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Associational bias claims evolving

By David C. Henderson

An employee claiming "associational discrimination" alleges being mistreated because of the employer's animus toward the protected status (e.g., race, sex, disability, etc.) of someone with whom the employee associates.

Associational discrimination claims are well established in parts of federal employment law, and for more than 30 years have formed a basis for state law rulings by the Massachusetts Commission Against Discrimination. But such claims under Massachusetts law had not been tested until recently before the state's highest court, and it was unclear whether they would be upheld.

Two significant court decisions now remove some of the uncertainty and show how far this part of state law has evolved.

Last July, the Supreme Judicial Court, in *Flagg v. AliMed, Inc.,* made its seminal ruling approving an associational discrimination claim under the state's non-discrimination statute, the Fair Employment Practices Act, or FEPA.

In November, the federal District Court, applying the SJC's analysis in *Flagg*, rejected a claim of associational discrimination under FEPA in the case of *Perez v. Greater New Bedford Vocational Technical School District*.

Both cases involved claims arising from the employee's association with a disabled person (or group of persons), but they reached different conclusions about whether FEPA authorized such a claim.

So what do *Flagg* and *Perez* tell us? Although the cases may seem inconsistent about whether the particular claim was valid, they in fact underscore the same four points about associational discrimination claims under Massachusetts law. Key points to remember are:

The core reason why associational discrimination law has developed so uncertainly in Massachusetts is that associational discrimination is not mentioned in the state statute being enforced.

Massachusetts' primary non-discrimination statute, FEPA, expressly prohibits discrimination based on an employee's own protected status. But unlike the Americans with Disabilities Act, FEPA does not mention discrimination against an employee because of the protected status of someone with whom the employee associates.

As a result, the SJC based its ruling in *Flagg* on the allegedly broader "objectives and purposes" of FEPA, the interpretation already given to FEPA by the Massachusetts Commission Against Discrimination, and analogous court rulings about federal discrimination law.

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Although the SJC's language in *Flagg* was broad, its holding about associational discrimination was narrow.

According to the SJC in *Flagg*, FEPA's anti-discrimination provisions can "only be understood as establishing an expansive, categorical prohibition against discrimination based on handicap in the workplace generally." And as a result, the court reasoned, "the concept of associational discrimination ... furthers the more general purposes of [FEPA] as a wide-ranging law, 'seeking removal of artificial, arbitrary, and unnecessary barriers to full participation in the workplace' that are based on discrimination."

But the SJC's holding was narrower than the broad language. The holding was simply that an employer violates FEPA's prohibition against handicap or disability discrimination if it fires an employee because it wants to keep the company health plan from having to pay the medical expenses of the employee's disabled spouse.

In other words, the SJC did not hold or say that an associational discrimination claim can be based on any type of association. Instead, it expressly "limit[ed] [its] analysis of associational claims to the immediate family context raised by [the *Flagg* case]," because it had "no occasion … to examine more attenuated associations."

Flagg, thus, left employers, employees and everyone else to speculate about whether an associational discrimination claim could be valid in a slightly different set of circumstances based on a different type of association.

In *Perez*, the U.S. District Court rejected the associational discrimination claim because, unlike the situation in *Flagg*, only a non-familial association between a school teacher and her disabled students was at issue.

Four months after *Flagg*, the District Court in Massachusetts decided *Perez*. *Perez* did not involve a familial association. And the holding instead was simply that a school district does not violate FEPA's prohibition against disability discrimination if it decides not to renew a special education coordinator's employment contract because of her association with (and advocacy for) the disabled students at her school.

According to the court, the teacher-student association alleged by the plaintiff in *Perez*, unlike the husband-wife association in *Flagg*, was too attenuated to support a claim.

Perez, too, shows that this area of law will continue to evolve, because it suggests that an associational discrimination claim based on a teacher-student association could be valid if an employee (teacher) alleges different circumstances.

Particularly significant about *Perez* is that the District Court explained its ruling, at least in part, on circumstances that the plaintiff had not alleged.

The court emphasized that the plaintiff had not alleged being "subject to the same prejudice, stereotypes, or unfounded fear that accompanies discrimination against the handicapped." Nor had the plaintiff alleged that "her association with any specific disabled child resulted in adverse employment actions," or that "she was dismissed because of defendant's beliefs regarding any disabled students with whom she was associated."

Each of those disclaimers by the court implies that, if the allegations had been slightly different, the plaintiff's associational discrimination claim could have been valid under Massachusetts law, even though at issue was a non-familial, teacher-student association. MLW