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# The Company You Keep: Associational Discrimination

Law360, New York (October 22, 2008) -- "Associational discrimination" claims – which involve employee allegations of an adverse employment action because of the employee's relationship with a member of a protected class – appear to be on the rise.

While the statutory language of the Americans with Disabilities Act ("ADA") explicitly prohibits discrimination based on an employee's relationship with a disabled person (and which the recently enacted Genetic Information Nondiscrimination Act, H.R. 493, prohibits by implication), and while courts have long afforded protection under Title VII because of an employee's relationship with a person in a protected class, these types of claims have been infrequently litigated.

However, as recent court decisions make clear, associational discrimination claims pose an increasing risk to employers.

Moreover, courts are increasingly sympathetic both to expanding available causes of action to current plaintiffs and to affording protection to new classes of plaintiffs.

These issues make associational discrimination claims a potential minefield for employers; as a result, employers should take these possible claims into consideration before taking action against an employee or the employee's relatives.

**Associational Discrimination: Expansion over Time**

Associational discrimination claims have been brought under the ADA and under Title VII.

While the ADA typically requires that an individual be a "qualified individual with a disability" to bring a claim, section 12112(b)(4) expressly prohibits discrimination against a non-disabled individual because of his or her association with a qualified individual with a disability.

These cases, however, have historically rarely been filed, and those which have been litigated usually revolved around absenteeism related to caring for a disabled person, rather than discrimination based purely on association. See, e.g., Tyndall v. National Education Centers, 31 F.3d 209 (4th Cir. 1994).

Title VII, in contrast to the ADA, contains no express prohibition against associational discrimination. In fact, courts originally did not recognize a claim for association discrimination under Title VII at all.

The basis for that position was that the employer was discriminating on the basis of the non-employee's race, not the plaintiff employee's race. See, e.g., Ripp v. Dobbs Houses, Inc., 366 F. Supp. 205 (N.D. Ala. 1973).

Eventually, courts did broaden Title VII's protection to employees in such situations.

Courts reasoned that if the employee suffered an adverse employment action because his or her associate was of a different race, then the employer's action was based on the employee's race as much as it was based on the friend's race. See, e.g., Whitney v. Greater N.Y. Corp., 401 F. Supp. 1363 (S.D.N.Y. 1975).

This theory is widely accepted and applied today. See, e.g., Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888, 892 (11th Cir. 1986).

Courts have continued to broaden protection for associational discrimination claims although they are split over the outer contours of these claims, further muddying the waters.

Employers must be aware of the current and potential sources of liability for these claims: (1) the typical claim based on an employee's association with a member of a protected class; (2) the potential new cause of action allowing employees who engage in protected activity to claim retaliation if an uninvolved relative suffers an adverse employment action; and (3) the emerging expansion of Title VII protection to a new class of third-party plaintiffs in retaliation cases, namely, those who suffer an adverse employment action because of their association with an employee who engaged in protected activity but who never themselves engaged in protected activity.

**The Typical Claim**

*Holcomb v. Iona College, 521 F.3d 130 (2d Cir. Apr. 1, 2008)*

In Holcomb v. Iona College, 521 F.3d 130 (2d Cir. Apr. 1, 2008), the plaintiff, Craig Holcomb, was one of three assistant coaches for the men's basketball team at Iona College.

After a few lackluster seasons, the college decided to fire two assistant coaches. It selected Holcomb, a white man married to a black woman, and a black assistant coach

for discharge. The remaining assistant coach, a white man not in an interracial relationship, was retained.

Holcomb brought a claim of race discrimination, pointing to the racial disparity of fired vs. retained assistant coaches as well as to several racist remarks made by a few of the decision-makers.

The Second Circuit, overruling the district court's grant of summary judgment to the college and in a case of first impression, held that Holcomb had both established a prima facie case and presented an issue of material fact as to the whether the college was motivated by racial animus in its actions.

In reaching its decision, the Second Circuit explained, "where an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee's own race" (emphasis in original).

The court noted that all of the district courts in the Second Circuit, as well as the Fifth, Sixth and Eleventh Circuits, had reached the same conclusion.

*Dewitt v. Proctor Hospital, 517 F.3d 944 (7th Cir. Feb. 27, 2008)*

In Dewitt v. Proctor Hospital, 517 F.3d 944 (7th Cir. Feb. 27, 2008), the plaintiff Phillis Dewitt worked as a nurse for Proctor Hospital beginning in September 2001.

She was promoted and her last evaluation before her termination was "outstanding." In August 2005, Dewitt was fired and designated as ineligible for rehire.

Dewitt believed that she was fired because her husband, who was struggling with cancer and incurring high medical bills, was too costly for the hospital, which was self-insured and facing financial difficulty.

On two occasions in the year before her discharge, Dewitt's manager confronted her about her husband's condition and high medical bills, and once suggested that they give up on the expensive chemotherapy and radiation.

Dewitt's manager also informed the employees three months before Dewitt's discharge that the hospital was in financial trouble which required "creative" cost cutting.

Dewitt brought suit under the ADA, alleging, inter alia, that Proctor Hospital had fired her because of her husband's costly disability.

The court overruled the district court's grant of summary judgment for the hospital and held that Dewitt had presented sufficient evidence that a discriminatory animus may have motivated the hospital in order to merit a trial.

## A New Type Of Claim

*EEOC v. Wal-Mart Stores Inc., 2008 WL 3471404 (D.N.M. July 17, 2008)*

It is axiomatic that an employee can bring a retaliation claim when he or she has suffered an adverse employment action after engaging in protected activity.

Under Burlington Northern and Santa Fe Railway Co. v. White, 548 U.S. 53 (2006), retaliation claims were expanded to cover any action (not just employment-related) taken against an employee that a reasonable employee would find "materially adverse."

Now, however, under EEOC v. Wal-Mart Stores, Inc., 2008 WL 3471404 (D.N.M. July 17, 2008), retaliation claims have been extended even further to cover actions taken against an employee's relative which a reasonable employee would find "materially adverse."

Ramona Kay Bradford, an employee of Wal-Mart, filed a charge of discrimination against Wal-Mart in August 2004. In October and December 2004, Bradford's daughter and son, respectively, applied for available positions for which each was qualified.

Both received positive feedback from their first interviews, but neither was hired, while several other less qualified individuals were hired in the same time frame. Bradford, her son, and her daughter all brought claims of retaliation.

The court held that Bradford's daughter and son could not maintain retaliation claims against Wal-Mart because they had not engaged in protected activity, a required element of a prima facie retaliation claim.

In so doing, the court noted its disagreement with Thompson v. North American Stainless, discussed below.

However, the court did permit Bradford's claim to go forward, despite the fact that she herself had not suffered a materially adverse action.

The court agreed with the EEOC's argument that "Wal-Mart's failure to hire the children 'adversely affected her status as an employee ... effectively deterring Mrs. Bradford, or others in her same or similar situation, from opposing and/or participating in protected proceedings under Title VII.'"

This is a ground-breaking ruling, allowing an employee to bring a retaliation claim based on action taken against a third party. It raises the concern that employers will have to begin to consider whether an individual is related to or has any relationship with an employee who engaged in protected conduct, before making employment decisions or taking actions regarding that individual.

## The New Plaintiff

*Thompson v. North American Stainless, LP, 520 F.3d 644 (6th Cir. March 31, 2008), rehearing en banc granted, opinion vacated July 28, 2008*

In Thompson v. North American Stainless, LP, 520 F.3d 644 (6th Cir. March 31, 2008), the plaintiff Eric Thompson had worked as a metallurgical engineer for the defendant stainless steel factory since 1997.

In 2000, he met Miriam Regalado, who would eventually become his wife, when she was hired by the defendant. They quickly began dating and eventually were engaged.

In 2002, Thompson's then-fiancée Regalado filed an EEOC charge alleging gender discrimination.

On Feb. 13, 2003, the EEOC notified the defendant of the charge. Approximately three weeks later, the defendant terminated Thompson's employment ostensibly for performance reasons.

Thompson filed an EEOC charge and then a lawsuit alleging that his employer had violated the anti-retaliation provision of Title VII by discharging him because of the protected activity of his fiancée.

In the district court case, North American Stainless moved for summary judgment, on the basis that even if Thompson had been fired because of his association with Regalado, this would be insufficient as a matter of law.

The district court agreed, holding that Thompson had failed to state a cognizable claim for discrimination or retaliation under Title VII.

On appeal, the Sixth Circuit reversed in a 2-1 decision, holding that retaliation "against employees not directly involved in protected activity but who are so closely related to or associated with those who are directly involved that it is clear that the protected activity motivated the employer's action ... is prohibited."

The court admitted that the plain language of Title VII indicates that the only individual protected is the one participating in the protected activity, but based its holding on the rationale that a literal reading of the statute would undermine the purpose of Title VII.

As the court stated, "[t]here is no doubt that an employer's retaliation against a family member after an employee files an EEOC charge would, under Burlington [Northern and Santa Fe Railway Co. v. White, 548 U.S. 53 (2006)], dissuade 'reasonable workers' from such an action." The court's decision has since been vacated pending an en banc rehearing.

The lesson, however, survives: courts are increasingly sympathetic to third-party retaliation claims.

Even though the other circuit courts which have considered the issue, namely the Third, Fifth, and Eighth Circuits, have issued rulings contrary to the Sixth Circuit's decision, several district courts in other circuits have allowed third-party retaliation claims, reasoning, as did the Sixth Circuit, that to hold otherwise would undermine the purpose of Title VII.

See, e.g., Fogleman v. Mercy Hospital, Inc., 283 F.3d 561 (3d Cir. 2002); Smith v. Riceland Foods, Inc., 151 F.3d 813 (8th Cir. 1998); Holt v. JTM Industries, Inc., 89 F.3d 1224 (5th Cir. 1996); Gonzalez v. N.Y. State Dep't of Corr. Servs., 122 F. Supp. 2d 335, 347 (N.D.N.Y. 2000); EEOC v. Nalbandian Sales, Inc., 36 F. Supp. 2d 1206, 1213 (E.D. Cal. 1998); Murphy v. Cadillac Rubber & Plastics, Inc., 946 F. Supp. 1108, 1119 (W.D.N.Y. 1996); McKenzie v. Atl. Richfield Co., 906 F. Supp. 572, 575 (D. Colo. 1995); Thurman v. Robertshaw Control Co., 869 F. Supp. 934, 941 (N.D. Ga. 1994).

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