Don't Associate With Those Who Provide Really Bad Advice Regarding Employment Discrimination

July 22, 2013

In a decision widely anticipated by employers, the Supreme Judicial Court ("SJC") ruled that an employee can state a claim for "associational discrimination" under Massachusetts General Law chapter 151B. *Flagg v. AliMed*, SJC-11182 (July 19, 2013). "Associational discrimination" occurs when an employer takes an adverse employment action based on an employee's relationship with a handicapped person. In this case, the SJC ruled that the plaintiff stated a claim by alleging that his employer terminated him to avoid costs associated with providing health insurance to his wife, who had a serious medical condition.

The plaintiff, Marc Flagg, worked for AliMed, a company that (somewhat ironically) makes medical and ergonomic products for healthcare, business and home use. Flagg's wife developed a brain tumor requiring surgery and rehabilitative care. Consequently, Flagg became responsible for picking up his children from school on certain days - an activity that took 25 minutes. Five weeks after Flagg's wife's surgery, AliMed terminated his employment on the ostensible basis that, during a two week period, Flagg had not "clocked out" while picking his children up from school. Flagg's manager knew he was not punching out and did not say anything to him about this practice. At the time of termination, Flagg had worked at AliMed for 18 years and had received positive performance reviews.

Flagg filed a discrimination lawsuit against AliMed, alleging that it fired him because his wife required expensive medical care for which AliMed, through its health plan, was financially responsible. AliMed moved to dismiss the claim on the theory that even if Flagg's contention was true, the Massachusetts discrimination statute, General Laws chapter 151B, does not protect employees from being discriminated against based on the handicapped status of an associated person (here, Flagg's wife). The SJC disagreed and overturned the trial court's ruling. It expanded the disability discrimination protections afforded employees based on the legislative history of chapter 151B and the prior interpretation of analogous federal disability law.

Here are some questions and answers to help guide our understanding of this newly recognized protection.

What does "associational discrimination" mean?

The term "associational discrimination" refers to a claim that a plaintiff, although not a member of a protected class himself or herself, is the victim of discriminatory animus directed toward a third person who is a member of the protected class and with whom the plaintiff associates. In this case, although Flagg was not handicapped himself, he alleged that AliMed terminated him to avoid its indirect responsibility to pay for his wife's expensive medical care.

Does M.G.L. c. 151B provide protection on the basis of "associational discrimination?"

Not directly; this was the basis of AliMed's motion to dismiss. However, the SJC ruled that the legislative history of G.L. 151B § 4 (16) affords such protection.

What does G.L. 151B § 4 (16) provide?

This section of the anti-discrimination statute prohibits an employer from taking an adverse action against an employee because of his handicap...".

But wait, doesn't § 4 (16) describe action that an employer is prohibited from taking against an employee? What was the basis of the court's expansion of protection to an employee's spouse?

The SJC interpreted the anti-discrimination statute broadly, noting that although the statute does not directly protect an employee's associate, the statute's "words must be evaluated in the context of the overarching purpose of the statute itself." To that end, the SJC noted that when the Massachusetts legislature passed c. 151B, it sought to prohibit discrimination based on handicap in the workplace *generally*.

Was that the SJC's sole rationale?

No. The SJC also reasoned that the definition of a handicapped person includes those employees that may not actually have a handicap, but are "regarded as" having one. G.L. 151B § 4(16). The inclusion of persons "regarded as" having a

disability protects employees who may be the victims of stereotypic assumptions, myths, and fears regarding a people with disabilities. From this, the SJC reasoned that the Massachusetts legislature sought to protect not just those employees with actual handicaps but essentially all members of its workforce, because every employee theoretically has the potential for "being regarded" by the employer as having an impairment. It stated "[w]hen an employer takes adverse action against its employee because of his spouse's impairment, it is targeting the employee as the direct victim of its animus, inflicting punishment for exactly the same reason and in exactly the same way as if the employee were handicapped himself." Said another way, "an employee treated in such a manner by his employer suffers precisely the same type of discrimination as an employee whom the employer directly but incorrectly 'regard [s] as' being handicapped."

Is there any support for the SJC's reasoning?

Yes. The Rehabilitation Act is a federal law that bars discrimination based on handicap or disability in programs receiving Federal financial assistance. Like the Massachusetts anti-discrimination law, the Rehabilitation Act does not include an explicit "associational discrimination" provision. However, federal courts have interpreted the Rehabilitation Act to cover claims of associational handicap discrimination. (Interestingly, the Americans with Disabilities Act, the federal law that prohibits discrimination against persons with disabilities, expressly provides associational discrimination protection).

What will this change for Massachusetts employers?

Probably not very much since these "associational discrimination" claims were available under the federal Rehabilitation Act and the ADA. The ADA applies to slightly larger employers (20 or more employees), while chapter 151B applies to all Massachusetts employers with 6 or more employees.

Can we read further into the SJC's holding?

Not at this point. The Court noted that its holding applied to cases in which an employer seeks to avoid health insurance costs related to the medical care of an employee's disabled spouse. The Court did not provide any other "examples" of how this claim could arise. Indeed, in an concurring opinion, Justice Gants noted that "[t]he court does not decide in this case whether associational discrimination . . . will be interpreted to extend beyond the type of case at issue

here.”

Are there any takeaways?

First, a measure of common sense. Who thought it was a good idea to terminate an 18 year veteran... who took off 25 minutes a day over a few weeks to pick his kids up from school...because his wife was in the hospital...suffering from a brain tumor? Although it should go without saying, employers cannot terminate an employee to save money on health insurance premiums, whether the expensive-to-insure-disabled-person is the employee, a spouse, a child or other dependent.