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Briefing Paper

Associational Discrimination

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"We hold that associational discrimination based on handicap is prohibited under § 4(16) [of M.G.L. c. 151B]."

That was the decision of the highest court in Massachusetts in *Flagg v. AliMed, Inc.*, 466 Mass. 23 (2013), interpreting the state's antidiscrimination law (Chapter 151B) so as to make it consistent with the federal Americans with Disabilities Act (ADA). Unlike the ADA, which explicitly defines and prohibits associational discrimination, the state statute does not. But in the *Flagg* case the Supreme Judicial Court (SJC) read the law as if it did. The decision raises some important questions for Massachusetts employers.

First, what is associational discrimination?

The term refers to the situation where an employee who is *not* disabled is on the receiving end of the employer's discriminatory animus toward a person the plaintiff associates with who *is* disabled. For example, imagine an employer that knows a particular employee (whose job performance is satisfactory) has a disabled child whose medical bills are causing — or might cause — the company's health care costs to rise. As a cost-controlling measure the company fires the employee.

The employer has discriminated against the employee because of the child's disability, not the employee's. But because of the association between the non-disabled employee and the disabled person, i.e. the parent-child relationship, the firing constitutes unlawful discrimination.

Second, how close does the association have to be?

Under the ADA the relationship does *not* have to be familial, e.g. a child or spouse, but in *Flagg* the SJC did not say what the parameters will be under Chapter 151B. In a footnote the court stated: "We limit our analysis of associational claims to the immediate family context raised by this case; we have no occasion here to examine more attenuated associations." So for the time being it is not clear whether the courts will confine associational claims to family relationships or take a more open-ended, ADA-style approach.

It is possible that employees will start to bring claims based on alleged discrimination against non-family members in their care who are disabled, such as close friends.

Does this mean employers have to give employees with disabled family members reasonable accommodations?

The *Flagg* case involved an employee who was "fired because the employer feared the medical expenses his

***Flagg v. AliMed*: Key Points**

- Case involved state law (Chapter 151B) not ADA.
- Employer's animus toward non-disabled employee's disabled spouse transferred to employee.
- Not yet clear whether non-family relationships/ associations will trigger protection.
- Court did not decide "reasonable accommodation" issue.

spouse was likely to incur because of her handicap," not because of any request for "reasonable accommodations," such as taking time off to care for her. On its face, the *Flagg* decision does not require employers to provide reasonable accommodations to employees with disabled family members beyond those required by the Family & Medical Leave Act (FMLA). That is not the whole story, however.

The court noted, again in a footnote, that "we have no occasion to consider whether an employee with a handicapped spouse himself is entitled to reasonable accommodation on account of his spouse's condition; **that issue is not raised in this case**" (emphasis added). By leaving the door open in this way, the SJC has suggested that in future it might interpret Chapter 151B as going further than the FMLA.

It was with this possibility in mind that two of the judges, Justice Cordy and Justice Gant, filed a separate concurring opinion. They stated that while the FMLA and "common decency" may require employers to accommodate employees with disabled family members "the failure to do so is not handicap discrimination under § 4 (16) [of Chapter 151B]." So reasonable accommodations are not a requirement, according to Justices Cordy and Gant. As a concurrence, their opinion has *some* weight (more than a dissent) but it is not binding precedent. This means that lower courts may take the concurrence into account but will not treat it as a ruling from the SJC as a whole. In other words, the law in this area is far from settled.

What happens next?

With the door ajar for employees to seek reasonable accommodations in connection with disabled family members — and to bring discrimination claims if the employer refuses — it seems likely that before too long the issue will come up at the Massachusetts Commission Against Discrimination (MCAD). Many times in the past the MCAD has pushed to expand the reach of Chapter 151B, and the courts tend to give considerable deference to the agency's interpretation of the statute.

Reasonable Accommodations?

- The concurrence says Chapter 151B does not require reasonable accommodations above and beyond the FMLA.
- But a concurrence does not have the same weight as the majority opinion.

If employees' attorneys push at the door, and if the MCAD's past performance is a reliable guide, at some point in the next couple of years employers should expect to see probable-cause findings emerge.

What should employers do?

Private-sector employers with more than six employees but fewer than 50 should remember that even though the FMLA does not apply Chapter 151B does, and that workers with disabled family members *might* start to seek accommodations, e.g. time off to provide care. In situations where the person with the disability is the *employee*, the employer has an unequivocal duty to engage in an interactive dialog. Where the disabled person is the employee's spouse or child, even though there is no clear duty to do so the safest course would be to (a) engage in an interactive dialog; (b) make clear that the employer is doing so as a courtesy, not because of any legal obligation; and (c) prepare to defend against a charge of discrimination.

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