

Legal Briefings

ADA Coverage Beyond Actual Disabilities: Regarded As, Record Of, and Association

By Equip for Equality¹

I. Introduction

Congress passed the Americans with Disabilities Act (ADA) to provide a national mandate to eliminate discrimination against people with disabilities.² In passing the ADA, Congress recognized that people with disabilities “have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.”³

To qualify for ADA protections, individuals must belong to a class of individuals protected by the ADA. Most individuals who seek protection under the ADA are individuals with an ADA-qualifying disability. The ADA defines persons with disabilities as individuals who have: (1) a physical or mental impairment that substantially limits one or more of the major life activities; (2) a record of such an impairment; or (3) been regarded as having such an impairment.⁴ These three definitions are known as the “actual disability,” “record of,” and “regarded as” prongs respectively.

In addition to protecting individuals who have ADA-defined disabilities, the ADA also seeks to prevent discrimination based on a “relationship” or “association” with a person with a disability by defining unlawful ADA discrimination to include “excluding or otherwise denying 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.”⁵

This Legal Brief examines the ADA’s protections for individuals who fall outside of the ADA’s “actual disability” prong within three other classes of ADA protection—those who are “regarded as,” have a “record of,” or an “association with” a person with at disability.

II. “Regarded As” Having an ADA Disability

When employees are regarded by their employers as having an impairment, they are protected by the ADA even if they do not have a condition that substantially limits a

ADA Coverage Beyond Actual Disabilities: Regarded As, Record Of, and Association



major life activity. Congress included this prong in the ADA's definition of "disability" to protect people from discriminatory actions based on "myths, fears, and stereotypes" about a disability that may occur even when a person does not have a substantially limiting impairment.⁶ "Regarded as" cases focus on the employer's subjective perception of the individual, rather than on the individual's actual abilities.⁷

Before 2008, plaintiffs had a very difficult time bringing claims under the "regarded as" prong. However, the ADA Amendments Act (ADAAA) redefined the "regarded as" prong of the definition of disability by significantly broadening who is eligible for coverage. Specifically, the ADAAA removed the requirement that an individual demonstrate that he was "regarded as" having an impairment that substantially limits a major life activity. Now, under the ADAAA, an individual only needs to show that he is "regarded as" having an impairment, regardless of whether the impairment is perceived to limit a major life activity or perceived to be substantially limiting.⁸

In light of these significant changes, the EEOC has explained that the "regarded as" prong should, in most circumstances, be the most viable avenue for ADA coverage: "Where an individual is not challenging a covered entity's failure to make reasonable accommodations and does not require a reasonable accommodation, it is generally unnecessary to proceed under the 'actual disability' or 'record of' prongs, which require a showing of an impairment that substantially limits a major life activity or a record of such an impairment."⁹ This principle has been reiterated in the case law.

For instance, in *Alexander v. Washington Metropolitan Area Transit Authority*, the D.C. Circuit Court stated that the "'regarded-as-prong' has become the primary avenue for bringing" most claims of discrimination.¹⁰ In *Alexander*, for example, an employee with alcoholism had used alcohol at work, was suspended and was later allowed to return to work subject to periodic alcohol tests. After failing a test, he was fired but told that he could reapply after one year if he completed an intensive alcohol dependency treatment program. The employee did that but was not rehired. He filed a lawsuit and the issue before the court was whether he was a person with a disability. The district concluded that he was not because the plaintiff's alcoholism did not substantially limit one or more major life activities. The D.C. Circuit Court reversed the decision, and made a number of strong statements about the breadth and scope of the "regarded as" clause. It reasoned that here, there was no dispute that alcoholism is an impairment under the ADAAA and that all the plaintiff needed to do was show that the employer took a prohibited action against an employee because of a perceived impairment, which he did.

Another example of how plaintiffs can easily move forward with a "regarded as" claim under the ADA Amendments Act can be found in *Cannon v. Jacobs Field Services*, where an employee with a torn rotator cuff received a conditional job offer and had a pre-employment exam.¹¹ He was cleared for work with certain accommodations,

ADA Coverage Beyond Actual Disabilities: Regarded As, Record Of, and Association



including no driving company vehicles, no lifting, pushing, or pulling over ten pounds, and no working with his hands above shoulder level. The Fifth Circuit found that the employee's regarded as claim "easily passes muster under the revised standard" due to, among other things, that he was cleared to work but then the manager said that the employee would not be able to meet the project needs due to his accommodation needs.¹²

Similarly, in *Burton v. Freescale Semiconductor*, the court again explained that the plaintiff only needs to show the perception of an impairment.¹³ Here, the employer knew of the plaintiff's impairment as the plaintiff reported an injury to the personnel department, had disclosed palpitations and had sent emails about the need "to sit down for a bit," "chest pains," and trouble breathing. See also *Stragapede v. City of Evanston*, 69 F. Supp. 3d 856 (N.D. Ill. 2014) (finding that the employee was deemed "regarded as" disabled when he was fired because of his perceived mental impairment following a head injury and that no substantial limitation is necessary).

In other words, whether an individual is regarded as having an impairment is "not subject to a functional test."¹⁴ See *Saley v. Caney Fork, LLC*, 886 F.Supp.2d 837, 851 (M.D. Tenn. 2012) (finding employee to be regarded as having a disability and noted that an employee with hemochromatosis "may recover under the 'regarded as' prong in the absence of visible symptoms, or any symptoms at all"); *Johnson v. Farmers Insurance Exchange*, 2012 WL 95387, at *1-2 (W.D. Okla. Jan. 12, 2012) (rejecting defendant's argument that plaintiff was not regarded as having a disability because her sleep apnea did not substantially limit a major life activity).

A. Judicial Interpretation of "Transitory and Minor"

To address concerns from the business community regarding the breadth of the new "regarded as" prong, Congress created an exception for impairments that are both transitory and minor. The ADAAA defines a transitory impairment as one that has an actual or expected duration of six months or less, but it does not define the term "minor."¹⁵

Some defendants have argued that cases should be dismissed because the plaintiff's impairment was either transitory or minor. These types of assertions have mostly failed, as most courts are complying with the ADAAA's language that requires an impairment to be *both* temporary and minor to fall within the scope of its exemption. In *Davis v. NYC Dept. of Education*, the court found that an employee sufficiently pled that she was regarded as having a disability, even though her back and shoulder impairments may have been "transitory," because there was nothing to suggest that her impairments were "minor."¹⁶

ADA Coverage Beyond Actual Disabilities: Regarded As, Record Of, and Association



Courts have found the flu and non-episodic anemia to be objectively both transitory and minor. See *Lewis v. Florida Default Law Group*, 2011 WL 4527456, at *5-7 (M.D. Fla. 2011) (H1N1 virus); *LaPier v. Prince George’s County, Maryland.*, 2011 WL 4501372, at *5 (D. Md. Sept. 27, 2011) (non-episodic anemia lasting one week). These decisions appear to be consistent with the plain language of the ADAAA and the EEOC’s regulations. Similarly, a one-time instance of dehydration and heat stroke, which only lasted for a few hours was considered to be transitory and minor. See *Willis v. Noble Environmental Power, LLC*, 143 F.Supp.3d 475, 484 (N.D. Tex. 2015).

Courts found the following conditions to be both transitory and minor:

- Broken finger¹⁷
- Broken bones that healed within two months¹⁸
- Dehydration episode lasting only a few hours¹⁹
- Injuries from a car accident that were recovered within a week²⁰
- Flu / H1N1²¹
- Non-episodic anemia lasting one week²²

Courts are also concluding that whether an impairment is “transitory and minor” is an objective determination.²³ In *Suggs v. Central Oil of Baton Rouge, LLC*, the court held that the defendant must *objectively* show that an impairment is both transitory and minor.²⁴ In this case, it found that the defendant failed to provide any evidence or argument that the employee’s carotid artery disease was both transitory and minor, and noted that the employee had produced evidence that his carotid artery disease was substantially limiting and had been treated with prescription medication for well over six months.

That said, if the employer’s perception is that the impairment is not transitory and minor, that too can be sufficient to establish a regarded as claim. In *Odysseos v. Rine Motors, Inc.*, the plaintiff had a biopsy incision, which became infected. He had to be hospitalized for eight days and then wore a heart monitor.²⁵ His employer asked questions such as: Will your infection come back? How is your heart? Do you still have a fast heartbeat? The court concluded that these questions suggested that the defendant believed the plaintiff’s diagnostic heart monitoring to be symptomatic of a disabling impairment and therefore, did not perceive the plaintiff to have an impairment that was transitory and minor—even if it was objectively minor.

B. Reasonable Accommodations and “Regarded As”

Unlike individuals who seek ADA protection under the “actual disability” or “record of” disability prong, individuals who qualify for coverage under the “regarded as” prong are not entitled to a reasonable accommodation under Title I.²⁶ For instance, in *Ryan v. Columbus Regional Healthcare System*, the plaintiff worked as an operating room nurse

ADA Coverage Beyond Actual Disabilities: Regarded As, Record Of, and Association



and had a degenerative joint disease and arthritis in her knee.²⁷ After exhausting her FMLA leave, the plaintiff requested a number of accommodations including limited standing, stooping, kneeling and crouching. The employer denied these requests, and the employee filed suit, alleging that she was regarded as having a disability. Because the ADAAA does not require employers to accommodate employees who are regarded as having a disability, the court dismissed the claim.

This limitation can have implications for individuals who are trying to prove that they are “qualified” under the ADA. For instance, in *Walker v. Venetian Casino Resort, LLC*, a cocktail server at the Venetian Casino Restaurant was injured on the job and subsequently terminated.²⁸ She brought a claim alleging that she was regarded as having a disability, and in response, her former employer argued that she was not qualified to do her job. The employee agreed that she was not qualified without a reasonable accommodation, but asserted that she would have been qualified if granted the accommodation of reassignment to another position. Because the ADAAA does not require employers to accommodate individuals under the “regarded as” prong, and because the plaintiff could not demonstrate that she was qualified absent a reasonable accommodation, the court found that the plaintiff failed to properly allege the elements of her ADA claim. See *Chamberlain v. Securian Fin. Grp., Inc.*, 180 F. Supp. 3d 381, 405 (W.D.N.C. 2016) (“Because the court has found that Plaintiff has only presented evidence that he meets the definition of disabled by virtue of being regarded as disabled, Plaintiff’s failure to accommodate claim must fail.”)

II. “Record Of” a Disability

The ADA also protects individuals who have a “record of” a disability. This prong extends ADA protections to individuals who have a history of, or who have been misclassified as having, a physical or mental impairment that substantially limits one or more major life activities even if such impairment is not substantially limiting at the time of the adverse employment actions.²⁹ For instance, in *Ferrari v. Ford Motor Co.*, the plaintiff brought an ADA claim under all three theories of disability.³⁰ Although the court found that his neck condition was not currently substantially limiting, it found that the plaintiff’s medical records established a history of a substantial limitation. This part of the ADA also protects individuals who have been misclassified as having such an impairment,³¹ although this is not an area that has seen significant litigation.

Given the inherent similarities between the “actual disability” and “record of” disability prongs, many courts analyze them as one, or alternatively, use their analysis about one as grounds for deciding the other. For instance, in *Mileski v. Gulf Health Hosps., Inc.*, the court reasoned that the plaintiff’s bouts of depression, which she had experienced since she was 12 or 13 years old, limits her ability to interact and communicate with

ADA Coverage Beyond Actual Disabilities: Regarded As, Record Of, and Association



others, as well as care for herself, especially in light of her numerous suicide attempts.³² Based on this analysis, the court found that she had an actual disability “and/or” a record of a disability.³³ See also *Upton v. Day & Zimmerman NPS*, 2018 WL 465979, at *4 (N.D. Ala. Jan. 18, 2018) (permitting a plaintiff with a history of lumbar radiopathy and related pain complaints to proceed on his “record of” claim for “the same reasons” he may proceed with his “actual disability” claim).

Most courts recognize that a general history of a substantially limiting impairment is a disability under the “record of” prong without requiring a specific medical record. The plaintiff in *James v. Oregon Sandblasting & Coating, Inc.*, was able to survive summary judgment on his claim of discrimination under both the “actual disability” and “record of” disability prongs by testifying that he had told his supervisors and coworkers about his dyslexia, but did not proffer any medical record or documentation of a diagnosis.³⁴

However, it is worth noting that at least one court has narrowly interpreted this prong, finding that an actual medical record is required. In *Marsh v. Terra Int’l (Oklahoma), Inc.*, the plaintiff had a knee injury from his military service.³⁵ He brought an ADA claim under all three prongs of disability. The court found that he had an actual disability because his knee injury caused a substantial limitation in his ability to carry, as compared to most people in the general population, because he had to be cautious and was constantly on guard of having his knee buckle, especially when carrying his children. The court also found that the plaintiff had been regarded as having a knee impairment. Nonetheless, the court found, possibly erroneously, that the plaintiff did not have a record of a disability. In support of this conclusion, the court stated that “nothing in [the] medical records indicate that Marsh [has] any impairment that substantially or materially restricts any major life activity.”³⁶ It reviewed a certificate of discharge with the plaintiff’s VA disability rating, but explained that did not address functional limitations.

Like its impact on the “actual disability” prong, the ADA Amendments Act significantly broadened the definition of disability under the “record of” prong by, among other ways, introducing the concept of “major bodily functions.”³⁷ For instance, in *Yanoski v. Silgan White Cap Americas, LLC*, an individual with muscular dystrophy worked as a press mechanic.³⁸ He was placed on a medical leave, and then fired. The court determined that Yanoski provided sufficient evidence regarding a record of disability to proceed to trial because his “medical records demonstrating that he has a history of muscular dystrophy which substantially limits his neurological function.”³⁹

Despite this broadened definition, individuals pursuing claims still need to demonstrate that the record at issue referenced more than a medical diagnosis. This tends to be one reason that plaintiffs pursuing claims under the “record of” theory are unsuccessful. See *Stermer v. Caterpillar*, 102 F. Supp. 3d 959 (N.D. Ill. 2015) (finding that plaintiff failed to

ADA Coverage Beyond Actual Disabilities: Regarded As, Record Of, and Association



demonstrate a record of disability because they admitted that these diagnoses never impacted him, and because the only actual record—note from his treating psychiatrist—state his medical diagnoses and medications but then conclude that the plaintiff is ready and able to work).

Similarly, like individuals seeking to establish an “actual disability”, plaintiffs pursuing claims under the “record of” theory find the most difficulty in establishing a substantial limitation. For that reason, it is important for plaintiffs to identify the impact of their impairment, as demonstrated in a recent case, *Chamberlain v. Securian Financial Group, Inc.*⁴⁰ The plaintiff repeatedly testified and stated that he had no limitations as a result of his alcoholism. Without any limitations in any major life activities, the court held the plaintiff failed to establish that he had a “record of” an impairment despite his history of alcoholism. See also *Wade v. Montgomery Cty., Texas*, 2017 WL 7058237, at *7 (S.D. Tex. Dec. 6, 2017), *report and recommendation adopted sub nom. Wade v. Montgomery Cty.*, 2018 WL 580642 (S.D. Tex. Jan. 25, 2018) (finding that although the plaintiff alleged that she was “diagnosed with mental illnesses,” she “has not alleged facts from which it can be reasonably inferred that those impairments substantially limited a major life activity”); *Walker v. U.S. Sec’y of the Air Force*, 7 F. Supp. 3d 438, 454 (D.N.J. 2014) (finding that the plaintiff failed to establish a record of a disability based on a record of his eligibility for vocational rehabilitation services and a letter generally describing certain limitations).

Compare those situations to *Williams v. AT&T*, where the court granted the plaintiff’s motion for summary judgment as to whether she had an ADA-qualifying disability.⁴¹ In *Williams*, the plaintiff had depression and anxiety, and was able to show that her employer knew not only that she had received treatment for these impairments, but also how they impacted her day-to-day functioning. Among other reasons, the plaintiff had provided her employer with information about her limitations when applying for the company’s short-term disability benefits. Likewise, in *Atwell v. Indianapolis-Marion County Forensic Services Agency*, the court found the record “replete” with evidence the plaintiff was classified as having substantial limitations in memory, speaking, concentrating and thinking.⁴² The plaintiff had applied for and received disability and medical leave due to her symptoms. After returning from leave, she regularly communicated her difficulty with focus and concentration with her employer.

Some courts acknowledge that the record itself is not required to specify the substantial limitation at issue. For example, in *Monroe v. County of Orange*, the defendant argued that the plaintiff did not have a “record of” a disability, despite the fact that he had medical notes stating that he had working diagnoses of Panic Disorder with Agoraphobia and ADHD, and that he was on medication to reduce anxiety and panic and to enhance attention and concentration.⁴³ The court acknowledged that this doctor’s

ADA Coverage Beyond Actual Disabilities: Regarded As, Record Of, and Association



note does not specify the major life activity at issue, but concluded that a reasonable jury could find that the plaintiff had a record of a substantial limitation to some major life activity. In support of this decision, the court pointed out that medical notes rarely provide that level of specificity and also cited an example from the EEOC regulations about the “record of” prong that stated this provision would protect someone who was treated for cancer ten years ago but is now deemed cancer free. The court held that the “fact that the EEOC regarded a record of earlier cancer—full stop—as sufficient to discharge the ‘record of’ requirement without further discussion as to the extent to which that record unpacked the substantial limitation on a major life activity suggests that such specificity in the record need not be found.”

Another way a plaintiff can successfully establish a “record of” claim is to show that she has sought leave or other accommodation for a disability, and that the employer has had knowledge of the reason for the leave or accommodation. In *Wessels v. Moore Excavation*, the court found that the plaintiff sufficiently stated a claim because he had “periodically requested time off to treat his disability, notifying Defendant of his need for leave and the reason for the leave,” which allowed for an inference that he had a record of a disability and the defendant was aware of such disability.⁴⁴ See also *Jones v. HCA*, 2014 WL 1603739, at *7 (E.D. Va. Apr.21, 2014) (allegations that plaintiff requested an accommodation and sought leave allowed the court to infer that defendant had notice of plaintiff’s condition).

It is clear that there is no requirement that the employer have a “misperception, stereotype, or other false belief” to find that the employee has a record of disability. This argument was raised, and rejected, in *Stanley v. BP Prod. North America, Inc.*, where the plaintiff demonstrated a past substantial impairment due to a stroke, making him eligible for disability benefits.⁴⁵

Before the ADA Amendments Act, there was some uncertainty as to whether individuals who qualified under the “record of” prong were entitled to reasonable accommodations.⁴⁶ The ADA Amendments Act removed all doubt, confirming that they are.⁴⁷ The regulations also include examples of what types of accommodations may be appropriate for someone with a history of a disability, such as “leave” or a “schedule change” for follow-up or monitoring “appointments with a health care provider.”⁴⁸ This is not an area of the law that is often litigated.

III. Association Discrimination

The ADA also protects individuals who do not fall within one of the three prongs of disability, but who are associated with someone who does. This is commonly referred to as association discrimination, and seeks to ensure that individuals are not discriminated

ADA Coverage Beyond Actual Disabilities: Regarded As, Record Of, and Association



against based on misconceptions, fears, or assumptions related to the individual's relationship with a person with a disability. Unlike the definition of disability, which is found in the ADA's definition section that applies to entire statute, protections based on association are found within these specific titles.

A. Title I

Title I of the ADA defines discrimination to include "excluding or otherwise denying 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."⁴⁹ The regulations render it "unlawful" to engage in an adverse employment action "because of the known disability of an individual with whom the qualified individual is known to have a family, business, social or other relationship or association."⁵⁰ Like the other groups protected by the ADA, the association discrimination clause does not prevent employers from taking adverse employment actions against employees for valid non-discriminatory reasons, including poor performance, attendance problems, or who pose a direct threat to the safety of themselves or others, even though they have an association with a person with a disability.

Although the overwhelming majority of cases brought under the association prong are on behalf of family members, it is well-settled that an association need not be familial.⁵¹ However, the ADA's associational discrimination provisions typically do not protect employees who claim they are being discriminated against due to their advocacy on behalf of individuals with disabilities, generally, as opposed to their relationship with a particular person. For example, in *Tyson v. Access Services*, the plaintiff asserted that she was fired due to her advocacy as a caretaker on behalf of her clients with disabilities.⁵² The court dismissed her claim, finding that the plaintiff could not establish an association discrimination claim without alleging a specific association with a particular individual with a disability and that general advocacy is insufficient to bring a claim for association discrimination under the ADA. See also *Chan v. County of Lancaster*, 2013 WL 2412168, at *25–26 (E.D. Pa. June 4, 2013) (granting summary judgment on plaintiff's associational discrimination claim where plaintiff's claim "rest[ed] upon the theory that she was fired in retaliation for her efforts, on behalf of disabled individuals," which is not covered by the ADA's association provision).

Plaintiffs must also be able to show that their employer knew of their association to and of their associate's disability. However, it is not necessary to prove actual knowledge. For instance, in *Straub v. County of Maui*, the court permitted the plaintiff's claim of association discrimination to move forward despite the fact that the plaintiff did not expressly allege that his employer knew of his wife's disability.⁵³ The court found that a

ADA Coverage Beyond Actual Disabilities: Regarded As, Record Of, and Association



reasonable inference could be drawn in this case as to the decision-maker's knowledge, given her position in a small county government.

Courts have recognized three theories of ADA associational discrimination in the employment context: "(1) expense; (2) disability by association; and (3) distraction."⁵⁴ The "expense" theory is when an employer takes an adverse action against an employee because of the costs potentially related to the individual with a disability, most frequently costs associated with health insurance. The "disability by association" theory is when an employer fears that the employee may contract the associate's disability or is genetically predisposed to developing the disability. The "distraction" theory is when an employer fears that an employee will be inattentive at work or will need leave to care for their associate.

One case example of the "expense" theory is the Tenth Circuit's decision in *Trujillo v. PacifiCorp*.⁵⁵ In this case, two employees of the same company had a child with cancer and a brain tumor. Their son's cancer relapsed, resulting in medical bills exceeding \$62,000 within six weeks. The employees were both fired within this period of time. The Tenth Circuit found that the employees successfully raised an inference that their termination was unlawful under the ADA's association provision based on the temporal proximity between the termination, their son's relapse, and the medical bills. There was also evidence that the company was "keeping tabs" of healthcare claims.⁵⁶ See also *Dewitt v. Proctor Hospital*, 517 F. 3d 944 (7th Cir. 2008) (finding a genuine issue of fact as to whether the plaintiff has a claim of association discrimination where the plaintiff's husband, who had prostate cancer, was on the hospital's insurance, and because the hospital was partially self-insured, kept records of the employees' health insurance bills, became aware of the high price it was paying for plaintiff's husband's care, confronted the plaintiff about the cost on several occasions, disclosed that it was facing financial trouble, and then fired the plaintiff for insubordination without further explanation within months of admitting its need to cut costs).

However, plaintiffs pursuing claims under this theory must be able to provide some evidence connecting their adverse employment action to the additional costs, failure to do so can sink their claim. In *Lester v. City of Lafayette, Colorado*, for example, the plaintiff sued the City of Lafayette and argued that she was terminated because of her association with her daughter, who had bipolar disorder, and resulting health insurance costs.⁵⁷ The problem with the plaintiff's argument is that her employer knew of her daughter's diagnosis for five years prior to her termination, there was no evidence that her employer tracked her daughter's healthcare costs, or that her daughter's care was particularly expensive, leading the court to grant summary judgment to the employer.

ADA Coverage Beyond Actual Disabilities: Regarded As, Record Of, and Association



Similarly, in *Hopkins v. Sam's West, Inc.*, the plaintiff failed to establish a *prima facie* case that his employer violated the ADA when it fired him.⁵⁸ Hopkins, a retail chain market manager who oversaw approximately fifteen retail stores, asserted that he was fired because his family maxed out their medical insurance every year. The plaintiff's claim failed, however, because he could not show that any decision-maker made any negative comments about the cost of his insurance. Instead, the employer's stated reason for termination was that the plaintiff failed to follow company protocol for handling a discrimination investigation.⁵⁹ See also *Williams v. Union Underwear Co.*, 614 F. App'x 249, 252 (6th Cir. 2015) (finding the plaintiff failed to show that he was terminated due to increased health insurance costs when the only discussion about health care costs was initiated by the plaintiff, who simply told his employer that he could not leave the company due to his need to keep medical insurance).

The "disability by association" theory occurs when an employee is regarded as having a disability because of her association with a person with a disability. Courts have identified two examples of this situation: when an employee's companion has a contagious disease and the employer fears that the employee may also become infected, or when an employee's blood relative had a genetic condition and the employer fears that the employee will likely develop that disease as well.⁶⁰ Although the court has recognized this theory, there are not many cases brought under it. Further, plaintiffs are not successful when they try to move forward on this theory but the disability is neither contagious nor genetic. See *Williams v. Union Underwear Co.*, 614 F. App'x 249, 255 (6th Cir. 2015) ("Williams simply has not identified any evidence to support an ADA claim under the disability-by-association theory because he has not produced evidence that [his wife's] Vascular Disease is contagious or that [his] supervisors feared that Williams would infect other employees.")

The third category, also referred to as the "distraction" theory, is by far the largest of the three types of association cases. This is when an employer fears that an employee will be inattentive at work, or distracted, due to the particular condition that the person with disabilities is facing.⁶¹ This was the situation in *Reiter v. Maxi-Aids, Inc.* In this case, the plaintiff brought an ADA claim for association discrimination because after he disclosed that his daughter was hospitalized for mental health reasons, his supervisor told him, "if you're not here, you're useless to me" and then fired him the very next day.⁶² This case went before a jury, who rendered a verdict in favor of the plaintiff. The court upheld the jury verdict finding evidence sufficient to establish that the supervisor "prospectively feared that [the plaintiff] would be distracted from work his during [his daughter's] treatment and recovery."⁶³

In a similar case, *Buffington v. PEC Management*, the plaintiff worked as a manager of Burger King and had a teenage son with a long history of cancer.⁶⁴ Although the plaintiff

ADA Coverage Beyond Actual Disabilities: Regarded As, Record Of, and Association



was fired for breaking a corporate rule, the jury returned a verdict for the plaintiff, which the court upheld. The court explained there was testimony sufficient to show that the company's explanation was pretextual, including comments during the employee's termination meeting that "[w]e need someone whose head is there 100 percent" and "[n]ow you can go spend all your time with your son."⁶⁵ See also *Detwiler v. Clark Metal Prods. Co.*, 2010 WL 1491325, at *30 (W.D. Pa. Mar. 19, 2010) (stated claim for associational discrimination where the reason given for termination was that plaintiff "had become 'an island' and was withdrawn from other employees," potentially from concern for husband's disability).

This theory has not been extended to employees who require leave or other accommodations, or to excuse performance problems, even if they are needed for or caused by the individual with a disability. For instance, in *Graziadio v. Culinary Inst. of America*, the plaintiff presented evidence that she was fired because she had taken leave to care for her sons—not due to her employer's fear that she would take leave in the future or due to her own distractions while in the workplace.⁶⁶

The reason for this is because while the ADA prohibits discrimination against individuals without disabilities because of their "relationship or association" with individuals with disabilities, the ADA's reasonable accommodation requirements do not apply to this class of employees.⁶⁷ In other words, the ADA does not require employers to provide reasonable accommodations to employees without disabilities.

This principle has been applied consistently in the case law. As an example, in *Milchak v. Carter*, an employee requested a second-shift work schedule so that he could be available to care for his wife, who had a disability.⁶⁸ The employee had previously been assigned to the second-shift, but the shift was eliminated for financial reasons and the employee had opted not to request a transfer. After the employee's request was denied, he worked partial days for a short period of time, using his accrued sick leave to cover the remainder of his shift. He then retired and brought an ADA lawsuit. The defendant asserted that it had no obligation to accommodate his request and the court agreed. The court explained that generally, the law does not require employers to accommodate employees without disabilities based on their association with an individual with a disability and here, there was no requirement to modify a work schedule. See also *Fenn v. Mansfield*, 2015 WL 628560 (D. Mass. Feb. 12, 2015) (confirming that the employer had no obligation under the ADA to permit the plaintiff to miss a week-long training so that he could care for his wife, who had a disability); *Pennington v. Wal-Mart Stores E., LP*, 2014 WL 1259727, at *5 (N.D. Ala. Mar. 26, 2014) (finding no valid claim where the relative's disability "caused [plaintiff] to miss multiple days of scheduled work per month," because "[w]hat plaintiff needed ... was an accommodation" and "federal law does not require employers to make reasonable accommodations for employees to care for their disabled relatives").

ADA Coverage Beyond Actual Disabilities: Regarded As, Record Of, and Association



Despite this limitation, an employer cannot terminate an employee based only on a fear that they will need an accommodation, including leave. And if employees are permitted to take leave or make other workplace adjustments for non-disability related reasons, individuals must be permitted to do the same to care for their associates with disabilities. See *Lynn v. Lee Mem'l Health Sys.*, 2015 WL 4645369, at *2 (M.D. Fla. Aug. 4, 2015) (denying the defendant's motion to dismiss because the plaintiff was fired during her approved leave time to care for her daughter with a disability); *Magnus v. St. Mark United Methodist Church*, 688 F.3d 331, 337 (7th Cir. 2012) ("Although an employer does not have to accommodate an employee because of her association with a disabled person, the employer cannot terminate the employee for unfounded assumptions about the need to care for a disabled person.").

Further, an employee's request for an accommodation on behalf of an associate, even if not required to be granted, should not be the basis for a termination. For example, in *Fenn v. Mansfield*, the plaintiff was asked to travel for a week-long training.⁶⁹ Because his wife had multiple disabilities, he asked to take the training course closer to his home. Instead of answering the request, the employer "abruptly terminated plaintiff."⁷⁰ The court permitted the plaintiff's case to proceed, noting that although the ADA "does not 'obligate employers to accommodate the schedule of an employee with a disabled relative,'" the plaintiff pled facts sufficient to establish a claim for association discrimination in light of his abrupt termination without explanation.⁷¹

The entitlement to accommodations on behalf of employees associated with individuals with a disability is an issue that confuses employees and employers alike. This confusion stems, most likely, from the complementary benefits provided by the Family and Medical Leave Act ("FMLA"). Unlike the ADA, the FMLA requires employers to provide eligible employees with unpaid leave to care for a spouse, son, daughter or parent with a serious health condition.⁷² Employees eligible for FMLA protection are protected by the FMLA's interference obligations (i.e., individuals must be provided with FMLA leave) and the FMLA's retaliation obligations (i.e., individuals cannot be penalized or retaliated against for exercising their FMLA rights).⁷³ As a result, if the employee associated with an individual with a disability needs the reasonable accommodation of leave, the employee should consider whether she can request FMLA in lieu of an ADA accommodation.

In "association" cases, employers should be certain that there are legitimate, non-discriminatory business reasons for its employment decisions that are not based on disability. Otherwise, an employee may show that employer fears or concerns entered into the employment decision in violation of the ADA. Employers do not have to accommodate employees without disabilities based on their relationship with a person

ADA Coverage Beyond Actual Disabilities: Regarded As, Record Of, and Association



with a disability, but they cannot make employment decisions based on an expectation that the employee will need large amounts of leave time.

B. Titles II and III

Title II does not have an explicit provision regarding association discrimination. This has led some defendants to argue that there is no association provision within Title II, but that argument has largely been rejected.⁷⁴ In Title II's enforcement provisions, it provides a remedy to "any person alleging discrimination on the basis of disability."⁷⁵ Further, Title II regulations do expressly restrict public entities from discriminating against "individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association."⁷⁶ Title III, on the other hand, expressly protects against association discrimination,⁷⁷ and this statutory provision is implemented by regulation.⁷⁸

When someone brings a claim about associational discrimination in the Title II and III context, the case often turns on whether the individual bringing the claim has his or her own individualized injury, separate and distinguishable from the one brought by the individual with a disability.

In one recent case, *Nevarez v. Forty Niners Football Co., LLC*, a husband and wife sued about accessibility barriers at a stadium, though only the husband had a disability.⁷⁹ The defendant asked the court to dismiss the case, arguing that the wife could not bring a case because her claim based on association was not separate or distinct from her husband's discrimination claim. The court disagreed and rejected this type of narrow interpretation of association discrimination. It explained that the wife was also unable to access and enjoy the stadium due to its accessibility barriers, and that she had to wander around looking for an elevator, assist her husband, and that she had difficulty purchasing accessible and companion seating.

Likewise, in *Huynh v. Bracamontes*, the court rejected the defendant's argument that Congress intended a narrow interpretation of associational discrimination claims, finding that the plaintiff without a disability adequately alleged an associational discrimination claim where she brought her daughter with a disability to a nail salon and could not locate a wheelchair-accessible parking spot, which then deterred her from visiting the salon with her daughter again.⁸⁰ See also *Daubert v. City of Lindsay*, 37 F. Supp. 3d 1168, 1171 (E.D. Cal. Aug. 11, 2014) (permitting case to proceed on behalf of plaintiff without a disability because of his experience when travelling with his great-granddaughter who used a wheelchair and who had "significant difficulty navigating" his great-granddaughter's wheelchair around a park due to the park's accessibility problems, causing him to feel like a second class citizen); *George v. AZ Eagle TT*

ADA Coverage Beyond Actual Disabilities: Regarded As, Record Of, and Association



Corp., 961 F. Supp. 2d 971, 973–76 (D. Ariz. 2013) (rejecting the defendant’s argument that associational discrimination provisions should be interpreted narrowly and finding a father without a disability adequately alleged associational discrimination claim where the father could not access a shopping center with his son who used a wheelchair due to the mall’s lack of wheelchair access).

A striking example of association discrimination comes from *Loeffler v. Staten Island University Hospital*, where the 13- and 17-year old children of a patient and his wife, both of whom were deaf, were forced to interpret during their father’s hospital stay.⁸¹ The Second Circuit held that these children suffered an injury independent of their parents that was causally related to the Hospital’s failure to provide auxiliary aids and services to their parents. The court noted that they suffered three injuries due to the Hospital’s failure—they were required to fill the gap left by the Hospital’s failure to honor its obligation under the statute, they were required to miss school because they had to be on-call to provide interpretation, and finally, they were “needlessly and involuntarily exposed to their father’s condition” placing them at risk of emotional trauma due to their young age.⁸²

Other courts have been more restrictive in their interpretation of association discrimination, however. For example, in *Labouliere v. Our Lady of Lake Foundation*, an individual brought a lawsuit on her behalf and on behalf of her mother’s estate, challenging a health care provider for failing to provide sign language interpreters during a number of medical visits.⁸³ Because no interpreter was provided and because the hospital’s attempt to use its Video Remote Interpreting service was ineffective, the plaintiff, who is a sign language interpreter, was forced to interpret for her mother. As a result, she was the one who had to tell her mother that she had stage 4 liver cancer and was not a candidate for chemotherapy. The plaintiff alleged that as a result of this experience, she has endured significant emotional distress and now avoids working as an interpreter. The court considered whether the daughter had her own claim under the Rehabilitation Act, and concluded that she did not experience her own injury.

Similarly, in *McCullum v. Orlando Regional Healthcare System, Inc.*, a lawsuit was brought on behalf of a 14-year old patient who is deaf, his sister, who is also deaf, and his parents.⁸⁴ The district court dismissed the claims brought by the patient’s sister and parents, and the Eleventh Circuit affirmed this decision. With respect to the patient’s parents, the Eleventh Circuit concluded that “non-disabled persons are [not] denied benefits when a hospital relies on them to help interpret for a deaf patient,” even though patients with disabilities are entitled to appropriate accommodations.⁸⁵ The court did not analyze whether the patient’s deaf sister had an independent right to an interpreter as a companion. Further, the Eleventh Circuit distinguished the

ADA Coverage Beyond Actual Disabilities: Regarded As, Record Of, and Association



Loeffler case, cited above, stating that here, the family never requested an interpreter, and that the patient’s family members missed neither work nor school.

Notably, the incident giving rise to the *McCullum* case occurred in 2009 and, arguably, the case might have turned out differently after the revised regulations became effective. The Department of Justice’s revised regulations, which became effective in 2011, more clearly restrict covered entities from relying on a deaf individual’s associates to interpret on his behalf. The regulations prohibit covered entities from relying on an adult to interpret or facilitate communication except in an “emergency involving an imminent threat to the safety or welfare of an individual or the public where there is no interpreter available” or where the individual “specifically requests that the accompanying adult” provide the interpretation, the accompanying adult agrees, and the reliance is appropriate.⁸⁶ There are even greater protections in the regulations for children. Minor children cannot be relied on to interpret or facilitate communication unless one very specific exception is met: there must be an emergency involving an imminent threat to the safety or welfare of an individual or the public where there is no interpreter available.⁸⁷

IV. Conclusion

It is important to remember that the ADA not only protects the rights of people with current disabilities, but also extends its protections to employees “regarded as” having a disability, those with a “record of” a disability, and those associated with others who have disabilities. This coverage is designed to help the ADA fulfill its goal of preventing employment discrimination based on assumptions, stereotypes, and fears regarding people with disabilities.

¹ This Legal Brief was updated in 2018 by Barry C. Taylor, Vice President of Civil Rights and Systemic Litigation, Rachel M. Weisberg, Staff Attorney and Manager, Employment Rights Helpline, and Karen Klass, PILI Fellow, Equip for Equality. This Brief was originally written in 2008 by Barry C. Taylor, Legal Advocacy Director, Alan M. Goldstein, Senior Attorney, and Gwynne Kizer, legal intern, Equip for Equality. Equip for Equality is the protection and advocacy system for the State of Illinois, and is providing this information under a subcontract with Great Lakes ADA Center.

² 42 U.S.C. §12101(b)(1).

³ 42 U.S.C. §12101(a)(7).

⁴ Americans with Disabilities Act, 42 U.S.C. §§ 12102(2), 12112(B)(4).

⁵ 42 U.S.C. §12112(b)(4).

⁶ *Sutton*, 527 U.S. at 490 (quoting 29 C.F.R. pt. 1630, App. §1630.2 (I)).

⁷ *Wilson v. Phoenix Specialty Manufacturing Company, Incorporated*, 513 F.3d 378, 385 (4th Cir. 2008).

-
- ⁸ 42 U.S.C. § 12012(3).
- ⁹ 29 C.F.R. § 1630.2(g)(3).
- ¹⁰ *Alexander v. Wash. Metro. Area Transit Authority*, 826 F.3d 544 (D.C. Cir. 2016).
- ¹¹ *Cannon v. Jacobs Field Services*, 813 F.3d 586 (5th Cir. 2016).
- ¹² *Id.*
- ¹³ *Burton v. Freescale Semiconductor*, 798 F.3d 222 (5th Cir. 2015).
- ¹⁴ *Id.*
- ¹⁵ 42 U.S.C. § 12102(3)(B).
- ¹⁶ *Davis v. NYC Dept. of Education*, 2012 WL 139255, at *5-6 (E.D.N.Y. Jan. 18, 2012).
- ¹⁷ *Budhun v. Reading Hosp. & Med. Ctr.*, 765 F.3d 245 (3d Cir. 2014).
- ¹⁸ *Ashby v. Amscan, Inc.*, 2017 WL 939324 (W.D. Ky. Mar. 9, 2017).
- ¹⁹ *Willis v. Noble Environmental Power, LLC*, 143 F.Supp.3d 475 (N.D. Tex. 2015).
- ²⁰ *Percoco v. Lowe's Home Centers, LLC*, 2015 WL 5050171 (D. Conn. Aug. 25, 2015).
- ²¹ *Lewis v. Florida Default Law Group*, 2011 WL 4527456 (M.D. Fla. 2011).
- ²² *LaPier v. Prince George's County, Maryland.*, 2011 WL 4501372 (D. Md. Sept. 27, 2011).
- ²³ See, e.g., *Davis*, 2012 WL 139255, at *5-6.
- ²⁴ *Suggs v. Central Oil of Baton Rouge, LLC*, 2014 WL 3037213, *5 (M.D. La. July 3, 2014).
- ²⁵ *Odysseos v. Rine Motors, Inc.*, 2017 WL 914252 (M.D. Pa. Mar. 8, 2017).
- ²⁶ 42 U.S.C. § 12201(h).
- ²⁷ *Ryan v. Columbus Regional Healthcare System*, 2012 WL 1230234, at *4-5 (E.D.N.C. Apr. 12, 2012).
- ²⁸ *Walker v. Venetian Casino Resort, LLC*, 2012 WL 4794149, at *14-15 (D. Nev. Oct. 9, 2012).
- ²⁹ 42 U.S.C.A. § 12102(1)(B); 29 C.F.R. § 1630.2(k).
- ³⁰ *Ferrari v. Ford Motor Co*, 96 F.Supp.3d 668 (E.D. Mich. 2015).
- ³¹ 42 U.S.C.A. § 12102(1)(B); 29 C.F.R. § 1630.2(k).
- ³² *Mileski v. Gulf Health Hosps., Inc.*, 2016 WL 1295026, at *15 (S.D. Ala. Mar. 31, 2016).
- ³³ *Id.*
- ³⁴ *James v. Oregon Sandblasting & Coating, Inc*, 2016 WL 7107227, at *6 (D. Or. Dec. 4, 2016).
- ³⁵ *Marsh v. Terra Int'l (Oklahoma), Inc.*, 122 F. Supp. 3d 1267, 1281–82 (N.D. Okla. 2015).
- ³⁶ *Id.* at 1281-82.
- ³⁷ For a detailed discussion of the ADA Amendments Act, please see the Great Lakes ADA Center Legal Brief, written by Equip for Equality: “The Litigation Landscape Nearly One Decade After the Passage of the ADA Amendments Act”
- ³⁸ *Yanoski v. Silgan White Cap Americas, LLC*, 179 F. Supp. 3d 413, 428 (M.D. Pa. 2016).
- ³⁹ *Id.* at 428.
- ⁴⁰ *Chamberlain v. Securian Financial Group, Inc.*, 180 F. Supp. 3d 381 (W.D.N.C. 2016).
- ⁴¹ *Williams v. AT&T*, 186 F. Supp. 3d (W.D. Tenn. 2016).

⁴² *Atwell v. Indianapolis-Marion Cty. Forensic Servs. Agency*, 168 F. Supp. 3d 1125, 1137 (S.D. Ind. 2016).

⁴³ *Monroe v. Cty. of Orange*, 2016 WL 5394745, at *11 (S.D.N.Y. Sept. 27, 2016).

⁴⁴ *Wessels v. Moore Excavation, Inc.*, 2014 WL 6750350, at *4 (D. Or. Dec. 1, 2014).

⁴⁵ *Stanley v. BP Prod. N. Am., Inc.*, 2018 WL 1182522, at *5–6 (N.D. Ohio Mar. 7, 2018).

⁴⁶ See, e.g., *Davidson v. Midelfort Clinic, Ltd.*, 133 F.3d 499, 509 n.6 (7th Cir. 1998) and *Gilday v. Mecosta County*, 124 F.3d 760, 764 n.4 (6th Cir. 1997)).

⁴⁷ 29 C.F.R. §§ 1630.2(k)(3) and 1630.9(e).

⁴⁸ 29 C.F.R. § 1630.2(k)(3).

⁴⁹ 42 U.S.C.A. § 12112(b)(4).

⁵⁰ 29 C.F.R. § 1630.8.

⁵¹ See, e.g., *Haire v. BIOS Corp.*, 2009 WL 484207 (N.D.Okla. Feb. 26, 2009) (applying association provision to a caregiver).

⁵² *Tyson v. Access Services*, 158 F. Supp. 3d 309 (E.D. Pa. 2016).

⁵³ *Straub v. Cty. of Maui*, 2018 WL 762383, at *5 (D. Haw. Feb. 7, 2018).

⁵⁴ *Graziadio v. Culinary Institute of America*, 817 F.3d 415 (2nd Cir. 2016); *Williams v. Union Underwear Co.*, 614 F. App'x 249, 254 (6th Cir. 2015); *Larimer v. International Business Machines Corp.*, 370 F.3d 698 (7th Cir.2004).

⁵⁵ *Trujillo v. PacifiCorp*, 524 F.3d 1149 (10th Cir. 2008).

⁵⁶ *Id.* at 1156.

⁵⁷ *Lester v. City of Lafayette, Colorado*, 2015 WL 881677 (D. Colo. Feb. 27, 2015).

⁵⁸ *Hopkins v. Sam's West, Inc.*, 216 F. Supp. 3d 1322 (N.D. Ala. 2016).

⁵⁹ *Id.* at 1336.

⁶⁰ See also 42 U.S.C. §2000ff, the Genetic Information Nondiscrimination Act of 2008,

⁶¹ *Graziadio*, 817 F.3d at 432.

⁶² *Reiter v. Maxi-Aids, Inc.*, 2018 WL 557864, at *2 (E.D.N.Y. Jan. 19, 2018).

⁶³ *Id.* at *4.

⁶⁴ *Buffington v. PEC Management*, 2014 WL 2567181 (W.D. Pa. June 5, 2014).

⁶⁵ *Id.* at *5.

⁶⁶ *Graziadio v. Culinary Institute of America*, 817 F.3d 415 (2nd Cir. 2016).

⁶⁷ 29 C.F.R. § 1630.8 (an employer need not provide the applicant or employee without a disability with a reasonable accommodation because that duty only applies to qualified applicants or employees with disabilities).

⁶⁸ *Milchak v. Carter*, 2016 WL 6248074, at *6 (E.D. Mo. Oct. 26, 2016).

⁶⁹ *Fenn v. Mansfield*, 2015 WL 628560 (D. Mass. Feb. 12, 2015).

⁷⁰ *Id.* at *1.

⁷¹ *Id.* at *4.

⁷² 29 U.S.C. § 2613(a)(1)(A)-(D).

⁷³ See, e.g., *Whitfield v. Hart County, Ga.*, 2015 WL 1525187, 3 (M.D. Ga. 2015) (“the employee merely has to prove that she is entitled to a benefit and that the employer interfered with that benefit. . . .” In contrast, to succeed on a retaliation claim, an employee . . . “[must show] that his employer’s actions were motivated by an impermissible retaliatory . . . animus.”).

⁷⁴ See, e.g., *A Helping Hand, LLC v. Baltimore Cty., Md.*, 515 F.3d 356, 363 (4th Cir. 2008) (finding Title II of the ADA provided cause of action to methadone clinic for associational discrimination in part because Title II’s implementing “regulations explicitly prohibit local governments from discriminating against [an individual or] entit [y] because of the disability of individuals with whom [an individual or] entity associates.” (citing 28 C.F.R. § 13.130(g)).

⁷⁵ 42 U.S.C. § 12133 (emphasis supplied).

⁷⁶ 28 C.F.R. 35.130(g).

⁷⁷ 42 U.S.C. § 12182(b)(1)(E).

⁷⁸ 28 C.F.R. § 36.205.

⁷⁹ *Nevarez v. Forty Niners Football Co., LLC*, 2017 WL 3288634, at *8–9 (N.D. Cal. Aug. 1, 2017).

⁸⁰ *Huynh v. Bracamontes*, 2016 WL 3683048, at *2–3 (N.D. Cal. July 12, 2016).

⁸¹ *Loeffler v. Staten Island University Hosp.*, 582 F.3d 268 (2nd Cir. 2009).

⁸² *Id.* at 279.

⁸³ *Labouliere v. Our Lady of Lake Foundation*, 2017 WL 4365989 (M.D. La. Sept. 29, 2017).

⁸⁴ *McCullum v. Orlando Regional Healthcare System, Inc.*, 768 F.3d 1135 (11th Cir. 2014).

⁸⁵ *Id.* at 1144.

⁸⁶ 28 C.F.R. § 36.303(c)(3) (Title III); 28 C.F.R. § 35.160(c) (Title II).

⁸⁷ 28 C.F.R. § 36.303(c)(4) (Title III); 28 C.F.R. § 35.160(c) (Title II).