4) of the Americans with Disabilities Act ("ADA") prohibits employers from discriminating against an employee based on "the known disability of an individual with whom [the employee] is known to have a relationship or association." The EEOC has recently signaled an increased interest in association discrimination cases. In 2004, the EEOC issued a [question-and-answer document](#) about association discrimination under the ADA that emphasized that federal discrimination law protects not only individuals with disabilities, but also "family members, friends and caregivers of individuals with disabilities." In its more recent [enforcement guidance](#) on disparate treatment of employee caregivers, the EEOC again emphasized the point that discrimination protections extended to employees and job applicants who, while not disabled themselves, cared for individuals with disabilities.

The purpose of these protections is to combat against unfair stereotypes and assumptions about persons with disabilities. But these protections mean that employers must be cautious in how they manage employees whose work is affected by their caregiving relationship or other association with a disabled person. For example:

- An employer may not lawfully refuse to hire an

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applicant out of concern that the applicant's spouse has a medical condition that requires expensive medical treatment and would likely increase the employer's health plan costs.

- An employer may not lawfully deny an employee a promotion to a management position based on concern that he or she will not be able to meet the job requirements because of care responsibilities for a disabled child.
- An employer may not lawfully terminate an employee whose partner has a contagious health condition out of concern that the employee may develop the disease him or herself and pose workplace risks.
- An employer should not make unwelcome, inappropriate jokes or comments to an employee about his or her friend's medical condition.

Note that while the ADA prohibits discrimination based on association with an individual who has a disability. It does not, however, require accommodation based on association. In other words, employers are not obligated to give special treatment to employees or applicants with disabled friends, family, etc. But the law does obligate employers to treat these employees the same as any other employees. For example, the ADA would not require employers to modify their leave policies to accommodate special needs of employees who need to care for a disabled family member. The ADA would require employers to afford those employees the same leave afforded to everyone else.

Employers are already finding themselves spending a great deal of time and money dealing with employees whose responsibilities to parents, spouses and children require them to miss work, or otherwise affect their jobs. Also the rising cost of health insurance is a very real concern. Nevertheless, employers must be cautious that, in managing these issues, they do not make themselves the victims of association discrimination lawsuits.

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