ASSOCIATION DISCRIMINATION UNDER THE AMERICANS WITH DISABILITIES ACT: ANOTHER UPHILL BATTLE FOR POTENTIAL ADA PLAINTIFFS

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I. INTRODUCTION

In 1990, President George H. Bush signed the Americans with Disabilities Act ("ADA")[1] into law.[2] At the signing of this Act, he praised it as being a "landmark" piece of legislation that would enable individuals with disabilities to compete in the workplace.[3] However, after almost fourteen years of court decisions regarding the ADA, it has become clear that very few plaintiffs who have attempted to use the ADA have been successful.[4] Not only have these plaintiffs been unsuccessful, but many

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1. 42 U.S.C. §§ 12101-12213 (2000).

2. The Americans with Disabilities Act of 1990 was signed into law on July 26, 1990. President George H. Bush, Remarks on Signing the Americans with Disabilities Act of 1990, *at* http://www.bushlibrary.tamu.edu/research/papers/1990/90072600.html (July 26, 1990).

3. At the signing of the ADA, President Bush observed the following: "With today's signing of the landmark Americans for [sic] Disabilities Act, every man, woman, and child with a disability can now pass through once-closed doors into a bright new era of equality, independence, and freedom." President George H. Bush, Remarks of President George Bush at the Signing of the Americans with Disabilities Act, *at* http://www.eeoc.gov/ada/bushspeech.html (last modified July 26, 2002).

4. *See* Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 100 (1999) (discussing that defendants prevail in more than ninety-three percent of the reported ADA cases); Ruth Colker, *Winning and Losing Under the Americans with Disabilities Act*, 62 OHIO ST. L.J. 239, 242 (2001) (demonstrating that most ADA cases brought on appeal result in defendant-friendly outcomes). Professor Colker's articles demonstrate how unlikely it is for ADA plaintiffs to prevail. Additionally, over the past few years, the Supreme Court has substantially limited the scope of the ADA. *See also* Chevron U.S.A., Inc. v. Echazabal, 536 U.S. 73, 78 (2002) (holding that an employer is allowed to refuse to hire an individual if that individual poses a "direct threat" to self); U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 406 (2002)

of them have lost their cases at the summary judgment or motion to dismiss stage, without being able to take their cases to trial.[5]

Although the ADA was meant primarily to cover individuals who have disabilities,[6] one of the lesser-known provisions of the Act protects individuals against discrimination based on their association or relationship with an individual with a disability.[7] This provision of the Act has not been the subject of much litigation;[8] however, like the plaintiffs who have sued under the other provisions of the ADA, most plaintiffs who have attempted to use this provision of the ADA have also been unsuccessful.[9]

(holding that an employer is not required to violate its seniority system to accommodate an employee requesting an accommodation); Toyota Motor Mfg., Inc. v. Williams, 534 U.S. 184, 197-98 (2002) (holding that when determining whether an individual is substantially limited in the ability to perform manual tasks, the court must look at those tasks that are central to everyday life, and commenting that there needs to be a "demanding standard" for a plaintiff to qualify as being disabled); Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 565-66 (1999) (holding that a body's internal mechanisms that compensate for an individual's physical limitations must be evaluated when determining whether that individual suffers from a disability under the Act); Murphy v. United Parcel Serv., Inc., 527 U.S. 516, 521 (1999) (concluding that mitigating measures must be considered when determining whether an individual suffers from a disability under the Act); Sutton v. United Air Lines, Inc., 527 U.S. 471, 482 (1999) (holding that mitigating measures must be taken into account when determining whether an individual suffers from a disability under the Act); *see also* Lawrence D. Rosenthal, *Can't* Stomach *the Americans with Disabilities Act? How the Federal Courts Have* Gutted *Disability Discrimination Legislation in Cases Involving Individuals with Gastrointestinal Disorders and Other* Hidden *Illnesses*, 53 CATH. U. L. REV. 449, 450 n.6 (2004) (discussing the recent ADA decisions of the United States Supreme Court).

5. Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, *supra* note 4, at 101-02; Colker, *Winning and Losing Under the Americans with Disabilities Act*, *supra* note 4, at 246.

6. According to the definitions section of the ADA, a "disability" with respect to an individual is defined as: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2) (2000). In the Congressional findings section of the ADA, Congress observed that approximately 43,000,000 Americans have one or more disabilities, and that these people face discrimination in employment, housing, public accommodations, and other aspects of life. *Id*. § 12101(a)(1), (a)(3). By listing the 43,000,000 figure, and by specifying that these people have suffered from discrimination, it is clear that Congress focused its attention on people with disabilities rather than on people who have relationships or associations with people with disabilities.

7. The term "discriminate" is defined by the ADA 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." 42 U.S.C. § 12112(b)(4) (2000).

8. As of October 5, 2004, a run of Shepard's Citators indicates that the association provision of the ADA results in only one hundred and two total citations.

9. *But see* Jackson v. Serv. Eng'g, Inc., 96 F. Supp. 2d 873, 882 (S.D. Ind. 2000) (denying defendant's motion for summary judgment where plaintiff alleged that employer terminated plaintiff because of plaintiff's wife's illness); Dollinger v. State Ins. Fund, 44 F. Supp. 2d 467, 482 (N.D.N.Y. 1999) (denying defendant's motion to dismiss complaint alleging discrimination based

Courts have denied recovery to these plaintiffs for a variety of reasons. First, like many ADA plaintiffs who have sued under other provisions of the Act, many plaintiffs who have sued under the association provision have lost their cases because they have been unable to prove a "disability" within the meaning of the ADA.[10] Second, even if association plaintiffs have been able to prove that the associate or relative had a "disability" under the ADA, numerous plaintiffs have been unable to demonstrate that they had an ADA-protected *relationship* or *association* with the disabled individual.[11] Third, some plaintiffs have failed because they have been unable to prove that they suffered an "ultimate employment decision," which some courts require in this type of action.[12]

In addition to the three reasons set forth above, there are other reasons these plaintiffs' claims have failed. While some ADA association plaintiffs have not been able to prove that their employers knew they had an association with an individual with a disability,[13] other ADA association plaintiffs have lost their claims because they mistakenly believed that the association provision of the ADA requires employers to reasonably accommodate them.[14] Finally, many plaintiffs have lost their ADA association claims because they were either (a) unable to prove that they were qualified for the position they held;[15] (b) unable to prove that their employer acted with discriminatory intent;[16] or (c) because these plaintiffs did not have "true" association claims.[17]

Regardless of the reasons, the success rate of plaintiffs who bring claims under the association provision of the ADA has been quite low. This is not unlike the success rate of those who have attempted to bring claims under the other provisions of the Act.[18] Thus, although President George H. Bush initially claimed that the ADA would be a "landmark" piece of legislation that would open many "once-closed doors," the reality has been much less encouraging to most ADA plaintiffs.[19]

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on plaintiff's association with HIV-positive individuals). *See* discussion *infra* note 451 for a further discussion.

10. *See* discussion *infra* section IV(A). For a definition of the term "disability," see *supra* note 6.

11. *See* discussion *infra* section IV(B).

12. *See* discussion *infra* section IV(C).

13. *See* discussion *infra* section IV(D).

14. *See* discussion *infra* section IV(E).

15. *See* discussion *infra* section IV(F).

16. *See* discussion *infra* section IV(G).

17. *See* discussion *infra* section IV(H).

18. *See supra* note 4.

19. ADA & IT Technical Assistance Centers, *Historical Context of Americans with Disabili-*

As a result of these hurdles, ADA association plaintiffs need to start finding other ways to obtain relief when they believe they have been discriminated against because of a relationship or an association with an individual with a disability or an illness. It is highly unlikely that Congress will amend the ADA, or that the courts will start giving the ADA's association provision and the disability definition broader meanings; therefore, when plaintiffs do find themselves in this situation, they must either seek redress under different provisions of the ADA, such as the anti-coercion[20] and the anti-retaliation provisions,[21] or under a different statute - either the Employee Retirement Income Security Act ("ERISA"),[22] or the Family and Medical Leave Act ("FMLA").[23] State or local laws are also available avenues for redress. Thus, if plaintiffs want to achieve any type of success when confronted with situations where they suffer adverse employment actions resulting from the disability or illness of a relative or associate, they will have to start using these additional potential avenues, in addition to asserting ADA association claims. This is because, as this article will demonstrate, the association provision of the ADA, like the other substantive provisions of the ADA, is most often an ineffective avenue to pursue.

This article will first discuss the association provision of the ADA, the legislative history behind it, and the executive agency interpretation of it. The article will then focus on cases that have addressed claims brought under this section of the ADA and will provide examples of the many reasons these ADA plaintiffs have lost their association-based claims. Finally, the article will suggest some possible alternatives for employees who believe they have suffered adverse employment actions

ties Act, at http://adata.org/whatsada-history.html (last modified Sept. 30, 2002).

20. The anti-coercion provision of the ADA provides the following:

> It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.

42 U.S.C. § 12203(b) (2000).

21. The anti-retaliation provision prevents employers from discriminating against an individual "because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter." *Id.* § 12203(a).

22. 29 U.S.C. §§ 1000-1461 (2000).

23. 29 U.S.C. §§ 2601-2619, 2651-2654 (2000). This legislation allows certain employees to take extended periods of time off from work in order to care for family members who have a serious health condition. *Id.* § 2612(a)(1)(C). It also allows certain employees to take time off from work if they suffer from a serious health condition that prohibits them from performing their jobs. *Id.* § 2612(a)(1)(D).

as a result of some type of association or relationship with an individual with an illness or a disability. This article will demonstrate that despite the initial optimism behind the ADA, the association provision of this statute has been just as ineffective as most disability advocates believe the rest of the ADA has been. This article will further show that unless plaintiffs find some other avenues to pursue, they will likely be left without a remedy when they suffer adverse employment actions as a result of their relationship or association with an individual with a disability or illness.

II. THE ASSOCIATION DISCRIMINATION PROVISION OF THE AMERICANS WITH DISABILITIES ACT - ITS LEGISLATIVE HISTORY AND AGENCY INTERPRETATION

At its most basic level, the ADA prohibits employers from discriminating against individuals with disabilities.[24] However, the definition of the term "discriminate" also includes "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."[25] The association provision has not been the subject of nearly as much litigation as the other provisions of the ADA,[26] and because the amount of case law is somewhat limited, an analysis of this provision's legislative history and executive agency interpretation is appropriate.[27]

The legislative history behind this provision sheds light on the principal evils Congress intended to address when it included this provision in the ADA. The impetus behind this provision came from testimony

24. The substantive provision of the ADA provides: "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges or employment." 42 U.S.C. § 12112(a) (2000).

25. *Id.* § 12112(b)(4).

26. *See* Den Hartog v. Wasatch Acad., 129 F.3d 1076, 1081-82 (10th Cir. 1997) (citing Den Hartog v. Wasatch Acad., 909 F. Supp. 1393, 1399-1400 (D. Utah 1995) (finding that plaintiff's ADA claim was unique)); *see also supra* note 8 (demonstrating that as of October 5, 2004, the association provision of the ADA results in only one hundred and two total Shepard's citations).

27. The agency interpretation can be found in the Code of Federal Regulations ("C.F.R.") as well as in the C.F.R.'s Interpretive Guidance. *See* 29 C.F.R. § 1630.8 (2000); 29 C.F.R. app. §1630.8 (2000). Some of the relevant legislative history is found in the reports from the House Committee on Education and Labor and the House Judiciary Committee. *See* H.R. REP. NO. 101-485, pt. 2, at 61-62 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 343-44; H.R. REP. NO. 101-485, pt. 3, at 38-39 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 461-62.

regarding an employer who terminated an employee because she had recently started caring for her AIDS-infected son, who had moved in with her.[28] Based on this history, it is clear that one reason Congress included the association provision in the ADA was that Congress believed that employers should not be entitled to terminate or otherwise adversely affect the employment status of a qualified individual because of that individual's association or relationship with an individual with a particular illness and/or because of an employer's fear of that illness.

In addition to this evidence, Congress's intent behind this provision of the ADA can also be discovered by reviewing other portions of the legislative history. According to the report from the House Judiciary Committee, the association provision was intended to cover the following hypothetical situations:

> For example, it would be discriminatory for an employer to discriminate against a qualified employee who did volunteer work for people with AIDS, if the employer knew of the employee's relationship or association with the people with AIDS, and if the employment action was motivated by that relationship or association.
>
> Similarly, it would be illegal for an employer to discriminate against a qualified employee because that employee had a family member or a friend who had a disability, if the employer knew about the relationship or association, knew that the friend or family member has a disability, and acted on that basis. Thus, if an employee had a spouse with a disability, and the employer took an adverse action against the employee based on the spouse's disability, this would then constitute discrimination.[29]

The House Committee on Education and Labor also provided guidance as to another situation the association provision was meant to cover:

> Thus, assume, for example that an applicant applies for a job and discloses to the employer that his or her spouse has a disability. The employer believes the applicant is qualified for the job. The employer, however, assuming without foundation that the applicant will have to miss work or frequently leave work early or both, in order to care for

28. H.R. REP. NO. 101-485, pt. 2, at 30, *reprinted in* 1990 U.S.C.C.A.N. 312 (giving an example of how a "women [sic] was discriminated against simply because of her association with a person with a disability").

29. H.R. REP. NO. 101-485, pt. 3, at 38-39, *reprinted in* 1990 U.S.C.C.A.N. 461-62.

> his or her spouse, declines to hire the individual for such reasons. Such a refusal is prohibited by this subparagraph.[30]

The committee then proceeded to address a situation that would *not* be covered:

> In contrast, assume that the employer hires the applicant. If he or she violates a neutral employer policy concerning attendance or tardiness, he or she may be dismissed even if the reason for the absence or tardiness is to care for the spouse. The employer need not provide any accommodation to the nondisabled employee. The individuals covered under this section are any individuals who are discriminated against because of their known association with an individual with a disability.[31]

Therefore, the legislative history suggests that one situation the association provision was meant to cover involves beliefs and stereotypes about people who associate with, or who are related to, people with particular illnesses such as AIDS. It is also clear that while Congress was concerned about an employer's unfounded beliefs about what the employee's associate's or relative's disability might do to the employee's ability to work, Congress did *not* intend for this provision of the ADA to cover the situation where the employee's associate's or relative's disability has *actually* caused the employee to miss work as a result of having to care for the other individual.

In addition to the legislative history behind this provision of the ADA, agency interpretation also sheds light on what situations this provision was meant to address. As one of the administrative agencies charged with implementing the ADA, the Equal Employment Opportunity Commission ("EEOC") articulated its interpretation of the association provision of the ADA.[32] In its Interpretive Guidance to the Code of Federal Regulations, the EEOC provided an overall explanation of this provision[33] and provided examples of when the association provision

30. H.R. REP. NO. 101-485, pt. 2, at 61, *reprinted in* 1990 U.S.C.C.A.N. 343-44.

31. H.R. REP. NO. 101-45, pt. 2, at 61-62, *reprinted in* 1990 U.S.C.C.A.N. 344.

32. 42 U.S.C. § 12117 (2000) (delegating the power of interpretation to the EEOC). The EEOC has promulgated regulations to help interpret the ADA, and these regulations include the regulations applicable to the association provision of the ADA. 29 C.F.R. § 1630.8 (2000). Additionally, the EEOC drafted its Interpretive Guidance to this section of the C.F.R., which also provides guidance as to how the association provision should be interpreted. 29 C.F.R. app. § 1630.8 (2000).

33. The first part of the Interpretive Guidance to this provision provides as follows:

> This provision is intended to protect any qualified individual, whether or not that individual has a disability, from discrimination because that person is known to have an as-

would form the basis of a cause of action under the ADA.[34] In addition to providing these examples of when the association provision would apply, the EEOC also indicated that the association provision applies to other aspects of employment, such as benefits. Specifically, with respect to benefits, the EEOC concluded:

> This provision also applies to other benefits and privileges of employment. For example, an employer that provides health insurance benefits to its employees for their dependents may not reduce the level of those benefits to an employee simply because that employee has a dependent with a disability. This is true even if the provision of such benefits would result in increased health insurance costs for the employer.[35]

Thus, looking at the agency interpretation of this ADA provision, it is clear that the EEOC's interpretations are consistent with the legislative history behind the ADA's association provision. Although both the legislative history and agency interpretations do shed light on the purposes behind the ADA's association provision, there has been very little litigation brought under this statutory provision. As a result, there have been very few written opinions about this section of the ADA; however, in 1997, the United States Court of Appeals for the Tenth Circuit in *Den Hartog v. Wasatch Academy*[36] issued a very thorough and detailed opinion on the association provision of the ADA. Since that time, several courts have relied on the *Den Hartog* opinion when presented with an ADA association claim.[37]

> sociation or relationship with an individual who has a known disability. This protection is not limited to those who have a familial relationship with an individual with a disability.

Id.

34. Specifically, the EEOC gives the following example of when the association provision would cover an employee:

> To illustrate the scope of this provision, assume that a qualified applicant without a disability applies for a job and discloses to the employer that his or her spouse has a disability. The employer thereupon declines to hire the applicant because the employer believes that the applicant would have to miss work or frequently leave work early in order to care for the spouse. Such a refusal to hire would be prohibited by this provision. Similarly, this provision would prohibit an employer from discharging an employee because the employee does volunteer work with people who have AIDS, and the employer fears that the employee may contract the disease.

Id.

35. *Id.*

36. 129 F.3d 1076 (10th Cir. 1997).

37. As of October 5, 2004, a search using Shepard's Citators reveals that since 1997, there has been a total of one hundred and nine total citation references to this opinion. Included in this num-

III. THE *DEN HARTOG* OPINION

Prior to 1997, very few United States Courts of Appeals had addressed the association provision of the ADA.[38] That year, the United States Court of Appeals for the Tenth Circuit issued an extended and complete opinion regarding the association provision, its legislative history, the EEOC's interpretation of the provision, and its intended application.[39] The Tenth Circuit also set forth a framework for analyzing these cases, a framework which has been adopted by other federal courts.[40] As a result of its thorough treatment of the association provision of the ADA, *Den Hartog* has become a widely-cited case involving association discrimination.[41]

In *Den Hartog*, the plaintiff, a teacher at a private high school, was fired after his son, who suffered from bipolar disorder, carried out threats of violence against some members of the local community with ties to the school.[42] Initially, the employer allowed the plaintiff to work "off campus," so as to avoid any potential contact between the plaintiff's son and other members of the school community.[43] However, after the one-year "off campus" appointment, the employer decided not to renew the plaintiff's contract.[44] Although the employer tried to argue that the plaintiff's contract was not renewed because his position no longer ex-

ber are sixty-six references to cases that have cited this opinion, fourteen of which have specifically followed the Tenth Circuit's opinion.

38. *Den Hartog*, 129 F.3d at 1083. Some of the pre- *Den Hartog* published opinions from the United States Courts of Appeals include *Rogers v. International Marine Terminals, Inc*., 87 F.3d 755, 761 (5th Cir. 1996) (affirming summary judgment in favor of employer because plaintiff was unable to demonstrate that his employer terminated him as a result of his disabled wife), *Ennis v. National Ass'n of Business & Education Radio, Inc.*, 53 F.3d 55, 62 (4th Cir. 1995) (affirming summary judgment in favor of employer because plaintiff could not establish prima facie case of association discrimination), and *Tyndall v. National Education Centers, Inc*., 31 F.3d 209, 214, 216 (4th Cir. 1994) (affirming summary judgment in favor of employer because plaintiff was unable to attend work on regular basis due to illness of family member).

39. *See Den Hartog*, 129 F.3d at 1081-86.

40. The *Den Hartog* opinion incorporated the *McDonnell Douglas* burden-shifting approach used in other employment discrimination cases. *Id.* at 1085. For a complete discussion of the *McDonnell Douglas* burden-shifting approach used in employment discrimination litigation, see Lawrence D. Rosenthal, *Motions for Summary Judgment When Employers Offer Multiple Justifications for Adverse Employment Actions: Why the Exceptions Should Swallow the Rule*, 2002 UTAH L. REV. 335 (2002). Additionally, the *Den Hartog* opinion established a method for determining how a plaintiff could establish a prima facie case under the association provision of the ADA. *Den Hartog*, 129 F.3d at 1085.

41. *See supra* note 37.

42. *Den Hartog*, 129 F.3d at 1078, 1080.

43. *Id*. at 1079.

44. *Id*. at 1080.

isted, the employer admitted that had the plaintiff not had problems with his son, the plaintiff would have most likely still been employed by the school.[45]

The plaintiff filed a charge of discrimination with the Utah Anti-Discrimination Division and the EEOC, and then sued his former employer under both the ADA and state law.[46] The lower court granted the employer's motion for summary judgment on the plaintiff's ADA claim, and a jury eventually returned a verdict in favor of the defendant on the plaintiff's breach of contract claim.[47] On appeal, the plaintiff argued that the lower court erred in concluding that the plaintiff's ADA association claim was appropriate for summary judgment.[48]

The court first addressed whether the plaintiff's son suffered from a disability within the meaning of the ADA.[49] Relying on the statutory definition of "disability"[50] and the appropriate regulations,[51] the court determined that the plaintiff's son had a disability under the ADA.[52] The court then addressed the substance of the association discrimination

45. *Id.*

46. *Id.* The plaintiff's state-law claim was a breach of contract claim.

47. *Id.*

48. *Id.*

49. *Id.* at 1081. An ADA plaintiff's claim will fail if the plaintiff or an associate or relative of an ADA association plaintiff does not suffer from a disability as that term is defined by the ADA. *See, e.g.*, Larimer v. IBM, Corp., No. 02-C-3160, 2003 U.S. Dist. LEXIS 7396 (N.D. Ill. Apr. 29, 2003), *aff'd*, 370 F.3d 698 (7th Cir. 2004); *see also* discussion *infra* section IV(A).

50. *See* 42 U.S.C. § 12102(2) (2000).

51. The relevant definitions related to the disability determination are those of "physical or mental impairment," "substantially limits," and "major life activity." The Code of Federal Regulations defines "physical or mental impairment" as:

> (1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or
>
> (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

Regulations to Implement the EEOC Provisions of the ADA, 29 C.F.R. § 1630.2(h) (2000).
The Code of Federal Regulations defines "substantially limits" as:

> (i) Unable to perform a major life activity that the average person in the general population can perform; or
>
> (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform the same major life activity.

Id. § 1630.2(j)(1).
The Code of Federal Regulations defines "major life activity" as: "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." *Id*. § 1630.2(i).

52. *Den Hartog*, 129 F.3d at 1081.

claim.[53]

The court started by acknowledging that the ADA does indeed prohibit association discrimination, and that, according to the Code of Federal Regulations, "[a] family relationship is the paradigmatic example of 'relationship' under the association provision of the ADA."[54] The court then recognized that there had been very little litigation under this provision of the ADA.[55] As a result, the court engaged in a lengthy discussion of the provision's legislative history and agency interpretation.[56] After addressing these issues, the court turned to the few appellate-level cases that had addressed this provision of the ADA.[57] Those cases, the Tenth Circuit observed, involved the exact type of scenario Congress envisioned when it enacted this provision of the ADA. It did not address the specific issue presented in this case, namely "whether the association provision of the ADA protects a qualified employee from adverse employment action based on his disabled associate's misconduct, where the associate's misconduct does not impair the employee's job performance."[58] Finally, after analyzing the difference between a disability and misconduct caused by a disability, and after analyzing the direct threat defense, the court concluded that the employer's decision to terminate the plaintiff did not violate the ADA.[59]

Most important for purposes of this article, however, was the Tenth Circuit's discussion regarding how to analyze ADA association claims. Specifically, the court determined that ADA association claims should be analyzed using the *McDonnell Douglas* burden-shifting approach used in cases brought under Title VII of the Civil Rights Act of 1964 ("Title VII")[60] and the Age Discrimination in Employment Act ("ADEA").[61] Under this framework, the plaintiff must first establish a prima facie case of discrimination.[62] Next, the burden of *production* (not

53. *Id.*

54. *Id.* at 1082 (citing 29 C.F.R. § 1630.8 (1996)).

55. *Id.*

56. *Id.* at 1082-84. For the legislative history behind this ADA provision and the agency interpretation of this provision, see discussion *supra* section II.

57. *Den Hartog*, 129 F.3d at 1083 (citing Rogers v. Int'l Marine Terminals, Inc., 87 F.3d 755 (5th Cir. 1996); Ennis v. Nat'l Ass'n of Bus. & Educ. Radio, Inc., 53 F.3d 55 (4th Cir. 1995); Tyndall v. Nat'l Educ. Ctrs., Inc., 31 F.3d 209 (4th Cir. 1994)).

58. *Id.*

59. *Id.* at 1092.

60. 42 U.S.C. § 2000-e to 2000e-17 (2000).

61. 29 U.S.C. § 621-634 (2000). *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142 (2000) (assuming, but not deciding, that the burden-shifting approach used in cases brought under Title VII applies to cases brought under the ADEA).

62. *Den Hartog*, 129 F.3d at 1085. In a typical employment discrimination claim based on

the burden of persuasion) shifts to the employer to articulate a legitimate, non-discriminatory reason for the adverse employment action.[63] Finally, if the employer meets this burden of production, the burden shifts back to the plaintiff to *prove* that the employer's articulated reason was not the real reason for the adverse employment action, but rather that a discriminatory motive was the real reason.[64]

One of the key questions the *Den Hartog* court decided was how an ADA association plaintiff can establish a prima facie case.[65] After considering both parties' suggestions and previous ADA case law, the court concluded that in order to establish a prima facie case of association discrimination under the ADA, it must be shown that

> (1) the plaintiff was 'qualified' for the job at the time of the adverse employment action; (2) the plaintiff was subjected to adverse employment action; (3) the plaintiff was known by his employer at the time to have a relative or associate with a disability; [and] (4) the adverse employment action occurred under circumstances raising a reasonable inference that the disability of the relative or associate was a determining factor in the employer's decision.[66]

Once the plaintiff establishes a prima facie case, the employer must then articulate a "legitimate, non-discriminatory reason for the adverse action."[67] Finally, the plaintiff must demonstrate that the reason articulated by the employer is not the real reason for the adverse employment action, and that the real reason is discrimination.[68] This analytical framework from the *Den Hartog* opinion has been used by numerous post-1997 ADA association discrimination claims. [69] However, regard-

race, sex, or age, a plaintiff establishes a prima facie case by establishing (1) that he was a member of a protected class; (2) that he was qualified for the position in question; (3) that he was not selected for the position despite his qualifications; and (4) that the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). As the Supreme Court later made clear, this prima facie test is flexible, and depends to some degree on the facts in each case. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253-54 n.6 (1981) (citing McDonnell Douglas, 411 U.S. at 802 n.13).

63. *See McDonnell Douglas*, 411 U.S. at 802. *See generally* Rosenthal, *Motions for Summary Judgment When Employers Offer Multiple Justifications for Adverse Employment Actions: Why the Exceptions Should Swallow the Rule*, *supra* note 40, at 340-55 (analyzing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)).

64. *McDonnell Douglas*, 411 U.S. at 804.

65. *Den Hartog*, 129 F.3d at 1085.

66. *Id.*

67. *Id.* (citing *McDonnell Douglas*, 411 U.S. at 802).

68. *Id.* (citing *McDonnell Douglas*, 411 U.S. at 804).

69. *See supra* note 38*; see also* Larimer v. IBM Corp., No. 02-C-3160, 2003 U.S. Dist.

less of which court uses this framework, the outcome is typically the same - the ADA association plaintiff is usually unable to prevail.

IV. UNSUCCESSFUL CASES BROUGHT UNDER THE ASSOCIATION PROVISION OF THE ADA

The next section of this article will analyze several cases brought under the association provision of the ADA. As this section will make clear, the plaintiffs in these cases have had extreme difficulty in prevailing under the association provision of the ADA. The reasons these plaintiffs fail are numerous, including (A) an inability to demonstrate that the associate or relative has a "disability" within the meaning of the ADA; (B) an inability to demonstrate a protected *relationship* or *association* with an individual with a disability; (C) an inability to prove that the plaintiff suffered an "ultimate employment decision"; (D) an inability to demonstrate that the plaintiff's employer knew of the employee's relative's or associate's disability; (E) the fact that the association provision of the ADA does not require an employer to provide any accommodations to individuals with disabled relatives or associates; (F) an inability to demonstrate that the plaintiff was qualified for the position in question; (G) an inability to demonstrate that the employer acted with discriminatory motives; and (H) because the claims the plaintiffs asserted were not "true" association claims. Regardless of the reason, the

LEXIS 7396, at *22-23 (N.D. Ill. Apr. 29, 2003), *aff'd*, 370 F.3d 698 (7th Cir. 2004) (explaining the four requirements to establish a prima facie ADA association claim); Anthony v. United Tel. Co., 277 F. Supp. 2d 763, 770 (N.D. Ohio 2002) (explaining the four requirements to establish a prima facie ADA association claim); Jackson v. Serv. Eng'g, Inc., 96 F. Supp. 2d 873, 879 (S.D. Ind. 2000) (describing how the *Den Hartog* court explained the prima facie case under *McDonnell Douglas*); Kennedy v. Chubb Group of Ins. Cos., 60 F. Supp. 2d 384, 396 (D.N.J. 1999) (noting that the employer is not required to provide the employee with a reasonable accommodation); Rocky v. Columbia Lawnwood Reg'l Med. Ctr., 54 F. Supp. 2d 1159, 1164 (S.D. Fla. 1999) (explaining that a familial relationship is an example of a protected relationship under the association provision of the ADA); Dollinger v. State Ins. Fund, 44 F. Supp. 2d 467, 480 (N.D.N.Y. 1999) (explaining the four requirements to establish a prima facie ADA association claim); Hilburn v. Murata Elecs. N. Am., Inc., 17 F. Supp. 2d 1377, 1383 (N.D. Ga. 1998), *aff'd*, 181 F.3d 1220 (11th Cir. 1999) (explaining the four requirements to establish a prima facie ADA association claim); Moresi v. AMR Corp., No. 3:98-CV-1518-R, 1999 U.S. Dist. LEXIS 13644, at *7-8 (N.D. Tex. Aug. 31, 1999) (explaining the four requirements to establish a prima facie ADA association claim); Atkinson v. Wiley Sanders Truck Lines, Inc., 45 F. Supp. 2d 1288 (M.D. Ala. 1998) (explaining the four requirements to establish a prima facie ADA association claim); Barker v. Int'l Paper Co., 993 F. Supp. 10 (D. Me. 1998) (explaining that a familial relationship is an example of a protected relationship under the association provision of the ADA); Bates v. Powerlab, Inc., No. 3:97-CV-2551-P, 1998 U.S. Dist. LEXIS 8034, at *12-13 (N.D. Tex. May 18, 1998) (explaining the four requirements to establish a prima facie ADA association claim).

outcomes in these association claims are typically the same - the employer will defeat the plaintiff's cause of action.

A. Plaintiffs Who Failed Because of an Inability to Prove a "Disability"

One of the primary reasons ADA association plaintiffs have failed is that they have been unable to prove that their relative or associate suffered from a "disability" within the meaning of the ADA. This hurdle has become even more difficult to overcome in recent years, as the Supreme Court has limited the ADA's definition of disability.[70]

One recent case in which the plaintiff's ADA association claim failed because he was unable to prove a "disability" was *Larimer v. International Business Machines, Corp*.[71] In *Larimer*, the United States District Court for the Northern District of Illinois determined that the plaintiff's twin daughters, who were born almost two months prematurely and with several impairments, did not meet the statutory definition of having a disability.[72] As a result, the court granted the defendant's motion for summary judgment.[73]

Thomas Larimer had worked for the defendant for approximately one year when his employer fired him, allegedly for performance issues.[74] This termination occurred approximately three months after his wife had given birth to twin daughters.[75] The daughters were born with respiratory distress syndrome, suspected sepsis, jaundice, apnea, a slowing of the heart rate, and prematurity.[76] Additionally, one of the twins suffered from bleeding of the brain and a problem with the brain tissue, while the other suffered from a vascular skin lesion.[77] During their lengthy stays in the hospital, the children required mechanical ventilation and mechanical feeding, and if they had not received these treatments, they would not have survived.[78] Eventually, however, both children were able to leave the hospital.[79] At the time of the defendant's

70. *See supra* note 4.

71. No. 02-C-3160, 2003 U.S. Dist. LEXIS 7396 (N.D. Ill. Apr. 29, 2003), *aff'd*, 370 F.3d 698 (7th Cir. 2004).

72. *Id.* at *3, *15-16, *35.

73. *Id.* at *35.

74. *Id.* at *3-4, *14-15.

75. *Id.* at *3.

76. *Id.* at *15-16.

77. *Id.* at *16.

78. *Id.* at *16-17.

79. *Id.* at *16.

motion for summary judgment, however, it was uncertain whether these conditions would cause long-term health consequences for the plaintiff's daughters.[80]

In his two-count complaint,[81] the plaintiff alleged that his employer violated the association provision of the ADA because it terminated him because of his association with his daughters.[82] After acknowledging that the Seventh Circuit had not yet addressed an ADA association claim, the court adopted the prima facie test established by the Tenth Circuit.[83] Even though there were questions about the plaintiff's ability to establish the other elements of his prima facie case, the court first went into a discussion about whether the plaintiff's daughters satisfied the ADA's strict definition of "disability."[84] Acknowledging that an ADA plaintiff can establish a disability in one of three ways, the court analyzed the plaintiff's claim under the first prong - that the plaintiff's daughters had *actual* disabilities - and the third prong - that the plaintiff's daughters were *regarded as* having disabilities.[85] Relying on the test the Supreme Court developed in *Bragdon v. Abbott*,[86] the court concluded that the daughters had impairments and that the impairments did indeed affect major life activities.[87] However, like many ADA cases,

80. *Id.* at *18.

81. The plaintiff also alleged that his former employer violated the Employee Retirement Income Security Act. 29 U.S.C. § 1140 (2000). Under this statute, an employer cannot retaliate against an employee because that employee has attempted to exercise a right provided to him pursuant to an employee benefit plan. *See id.*

82. *Larimer*, 2003 U.S. Dist. LEXIS 7396, at *20-21.

83. *Id.* at *21-22 (relying on Den Hartog v. Wasatch Acad., 129 F.3d 1076 (10th Cir. 1997)). For a discussion of this opinion, *see supra* section III.

84. *Larimer*, 2003 U.S. Dist. LEXIS 7396, at *22 (defining disability under the ADA).

85. *Id.* at *22-23.

86. 524 U.S. 624 (1998) (holding that the plaintiff's HIV-positive status was a "disability" under the ADA). Under *Bragdon*, to determine whether an individual suffers from a "disability" within the meaning of the ADA, courts will first look at whether the plaintiff suffers from a "physical or mental impairment." *Id.* at 632. If the plaintiff is able to demonstrate such an impairment, courts will determine whether the impairment "substantially limits" a "major life activity." *Id.* at 637, 639. Of course, the plaintiff can also demonstrate a "disability" by proving that he has a record of such an impairment or by proving that he was regarded as having such an impairment. 42 U.S.C. § 12102(2) (2000).

87. *Larimer*, 2003 U.S. Dist. LEXIS 7396, at *22-24. The major life activities the plaintiff's daughters' impairments affected included eating and breathing. *Id.* at *24. The C.F.R. lists breathing as a "major life activity," but eating is not listed. 29 C.F.R. § 1630.2(i) (2000). However, this regulation is not an exclusive list, as is indicated by the phrase "such as" before the list of examples of major life activities. *See id.*; *see also* Furnish v. SVI Sys., Inc., 270 F.3d 445, 449 (7th Cir. 2001) (citing Lawson v. CSX Transp., Inc., 245 F.3d 916, 923 (7th Cir. 2001) (concluding that eating is a major life activity under the ADA)). In addition, although the C.F.R. does not list eating as a "major life activity," it can be construed that "caring for oneself [or] performing manual tasks" would include eating. *See* 29 U.S.C. § 1630.2(i).

Larimer's case failed because he was unable to prove that his daughters' impairments *substantially limited* these major life activities.[88]

Although the plaintiff was able to present testimony that his daughters would not have survived without the mechanical assistance they received, the court focused more on the duration of the medical problems rather than on their severity.[89] Relying on the Code of Federal Regulations, which establishes a multi-factor test to determine whether a limitation is substantial,[90] the court concluded that because the plaintiff was unable to prove with certainty that his daughters' limitations on major life activities were permanent, he could not satisfy the first prong of the ADA's definition of disability.[91] The court reached this conclusion even though it was possible that the long-term effects of the illnesses could have caused, among other things, mental retardation and cerebral palsy.[92] In reaching this conclusion, the court also relied on the Supreme Court's language in *Sutton v. United Air Lines, Inc.*,[93] where the Court noted that the Act covers only *actual*, as opposed to hypothetical or potential, disabilities.[94] Despite acknowledging that the plaintiff's daughters' young ages made it extremely difficult to establish that the daughters were indeed disabled, the court concluded that his daughters could not establish a disability under the first prong of the ADA's "disability" definition.[95]

The plaintiff's next argument was that his daughters had disabilities

88. *Larimer*, 2003 U.S. Dist. LEXIS 7396, at *31.

89. *See id*. at *25-30.

90. 29 C.F.R. § 1630.2(j)(2). [Pursuant to the regulations, t]he following factors should be considered in determining whether an individual is substantially limited in a major activity:

(i) The nature and severity of the impairment: [sic]

(ii) The duration or expected duration of the impairment; and

(iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

Id.

91. *Larimer*, 2003 U.S. Dist. LEXIS 7396, at *29-31.

92. *Id*. at *28.

93. 527 U.S. 471, 482 (1999) (holding that mitigating measures must be taken into consideration when determining whether an individual suffers from a "disability" within the meaning of the ADA).

94. The Court in *Sutton* noted the following:

> Because the phrase "substantially limits" appears in the Act in the present indicative verb form, we think the language is properly read as requiring that a person be presently – not potentially or hypothetically – substantially limited in order to demonstrate a disability. A "disability" exists only where an impairment "substantially limits" a major life activity, not where it "might," "could," or "would" be substantially limiting if mitigating measures were not taken.

Id.

95. *Larimer*, 2003 U.S. Dist. LEXIS 7396, at * 31.

under the "regarded as" prong of the ADA's "disability" definition.[96] Under this prong of the definition, the plaintiff could have prevailed if he had been able to show not only that his employer knew that his daughters suffered from impairments, but also that his employer believed that one or more of these impairments substantially limited one or more of the daughters' major life activities.[97]

The employer launched a two-pronged attack on this part of the plaintiff's case, arguing first that this allegation was "beyond the scope" of the plaintiff's EEOC charge,[98] and then arguing that nobody regarded the plaintiff's daughters as having disabilities.[99] Although the plaintiff was able to defeat his former employer's "beyond the scope" argument, he was unable to defeat the substantive argument that the employer did not regard his daughters as being disabled.[100]

With respect to the EEOC charge argument, the court quickly rejected the defendant's position.[101] Although the plaintiff had not specifically identified the "regarded as" prong in the EEOC charge, he did state that he believed he was discriminated against because of his association with "people with disabilities."[102] The court concluded that because the ADA's definition of "disability" included people who were "regarded as" being disabled, the plaintiff's charge sufficiently covered this potential argument.[103]

However, the court was not as sympathetic to the *substance* of the plaintiff's "regarded as" claim.[104] Specifically, the court found that the plaintiff did not present sufficient evidence that his supervisors regarded his daughters as being disabled.[105] According to the court, the most the plaintiff did was present evidence that his employer knew that there

96. *Id.* at *32; s*ee also* 42 U.S.C. § 12102(2) (2000) (containing three options for potential ADA plaintiffs).

97. *Larimer*, 2003 U.S. Dist. LEXIS 7396, at *33.

98. *Id*. Before bringing a lawsuit in federal court, an aggrieved individual must first file a charge of discrimination with the Equal Employment Opportunity Commission. 42 U.S.C. § 2000e-5(e)(1) (2000). Eventually, the EEOC will provide the charging party with a Right to Sue notice, after which the charging party will have ninety days to file his or her lawsuit. *See Id*. § 2000e-5(f)(1). For a more thorough explanation of the EEOC charge-filing process, see EEOC's Charge Processing Procedures,
at http://eeoc.gov./charge/overview_charge_processing.html (last modified Aug. 13, 2003).

99. *Larimer*, 2003 U.S. Dist. LEXIS 7396, at *34.

100. *Id.* at *33-35.

101. *Id*. at *33.

102. *Id*.

103. *Id*. at *33-34 (citing 42 U.S.C. § 12102(2)(C) (2000)).

104. *Id*.

105. *Id*. at *35.

were complications with the plaintiff's wife's pregnancy.[106] The court therefore granted the defendant's motion for summary judgment on the plaintiff's ADA association claim.[107]

The United States Court of Appeals for the Sixth Circuit, in *Smith v. Hinkle Manufacturing, Inc.*,[108] also rejected a plaintiff's association discrimination claim because the plaintiff was unable to prove an association or relationship with an individual with a disability, as that term is defined in the ADA.[109] In *Smith*, the court affirmed the lower court's granting of summary judgment on the plaintiff's ADA claim in favor of the defendant, but it reversed the summary judgment on the plaintiff's ERISA claim.[110]

The plaintiff in *Smith* was terminated two weeks after she informed her employer's accounting supervisor about her son's brain disease and had inquired about the possibility of obtaining leave under the FMLA.[111] Although the employer claimed that the plaintiff had been terminated for poor performance, the court concluded that there were genuine issues of material fact regarding the true reason behind the plaintiff's discharge, and that summary judgment was inappropriate on the plaintiff's ERISA claim.[112]

Despite her success on the ERISA claim, the plaintiff was unable to convince the court of the merits of her ADA association claim and her parallel state law association claim.[113] After first rejecting the plaintiff's state law association claim because there was no similar association discrimination language in the state anti-discrimination statute, the court then went on to address the plaintiff's ADA association claim.[114] The plaintiff argued that her son had a disability, but the court quickly rejected this argument.[115] After reciting the ADA's definition of disability, the court concluded that the plaintiff "produced no evidence" that her son was substantially limited in any major life activities.[116] In addressing the "perceived disability" argument, the court concluded that

106. *Id.*
107. *Id.*
108. 36 FED Appx. 0825P (6th Cir. 2002).
109. *Id.* at 831.
110. *Id.*
111. *Id.* at 827.
112. *Id.* at 830. *See* discussion *infra* section V(B), for the ERISA portion of this opinion.
113. *Smith*, 2002 FED App. at 0830P-0831P.
114. *Id.* (indicating that even though Ohio courts look to federal law for guidance, they do so only when the ADA is similar to the Ohio law).
115. *Id.* at 831.
116. *Id.*

the plaintiff's evidence that her supervisor suggested that she inquire about taking time off under the FMLA[117] was not sufficient to avoid summary judgment on that issue.[118] Therefore, the court affirmed the summary judgment in favor of the defendant on the ADA claim.[119]

In *Ennis v. The National Ass'n of Business & Educational Radio, Inc.*,[120] the United States Court of Appeals for the Fourth Circuit addressed the issue of whether a plaintiff was covered under the association provision of the ADA.[121] In *Ennis*, the plaintiff filed her complaint against her former employer, alleging a violation of the association provision of the ADA.[122] The plaintiff believed she had been terminated from her employment because of the health care costs associated with her HIV-positive son.[123] However, the employer was able to convince the court that it was the plaintiff's poor work performance, and not her association with her son, that was the cause of the adverse employment action.[124]

The court first addressed whether the *McDonnell Douglas* burden-shifting framework would apply to association claims brought under the ADA.[125] After concluding that it did, the court then considered how an ADA association plaintiff would establish her prima facie case.[126] After reviewing case law from the United States Supreme Court, various United States Courts of Appeals, and its own previous decisions,[127] the court determined that such a prima facie case could be established by proving membership in a protected class, discharge, job performance at a

117. 29 U.S.C. § 2601-2619, 2651-2654 (2000). The FMLA allows certain employees to take extended periods of time off from work in order to care for ill family members. *Id.* § 2612(a)(1)(C). It also allows certain employees to take time off from work if they suffer from a serious health condition that prohibits them from performing their jobs. *Id.* § 2612(a)(1)(D).

118. *Smith*, 2002 FED App. at 0831P (relying on Kvintous v. R.L. Polk & Co., 3 F. Supp. 2d 788 (E.D. Mich. 1998), *aff'd*, 194 F.3d 1313 (6th Cir. 1999) (finding that an employer's offer of paid medical leave is not sufficient to infer a perceived disability)).

119. *Id.*

120. 53 F.3d 55 (4th Cir. 1995).

121. *Id*. at 57-59 (relying on the *Den Hartog* prima facie elements as well as the *McDonnell Douglas* burden-shifting framework to determine if the plaintiff could prevail under the association provision of the ADA).

122. *Id*. at 57.

123. *Id.*

124. *See id.* at 61-62.

125. *Id.* at 57-58.

126. *Id.* at 58.

127. *Id*. (relying on Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981); Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978); Crawford v. Runyon, 37 F.3d 1338 (8th Cir. 1994); Mitchell v. Data Gen. Corp., 12 F.3d 1310 (4th Cir. 1993); Duke v. Uniroyal, Inc., 928 F.2d 1413 (4th Cir. 1991); Smith v. Barton, 914 F.2d 1330 (9th Cir. 1990)).

level that met the employer's legitimate expectations, and circumstances that raised a "reasonable inference of unlawful discrimination."[128] Although the Fourth Circuit ultimately concluded that the plaintiff was unable to prove that she was meeting the expectations of her employer, it first examined whether her son had a disability.[129]

Essentially, the court was asked to determine whether the HIV-positive status of the plaintiff's son constituted a "disability" within the meaning of the ADA.[130] The court first set forth the three-part definition of "disability" under the Act, and then recognized that the disability determination must be made on an individual, case-by-case basis, looking at the actual effects the disease has on the victim.[131] The Fourth Circuit noted that although the plaintiff's son was HIV-positive, he was asymptomatic and experienced no limitations on any major life activities.[132] The court also noted that the mother conceded that her son had not experienced any "ailments or conditions that affected the way he lived on a daily basis."[133] Finally, the court noted that there was no evidence that the plaintiff's employer regarded her son as being disabled or that he had any record of having a disability.[134] As a result of this lack of evidence, the court strongly suggested (but did not hold) that the plaintiff's son did *not* have a disability under the Act.[135]

Another recent case to address this situation came from the United States District Court for the Eastern District of New York in *Sacay v. Research Foundation of the City University of New York*.[136] In *Sacay*, a mother and daughter brought suit against their common employer after the employer eliminated the mother's position, alleging that the employer violated several federal and local laws, including the association

128. *Id.*

129. *See id*. at 59-60.

130. *See id*. Since this opinion, the United States Supreme Court has determined that an HIV-positive individual can have a disability within the meaning of the ADA. *See* Bragdon v. Abbott, 524 U.S. 624, 631 (1998). However, since *Bragdon*, at least one court has determined that an HIV-positive individual does not automatically have a disability within the meaning of the ADA. *See* Blanks v. Southwestern Bell Communications, Inc., 310 F.3d 398, 401 (5th Cir. 2002) (concluding that the HIV-positive plaintiff did not have a disability under the ADA because he could not prove a substantial limitation on any major life activity).

131. *Ennis*, 53 F.3d at 59.

132. *Id.* at 60.

133. *Id.*

134. *Id.*

135. *See id*. Although strongly suggesting that the plaintiff's son did *not* have a disability under the ADA, the Fourth Circuit assumed, for purposes of that opinion, that he did have a disability. *Id.* The court did this after acknowledging that at this stage of the litigation, the record had not been fully developed on this issue. *Id.*

136. 193 F. Supp. 2d 611 (E.D.N.Y. 2002).

provision of the ADA.[137] The mother in *Sacay* suffered from a number of ailments, including a partial seizure disorder, back problems, neck problems, poor vision, chest pain (which was later determined to be a gall bladder attack), a post-surgical myocardial infarction, an ulcer, severe gastritis, and a hiatus hernia.[138]

The court first addressed the mother's claims, which ultimately affected the success (or failure) of the daughter's ADA association claim.[139] After disposing of many of the mother's claims on Eleventh Amendment immunity grounds,[140] the court then addressed the merits of her ADA and Rehabilitation Act claims.[141] Not surprisingly, the court first had to decide whether the mother did indeed suffer from a disability within the meaning of the ADA.[142]

Because the defendants did not contest that the mother suffered from impairments, the court first focused on the alleged major life activities the mother claimed were substantially limited.[143] The court determined that some of these activities were not "major life activities" and ended up evaluating the mother's ability to work, engage in physical activities, eliminate waste, sit, and lift, and it concluded that she was *unabl*e to present a genuine issue of material fact about whether she was substantially limited in any of those activities.[144] When granting the employer's ADA summary judgment motion on the disability issue, the court also determined that granting the employer's motion for summary judgment under the Rehabilitation Act was appropriate.[145]

The court then addressed the daughter's association claim.[146] The

137. *Id*. at 614-15. The plaintiffs alleged discrimination in violation of the ADA, the Rehabilitation Act, the New York State Human Rights Law, the New York City Human Rights Law, and 42 U.S.C. § 1983 for violations of the First, Fifth and Fourteenth Amendments to the Constitution. *Id.* at 615. Most cases brought under the ADA are analyzed the same way in which cases are analyzed under the Rehabilitation Act; however, the Rehabilitation Act does not specifically contain an association provision. *See* Oliveras-Sifre v. Puerto Rico Dep't of Health, 38 F. Supp. 2d 91, 100 n.3 (D.P.R. 1999), *aff'd*, 214 F.3d 23 (1st Cir. 2000) (assuming that the Rehabilitation Act does allow for claims based on association discrimination despite the absence of any statutory language to that effect).

138. *Sacay*, 193 F. Supp. 2d. at 615-16.

139. *Id.* at 625-30.

140. *Id.* at 624.

141. *Id.* at 625, 629.

142. *See id*. at 626.

143. *Id*. at 627. The mother claimed the she was substantially limited in the following activities: traveling, working, controlling the elimination of waste, and performing physical activities such as lifting, pushing, pulling, carrying, and sitting. *Id.*

144. *Id*. at 627-29.

145. *Id.* at 629-30, 636.

146. *Id.* at 630.

crux of the daughter's claim was that she suffered adverse employment actions because of her association with her mother, who, according to the daughter, had a disability.[147] The court first stated that the association provision of the ADA prohibits discrimination against individuals based upon their known association or relationship with an individual with a disability.[148] Next, the court observed that one purpose behind this provision was to protect individuals against discrimination because of an employer's assumption that such an association would require the employee to miss work to care for the disabled individual.[149]

After addressing the purpose behind this provision of the ADA, the court articulated the necessary elements of a prima facie case in an association claim.[150] Although the court identified the usual four elements, it stopped its analysis quickly and concluded that because the plaintiff's mother did not have a disability under the ADA, the plaintiff could not prevail.[151] The court therefore granted the employer's motion for summary judgment on the association claim.[152]

As the previously discussed cases demonstrate, many ADA association plaintiffs have failed because they were unable to prove that they had an association or relationship with someone with a "disability" as that term is defined by the ADA. This problem has also plagued many individuals who have attempted to sue under the ADA based upon their own "disabilities" and were unable to convince a court that they suffered from an impairment that substantially limited a major life activity.[153] However, as the next several sections of this article will demonstrate, this is not the only reason why many ADA association plaintiffs have failed. Another major hurdle these plaintiffs face is that they must also prove that they have the type of *relationship* or *association* the ADA association provision was intended to protect.

B. Plaintiffs Who Failed Because They Could Not Prove a Protected Relationship *or* Association *with an Individual with a Disability*

Another basis upon which courts have relied when deciding against

147. *Id*.
148. *Id.*
149. *Id.*
150. *See id.*
151. *Id.* (noting that the daughter's claim failed "because she has not shown she was known by her employer to have a relative with a disability under the ADA . . . [her] mother was not disabled").
152. *Id*. at 636.
153. *See supra* note 4.

ADA association plaintiffs is that the plaintiffs in these cases were not able to establish that they enjoyed a protected *relationship* or *association* with an individual who has a disability.[154] In these cases, because the plaintiffs were unable to convince the court that they had a "close enough" association or relationship with the individual with a disability, they could not prevail.

One such case was decided by the United States District Court for the Eastern District of Virginia in *O'Connell v. Isocor Corp.*[155] In *O'Connell*, the court concluded that because the plaintiff was unable to establish that she shared a protected relationship or association with an individual with a disability, summary judgment in favor of her former employer was appropriate.[156] With respect to her ADA association claim, the plaintiff alleged that her former employer terminated her to protect itself in another disability discrimination lawsuit brought by an HIV-positive former employee who was trying to show that the company's decision to terminate him and retain the plaintiff (who was similarly situated but who did not have a disability) was based on his HIV-positive status.[157]

The plaintiff's termination occurred one day after her former employer was served with the HIV-positive former employee's complaint, which made reference to the plaintiff as being a similarly situated, but retained, employee.[158] First, the court acknowledged that this was a case of first impression in that jurisdiction.[159] Next, the court phrased the issue as being whether "an employer's perception that the continued employment of a non-disabled employee, who is referred to as a comparator in an ADA lawsuit against the employer, constitute[s] an 'association' as envisioned by the ADA."[160] The court concluded that Congress did *not* intend the ADA to protect such a relationship.[161]

154. 42 U.S.C. § 12112(b)(4) (2000). The specific language of the ADA defines the term "discriminate" 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." *Id.*

155. 56 F. Supp. 2d 649 (E.D. Va. 1999).

156. *Id.* at 653.

157. *Id.* at 651.

158. *Id.*

159. *Id.* at 652.

160. *Id.* Prior to articulating the issue in this manner, the court identified the issue as being "whether being referred to by a co-worker in an ADA lawsuit creates an 'association' between instant plaintiff . . . and the co-worker who filed the suit . . . , where the nature of the reference is a suggestion that the employer's failure to terminate the non-disabled co-worker . . . evidences unlawful discrimination against the suing co-worker . . . ." *Id.*

161. *Id.* at 653.

The court acknowledged that the association provision does protect individuals because of their known association with an individual with a disability.[162] Relying on the Code of Federal Regulations,[163] the court then acknowledged that the purpose behind this provision of the ADA was to prohibit employers from taking adverse employment actions against employees based on this type of "family, business, social, or other relationship or association."[164] It then articulated the two examples of the type of situation the association provision was meant to cover[165] - one being a situation where an employee or potential employee suffers an adverse employment action because of an employer's concern about whether that employee would be forced to miss work to care for an individual with a disability, and the other being a situation where an employee who does volunteer work with AIDS patients suffers an adverse employment action because of his employer's fear that the employee might contract AIDS.[166]

The court went on to distinguish the current case from a case upon which the plaintiff relied in her argument, and ultimately concluded that the case upon which the plaintiff relied, which involved allegations of Title VII race discrimination, was not directly analogous to this ADA claim.[167] After rejecting this analogy, the court concluded that the association provision of the ADA was not meant to protect this type of "association."[168] Referring to the Code of Federal Regulations, the court stated:

> As the regulations make clear, the ADA's purpose is to prevent discrimination against . . . those who may have a close familial, social, or

162. *Id*. at 652.

163. *See* 29 C.F.R. § 1630.8 (2000). This section provides that an employer may not take an adverse employment action against an individual because of the fear that the individual will miss work in order to care for a sick relative. 29 C.F.R. app. § 1630.8 (2000). It also provides that an employer may not take an adverse employment action against an individual out of fear that he might contract some type of communicable disease such as AIDS. *Id.*

164. *O'Connell*, 56 F. Supp. 2d at 652. The plaintiff acknowledged that she did not have a "business, social, or other relationship or association" with her co-worker other than having the same employer and speaking to him on a few occasions. *Id.*

165. *Id.*

166. *Id.* (relying on 29 C.F.R. app. § 1630.8).

167. *Id*. at 652-53. The plaintiff attempted to analogize her case to *Crowley v. Prince George's County*, 890 F.2d 683 (4th Cir. 1989), where the court determined that a white employee who was demoted in order to allow the employer to defend against a separate race discrimination claim brought by a black former employee stated a cause of action under Title VII. *O'Connell*, 56 F. Supp. 2d at 652.

168. *O'Connell*, 56 F. Supp. 2d at 653 (relying on Ennis v. Nat'l Ass'n of Bus. & Educ. Radio, Inc., 53 F.3d 55 (4th Cir. 1995); Tyndall v. Nat'l Educ. Ctrs., Inc., 31 F.3d 209 (4th Cir. 1994)).

> possibly even physical relationship with a disabled person. The paradigmatic case is that of the parent of a disabled child, whose employer may fear that the child's disability may compromise the employee's ability to perform his or her job.[169]

After making this observation, the court relied on the Tenth Circuit's opinion in *Den Hartog* and opined that applying the association provision to this situation would not be consistent with Congress's intent when it enacted this provision.[170] Because the relationship between the plaintiff and the HIV-positive former employee was not the type of relationship or situation Congress envisioned when it enacted the association provision of the ADA, the court rejected the plaintiff's argument and granted the defendant's summary judgment motion.[171]

Other courts have also concluded that certain ADA association plaintiffs were not within the class of persons protected by this provision of the statute as a result of a claimed *association* or *relationship* with a third party. For example, the United States District Court for the Northern District of Alabama, in *Lester v. Compass Bank*,[172] reached this conclusion when a former employee attempted to use the ADA's association provision to recover after he "championed the cause" of a disabled applicant for an open position.[173] In *Lester*, the plaintiff was terminated from his position with a security services firm shortly after he had recommended an amputee for a position with his employer.[174] Although the plaintiff did have some performance issues, the court noted that at the time of his termination, the plaintiff had corrected many, "if not all," of those problems.[175] The plaintiff sued his former employers, alleging

169. *Id.*

170. *Id.* Specifically, the Tenth Circuit noted that it was Congress's belief that it was "in society's best interest to encourage others to care for and assist disabled people," and that allowing employers to terminate or otherwise adversely affect the employment status of close family members of individuals with disabilities would further harm individuals with disabilities. *Id.*

171. *See id.*

172. No. 96-AR-0812-S, 1997 U.S. Dist. LEXIS 11575 (N.D. Ala. Feb. 10, 1997).

173. *Id.* at *11. This opinion is not particularly clear on whether the plaintiff was, in fact, arguing that he was terminated because of his association with an individual with a disability. The court fully addressed this assertion, but then indicated that the plaintiff did not assert he was terminated "because he associated with or befriended" the disabled individual. *See id.* at *9-11. Rather, the plaintiff alleged that he was terminated for "champion[ing] the cause" for the individual with a disability. *Id.* at *11. The court observed that such activity is protected, but that the association provision of the ADA is not the appropriate provision for that type of protection. *Id.* Specifically, such "championing" would be protected by the anti-retaliation or anti-coercion provision of the ADA. *See id.*

174. *Id.* at *5-6.

175. *Id.* at *6.

that they terminated him because of his alleged association with the disabled applicant whom the employers eventually hired.[176]

Not surprisingly, the court began its analysis by reciting the language of the association provision and then articulating the elements a plaintiff needs to prove in order to establish a prima facie case under this provision of the ADA.[177] The court decided that Lester could not demonstrate he was a member of a protected class; therefore, he did not establish the first element of a prima facie case, giving the court no reason to examine any of the remaining elements of the prima facie case.[178]

In addressing the protected class requirement, the court started its analysis by examining the EEOC's interpretive guidelines regarding the ADA's association provision.[179] According to the court, and consistent with other courts' interpretations of the EEOC's position, these guidelines indicate that the goal behind the association provision was to prevent "unfounded stereotypes and assumptions about employees who associate with disabled people."[180] The court also highlighted the same examples to which the court in *O'Connell* referred, those being cases involving an individual who would have to miss work to care for a sick family member and of an individual who performs volunteer work for people with AIDS.[181]

Although acknowledging that the plaintiff need not be a *family member* of the disabled individual, the court concluded that this plaintiff did not have the type of relationship or association Congress intended to protect when it enacted the association provision of the ADA.[182] Because the plaintiff had only met the job applicant one time, and because that applicant testified that he did not consider the plaintiff to be a "close personal friend," the court rejected the plaintiff's claim and granted the

176. *Id*. at *1-2.

177. *Id.* at *8 (citing Saladin v. Turner, 936 F. Supp. 1571, 1581 (N.D. Okla. 1996)).

178. *Id*. at *9-10.

179. *Id.* at *9. The EEOC Interpretative Guidance provides that the ADA association provision:

> is intended to protect any qualified individual, whether or not that individual has a disability, from discrimination because that person is known to have an association or relationship with an individual who has a known disability. This protection is not limited to those who have a familial relationship with an individual with a disability.

Regulations to Implement the EEOC Provisions of the ADA, 29 C.F.R. app. § 1630.8 (2000).

180. *Lester*, 1997 U.S. Dist. LEXIS 11575, at *9 (citing Rogers v. Int'l Marine Terminals, Inc., 87 F.3d 755, 760-61 (5th Cir. 1996)).

181. *Id.* (citing 29 C.F.R. app. § 1630 (1996); Tyndall v. Nat'l Educ. Ctrs., Inc., 31 F.3d 209, 214 (4th Cir. 1994); Braverman v. Penobscot Shoe Co., 859 F. Supp. 596, 604 (D. Me. 1994)).

182. *See id.* at *10.

employer's motion for summary judgment.[183]

As the previously described cases demonstrate, many ADA association plaintiffs have failed to demonstrate that they shared a protected *association* or *relationship* with an individual who had a disability. However, as the next several sections of this article will demonstrate, there are also other reasons why these plaintiffs have failed in their attempts to use this provision to protect against adverse employment actions. One such reason is that ADA association plaintiffs have been unable to prove they suffered the type of adverse employment action the ADA was meant to cover.

C. Cases Where the Plaintiffs Could Not Prove An "Ultimate Employment Decision"

Another basis upon which plaintiffs bringing suit under the ADA's association provision have lost their cases is their inability to prove an "ultimate employment decision."[184] Some courts believe an "ultimate employment decision" is a requirement needed to prevail under this provision of the ADA. More specifically, these plaintiffs have not been successful because the adverse employment actions they suffered were not "serious enough" to justify finding an ADA violation.

Such a conclusion was reached in *Darby v. Hinds County Department of Human Services*.[185] In *Darby*, the court rejected the plaintiff's ADA association claim after it concluded that the actions taken against the plaintiff, including written and verbal reprimands, poor work evaluations, and co-worker harassment, did not entitle her to relief under the ADA.[186] Specifically, in *Darby*, the plaintiff brought suit under the FMLA[187] and the ADA after her employer denied her requests for leave and allegedly retaliated against her.[188] The plaintiff had several ill relatives: her son suffered from a severe case of asthma, her mother was in a coma, and her daughter had been seriously injured in a car accident.[189] The plaintiff was denied leave to care for her family members and even-

183. *Id.* at *10-11 (observing that the interpretive guidelines to the C.F.R. also indicated that a "one-time chance meeting does not equate [to] an association").

184. *See* Mattern v. Eastman Kodak Co., 104 F.3d 702, 708 (5th Cir. 1997); Dollis v. Rubin, 77 F.3d 777, 781-82 (5th Cir. 1995) (noting that an "ultimate employment decision" includes such actions as hiring, granting leave, discharging, promoting, or compensating).

185. 83 F. Supp. 2d 754 (S.D. Miss. 1999).

186. *Id*. at 760.

187. 29 U.S.C. §§ 2601-2619, 2651-2654 (2000).

188. *Darby*, 83 F. Supp. 2d at 756.

189. *Id*.

tually brought suit against her employer.[190] With respect to her ADA association claim, she alleged that her employer "discriminated or retaliated against her" because of her family members' disabilities.[191]

After the court rejected the plaintiff's FMLA claims on Eleventh Amendment immunity grounds, the court then addressed the merits of her ADA association claim.[192] The court first acknowledged that the association provision does indeed protect individuals from discrimination based upon a known association with an individual with a disability; however, the court quickly reached its conclusion that the action taken by the employer did not constitute an "ultimate employment decision" required to violate the Act.[193] Specifically, the court concluded that the alleged discriminatory actions, including poor work evaluations, coworker harassment, and written and verbal reprimands, did not constitute actions upon which the plaintiff could base her ADA association claim.[194]

The court reached this conclusion after reviewing case law under both the ADA and Title VII.[195] In analyzing Title VII case law, the court relied on opinions from the Fifth Circuit, which had previously observed that Title VII "was designed to address 'ultimate employment decisions,' not to address every decision made by employers that arguably might have some tangential effect upon those ultimate decisions."[196] Using ADA case law, the court also relied on opinions from the Fifth Circuit, which had previously observed that the ADA's anti-retaliation provision[197] was "not [designed] to address every decision made by

190. *Id.*

191. *Id.* (citing 42 U.S.C. § 12112(b)(4) (2000)).

192. *See id.* at 760. The Eleventh Amendment has been construed by the United States Supreme Court "'to embrace the larger principle that a state is granted immunity from suits initiated by private entities or persons in federal courts, if the state has not consented to such suits.'" *Id.* at 757 (citing Coolbaugh v. Louisiana, 136 F.3d 430, 433 (5th Cir. 1998)).

193. *See id.*

194. *Id.*

195. *See id.* (relying on Mattern v. Eastman Kodak Co., 104 F.3d 702, 707 (5th Cir. 1997) (observing that Title VII was meant to cover only "ultimate employment decisions such as hiring, granting leave, discharging, promoting, and compensating."); Dollis v. Rubin, 77 F.3d 777, 781-82 (5th Cir. 1995) (concluding that Title VII was not meant to cover every employment action taken against an employee); Dupre v. Harris County Hosp. Dist., 8 F. Supp. 2d 908, 924 (S.D. Tex. 1998) (quoting *Dollis* for the proposition that the ADA's anti-retaliation provision was not meant to cover every employer decision); Gunderson v. Neiman-Marcus Group, Inc., 982 F. Supp. 1231, 1235 n.5 (N.D. Tex. 1997) (citing *Dollis* for the proposition that the ADA was not meant to cover every employment decision made by employers)).

196. *Id.* (quoting *Dollis*, 77 F.3d at 781-82).

197. 42 U.S.C. § 12203(a) (2000). The ADA's anti-retaliation provision is not the same as the ADA's association provision; however, the *Darby* court applied a similar analysis. *See generally*

employers that arguably might have some tangential effect upon those ultimate decisions."[198] Based upon these previous pronouncements from the Fifth Circuit, the court in *Darby* concluded that the plaintiff's claims were without merit.[199] The court therefore granted the defendant's motion for summary judgment.[200]

In *Moresi v. AMR Corp.*,[201] the United States District Court for the Northern District of Texas concluded that a plaintiff suing under the ADA association provision did not suffer the type of adverse employment action against which the ADA was meant to protect.[202] The court held that the plaintiff, who was suing his employer over his employer's health insurer's decision not to cover certain expenses associated with his daughter's treatment for Attention Deficit Hyperactivity Disorder ("ADHD"), was not entitled to prevail under the association provision of the ADA.[203] For purposes of the defendant's motion for summary judgment, the employer conceded that ADHD did constitute a disability under the ADA and that the employer knew of the plaintiff's daughter's illness.[204] The issue the court needed to address for purposes of the defendant's motion for summary judgment was whether the defendant's health insurance carrier's decision to deny reimbursing the plaintiff for his daughter's therapeutic and occupational and speech therapy expenses constituted unlawful association discrimination under the ADA.[205]

After observing that the plaintiff himself did not have a disability, the court noted that the ADA does afford protection for people without

Darby, 83 F. Supp. 2d at 760 (analyzing the plaintiff's claim under the ADA association provision by applying the same elements to establish a prima facie case for a retaliation claim as applied in *Rizzo v. Children's World Learning Centers, Inc.*, 84 F.3d 758, 763 (5th Cir. 1996)). The anti-retaliation provision prohibits employers from taking adverse employment actions against an employee "because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter." 42 U.S.C. § 12203(a).

198. *Darby*, 83 F. Supp. 2d at 760 (relying on *Dupre*, 8 F. Supp. 2d at 924 (quoting *Dollis*, 77 F.3d at 781)).

199. *See id.*

200. *Id.* at 761. The court did note that some of the plaintiff's allegations - that she was denied leave on two occasions - could have been classified as "ultimate employment decisions." *Id.* However, these requests were not based on any of plaintiff's family members' illnesses. *Id*. Additionally, the court noted that even had these requests been related to a family member's illness, the association provision of the ADA does not require an employer to modify an employee's work schedule so as to allow that employee to care for a sick relative. *Id.* (citing 29 C.F.R. app. § 1630 (2000)). *See* discussion *infra* section IV(E).

201. No. CA 3:98-CV-1518-R, 1999 U.S. Dist. LEXIS 13644 (N.D. Tex. Aug. 31, 1999).

202. *Id.* at *8.

203. *Id.* at *2-3, *9.

204. *Id*. at *2.

205. *Id*. at *3-4.

disabilities so long as those people have an association or relationship with someone who has a disability under the Act.[206] The court then concluded that the plaintiff was "clearly associated with a disabled individual," namely, his daughter.[207]

The court then observed that the association provision of the ADA had not been the subject of much litigation, and that the Fifth Circuit had not yet established a test for evaluating ADA association claims.[208] Therefore, the court decided to evaluate the four-element prima facie case test for establishing an ADA association claim set forth by the Tenth Circuit in *Den Hartog v. Wasatch Academy*.[209]

The court concluded that the plaintiff's claim failed under the second element of the four-element test, and the court never addressed the entirety of the plaintiff's prima facie case.[210] When addressing the "adverse employment action" prong of the test, the court quickly decided that this type of dispute between a healthcare provider and an individual in that healthcare plan was not the type of adverse employment action the association provision of the ADA was meant to cover.[211] Acknowledging that such a broad reading of the association provision would result in a large number of new ADA cases, the court observed that adopting the plaintiff's argument would "potentially bring a massive number of routine, managed care benefit decisions under the coverage of the ADA."[212] The court then noted that because the plaintiff had not been suspended, demoted, or terminated as a result of his relationship with his daughter, he did not suffer an ADA association-type injury.[213] The court therefore granted the defendant's motion for summary judgment.[214]

Similarly, in *Atkinson v. Wiley Sanders Truck Lines, Inc.*,[215] the United States District Court for the Northern District of Alabama held that an ADA association plaintiff's claim failed because the plaintiff was unable to prove that he suffered the type of injury against which the ADA association provision was meant to protect.[216] In *Atkinson*, the

206. *Id.* at *6.
207. *Id*. at *6-7.
208. *Id.* *7.
209. *Id*. at *7-8 (citing Den Hartog v. Wasatch Acad., 129 F.3d 1076, 1085 (10th Cir. 1997)).
210. *Id*. at *8. The second prong of a prima facie case is "whether the plaintiff was subjected to an adverse employment action." *Den Hartog*, 129 F.3d at 1085.
211. *Moresi*, 1999 U.S. Dist. LEXIS 13644, at *8.
212. *Id*.
213. *Id.*
214. *Id.* at *9.
215. 45 F. Supp. 2d 1288 (M.D. Ala. 1998).
216. *Id.* at 1295.

plaintiff alleged that the employer violated the ADA when it denied the plaintiff's wife, who was a diabetic, the opportunity to ride with the plaintiff on his trucking trips as part of the "spouse rider" program.[217] The plaintiff then resigned and sued his former employer, alleging constructive discharge and a violation of the ADA.[218]

Referring to *Den Hartog*, the court observed that the Tenth Circuit gave a "thorough discussion" of the association provision in that opinion.[219] After that, the court concluded that the plaintiff failed to establish a prima facie case.[220] The court framed the issue as being "whether [the] [d]efendant's denial of [the] [p]laintiff's request to participate in the spouse rider program constitute[d] an adverse employment action."[221] The plaintiff argued that allowing his wife to participate in the spouse rider program was a "fringe benefit."[222] Although the court acknowledged that the ADA and its regulations did indeed prohibit discrimination with respect to "fringe benefits,"[223] the court concluded that such benefits were limited to "privileges such as health and life insurance benefits, retirement funds, profit-sharing, paid holidays and vacations, and sick leave."[224] The plaintiff was unable to provide the court with any evidence supporting his proposition that the spouse rider program was the type of fringe benefit the ADA and its regulations were meant to protect; therefore, the court concluded that the program was not one of the "terms, conditions, and privileges of employment" covered by the ADA.[225] The court also noted that the plaintiff had "not carried his burden of demonstrating that [the] [d]efendant's denial of [the] [p]laintiff's participation in the spouse rider program affected or could affect his salary, chances of promotion, ability to perform his job, or resulted or could

217. *Id*. at 1292.

218. *Id*. at 1291.

219. *Id. at* 1292 n.3.

220. *Id*. at 1292, 1295. The court used the four-element test for establishing a prima facie case created by the Tenth Circuit in *Den Hartog*. *See Den Hartog*, 129 F.3d at 1085; *see also* discussion *supra* section III of this article for the elements of a prima facie case.

221. *Atkinson*, 45 F. Supp. 2d at 1293.

222. *Id.*

223. *See id*.; s*ee also* 29 C.F.R. § 1630.4(f) (2000) ("It is unlawful . . . to discriminate on the basis of disability . . . in regard to . . . . (f) [f]ringe benefits available by virtue of employment . . . .").

224. *Atkinson*, 45 F. Supp. 2d at 1293.

225. *Id.* at 1294. Although the plaintiff tried to argue that the case of *Gonzales v. Garner Food Services, Inc*., 89 F.3d 1523 (11th Cir. 1996), supported his position, the court rejected this argument because the Gonzales case involved health insurance benefits, while this case involved a less tangible benefit, namely participation in the spouse rider program. *Atkinson*, 45 F. Supp. 2d at 1293-94.

result in any other final adverse employment action."[226] Therefore, the court concluded that summary judgment was appropriate.[227]

As the cases described in this section of the article have demonstrated, some ADA association plaintiffs have lost their cases because they were unable to demonstrate that they suffered the type of adverse employment action the ADA was meant to cover. This is one more example of how ADA association plaintiffs have been unsuccessful when attempting to assert claims under this provision of the Act. However, as the next several sections of this article will demonstrate, there are still other reasons why these claims have failed at such a high rate. One of these other reasons is that plaintiffs have been unable to demonstrate that their employers knew of the disability of their relative or associate.

D. Plaintiffs Who Could Not Prove Their Employers' Knowledge of an Association or a Relationship with an Individual with a Disability

Another reason some ADA association plaintiffs' lawsuits have been unsuccessful is that the plaintiffs have been unable to demonstrate that their employers knew of a disability. The association provision of the ADA specifically indicates that the employer must know of the disability, as it refers to prohibiting discrimination "because of the *known* disability of an individual with whom the qualified individual is *known* to have a relationship or association."[228]

As a result of this knowledge requirement, many plaintiffs have failed in their ADA association cases. One such case in which an ADA plaintiff was unable to prove his employer's knowledge of his relative's disability is *Wesley v. Stanley Door Systems, Inc.*[229] In *Wesley*, the plaintiff, a temporary worker, sued his employer after the employer did

226. *Id*. at 1294-95.

227. *Id.* at 1295. The court then went on to reject the plaintiff's claim that the decision not to allow the plaintiff's wife to participate in the spouse rider program amounted to a constructive discharge. *Id*. The court noted that the plaintiff failed to prove that his former employer's actions "created an intolerable work situation that would compel a reasonable person to resign . . . ." *Id.*

228. 42 U.S.C. § 12112(b)(4) (2002) (emphasis added). The legislative history of the association provision sheds additional light on the knowledge requirement. According to this legislative history, the "provision applies only when the employer . . . knows of that other person's disability." H.R. REP. NO. 101-485, pt. 3, at 38 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 461. The plaintiff then has the burden of proof in proving that the employer's decision was motivated by the plaintiff's relationship or association with a person who has a disability. H.R. REP. NO. 101-485, pt. 3, at 38, *reprinted in* 1990 U.S.C.C.A.N. 461. Congress found that the association provision would not apply if the employer was unaware of the relationship or association. H.R. REP. NO. 101-485, pt. 3, at 39 (1990), *reprinted in* 1990 U.S.C.C.A.N. 462.

229. 986 F. Supp. 433 (E.D. Mich. 1997).

not offer the plaintiff a full-time position.[230] The plaintiff sued his employer under the association provision of the ADA, alleging that his employer failed to offer him a full-time position because of his wife's multiple sclerosis, which could have potentially increased the costs of covering the plaintiff's heath insurance.[231]

The plaintiff's only evidence that this issue played a role in the decision-making process was his testimony that the plant manager had overheard a discussion between the plaintiff and a co-worker regarding the plaintiff's need for health insurance.[232] According to the plaintiff, the plant manager "listened intently" to the conversation between the plaintiff and his co-worker, during which the plaintiff spoke about both his wife's illness and the company's medical coverage.[233] This conversation occurred approximately one month prior to the employer's decision not to offer the plaintiff a full-time position.[234]

The only other evidence the plaintiff submitted to support his contention that his supervisor heard the conversation was that the plaintiff had been able to hear a conversation between his supervisor and a co-worker while standing fifteen feet away.[235] The plaintiff offered no further testimony that his supervisor had heard any other illness-related discussions, and he indicated that his supervisor never discussed the issue with him, and that nobody had ever told him that the supervisor had overheard the conversation.[236] Finally, the plaintiff admitted, in his deposition, that he had never discussed his wife's illness or his interest in obtaining health insurance because of his wife's illness with any of his supervisors.[237]

Although the court spent some time discussing the issue of whether the employer knew of the plaintiff's wife's medical condition, the court ultimately never made a decision as to whether the employer knew about the plaintiff's wife's illness.[238] By highlighting the weakness of the plaintiff's evidence, the court strongly suggested that it was finding that the employer did *not* have this knowledge, and the court further indicated this belief when it stated that the plaintiff would have lost his case

230. *Id.* at 434.
231. *Id.*
232. *See id.*
233. *Id*. at 436.
234. *Id.*
235. *Id.*
236. *Id.*
237. *Id.*
238. *See id.* (explaining that even if the employer had knowledge of the plaintiff's wife's illness, that knowledge never entered full-time employment discussions).

"*[e]ven if* [the employer] actually had knowledge of [p]laintiff's wife's disability."[239] The court then pointed out that the plaintiff would not have been able to establish another of the elements of his prima facie case,[240] a causal connection between the adverse employment action and the plaintiff's wife's disability.[241] The court focused on the fact that there was no discussion of the plaintiff's wife's disability or about the cost of health insurance for any of the potential full-time hires during the meetings in which the employer discussed the hiring decisions.[242] Finally, the court noted that the plaintiff had failed to present evidence that the health insurance costs would have increased had the plaintiff been hired.[243] Therefore, the court ultimately concluded that the plaintiff could not establish a prima facie case.[244]

The United States District Court for the Middle District of Tennessee reached a similar conclusion in *Potts v. National Healthcare, L.P.* [245] In *Potts*, the court determined that the plaintiff did not present sufficient evidence to defeat his former employer's motion for summary judgment.[246] The plaintiff had worked for his former employer for approximately seventeen years when he was terminated.[247] He alleged that his employer fired him because of his daughters' illnesses, while the employer claimed the plaintiff was terminated because his position had been eliminated.[248] The plaintiff brought suit under ERISA and the association provision of the ADA.[249] The defendant moved for summary judgment, arguing that the plaintiff had no evidence that the people involved in the employment decision knew that the plaintiff's daughters were ill, and that the plaintiff could not, therefore, establish a prima facie

239. *Id.* (emphasis added).

240. *Id*. at 435. The elements of the prima facie case are that "(1) [the] plaintiff was in a protected class: [sic] (2) [the] plaintiff was discharged; (3) at the time of his discharge, [the plaintiff] was performing his job at a level that met his employer's legitimate expectations; and (4) his discharge occurred under circumstances that raise a reasonable inference of unlawful discrimination." *Id.* (citing Ennis v. Nat'l Ass'n of Bus. & Educ. Radio, Inc., 53 F.3d 55, 58 (4th Cir. 1995); Deghand v. Wal-Mart Stores, Inc., 926 F. Supp. 1002, 1014 (D. Kan. 1996)).

241. *Id*. at 436.

242. *Id.*

243. *Id*.

244. *Id*.

245. 961 F. Supp. 1136 (M.D. Tenn. 1996).

246. *Id.* at 1140-41.

247. *See id*. at 1138.

248. *Id.* One of the plaintiff's daughters suffered from a congenital heart problem, while the other daughter suffered from a growth hormone deficiency. *Id.*

249. *Id*. ERISA prohibits employers from discriminating against employees because they attempt to exercise a right under an employee benefit plan. *See* 29 U.S.C. § 1140 (2000).

case.[250]

The court first discussed the respective burdens at the summary judgment stage,[251] and it then addressed the merits of the plaintiff's claims.[252] The court focused on whether the plaintiff presented any evidence that the employer knew of his daughters' disabilities.[253] The court noted that the statute requires this knowledge and stated that in order to prove a prima facie case, the plaintiff "must show that those responsible for his termination *knew*, at the time of the termination, of the alleged disability."[254] The court relied on the Seventh Circuit's statement from *Hedberg v. Indiana Bell Telephone Co.*,[255] that

> [a]t the most basic level, it is intuitively clear when viewing the ADA's language in a straightforward manner that an employer cannot fire an employee "because of" a disability unless it knows of the disability. If it does not know of the disability, the employer is firing the employee "because of" some other reason.[256]

Despite the plaintiff's statements that he had "circumstantial and indirect evidence" that his employer terminated him for illegal reasons, the court agreed with the defendant and granted its motion for summary judgment.[257] Specifically, the court emphasized that the plaintiff could not prove that the two people responsible for terminating the plaintiff had any knowledge of the plaintiff's daughters' illnesses.[258] Although the plaintiff attempted to argue that there were more than two people involved in the decision to terminate him, he was unable to present any evidence to that effect, and the court therefore concluded that there were, indeed, only two people involved in the decision-making process.[259]

The court then went on to further explain why the plaintiff failed to

250. *Potts*, 961 F. Supp. at 1138.

251. *Id*. at 1138-39. Wesley v. Stanley Door System., Inc., 986 F. Supp. 433, 434-35 (E.D. Mich. 1997) (observing that "[u]nder Rule 56(c) of the Federal Rules of Civil Procedure . . . . [t]he movant bears the burden of demonstrating the absence of all genuine issues of material fact . . . . Once [this is done] the burden shifts to the nonmoving party to set forth specific facts showing a genuine triable issue. . . ." (internal citations omitted)).

252. *See Potts*, 961 F. Supp. at 1139-41.

253. *Id.* at 1139-40.

254. *Id*. at 1139 (citing Maddox v. Univ. of Tenn., 62 F.3d 843, 848 (6th Cir. 1995); Hedberg v. Ind. Bell Tel. Co., 47 F.3d 928, 932 (7th Cir. 1995); Landefeld v. Marion Gen. Hosp., Inc., 994 F.2d 1178, 1181 (6th Cir. 1993).

255. 47 F.3d 928 (7th Cir. 1995).

256. *Potts*, 961 F. Supp. at 1139 (quoting *Hedberg*, 47 F.3d at 928).

257. *Id.* at 1138, 1140-41.

258. *Id*. at 1139.

259. *Id*. at 1139 n.2.

create genuine issues of fact about the employer's knowledge.[260] First, the court concluded that the plaintiff's "bald assertion" that he discussed his daughters' health problems with his immediate supervisor was not sufficient to create a genuine issue of material fact.[261] Next, the court concluded that the plaintiff's statement that he discussed his daughters' health problems with an administrator in the location in which the plaintiff worked was irrelevant because that person did not have a role in the decision to terminate the plaintiff.[262]

The court then rejected the plaintiff's arguments that summary judgment was inappropriate because the defendant's "management committee" regularly discussed health insurance and made health claim reports available to that committee, and that the defendant's "health care representative" received health claim reports.[263] This, according to the plaintiff, demonstrated that the defendant did know about the plaintiff's daughters' health problems.[264] The court quickly rejected this argument, concluding that the plaintiff was unable to show that the decision makers were a part of this committee, that the decision makers were "health care representatives," or that the decision makers ever received any information regarding the plaintiff's health care claims.[265] Finally, the court concluded that the plaintiff was unable to rebut the defendant's claim that individual claims were never discussed at these meetings.[266] As a result, the court characterized the plaintiff's "evidence" as "speculative," and therefore insufficient to defeat the employer's motion for summary judgment.[267]

The United States District Court for the Northern District of Texas also ruled in favor of a former employer in *Bates v. Powerlab, Inc.*,[268] because the plaintiff was unable to demonstrate that the employer knew

260. *Id*. at 1140-41. The court spent quite a bit of time criticizing the plaintiff's response to the defendant's motion for summary judgment and the plaintiff's failure to comply with the court's rules. *Id*. at 1140. The court criticized the fact that the plaintiff claimed to have evidence to rebut the defendant's assertions, yet he failed to present any of this evidence in response to the employer's motion for summary judgment. *Id*. Ultimately, the court concluded that when confronted with the option of "putting up" or "shutting up," the plaintiff was unable (or unwilling) to present enough evidence to rebut the employer's claims. *Id.*

261. *Id.*

262. *Id.* at 1140 n.3.

263. *Id*. at 1140.

264. *See id.*

265. *Id.*

266. *Id.*

267. *Id*.

268. No. 3:97-CV-2551-P, 1998 U.S. Dist. LEXIS 8034 (N.D. Tex. May 18, 1998).

that the plaintiff's spouse was ill.[269] In *Bates*, the plaintiff sued his former employer after being terminated.[270] According to the employer, the plaintiff was fired for failure to report to work on a Saturday, even though the employer reminded the plaintiff that he was required to do so.[271] After receiving his right to sue from the EEOC,[272] the plaintiff filed suit under Title VII[273] and under the association provision of the ADA.[274]

The court first granted the employer's motion for summary judgment on the plaintiff's Title VII claim and then turned to the merits of the plaintiff's ADA association claim.[275] When examining the ADA claim, the court indicated that it would use the *McDonnell Douglas*[276] burden-shifting formula used in Title VII cases, which first required the plaintiff to establish a prima facie case, and then to attempt to rebut the defendant's legitimate, non-discriminatory reason for the adverse employment action.[277] With respect to the prima facie case, the court adopted the Tenth Circuit's formulation from *Den Hartog* and concluded that the plaintiff could not establish the prima facie case.[278] The court determined that the "undisputed summary judgment evidence on file indicates that [the plaintiff's supervisor] had never met [the] [p]laintiff's wife and he did not know she was disabled."[279] Because of this, the court concluded that the alleged disability "could not have been a determining factor in the decision to terminate [the] [p]laintiff's employment."[280] Because the plaintiff could not establish a prima facie case, summary judgment was appropriate.[281]

As the cases described in this section demonstrate, some ADA as-

269. *Id.* at *13.

270. *Id*. at *3.

271. *Id*.

272. *Id*. A plaintiff must first receive his Notice of Right to Sue prior to initiating a lawsuit against his employer. 42 U.S.C. § 2000e-5 (2000).

273. 42 U.S.C. §§ 2000-e to 2000e-17 (2000) (alleging reverse discrimination).

274. *Bates*, 1998 U.S. Dist. LEXIS 8034, at *2.

275. *Id.* at *6-11.

276. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); *see also* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142-43 (2000) (applying the *McDonnell Douglas* framework to an ADEA claim); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506-08 (1993) (applying the *McDonnell Douglas* framework to Title VII disparate treatment claims on the basis of race); Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-56 (1981) (applying the *McDonnell Douglas* framework to Title VII sexual discrimination claims).

277. *Bates*, 1998 U.S. Dist. LEXIS 8034, at *11.

278. *Id*. at *12-13.

279. *Id*. at *13.

280. *Id.*

281. *See id*. at *13-14.

sociation plaintiffs have lost their cases because they were unable to demonstrate that their employer knew of the relationship or association with an individual with a disability. However, as the next several sections of this article will demonstrate, there are still other reasons why these ADA association claims have failed. One of the reasons many ADA association plaintiffs have lost their cases is because they mistakenly believed that the ADA requires employers to provide a reasonable accommodation for individuals who have associations with individuals who have disabilities; however, as the following cases demonstrate, although the ADA does require employers to provide accommodations to individuals with disabilities, there is no such obligation to provide an accommodation to an individual who is associated with, or related to, an individual with such a disability.

E. Plaintiffs Who Lost Because they Mistakenly Believed that the ADA Requires Employers To Accommodate Employees with Relatives or Associates With Disabilities

Although the ADA requires employers to accommodate individuals with disabilities as long as such an accommodation would not present an undue hardship on the employer,[282] the association provision of the ADA has no such requirement.[283] Many of the cases that will be discussed in this section of the article have made this clear by relying on the EEOC's Interpretive Guidance to the association provision of the ADA.[284] That Interpretive Guidance specifically addresses this situation, and despite the EEOC's pro-employer interpretation of this aspect of the association provision of the ADA, many plaintiffs have tried to argue that such a failure to accommodate establishes an ADA association violation.[285]

The EEOC's Guidance provides:

> It should be noted, however, that 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 employ-

282. *See* 42 U.S.C. § 12112(b)(5)(a) (2000). Specifically, the term "discriminate" includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." *Id.*

283. *See* 42 U.S.C. § 12112(b)(4).

284. *See generally* 29 C.F.R. app. § 1630.8 (2000) (stating that an employer does not have to accommodate an employee who is associated with an individual who has a disability).

285. *See, e.g.*, Kennedy v. Chubb Group of Ins. Cos., 60 F. Supp. 2d 384, 395 (D.N.J. 1999).

> ees with disabilities. Thus, for example, an employee would not be entitled to a modified work schedule as an accommodation to enable the employee to care for a spouse with a disability.[286]

Despite the lack of such a reasonable accommodation requirement, many ADA plaintiffs have attempted to use the ADA association provision as a means to obtain relief when their employer did not agree to accommodate a request that would have enabled the employee to care for a sick relative or associate. Not unlike other ADA plaintiffs who have attempted and failed to obtain relief under this provision of the ADA, these plaintiffs have also been unsuccessful when attempting to assert these claims.

One such case in which a plaintiff attempted to use the association provision of the ADA to obtain an accommodation to care for her sick son was *Kennedy v. Chubb Group of Insurance Cos*.[287] In *Kennedy*, the plaintiff had worked for her former employer for approximately thirteen years, and for the seven years prior to her resignation, the plaintiff was on "short-week status," which allowed her to care for her son, who suffered from autism and a "severe seizure disorder."[288] However, after a performance evaluation, the plaintiff's employer informed her that she would no longer be able to work on "short-week status" and that she needed to return to her original schedule.[289] Because the plaintiff would not have been able to care for her son under these conditions, she resigned and brought an eleven-count complaint against her former employer.[290]

After denying the employer's motion for summary judgment on the plaintiff's age discrimination claims, the court focused its attention on the plaintiff's disability claims.[291] The plaintiff alleged that her former employer violated the ADA and the state equivalent to it, the New Jersey Law Against Discrimination ("NJLAD"), when her employer required her to go back to work on her original, full-time schedule.[292] The court first addressed the plaintiff's state law claim and concluded that because there was no similar association language in the state anti-discrimination statute, the plaintiff's state law claim was without merit.[293] Despite the

286. 29 C.F.R. app. § 1630.8 (citations omitted).
287. 60 F. Supp. 2d 384 (D.N.J. 1999).
288. *Id.* at 387.
289. *Id*. at 389.
290. *Id.*
291. *Id.* at 395-96.
292. *Id.* at 395.
293. *Id.*

plaintiff's attempt to convince the court that because the NJLAD is a remedial statute it should be read broadly, the court refused to recognize plaintiff's discrimination claim under the state statute and proceeded to address the plaintiff's ADA association claim.[294]

Although the plaintiff attempted to argue a trial on the merits was required to decide her case, the court granted the employer's motion for summary judgment.[295] After acknowledging that the ADA does prohibit discrimination against someone because of her association or relationship with an individual with a disability, and that there was not a significant amount of case law addressing this provision of the ADA, the court concluded that the plaintiff's theory of relief under the association provision of the ADA was "untenable."[296]

After reviewing the relevant case law, the court concluded that the association provision "does not mandate that an employer provide an employee without a disability with a reasonable accommodation to enable the employee to care for a disabled individual with whom the employee is associated."[297] Rather, the court concluded that the purpose behind this provision of the ADA was to "prohibit employers and potential employers from taking adverse employment action because of a known disability of an individual with whom the qualified employee or applicant is known to have a relationship or association."[298] Ultimately, the court concluded that "the ADA does not require [the defendant] to allow [the] plaintiff to continue to work part time because her request in that regard is necessitated by her need to care for her disabled son, [and that the] plaintiff has no claim under the association provision of the ADA."[299] The court therefore granted the employer's motion for summary judgment on the ADA and NJLAD association discrimination claims.[300]

Another case in which the plaintiff attempted to use the association provision of the ADA to obtain relief after being fired from her former

294. *Id.*

295. *Id*. at 395-96. The plaintiff also argued that it was imperative for the court not to make a decision without a full trial record, because of the importance of the public policy issue presented by her case. *Id.*

296. *Id.* at 396.

297. *Id.* (citing Den Hartog v. Wasatch Acad., 129 F.3d 1076, 1084-85 (10th Cir. 1997); Tyndall v. Nat'l Educ. Ctrs. Inc., 31 F.3d 209, 214 (4th Cir. 1994); Padilla v. Buffalo State Coll. Found., 958 F. Supp. 124, 128 (W.D.N.Y. 1997); Miller v. CBC Co., 908 F. Supp. 1054, 1066 (D.N.H. 1995)).

298. *Id.* (basing its conclusion on the previously mentioned case law, as well as on the EEOC's Interpretive Guidance to the C.F.R.).

299. *Id*.

300. *Id.*

position was *Rocky v. Columbia Lawnwood Regional Medical Center*,[301] in the United States District Court for the Southern District of Florida. In *Rocky*, the plaintiff brought suit under the ADA's association and anti-retaliation provisions, as well as under the FMLA and Title VII.[302] The plaintiff had been discharged after receiving numerous warnings about her poor attendance record and other workplace violations, but she claimed that the reason for her termination was her relationship with her disabled son.[303]

After first discussing the burdens required at the summary judgment stage,[304] the court addressed the merits of the plaintiff's association claim under the ADA.[305] The court first acknowledged that the ADA does indeed prohibit discrimination based upon a known relationship or association with an individual with a disability, but then noted that the association provision of the ADA differs from the provisions of the ADA that protect employees *with* disabilities.[306] Specifically, the court noted:

> In contrast [to the other provisions of the ADA], the associational provision of the ADA does not require employers to make any "reasonable accommodation" for the disabilities of relatives or associates of a nondisabled employee. Because the ADA does not require employers to accommodate nondisabled employees, a "qualified individual," as used in the associational provision of the ADA, is an individual who can "perform the essential functions of the employment position that such individual holds or desires" without regard to the availability of any accommodation.[307]

The court based this statement on specific parts of the ADA's legislative history, and in particular on a House Report that gave the following example of how the association provision was meant to help individuals with relatives or associates with disabilities:

> [A]ssume, for example, that an applicant applies for a job and discloses to the employer that his or her spouse has a disability. The employer believes the applicant is qualified for the job. The employer, however,

301. 54 F. Supp. 2d 1159 (S.D. Fla. 1999).

302. *Id.* at 1162.

303. *Id*. at 1162-63.

304. *Id.* at 1163-64. *See supra* note 251 for the appropriate standards governing motions for summary judgment.

305. *Rocky*, 54 F. Supp. 2d at 1164.

306. *Id*. at 1164-65 (emphasis added).

307. *Id*. at 1165 (internal citations omitted).

> assuming without foundation, that the applicant will have to miss work or frequently leave work early or both, in order to care for his or her spouse, declines to hire the individual for such reasons. Such refusal is prohibited . . . . *In contrast, assume that the employer hires the applicant. If he or she violates a neutral employer policy concerning attendance or tardiness, he or she may be dismissed even if the reason for the absence or tardiness is to care for the spouse. The employer need not provide any accommodation to the nondisabled employee.*[308]

After reviewing this legislative history, the court concluded that "the purpose of the associational provision is to prevent an employer from making an unfounded assumption that an employee who has an association with a disabled person will miss work in order to care for that person."[309] The court then evaluated the plaintiff's prima facie case using the four-element test from *Den Hartog* and concluded that the plaintiff was only able to prove two of the four elements: that she suffered an adverse employment action and that her former employer knew of her relationship with an individual with a disability.[310]

With respect to the plaintiff's inability to prove that she was qualified for the position, the court observed that "if the nature of an employee's position requires her to regularly and reliably attend work, and she fails to meet that requirement, then she is not qualified for the job."[311] After concluding that the plaintiff's former job did indeed require regular and reliable attendance, and that the plaintiff was unable to satisfactorily perform that aspect of her position, the court decided that she was not qualified for the position.[312] The plaintiff's situation, according to the court, was similar to the situation Congress addressed when discussing this provision in the legislative history of the ADA, that being that when an employee "'violates a neutral employer policy concerning attendance or tardiness, he or she *may be dismissed* even if the reason for the absence or tardiness is to care for' a child with a disability."[313] Thus, the court agreed that no accommodation was necessary

308. *Id.* (emphasis added) (quoting H.R. REP. NO. 101-485, pt. 2, at 61-62 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 343-44).

309. *Id*.

310. *See id.* at 1166 (citing Den Hartog v. Wasatch Acad., 129 F.3d 1076, 1085 (10th Cir. 1997)).

311. *Id*. (construing Jackson v. Veterans Admin., 22 F.3d 277, 278-79 (11th Cir. 1994); Tyndall v. Nat'l Educ. Ctrs., Inc., 31 F.3d 209, 212-13 (4th Cir. 1994); Hilburn v. Murata Elecs. N. Am., Inc., 17 F. Supp. 2d 1377, 1383 (N.D. Ga. 1998), *aff'd* 181 F.3d 1220 (11th Cir. 1999)).

312. *See id.*

313. *Id.* at 1167 (emphasis added) (quoting H.R. REP. NO. 101-485, pt. 2, at 61-62 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 343-44).

and that the plaintiff was therefore not entitled to prevail.[314]

Another case that addressed the issue of whether the association provision of the ADA requires an employer to make an accommodation for a person who has a relationship or an association with a person with a disability was *Atkinson v. Wiley Sanders Truck Lines, Inc.*[315] In *Atkinson*, the plaintiff sued his former employer, alleging that the employer violated the ADA when it denied his wife the opportunity to ride with the plaintiff on his trucking trips.[316] Although the court granted the employer's motion for summary judgment on a different basis, it did briefly address the accommodation issue.[317] The court noted that the association provision does not require an employer to accommodate the disabilities of relatives or associates of an employee who is not disabled.[318] The court noted, "[t]he plain language of Title I of the ADA requires that only job applicants or employees, *but not their relatives or associates*, need be reasonably accommodated."[319] This opinion, therefore, provides further support for the proposition that ADA association plaintiffs are not entitled to accommodations.

As the cases in this section demonstrate, some ADA association plaintiffs have lost their cases because they mistakenly believed that the ADA requires employers to provide accommodations for them. Unfortunately for these plaintiffs, the legislative history, the language of the statute, the EEOC interpretation of this provision, and case law all show that employers are *not* required to provide any type of accommodation for these individuals. On a related issue, the next section of this article will demonstrate that because these individuals typically require additional time away from work in order to take care of their ill relatives or associates, several courts have simply determined that these plaintiffs were not qualified for the positions in question and were therefore unable to prevail under the association provision of the ADA.

314. *Id.*

315. 45 F. Supp. 2d 1288 (M.D. Ala. 1998).

316. *Id*. at 1292.

317. *See id*. at 1292-93 n.4, 1295.

318. *Id.* at 1293 n.4 (citing Den Hartog v. Wasatch Acad., 129 F.3d 1076, 1084 (10th Cir. 1997)).

319. *Id.* at 1293 n.4 (emphasis added) (citing *Den Hartog*, 129 F.3d at 1084; 29 C.F.R. app. § 1630.8 (2000)). As was discussed in section IV(C), the court ultimately decided this case on the "ultimate employment decision" part of the plaintiff's prima facie case. Nonetheless, the court did indeed discuss the fact that employers are not required to accommodate an individual based on that person's relative's disability. *Id*. at 1293 n.3. Another issue raised in this case was whether the plaintiff's wife's diabetes was a "disability" within the meaning of the ADA. *Id.* at 1291-92 n.2. The court declined to answer that question because it was able to decide the case on the "adverse employment action" requirement of the prima facie case. *Id.* at 1292 n.2.

F. Plaintiffs Who Lost Because They Could Not Prove They Were "Qualified"

Another area in which plaintiffs have had trouble with association discrimination claims is in their ability (or inability) to prove that they were "qualified." This failure is similar to the failures the plaintiffs experienced in the cases described in the previous section of this article, in that because they were not entitled to a modified work schedule or any other type of accommodation to care for the ill associate or relative, they were unable to prove that they were able to devote the amount of time needed to successfully perform the job in question.

One example of this comes from the United States Court of Appeals for the Fourth Circuit in *Tyndall v. National Education Centers*.[320] In *Tyndall*, the court concluded that summary judgment in favor of the employer was appropriate after the plaintiff was unable to show that she was qualified for her former position or that the former employer had any discriminatory motive when it terminated her employment.[321] In *Tyndall*, the plaintiff was hired as an instructor in her former employer's medical assisting program, and as a result of her own medical condition (lupus) and her son's medical condition (gastro-esophageal reflux disease), she was forced to miss an excessive number of days from work.[322] Although her employer attempted to accommodate the plaintiff in numerous ways, it was unable to do so when she requested additional time off to care for her son's post-operative care.[323] Despite what seemed to be an "amicable" separation, the plaintiff filed a charge with the EEOC, alleging that her former employer had violated the ADA.[324] Tyndall alleged that she was discriminated against because of her own condition and because of her association with her disabled son.[325] After the EEOC concluded that the evidence did not establish an ADA violation,[326] the plaintiff filed suit in the United States District Court for the Eastern District of Virginia, also alleging a violation of the Virginians with Disabili-

320. 31 F.3d 209 (4th Cir. 1994).

321. *See id.* at 214, 216.

322. *Id.* at 211.

323. *Id*. at 211-12.

324. *Id.* at 212.

325. *Id.*

326. *Id.* Potential plaintiffs are entitled to bring discrimination claims in federal court even if the EEOC does not issue a finding that is favorable to them. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798-99 (1973) (concluding that a "for cause" determination by the EEOC was not a jurisdictional prerequisite for a Title VII plaintiff to bring suit in federal court).

ties Act.[327] The trial court granted the employer's motion for summary judgment on all counts, and the plaintiff appealed.[328]

The Fourth Circuit first focused on whether the plaintiff was indeed qualified for her position.[329] Tyndall claimed that her positive performance evaluations proved that she was qualified for the position, while the court focused its attention on whether the plaintiff was able to attend work on a regular basis.[330] The court noted that in addition to possessing the required skills, an employee "must be willing and able to demonstrate these skills by coming to work on a regular basis."[331] The court continued, "[e]xcept in the unusual case where an employee can effectively perform all work-related duties at home, 'an employee who does not come to work, cannot perform *any* of his job functions, essential or otherwise.'"[332] The court concluded that Tyndall was unable to meet these attendance requirements, and held she was not "qualified" for her teaching position.[333]

Next, the court observed that the association provision of the ADA prohibits employers from discriminating against employees or potential employees based upon the "'belie[f] that the [employee] would have to miss work' in order to care of a disabled individual."[334] The court, however, concluded that the employer's decision was not based upon a *belief* that the plaintiff would have to miss work to care for her son; it was based on the *fact* that the plaintiff did indeed take time off from work to care for her son.[335] The court therefore affirmed the lower court's grant-

327. *Tyndall*, 31 F.3d at 212; *see also* VA. CODE ANN. § 51.5-41. "(A) No employer shall discriminate in employment or promotion practices against an otherwise qualified person with a disability solely because of such disability . . . . (C) An employer shall make reasonable accommodations to the known physical and mental impairments of an otherwise qualified person . . . ." *Id.* § 51.5-41(A), (C).

328. *Tyndall*, 31 F.3d at 212.

329. *Id.* at 212-13.

330. *Id.* at 213.

331. *Id.*

332. *Id.* (citing Wimbley v. Bolger, 642 F. Supp. 481, 485 (W.D. Tenn. 1986), *aff'd*, 831 F.2d 298 (6th Cir. 1987)). The court then went on to cite numerous cases for the proposition that for an employee to be "qualified," he or she must be able to attend work on a regular basis. *Id.* (relying on Carr v. Reno, 23 F.3d 525, 529 (D.C. Cir. 1994); Law v. United States Postal Serv., 852 F.2d 1278, 1279-80 (Fed. Cir. 1988); Walders v. Garrett, 765 F. Supp. 303, 309 (E.D. Va. 1991), *aff'd*, 956 F.2d 1163 (4th Cir. 1992); Santiago v. Temple Univ., 739 F. Supp. 974, 979 (E.D. Pa. 1990), *aff'd*, 928 F.2d 396 (3d Cir. 1991)).

333. *Id.* at 213-14.

334. *Id.* at 214 (citing 29 C.F.R. app. § 1630 (2000)).

335. *Id.* Specifically, the court stated:

> Because [the plaintiff's] termination was not based on any assumption regarding future absences related to [her son's] care, but instead resulted from her record of past absences and her clear indication that she needed additional time off, we hold that [the defen-

ing of summary judgment in favor of the employer on the ADA association claim.[336]

The *Tyndall* case was followed by the United States Court of Appeals for the Eleventh Circuit in *Hilburn v. Murata Electronics North America, Inc.*,[337] when it decided that an employee with a poor work attendance record failed to establish a prima facie case under the association provision of the ADA.[338] Hilburn sued her employer under the association provision and the actual disability provision of the ADA after she was terminated and not hired for an alternate position with the employer.[339] The plaintiff claimed that her illness (coronary heart disease), her son's illness (a brain stem tumor), and her husband's illnesses (pancreatitis and diabetes) were the reasons the employer terminated her.[340]

The district court granted the employer's motion for summary judgment, concluding that the plaintiff was unable to prove that she or her family members had disabilities within the meaning of the ADA, and that the plaintiff was not qualified for her position because of her excessive absenteeism.[341] Hilburn appealed the decision of the district court on her ADA claim, but the Eleventh Circuit affirmed the lower court's judgment, concluding that the plaintiff was not disabled within the meaning of the ADA, and that she was unqualified for the positions in question.[342] The court did not address whether the plaintiff's family members were disabled because the outcome of the case did not hinge on either of those determinations.[343]

The Eleventh Circuit addressed the merits of the plaintiff's association claim, observing that the ADA protects individuals from discrimination based on an association with a family member or other person, but that the plaintiff must prove the four elements established in *Den Hartog* in order to establish a prima facie case.[344] Although there are four elements to prove a prima facie case, the court was able to base its decision on only one element of the test - that the plaintiff was not qualified for

> dant's] actions did not constitute discrimination based on [the plaintiff's] association with a disabled individual.

Id.

336. *Id.* at 216.

337. 181 F.3d 1220 (11th Cir. 1999).

338. *Id.* at 1231.

339. *Id*. at 1224-25.

340. *Id*. at 1222-23, 1231.

341. *Id.* at 1222.

342. *Id*. at 1222, 1231.

343. *Id*. at 1231.

344. *Id.* at 1230-31 (citing 42 U.S.C. § 12112(b)(4) (2000); Den Hartog v. Wasatch Acad., 129 F.3d 1076, 1085 (10th Cir. 1997)).

the job.[345] Relying heavily on *Tyndall*, the court concluded that the employer did not violate the ADA because the employer's decision was based on the plaintiff's *actual* poor attendance record.[346] Also relying on *Den Hartog*, the court stated that "'if [a non-disabled employee] violates a neutral employer policy concerning attendance or tardiness, he or she may be dismissed even if the reason for the absence or tardiness is to care for the [disabled associate].'"[347] Because the plaintiff's absences in this case were caused either by her illness or her family members' illnesses, the court agreed that the plaintiff was not qualified for the position, and that summary judgment in favor of the employer was appropriate.[348]

Another case where a plaintiff was unable to prove she was qualified for the position in question is *Pittman v. Moseley, Warren, Prichard & Parrish*,[349] from the United States District Court for the Middle District of Florida. In *Pittman*, the plaintiff alleged a violation of the ADA's association provision after she was terminated from her position as a paralegal with the defendant law firm.[350] The plaintiff was let go as a result of her poor attendance record, which was caused by her daughter's autism and the plaintiff's need to care for her.[351]

In this case, the defendant, a law firm, hired the plaintiff as a paralegal, with full knowledge of the potential conflicts associated with the plaintiff's daughter's illness.[352] In fact, the record was clear that the law firm had stated its willingness to accommodate the plaintiff's schedule in order to allow the plaintiff to continue working.[353] Eventually, as a result of the plaintiff's daughter's worsening condition, the plaintiff asked for an indefinite leave of absence.[354] After this request, the defendant terminated the plaintiff, which led the plaintiff to bring this ADA association claim.[355]

The court first acknowledged that the ADA does indeed provide a

345. *Id.* at 1231.

346. *Id.*

347. *Id.* (relying on *Den Hartog*,129 F.3d at 1083 (quoting H.R. REP. NO. 101-485, pt. 2, at 61 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 344)).

348. *Id*. The court did not address whether the plaintiff's family members were disabled because the outcome of the case did not hinge on either of those determinations. *Id*.

349. No. 3:01-CV-279-J-21TJC, 2002 U.S. Dist. LEXIS 17030 (M.D. Fla. July 29, 2002).

350. *Id.* at *1-2.

351. *Id.* at *5.

352. *See id.* at *2.

353. *Id*.

354. *Id.* at *5.

355. *Id.* at *1-2, *5.

cause of action based on association discrimination.[356] The court then set out the familiar prima facie case test and proceeded to analyze the plaintiff's claim under this test.[357] The defendant had conceded that the plaintiff had established two of the four elements: that she was subjected to an adverse employment action and that the defendant knew the plaintiff had a family member with a disability.[358] However, the plaintiff was unable to prove the other two elements of the prima facie case.[359]

Because the basis of the employer's decision to terminate the plaintiff was her attendance record, the court first noted that although the ADA does list a modified work schedule as an accommodation,[360] the association provision does not require an employer to provide *any* accommodations to a non-disabled employee.[361] Also, even though the Code of Federal Regulations suggests that an employer cannot discriminate against a non-disabled employee on the basis of a concern that the employee would miss too much work, "an employer's decision to terminate an employee based on an established record of absences to care for a disabled person" did not violate the ADA.[362]

After addressing these employee attendance concerns, the court relied on additional case law for the proposition that "'except in the unusual case where an employee can effectively perform all work-related duties at home, an employee who does not come to work cannot perform any of his job functions, essential or otherwise.'"[363] Because the plaintiff was not able to attend work on a regular basis, and because the plaintiff's job was not a job that allowed for work to be done at home,[364] the court concluded that she was not qualified for her job, and that she was

356. *See id.* at *8 (quoting 42 U.S.C. § 12112(b)(4) (2000)).

357. *See id.* at *8-10.

358. *Id.* at *10.

359. *Id.* at *13, *20.

360. *Id*. at *11.

361. *Id*. at *11 (relying on 29 C.F.R. app. § 1630 (2000)).

362. *Id.* at *11 (relying on Hilburn v. Murata Elecs. N. Am., Inc., 181 F.3d 1220, 1231 (11th Cir. 1999); Tyndall v. Nat'l Educ. Ctrs., Inc., 31 F.3d 209, 214 (4th Cir. 1994)).

363. *Id*. at *12-13 (quoting Wimbley v. Bolger, 642 F. Supp. 481, 485 (W.D. Tenn. 1986)). The court observed that "a regular and reliable level of attendance is a necessary element of most jobs," and that "an employee must be able to meet a job's attendance requirements to be considered qualified for the job." *Id*. at *13 (quoting *Wimbley*, 642 F. Supp. at 485).

364. The plaintiff attempted to argue that because her employer had allowed her to work at home in the past, she should have been entitled to a more flexible attendance policy. *Id*. at *15. The court rejected this argument, noting that the ADA association provision does not require an employer to provide any accommodations to non-disabled individuals, and that simply because the employer allowed her to work from home in the past, her position was not one that did not require regular attendance. *Id*.

therefore unable to establish this part of her prima facie case.[365] As a result, summary judgment was appropriate.[366]

As the previous cases have demonstrated, another basis upon which plaintiffs' ADA association claims have failed is the plaintiffs' inability to prove that they were qualified for the positions in question. As the next few sections of this article demonstrate, there are other reasons why these ADA plaintiffs have been so unsuccessful. One such reason is that, although some plaintiffs have been able to overcome each of the previously addressed hurdles to prevail in an ADA association claim, these plaintiffs were unable to prove a discriminatory motive behind their employers' adverse employment actions.

G. Plaintiffs Who Were Unable to Prove Discriminatory Motives

Another reason many ADA association plaintiffs have failed under this provision is because they were unable to prove that their employers acted with a discriminatory motive. With most cases involving intentional discrimination,[367] the plaintiff bears the burden of proof on this issue, and many times the plaintiff is unable to carry this burden.[368] Therefore, even if the plaintiff can prove an association with an individual with a disability, often times this plaintiff cannot prove a discriminatory motive behind the employer's actions. This failure occurs either at the prima facie stage of the case, during which the plaintiff must present facts that raise a reasonable inference that there was a connection between the disability and the adverse employment action, or at the "pretext" stage, where the employee must prove that the employer's articulated reason for the adverse employment action is not the real reason.

One case in which an ADA association plaintiff was unable to demonstrate that her former employer's articulated reasons for her dis-

365. *See id.* at *13.

366. *Id.* at *21. *See also* Ennis v. Nat'l Ass'n of Bus. & Educ. Radio, Inc., 53 F.3d 55 (4th Cir. 1995) (determining that plaintiff's ADA association claim failed because plaintiff was not meeting employer's legitimate work expectations, and plaintiff was thus not qualified for position).

367. Some anti-discrimination statutes also prohibit "unintentional" discrimination, which occurs when an employer adopts a policy that has an adverse effect, or "disparate impact," on a protected class. *See* Griggs v. Duke Power Co., 401 U.S. 424, 426 n.1 (1971) (citing 42 U.S.C. § 2000e-2 (2000)). While Title VII recognizes such a theory of discrimination, there is much less certainty whether the ADEA allows for a disparate impact cause of action. *See* Hazen Paper Co. v. Biggins, 507 U.S. 604, 618 (1993) (Kennedy, J., concurring). The Supreme Court has recently heard oral argument on the issue of whether the disparate impact cause of action exists under the ADEA; however, at the time of publication, the Court had not yet issued its ruling in *Smith v. City of Jackson*, 124 S. Ct. 1724 (2004).

368. *See* Wascura v. City of S. Miami, 257 F.3d 1238, 1242-43 (11th Cir. 2001).

charge were pretextual was *Wascura v. City of South Miami*.[369] In *Wascura*, the plaintiff was terminated from her position as City Clerk after being employed in that position for almost fourteen years.[370] Her termination occurred less than four months after she notified her employer that her son was in the later stages of AIDS, and that he had recently moved into her home.[371] She had also informed her employer that she might have to take time off from work in order to take care of some of her son's medical needs.[372] After her termination, the plaintiff sued her former employer, alleging violations of the FMLA and the association provision of the ADA.[373] The district court granted the employer's motion for summary judgment on both counts, and the plaintiff appealed to the Eleventh Circuit.[374]

After first acknowledging that the ADA does protect employees with relationships or associations with people with disabilities, the court adopted the *McDonnell Douglas* burden-shifting formula for evaluating those cases.[375] The court assumed, without deciding, that the plaintiff could establish a prima facie case, and then addressed the reasons proffered by the employer for the plaintiff's termination.[376] Although the plaintiff initially did not receive a reason for her termination, the employer testified that the plaintiff was terminated for several reasons, including her personality, her lack of integrity, her dealings with other individuals, her lack of trustworthiness, her job performance, her decision to sign documents she should not have signed, her decision to charge personal items to the city, and her decision to sell products out of the City Clerk's office.[377]

The court then addressed the plaintiff's arguments that tried to demonstrate that the employer's reasons for termination were pretext for discrimination based on the plaintiff's association with her son.[378] First, the plaintiff pointed to the temporal proximity between her decision to tell her employer about her son's condition and the employer's decision

369. 257 F.3d 1238 (11th Cir. 2001).

370. *Id*. at 1240.

371. *Id*. at 1241.

372. *Id*.

373. *Id.* at 1240.

374. *Id.* at 1241-42.

375. *Id*. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); *see also* Reeves v. Sanderson Plumbing Prods., Inc., 50 U.S. 133, 142-43 (2000); Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-53 (1981) (applying the *McDonnell Douglas* burden-shifting formula); Den Hartog v. Wasatch Acad., 129 F.3d 1076, 1085 (10th Cir. 1997).

376. *Wascura*, 257 F.3d at 1243-44.

377. *Id*. at 1241, 1243-44.

378. *See id*. at 1244-47.

to terminate her.[379] The court concluded that although a close temporal proximity can, in some cases, support a connection between the two events, the three-and-a-half month gap in time in this case was not sufficient, "standing alone," to support a finding of pretext.[380] The plaintiff also argued her alleged misconduct had occurred *prior* to her informing her employer of her son's illness, and that because her employer did not terminate her until *after* finding out about her son's illness, there was evidence of pretext.[381] Giving credence to the employer's explanation for the delay, the court rejected the plaintiff's argument and found the explanations for the employer's decision to be adequate.[382]

The plaintiff then argued that her long employment record further supported her argument that the termination occurred because of her son's illness; however, the court rejected this argument, concluding that although the plaintiff did not have any complaints in her personnel file, there was no formal review process for the plaintiff's position.[383] The court also rejected the plaintiff's additional evidence of pretext, concluding that the employer's decision not to give a reason for the plaintiff's termination at the time the plaintiff was notified of that decision was not evidence that the employer had a discriminatory motive.[384]

According to the court, the only possible evidence regarding any discriminatory motive was one comment to the plaintiff that she could use her son's situation as an excuse for why she left her employment as City Clerk; however, this statement was seen by the court as the employer giving the plaintiff a justification as to why she left her position if she was questioned about it by future potential employers.[385] After reviewing this evidence, the court concluded that no jury could have concluded that the termination was based on the plaintiff's association with her son and therefore affirmed the district court's judgment.[386]

Another case where the plaintiff was unable to prove that her employer acted with a discriminatory motive is Ennis v. National Ass'n of

379. *Id*. at 1244 (arguing lack of complaints concerning her performance, her boss's failure to provide a reason, and the lack of an independent investigation into her discharge, all demonstrate pretext for discrimination).

380. *Id*. at 1244-45 (relying on Conner v. Schnuck Mkts., Inc., 121 F.3d 1390, 1395 (10th Cir. 1997); Richmond v. ONEOK, Inc., 120 F.3d 205, 209 (10th Cir. 1997)).

381. *Id*. at 1245.

382. *See id.* (finding that the employer's decision to wait until enough votes could be gathered to terminate plaintiff if she refused to resign was enough to defeat plaintiff's evidence of pretext).

383. *See id.*

384. *See id.* at 1246.

385. *See id.*

386. *Id.* at 1248.

Business & Educational Radio, Inc.,[387] from the United States Court of Appeals for the Fourth Circuit. In addition to having problems establishing that her son suffered from a disability and that she was qualified for her position, the plaintiff in Ennis was unable to prove her employer acted with a discriminatory motive.[388] More specifically, the Fourth Circuit affirmed the district court's granting of summary judgment in favor of the employer because the plaintiff was unable to satisfy the last element of her prima facie case: that her termination occurred under circumstances that would permit an inference of discriminatory motive.[389]

In *Ennis*, the plaintiff alleged that her employer terminated her as a result of her association with her HIV-positive son and the high health insurance costs associated with that relationship.[390] After addressing the first few elements of the prima facie case, the Fourth Circuit addressed the final issue, that being whether the plaintiff presented facts that gave rise to an inference of discrimination.[391] In addition to finding that the plaintiff was not meeting her employer's legitimate work expectations, the court found that the evidence the plaintiff presented did not raise an inference that her employer terminated her as a result of the costs associated with having an employee with an HIV-positive son.[392] The court rejected the plaintiff's argument that the employer's decision to send a memorandum to its employees regarding health insurance coverage was evidence that the employer terminated her because of the costs of having an HIV-positive relative.[393] The court decided that this memorandum was "too remote and too tenuous" to conclude that there was a discriminatory motive.[394] Therefore, because the plaintiff could not present evidence to support a discriminatory motive on behalf of her former em-

387. 53 F.3d 55 (4th Cir. 1995).

388. *Id*. at 62.

389. *Id.*

390. *Id*. at 57.

391. *Id*. at 59-62.

392. *Id*. at 62.

393. *Id.*

394. *Id.* Specifically, with respect to this memorandum, the court observed:

> The trier of fact would have to infer from an innocuous notice informing employees about their insurance, that [the defendant] wanted to prevent its employees from filing expensive claims against its insurance, that [the defendant] knew [the plaintiff's] son was HIV-positive and would incur substantial medical expenses, and that [the defendant] decided to fire [the plaintiff] as a direct result. The building of one inference upon another will not create a genuine issue of material fact . . . . Mere unsupported speculation, such as this, is not enough to defeat a summary judgment motion.

Id. (relying on Felty v. Graves-Humphreys Co., 818 F.2d 1126, 1128 (4th Cir. 1987); Beale v. Hardy, 769 F.2d 213, 214 (4th Cir. 1985); Ross v. Communications Satellite Corp., 759 F.2d 355, 364 (4th Cir. 1985)).

ployer, the Fourth Circuit affirmed the lower court's granting of summary judgment.[395]

Another case in which the plaintiff was unable to prove that he was terminated as a result of his family member's disability came from the United States Court of Appeals for the Fifth Circuit in *Rogers v. International Marine Terminals, Inc*.[396] In *Rogers*, the plaintiff sued his former employer, alleging that he was terminated as a result of his disability, his wife's disability, and because his former employer wanted to prevent him from exercising certain rights under the employer's benefit plan.[397] The district court had granted the employer's motion for summary judgment on the ADA claims and the ERISA claim, and the Fifth Circuit affirmed the trial court's judgment in all respects.[398]

In *Rogers*, the plaintiff suffered from ankle pain and was eventually released from his employment after working there for nine years.[399] This was part of the employer's reduction in force, and the plaintiff was selected to be released due to his absenteeism and inability to work for the months leading up to the decision to terminate him.[400] Also important to his ADA claims was the fact that the plaintiff's wife suffered from Crohn's Disease, a fact of which the plaintiff's employer was aware.[401]

The Fifth Circuit first addressed whether the plaintiff was disabled within the meaning of the ADA.[402] After concluding that the plaintiff did not prove he suffered from a physical impairment that substantially limited a major life activity or that the plaintiff was a qualified individual with an actual disability, the court then considered whether he was able to prove that his former employer regarded him as being disabled.[403] Once again, however, the court found the plaintiff's arguments unpersuasive and concluded that the plaintiff could not establish that he was regarded by his employer as having a disability.[404]

The court then addressed the plaintiff's argument that he was terminated because of his relationship with his wife, who suffered from

395. *Id.*
396. 87 F.3d 755 (5th Cir. 1996).
397. *Id.* at 758.
398. *Id.* at 757.
399. *Id.*
400. *Id*.
401. *Id.* at 757, 760.
402. *Id*. at 758.
403. *Id*. at 759-60.
404. *Id*. at 760.

Crohn's Disease.[405] The Fifth Circuit first acknowledged that the ADA does indeed protect employees who suffer adverse employment actions as a result of their association or relationship with an individual with a disability.[406] The court concluded, however, that the plaintiff failed to present sufficient evidence that his employer terminated him because of his relationship with his wife.[407] Although the employer knew of the plaintiff's wife's illness, there was not sufficient evidence to create a jury question with respect to whether this knowledge was proof of a discriminatory motive.[408] In fact, the court noted that the evidence suggested that the plaintiff was counseled as a result of his absences caused by *his own* medical problems, and these warnings did not once refer to the plaintiff's wife's problems.[409] Therefore, the court concluded that there was no issue of fact with respect to whether the plaintiff was terminated because of his relationship with his ill wife, and it therefore affirmed the summary judgment.[410]

Another case in which the plaintiff was unable to prove that a discriminatory motive was behind an employer's adverse employment action was *Wesley v. Stanley Door Systems, Inc*.[411] In *Wesley*, not only was the plaintiff unable to demonstrate that the defendant knew that the plaintiff's wife suffered from multiple sclerosis, but the plaintiff also failed to show a discriminatory motive.[412]

Although the court determined that the plaintiff could not establish the knowledge requirement of his prima facie case, it nonetheless examined whether the employer had a discriminatory motive when it refused to offer the plaintiff a full-time job.[413] The employer articulated several reasons for not hiring the plaintiff on a permanent basis, those being that his "total work performance" did not justify awarding him a permanent position, he was seen wandering from his work station talking to other employees during working hours, he was seen in the cafeteria when he should have been working, and he exchanged money with a co-worker

405. *Id*. For a thorough discussion about Crohn's Disease and other gastrointestinal disorders and how the ADA has treated individuals with these illnesses, see Rosenthal, *Can't* Stomach *the Americans with Disabilities Act? How the Federal Courts Have* Gutted *Disability Discrimination Legislation in Cases Involving Individuals with Gastrointestinal Disorders and Other* Hidden Illnesses, supra note 4.

406. *Rogers*, 87 F.3d at 760.

407. *Id.*

408. *Id*.

409. *Id*. at 760-61.

410. *Id*. at 761.

411. 986 F. Supp. 433 (E.D. Mich. 1997).

412. *See id*. at 436.

413. *Id.*

(making the plaintiff's supervisor suspect him of illegal activity).[414] In response to these reasons articulated by his employer, the plaintiff tried to present evidence to cast doubt on the veracity of them.[415]

The plaintiff was able to present evidence that he and his co-worker never exchanged money, he did not wander away from his work station at inappropriate times, two of his supervisors had recommended him for a permanent position, he was "a good worker," and he was "smart, dedicated, and showed initiative."[416] Finally, the plaintiff was able to present evidence that a co-worker believed he was a better worker than the other employees whom the defendant hired instead of the plaintiff.[417] Despite being presented with this evidence to contradict the defendant's articulated reasons, the court still granted the employer's motion for summary judgment.[418] Relying on the Supreme Court's decision in *St. Mary's Honor Center v. Hicks*,[419] the court implicitly found that although the plaintiff presented some evidence that the proffered reasons were false, he was unable to present additional evidence that the employer acted in response to the plaintiff's wife's illness.[420] Specifically, the court observed that "[b]efore becoming entitled to bring the case before the trier of fact[,] [p]laintiff must produce sufficient evidence from which a jury can reasonably reject the employer's explanation *and* conclude that the employer's decision to discharge was wrongfully based on discrimination."[421] The court then concluded that the plaintiff was unable to provide sufficient evidence of a discriminatory motive and that summary judgment was therefore appropriate.[422]

As the previously described cases demonstrate, even if ADA association plaintiffs are able to overcome the preliminary hurdles to succeeding on an ADA association claim, many plaintiffs still fail. However, unlike the cases described in some of the earlier sections of this article, where the plaintiffs were unable to even get to attack the employer's motives, the plaintiffs in these cases failed because they were unable to prove that the employer acted with any discriminatory motive. Nonetheless, as is the case with most ADA association claims, the plain-

414. *See id*. at 436-37.
415. *Id*. at 437.
416. *Id.*
417. *Id.*
418. *Id.*
419. 509 U.S. 502 (1993).
420. *Wesley*, 986 F. Supp. at 437.
421. *Id*. (emphasis added) (relying on St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507-08 (1993); Manzer v. Diamond Shamrock Chem. Co., 29 F.3d 1078, 1083-84 (6th Cir. 1994)).
422. *Id.*

tiffs in the cases described in this section of the article were also left unprotected by the ADA's association provision. This, however, is still not the final reason these plaintiffs fail. As the next section of this article will demonstrate, some plaintiffs who have attempted to use the ADA association provision were unable to prove that the facts of their cases fit neatly within this provision of the ADA.

H. Cases in Which Plaintiffs Lost Because Their Claims Were Not "True" Association Claims

Another reason why some ADA association plaintiffs have lost their claims is because the facts giving rise to their complaints did not fit neatly into what the association provision of the ADA was intended to protect. In these cases, courts have determined that although the plaintiffs might have been wronged by their employers, the association provision of the ADA was not the correct avenue for relief.

In one such case, *Oliveras-Sifre v. Puerto Rico Department of Health*,[423] the plantiffs were unable to prevail against their former employer on their ADA association claim.[424] The plaintiffs alleged that they were terminated because of their opposition to the way in which their employer handled a variety of AIDS-related issues.[425] The plaintiffs had been supporters of people with HIV/AIDS and alleged that their support and advocacy on behalf of these individuals resulted in numerous adverse employment actions.[426] After the plaintiffs were terminated, they filed a multi-count complaint, alleging violations of the ADA, the Rehabilitation Act, and the Puerto Rico Civil Code.[427]

The court first turned to the merits of the plaintiffs' ADA claims and rejected two of the three plaintiffs' non-association-based ADA claims, concluding that these plaintiffs did not have disabilities.[428] The court concluded that the third plaintiff, who was blind, did allege sufficient facts to at least survive the defendant's motion to dismiss.[429] Although the plaintiffs did not raise the association provision in their complaint, the court did acknowledge that pursuing their claims through this

423. 38 F. Supp. 2d 91 (D.P.R. 1999), *aff'd*, 214 F.3d 23 (1st Cir. 2000).
424. *Id*. at 101.
425. *Id*. at 94.
426. *Id*. at 97-98.
427. *Id*. at 94.
428. *Id*. at 98-99.
429. *Id*.

avenue was at least a possibility.[430] The court first discussed the Code of Federal Regulations and noted that the association provision was included in the ADA to protect individuals from discrimination because of an association or family relationship with people with disabilities.[431] The court also noted that the provision was included in the Act to prevent employers from failing to hire individuals because of the mistaken belief that those applicants would miss time from work, and to prohibit employers from discriminating against individuals who volunteer with AIDS patients out of fear that these employees might contract the disease.[432] After discussing the regulations and history behind the association provision of the ADA, the court then went on to address the merits of this claim.[433]

Relying on the Tenth Circuit's opinion in *Den Hartog*, the court articulated the four-part test used to determine whether a plaintiff can establish a prima facie case of association discrimination.[434] Although the court determined that the plaintiffs were indeed able to establish, for purposes of a motion to dismiss, the first three prongs of the test, the court ultimately concluded that the plaintiffs did not sufficiently allege "that they lost their positions because of their association with HIV/AIDS patients."[435] Specifically, the court went on to observe that the association provision "is intended to apply to situations in which an employer takes an adverse action against an employee based on a belief about the disability of the employee's associate."[436] The court also observed that this provision was intended to prevent employers from taking adverse employment actions "because of stereotypes or unfounded beliefs regarding the associate's disability."[437] Concluding that the plaintiffs' allegations did not fall within the scope of the association provision and the regulations and legislative history behind it, the court concluded that the plaintiffs' ADA association claim must fail.[438] The plaintiffs

430. *See id*. at 99.
431. *Id.* at 100 (relying on 29 C.F.R. § 1630.8, app. § 1630.8 (2000)).
432. *Id*. (relying on 29 C.F.R. app. § 1630.8).
433. *Id*. at 100-01.
434. *Id*. at 100 (citing Den Hartog v. Wasatch Acad., 129 F.3d 1076, 1085 (10th Cir. 1997)).
435. *Id*.
436. *Id*.
437. *Id.* at 101 (relying on Barker v. Int'l Paper Co., 993 F. Supp. 10, 15 (D. Me. 1998)).
438. *Id*. Specifically, the court noted:

> In this case, assuming [p]laintiffs' allegations are true, [p]laintiffs do not claim they were dismissed because of their employer's beliefs regarding HIV/AIDS patients with whom [p]laintiffs were associated. Rather, [p]laintiffs claim they were dismissed because of their advocacy on behalf of HIV/AIDS patients as part of their jobs at the Department of Health. Thus, [p]laintiffs [sic] claims are not covered by section 12112(b)(4) . . . .

appealed the district court's judgment, and the United States Court of Appeals for the First Circuit, after noting the purposes behind the association provision of the ADA,[439] affirmed the district court's judgment.[440]

In a case similar to *Oliveras-Sifre*, the United States Court of Appeals for the Fourth Circuit in *Freilich v. Upper Chesapeake Health, Inc.*,[441] determined that an ADA association plaintiff did not engage in the exact type of behavior the ADA association provision was meant to protect.[442] Specifically, in *Freilich*, the plaintiff sued various individuals and medical entities after she lost her privileges at a hospital.[443] The plaintiff brought several claims against various defendants and also included a claim alleging that she was discriminated against as a result of her advocacy on behalf of individuals who needed dialysis treatment.[444] After addressing the merits of the plaintiff's constitutional challenges and her other ADA claim,[445] the court addressed the plaintiff's ADA association claim.[446]

After referring to *Oliveras-Sifre* and to another similar case, *Barker v. International Paper Company*,[447] the court concluded that this type of patient advocacy was not what Congress intended to protect when it enacted the association provision of the ADA.[448] Specifically, the court stated:

> [The plaintiff] alleges that [the defendant] "coerced, intimidated, threatened, or interfered . . . with [her] because she exercised rights protected by the ADA," and that [the defendant] discriminated against

Id.

439. Oliveras-Sifre v. Puerto Rico Dep't of Health, 214 F.3d 23, 26 (1st Cir. 2000). In addition to the two examples cited by the district court, the First Circuit also noted that the association provision would have come in to play if an employer denied health benefits to the dependent of an employee, even if granting such benefits would have resulted in higher insurance costs to the employer. *Id*. at 26 (citing Den Hartog v. Wasatch Acad., 129 F.3d 1076, 1085 (10th Cir. 1997)).

440. Oliveras-Sifre v. Puerto Rico Dep't of Health, 214 F.3d 23 (1st Cir. 2000).

441. 313 F.3d 205 (4th Cir. 2002).

442. *Id*. at 217; *see also* Freilich v. Bd. of Dirs. of Upper Chesapeake Health, Inc., 142 F. Supp. 2d 679 (D. Md. 2001) (district court opinion).

443. *Freilich*, 313 F.3d at 209.

444. *Id*. at 209-10.

445. *Id*. at 211-15. The plaintiff attempted to claim that she had standing to sue on behalf of the individual dialysis patients; however, the court concluded that the plaintiff did not have standing to assert those claims. *Id*. at 214-15.

446. *Id.* at 211-16 (concluding that plaintiff's claim construed associational discrimination too broadly).

447. 993 F. Supp. 10 (D. Me. 1998).

448. *Freilich*, 313 F.3d at 215-16.

> her because she refused "to end her advocacy of the dialysis patients' rights that were being violated under [the] ADA." She further alleges that she was "denied equal use of facilities, privileges, advantages or other opportunities because of her association with and her relationship to patients with disabilities." But such generalized references to association with disabled persons or to advocacy for a group of disabled persons are not sufficient to state a claim for associational discrimination under the ADA. Every hospital employee can allege at least a loose association with disabled patients. To allow [the plaintiff] to proceed on such a basis would arm every hospital employee with a potential ADA complaint. A step of that magnitude is for Congress, not this court, to take.[449]

Therefore, the court affirmed the lower court's judgment dismissing the plaintiff's claim.[450]

As this section of the article has demonstrated, one additional reason why plaintiffs have failed in their ADA association claims is that the facts giving rise to their causes of action do not fit neatly into what Congress envisioned when it enacted the association provision of the ADA. However, regardless of the reason why these ADA association claims have failed, this article has demonstrated that most plaintiffs attempting to use this provision of the ADA have been unsuccessful.[451] This is not unlike the many unsuccessful ADA plaintiffs who have attempted to seek the statute's protection because of their own disabilities.[452] This is yet more proof that the "era of equality" to which President Bush referred when signing the ADA into law has not been realized by all of those who need ADA protection.

449. *Id.* at 216.

450. *Id*. at 217.

451. *But see* Jackson v. Serv. Eng'g, 96 F. Supp. 2d 873, 874, 882 (S.D. Ind. 2000) (denying defendant's motion for summary judgment due to allegations that the employer terminated plaintiff because of plaintiff's wife's illness); Dollinger v. State Ins. Fund, 44 F. Supp. 2d 467, 470, 482 (N.D.N.Y. 1999) (denying defendant's motion to dismiss complaint alleging discrimination based on association with HIV-positive individuals); Morgenthal v. AT&T Co., No. 97-CIV. 6443, 1999 U.S. Dist. LEXIS 4294, at *1-2, *12 (S.D.N.Y. Apr. 5, 1999) (denying defendant's motion to dismiss complaint alleging discrimination based on plaintiffs' association with an individual who had a developmental disorder); Padilla v. Buffalo State Coll. Found., Inc., 958 F. Supp. 124, 124, 128 (W.D.N.Y. 1997) (denying defendant's motion for summary judgment because of employer's decision to withdraw plaintiff's employment offer due to plaintiff's child's illness); Deghand v. Wal-Mart Stores, Inc., 926 F. Supp. 1002, 1022 (D. Kan. 1996) (denying defendant's motion for summary judgment on plaintiff's ADA association claim). *But see also* Doe v. An Oregon Resort, No. 98-6200-HO, 2001 U.S. Dist. LEXIS 17449, at *30 (D. Or. May 10, 2001) (finding in favor of plaintiff on each of his ADA claims); Saladin v. Turner, 936 F. Supp. 1571, 1585 (N.D. Okla. 1996) (finding in favor of plaintiff and awarding damages).

452. *See supra* note 4; *see also supra* note 9.

V. SUGGESTIONS FOR ADA PLAINTIFFS

As a result of the very narrow interpretation the courts are giving the association discrimination provision, individuals who find themselves subjected to adverse employment actions, possibly because of their association or relationship with an individual with a disability or an illness, must find other potential avenues to recovery. Because the courts do not seem to be willing to open the ADA association provision up to cases not initially contemplated by Congress when it passed the ADA, these individuals must explore other options.[453] This section of the article will address some of these options. Specifically, this section will briefly look into the possible use of the anti-coercion and anti-retaliation provisions of the ADA,[454] the ERISA statute,[455] the FMLA,[456] and the use of state and local anti-discrimination laws. Although none of these options provides a guarantee for relief, there is the possibility that a plaintiff who is unable to prevail in an ADA association claim will be able to obtain relief under one of these alternatives.

A. The Anti-Coercion and the Anti-Retaliation Provisions of the ADA

In addition to the substantive prohibitions against discriminating against individuals with disabilities and those who are related to or associated with individuals with disabilities, the ADA also protects employees from being punished for helping or aiding others in their exercise of ADA rights. According to the statutory language, the anti-coercion provision provides:

> It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, *or on account of his or her having*

453. At times, the Supreme Court has expanded statutory protections to situations not considered to be the "principal evils" Congress meant to address. *See, e.g.*, Oncale v. Sundowner Offshore Servs., Inc. 523 U.S. 75, 78-80 (1998) (determining that although same-sex sexual harassment was not the "principal evil" Title VII originally intended to address, such conduct did violate Title VII when it was "because of the sex."); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 278-80 (1976) (concluding that although discrimination against minorities was the principal evil Congress meant to address when passing Title VII, non-minorities were also protected by that legislation). *But see* Gen. Dynamics Land Sys., Inc., v. Cline, 124 S. Ct. 1236, 1248-49 (2004) (declining to extend the ADEA to protect younger workers who received less favorable treatment than older employees).

454. 42 U.S.C. § 12203 (2000).

455. 29 U.S.C. §§ 1000-1461 (2000).

456. *Id.* §§ 2601-2619, 2631-2654.

> *aided or encouraged another individual in the exercise or enjoyment of, any right granted or protected by this chapter*.[457]

Additionally, the anti-retaliation provision provides: "No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter."[458]

Although not every potential association-type claim will fit under one of these particular statutory provisions, some ADA plaintiffs have been successful in cases brought under one of these provisions after suffering an adverse action they thought was a result of their association with an individual with a disability.

One such case where the plaintiff attempted to pursue a claim under the anti-coercion provision of the ADA was *Barker v. International Paper Co.*[459] Although the plaintiff in this case lost his association claim at the summary judgment stage, he was able to defeat the employer's summary judgment motion on his claim brought under the anti-coercion provision of the ADA.[460] In *Barker*, the plaintiff and his wife had worked for the defendant, and both were eventually terminated from their positions.[461] Prior to his wife's termination, the husband requested an accommodation for his disabled wife.[462]

Although the employer provided an accommodation, the plaintiff's wife's supervisor was angered over the plaintiff's advocacy on behalf of his wife and indicated that she would go to the plaintiff's manager to try to get him fired if he continued to advocate on his wife's behalf.[463] Shortly after receiving the plaintiff's wife's EEOC charge, the plaintiff's supervisor started having troubles with him.[464] The plaintiff was eventually terminated, and in addition to his claim for association discrimination, he alleged that his former employer terminated him because of his advocacy on his wife's behalf.[465] This allegation was partially the result of being told that one example of the plaintiff's poor interpersonal skills was demonstrated by the way in which he handled the situation with his

457. 42 U.S.C. § 12203(b) (emphasis added).
458. *Id.* § 12203(a).
459. 993 F. Supp. 10 (D. Me. 1998).
460. *Id*. at 15-16.
461. *Id.* at 12-13.
462. *Id.* at 12.
463. *Id.*
464. *Id.* at 12-13.
465. *Id*. at 13-14.

wife.[466]

The court first identified the three prima facie elements under this type of ADA claim: (1) he aided his wife in ADA-protected activity; (2) he was subjected to an adverse employment action; and (3) there was a causal connection between the protected activity and the adverse employment action.[467] The employer did not dispute that the plaintiff suffered an adverse employment action; therefore, the two remaining issues involved the protected activity issue and the causal connection issue.[468] The plaintiff convinced the court that he engaged in a protected activity when he requested an accommodation on behalf of his disabled wife.[469] Although the defendant argued that the only reason the *plaintiff* asked for the accommodation was because the plaintiff's wife was busy at the time, and that the plaintiff was therefore not engaged in a protected activity, the court rejected that argument.[470] According to the court, the plaintiff "easily satisfie[d]" that element of the prima facie case.[471]

Finally, the court addressed the causal connection issue and determined that there was a genuine issue of material fact on this part of the plaintiff's prima facie case, and that summary judgment was inappropriate.[472] Specifically, the plaintiff was able to point to the comment his supervisor made to him regarding the way the plaintiff handled his wife's request for a reasonable accommodation, and the plaintiff was also able to point to the close temporal proximity between the plaintiff's initial problems with his supervisor and the timing of his wife's EEOC charge.[473] These two pieces of evidence were sufficient to defeat the employer's motion for summary judgment.[474] Therefore, although he was unable to prevail in his association claim, the plaintiff successfully used the anti-coercion provision of the ADA to at least get past the employer's motion for summary judgment.

In addition to the anti-coercion provision of the ADA, which was the subject of the *Barker* opinion, the ADA also contains an anti-retaliation provision. In some circumstances, some ADA plaintiffs who believe they have been discriminated against as a result of some type of relationship with individuals with disabilities might be able to pursue an

466. *Id*. at 13.
467. *Id*. at 15-16.
468. *Id.* at 16.
469. *Id*.
470. *Id*.
471. *Id.*
472. *Id*.
473. *See id.*
474. *Id.*

action under this provision of the ADA in addition to, or instead of, under the association provision of the ADA. Of course, not all plaintiffs who have attempted to pursue this avenue have been successful.

One such plaintiff was the plaintiff in the previously discussed case of *Freilich v. Upper Chesapeake Health, Inc*.[475] Specifically, in *Freilich*, the plaintiff sued various individuals and medical entities after she lost her privileges at a hospital.[476] The plaintiff brought several claims against various defendants, and she also included a claim alleging that she was discriminated against in retaliation for her advocacy on behalf of individuals who needed dialysis treatment.[477] After addressing the merits of the plaintiff's constitutional challenges and ADA association claim,[478] the court addressed the plaintiff's retaliation claim.[479] The court first acknowledged that the ADA does indeed protect individuals against adverse employment actions an employer takes against them in retaliation for their opposition to practices made unlawful by the ADA.[480] For a plaintiff to establish a prima facie case under this particular ADA provision, she must demonstrate that she (1) engaged in ADA-protected activity; (2) suffered an adverse employment action after engaging in the protected activity; and (3) that there was a causal connection between the protected activity and the adverse employment action.[481] With respect to the first element of the prima facie case - that the plaintiff engaged in a protected activity - the Fourth Circuit indicated that the employer behavior the employee opposes need not be an *actual* ADA violation; however, in order for the employee's activity to be considered protected, the employee must have a "reasonable, good faith belief" that the employer's behavior violated the ADA.[482] Because the court concluded that the plaintiff in this case could not have had a reasonable, good faith belief that what she opposed constituted ADA violations, she was unable to establish the first element of her prima facie case.[483]

The plaintiff in *Freilich* opposed several of the hospital's decisions regarding the treatment dialysis patients received.[484] Although the court

475. 313 F.3d 205 (4th Cir. 2002).
476. *Id*. at 209.
477. *Id*. at 209-10.
478. *Id.* at 211-16.
479. *Id*. at 216-17.
480. *Id*. at 216.
481. *Id.* (relying on Rhoads v. FDIC, 257 F.3d 373, 392 (4th Cir. 2001)).
482. *Id*.
483. *Id*. at 216-17.
484. *Id.*

concluded that the plaintiff might have had legitimate concerns over these issues, the court also decided that these issues brought into question state medical malpractice laws, but did not bring into question any ADA concerns.[485] Because the plaintiff's concerns dealt mostly with the hospital's decisions with respect to patient care and the outsourcing of particular services, no ADA issues were implicated, and the plaintiff could not have had a reasonable, good faith belief that she was opposing anything made illegal by the ADA.[486] The court concluded that "[e]very disagreement over the adequacy of hospital expenditures or the provision of patient care is not an ADA issue. If it were, courts would be drawn into medical resource disputes quite beyond their expertise and hospital personnel would be diverted by litigation from their primary task of providing medical attention . . . ."[487] Thus, because the issues about which the plaintiff was complaining were not ADA issues, the plaintiff's ADA retaliation claim failed.[488]

Although not all claims brought under the anti-coercion and anti-retaliation provisions of the ADA have succeeded, potential plaintiffs should consider the possibility of using these provisions of the Act. In the association context, if a plaintiff finds herself facing an adverse employment action as a result of trying to assist someone to pursue an ADA issue with their common employer, she should attempt to pursue an action under the ADA's anti-coercion provision. Or, if an employee finds herself in a situation where she suffers an adverse employment action as a result of opposing employer conduct she reasonably believed violated the ADA or as a result of participating in any type of ADA-related proceeding or investigation involving another individual, she may indeed be able to pursue a retaliation claim against her employer. Although neither is a perfect solution, a plaintiff might be able to prevail under one of these statutory provisions when her claim under the association provision does not fit neatly into what Congress envisioned when it enacted the association provision of the ADA. However, if neither of these potential avenues is an option, then a plaintiff might have to turn to other statutes for potential remedies.

485. *Id.* at 217.
486. *Id.*
487. *Id.*
488. *Id.*

B. Attempt to Assert an ERISA Claim

Another potential avenue for plaintiffs who believe they are being discriminated against because of a relationship with an individual with a disability is ERISA, the Employee Retirement Income Security Act.[489] Protection under ERISA is available when an employee believes that she was terminated because of her employer's desire to interfere with the employee's rights under an employee benefit plan. In the association context, a potential ERISA violation is likely to be found when an employee believes she was terminated as a result of an employer's effort to minimize health insurance costs by eliminating an employee whose family members need expensive medical treatments.

One employee who was able to defeat an employer's motion for summary judgment on her ERISA claim was the plaintiff in the previously mentioned case of *Smith v. Hinkle Manufacturing, Inc.*[490] Although the plaintiff in *Smith* lost her ADA association claim at the summary judgment stage, the United States Court of Appeals for the Sixth Circuit concluded that summary judgment was *inappropriate* on her ERISA claim.[491]

In *Smith*, the plaintiff's ERISA claim alleged that she was terminated as a result of her employer's desire to avoid high health insurance costs associated with the plaintiff's son's disease.[492] In addressing the plaintiff's ERISA claim, the court first explained what ERISA prohibited - interfering with an employee's right to attain any rights to which that employee is entitled under an employee benefit plan[493] - and then proceeded to explain how to analyze this type of dispute.[494] After conclud-

489. 29 U.S.C. §§ 1000-1461 (2000).

490. 36 FED Appx. 0825P (6th Cir. 2002). *See supra* notes 108-116 and accompanying text.

491. *Smith*, 2002 FED App. at 0830P-0831P.

492. *Id*. at 828.

493. *Id.* Specifically, ERISA provides:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act. The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

29 U.S.C. § 1140 (2000).

494. *Smith*, 2002 FED App. at 0828P-0830P.

ing that the plaintiff presented no direct evidence of a discriminatory motive, the court used the *McDonnell Douglas* circumstantial evidence burden-shifting framework.[495] The court first determined that the plaintiff did establish her prima facie case.[496] In addition to establishing the preliminary elements of the prima facie case, the plaintiff was also able to point to a close temporal proximity (two weeks) between the employer's knowledge of the plaintiff's son's illness and the adverse employment action.[497]

The defendant then articulated a legitimate, nondiscriminatory reason for discharging the plaintiff: poor job performance.[498] Once the defendant met this burden of production, it was up to the plaintiff to demonstrate (or at least create a genuine issue of fact) that poor performance was not the true reason for the discharge and that one motivating factor for the adverse employment action was to interfere with the plaintiff's rights under the employee benefit plan.[499] The plaintiff was unable to show that the employer's proffered reason for the adverse employment action had "no basis in fact," as the employer was able to show that the plaintiff did have some performance issues.[500] Similarly, the plaintiff was unable to demonstrate that other employees with performance problems - but who did not attempt to exercise rights under an employee benefit plan - were treated more favorably than the plaintiff.[501] However, despite the inability to create a genuine issue of fact with respect to the issue of pretext by the preceding two methods, the plaintiff was able to point to other facts that did create such an issue of fact.[502]

Specifically, in addition to the close timing between the plaintiff's informing her employer of her son's health condition and the adverse employment action, the plaintiff was also able to present evidence that (1) the defendant's accounting supervisor had made statements that families with health problems were causing insurance rates to increase and that these costs were a "drain on the company"; (2) the plaintiff had

495. *Id.* at 828.

496. *Id*. at 829. In order to establish a prima facie case under ERISA, the plaintiff must show "(1) prohibited employer conduct (2) taken for the purpose of interfering (3) with the attainment of any right to which the employee may become entitled." *Id.* at 828 (citing Humphreys v. Bellaire Corp., 966 F.2d 1037, 1043 (6th Cir. 1992)).

497. *See id.* at 829 (relying on Pennington v. W. Atlas, Inc., 202 F.3d 902, 908 (6th Cir. 2000); Smith v. Ameritech, 129 F.3d 857, 865 (6th Cir. 1997); Shahid v. Ford Motor Co., 76 F.3d 1404, 1411 (6th Cir. 1996); Humphreys v. Bellaire Corp., 966 F.2d 1037, 1043-44 (6th Cir. 1992)).

498. *Id.*

499. *Id.*

500. *Id*.

501. *Id*. at 829-30.

502. *Id*. at 830.

received an eight percent pay raise six weeks prior to her discharge, suggesting that the company was not unhappy with her performance; (3) the employer had, in the past, warned other employees about termination anywhere between five and fifty times before actually terminating that employee, yet the company warned the plaintiff only once prior to her termination; and (4) the complaints upon which the company relied to terminate the plaintiff all occurred in the two-week period between her telling her employer about her son's medical condition and her termination.[503] The court concluded that looking at this evidence in the light most favorable to the plaintiff, she at least created a jury question with respect to whether her employer terminated her in an effort to interfere with the plaintiff's rights under her employee benefit plan.[504]

Thus, the *Smith* case is one example of where a plaintiff who lost her ADA association claim was able to at least defeat her employer's motion for summary judgment on her ERISA claim. Thus, when a potential ADA association plaintiff believes that her employer terminated her as a result of a sick relative (and the health insurance costs associated with that illness), in addition to attempting to assert an ADA association claim, that plaintiff should also attempt to assert an ERISA claim.

C. Attempt to Assert an FMLA Claim

Another possible avenue ADA association plaintiffs can attempt to pursue is the Family and Medical Leave Act.[505] Although this legislation will only apply in limited association-type circumstances, it might provide some relief to plaintiffs who find themselves suffering adverse employment actions as a result of having to ask to take time off from work to care for a sick family member, or in retaliation for having taken time off from work in order to care for a sick family member.

The FMLA allows eligible employees to take unpaid leave from work under certain, limited circumstances,[506] and it also prohibits employers from retaliating against them for taking such leave.[507] Under the

503. *Id.* at 827, 830.

504. *Id*. at 830.

505. 29 U.S.C. §§ 2601-2619, 2631-2654 (2000).

506. *Id*. § 2612(a)(1).

507. S*ee* 29 C.F.R. § 825.220(c) (2000). The regulations for the FMLA provide:

> An employer is prohibited from discriminating against employees or prospective employees who have used FMLA leave. For example, if an employee on leave without pay would otherwise be entitled to full benefits (other than health benefits), the same benefits would be required to be provided to an employee on unpaid FMLA leave. By the same

FMLA, eligible employees are entitled to up to twelve weeks of unpaid leave for (a) the birth of a child and to care for the child; (b) the placement of a child for adoption or foster care; (c) the care of a spouse or immediate family member with a "serious health condition"; and (d) a serious health condition that prevents the employee from performing the functions of her position.[508] With respect to how and when the FMLA might be similar to the ADA's association provision, it is subsection (c), above, that becomes the most relevant; both the association provision of the ADA and subsection (c), above, address situations where an employee's relative is somehow involved in the adverse employment action.

There are at least two potential situations where this might occur. First, if an employee does avail herself of FMLA leave to take care of a sick relative and is later terminated or discriminated against in retaliation for taking leave, then that plaintiff could bring a claim under the FMLA.[509] Although some plaintiffs might think these facts could give rise to an association-based claim under the ADA and try to fit these facts into an ADA association-based cause of action, the more appropriate remedy would most likely be under the FMLA.

A second potential situation where the FMLA and the association provision of the ADA might seem to overlap is when an employer terminates an employee who asks to take leave to care for a sick family member. Although some employees might attempt to pursue an ADA association claim, another avenue to pursue is to seek relief under the FMLA. Under the FMLA, an employer cannot prevent an eligible employee from taking leave to care for the sick relative, and although the employer is not required to pay the employee during this leave, the employee must be restored to the same or an equivalent position after returning from caring for the sick relative.[510] Therefore, the FMLA does provide some protection in factual situations that might also seem to raise the prospect of an ADA association claim.

Employees need to be aware, however, of some of the "technical" differences between these two pieces of legislation. Some of these dif-

token, employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under "no fault" attendance policies.

Id.

508. 29 U.S.C. § 2612(a)(1).

509. *See id.* § 2615(a)(2).

510. *Id.* §§ 2612(c), 2614(a)(1). Typically, the FMLA prohibits employers from terminating employees while they are on FMLA leave, but there are some limited exceptions to this prohibition. *See id*. § 2614(b) (2000).

ferences make it *easier* for plaintiffs to prevail under the FMLA, while other requirements of the FMLA make it *more difficult* for potential plaintiffs. The first difference, which may prove helpful for employees, is the FMLA's definition of a "serious health condition."[511] While the ADA's association provision's protections are not triggered unless a plaintiff can demonstrate that her relative or associate has a "disability," FMLA plaintiffs need only prove that their family member suffers from a "serious health condition."[512] Unlike the high standard courts have established for ADA plaintiffs, the standard for FMLA plaintiffs is less rigorous; a plaintiff is more likely to be able to satisfy the FMLA's definition of "serious health condition" than the ADA's "disability" definition.

One such example of this occurred in *Oswalt v. Sara Lee Corp.*,[513] where the plaintiff lost his ADA claim and his FMLA claim. However, the court did observe that although his high blood pressure did *not* satisfy the ADA's definition of "disability," it could meet the FMLA's definition of "serious health condition."[514] Specifically, in *Oswalt*, the plaintiff appealed the lower court's granting of summary judgment in favor of his former employer, arguing that he was entitled to both ADA and FMLA protection.[515] The United States Court of Appeals for the Fifth Circuit disagreed with the plaintiff and affirmed the lower court's judgment.[516]

The Fifth Circuit concluded that the plaintiff failed to show that his high blood pressure (or the side effects from his medication) substantially limited the plaintiff in any major life activities; therefore, the plaintiff did not have a disability, and the ADA did not provide the plaintiff with any protection.[517] With respect to the plaintiff's FMLA claim, which was based on his high blood pressure and a case of food poisoning, the Fifth Circuit quickly concluded that the plaintiff's food poisoning did not constitute a "serious health condition" because it did not in-

511. The FMLA defines a serious health condition as: "an illness, injury, impairment, or physical or mental condition that involves—(A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider." 29 U.S.C. § 2611(11) (2000).

512. 29 C.F.R. § 1630.8 (2000); 29 U.S.C. § 2613(b) (2000).

513. 74 F.3d 91 (5th Cir. 1996).

514. *Id.* at 92-93.

515. *Id*. at 92. *See* Oswalt v. Sara Lee Corp., 889 F. Supp. 253 (N.D. Miss. 1995) (district court opinion).

516. *Oswalt*, 74 F.3d at 92-93.

517. *Id*. at 92.

volve in-patient care or continued medical treatment.[518] However, the court did conclude that the plaintiff's high blood pressure could be considered a "serious health condition" under the FMLA.[519] The plaintiff, however, was unable to win his FMLA claim because the FMLA had not yet become effective when the plaintiff's claim arose.[520]

Oswalt is therefore a good example of where an individual could not meet the rigorous ADA definition of "disability," but was able to meet the FMLA's definition of a "serious health condition."[521] In the association context, this might be helpful when, although an ADA association plaintiff is unable to prove that her relative can satisfy the ADA's strict definition of "disability," she can demonstrate that her relative can meet the less stringent "serious health condition" definition found in the FMLA. This could, in some cases, eliminate the problem the plaintiffs described in section IV (A) of this article faced when pursuing their ADA association claims, and provide these plaintiffs with a different avenue to pursue.

The potential FMLA plaintiffs should, however, be aware of certain limitations of the FMLA. The FMLA does protect certain employees from losing their jobs while having to care for a sick relative and from retaliation for having done so; however, the FMLA does not protect all employees, and its coverage is limited only to individuals with a *spouse* or an *immediate family member* with a "serious health condition."[522] This scope of protection under the FMLA is narrower than the ADA association provision, in that the ADA association provision is not limited to family members, but can also protect an individual from an adverse employment action taken because of that person's association (rather than a relationship) with an individual with a disability.[523]

Another potential problem for employees attempting to assert rights under the FMLA is that the FMLA does not cover all employees. First, the employee must work for an employer with fifty or more employees.[524] This minimum of fifty employees is higher than the ADA's

518. *Id*. at 92-93.

519. *Id*. at 93.

520. *Id*.

521. *See also* Stekloff v. St. John's Mercy Health Sys., 218 F.3d 858, 861 (8th Cir. 2000) (noting that the FMLA's definition of "serious health condition" and the ADA's definition of "disability" are two separate concepts, and concluding that the FMLA's definition of "serious health condition" is less stringent than the ADA's definition of "disability").

522. *See* 29 U.S.C. § 2612(a)(1)(C) (2000).

523. *See id*. § 12112(b)(4).

524. *Id*. § 2611(4)(A)(i). Specifically, the definition of an "employer" is "any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees

minimum number of employees, which is fifteen.[525] Additionally, employees seeking leave under the FMLA are required to have worked for the particular employer for a minimum of twelve months and for a statutorily designated number of hours during that twelve-month period.[526]

These are just some of the potential pitfalls of pursuing a claim under the FMLA.[527] This is not to say, however, that a plaintiff would not be able to pursue this statutory remedy when facing a situation in which she finds herself suffering an adverse employment action because of her decision to take time away from work to care for an ill relative, or because she suffers an adverse employment action because her employer will not allow her time away from work in order to take care of that ill relative. Thus, potential ADA association plaintiffs should also investigate the possibility of bringing an FMLA claim when deciding which causes of action to pursue against their employer.

D. Attempt to Assert a State Law Claim

Although not all state anti-discrimination statutes contain an association discrimination provision similar to the ADA, ADA plaintiffs should investigate the potential existence of such laws. Although it will most likely be interpreted as narrowly as the ADA's association provision, some courts have construed their state or local anti-discrimination statutes more broadly than the federal courts have interpreted the ADA.

Although most states interpret their disability statutes in a manner consistent with how the federal courts interpret the ADA, not all states do so. For example, even though the United States Supreme Court determined that mitigating measures must be considered when making the

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for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year . . . ." *Id*.

525. 42 U.S.C. § 12111(5)(A) (2000). The ADA defines "employer" as:

> a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

Id.

526. 29 U.S.C. § 2611(2)(A) (2002).

527. The FMLA has several requirements for employees. These requirements address, among other things, the notice an employee must provide to his employer and the medical certification regarding an employee's medical condition. *See* 29 U.S.C. §§ 2612(e)(1), 2613(a) (2000). These technical requirements are beyond the scope of this article; however, potential plaintiffs must be aware of them.

determination of whether an individual suffered from a disability,[528] the Supreme Judicial Court of Massachusetts determined that mitigating measures should *not* be considered when determining whether an individual suffers from a disability within the meaning of the state anti-discrimination statute.[529] As a result, many more individuals will be considered disabled under the Massachusetts statute than under the ADA. Massachusetts is not the only state that interprets its state statute's definition of disability more broadly than how the federal courts interpret the same definition under the ADA; New York courts also interpret that state's anti-discrimination statute's definition of "disability" more broadly than the ADA definition.[530] Therefore, if other states follow suit and adopt a more liberal interpretation of "disability," and if these states have a prohibition against discrimination based on an association or relationship with an individual with a disability,[531] then many association plaintiffs will be able to overcome a hurdle many ADA plaintiffs are unable to overcome - that they have an association or a relationship with an individual with a "disability." This, of course, will

528. Sutton v. United Air Lines, Inc., 527 U.S. 471, 482 (1999).

529. Dahill v. Police Dep't of Boston, 748 N.E.2d 956, 962 (Mass. 2001). In *Dahill*, the court answered whether a hearing-impaired police officer had a handicap within the meaning of the Massachusetts anti-discrimination statute. *Id*. at 958-59. The police department argued that the Supreme Judicial Court of Massachusetts should adopt the U.S. Supreme Court's interpretation of "disability" from *Sutton* (mitigating measures considered when making the initial disability determination). *Id.* at 959. Because the Massachusetts statute was not clear on its face, the Supreme Judicial Court looked at other sources to discern the legislative intent. *Id*. at 960. After a review of legislative intent surrounding the Federal Rehabilitation Act of 1973, upon which the law was patterned, the guidance offered by the Massachusetts Commission Against Discrimination, and the intent of the state legislature to construe that statute "liberally," the court determined that mitigating measures should not be considered when deciding a state disability claim. *Id*. at 960-62. *See also* Rosenthal, *Can't* Stomach *the Americans with Disabilities Act? How the Federal Courts Have* Gutted *Disability Discrimination Legislation in Cases Involving Individuals with Gastrointestinal Disorders and Other* Hidden *Illnesses*, *supra* note 4, at 492-93.

530. *See* Treglia v. Town of Manlius, 313 F.3d 713, 723 (2d Cir. 2002) (noting that "New York and Second Circuit cases make clear that the New York disability statute defines disability more broadly than does the ADA."); *see also* Anyan v. New York Life Ins. Co., 192 F. Supp. 2d 228, 245 (S.D.N.Y. 2002).

531. Not all state statutes have provisions analogous to the ADA's association provision. *See, e.g*., Smith v. Hinkle Mfg., Inc., 2002 FED App. 0825P, 0830P-0831P (6th Cir.) (concluding that the Ohio equivalent of the ADA did not contain a provision prohibiting discrimination based on association with an individual with a disability); *see also* Kennedy v. Chubb Group of Ins. Cos., 60 F. Supp. 2d 384, 395 (D.N.J. 1999) (rejecting plaintiff's invitation to interpret the state anti-discrimination statute to include a prohibition against discrimination based on an association or relationship with an individual with a disability); Abdel-Khalek v. Ernst & Young, LLP., No: 97-CIV-4514, 1999 U.S. Dist. LEXIS 2369, at *26 (S.D.N.Y. Mar. 5, 1999) (rejecting a state-law association claim because the state statute does not contain a provision prohibiting discrimination based upon an association with an individual with a disability).

give these individuals a possible avenue to pursue when the ADA avenue is unavailable.

Plaintiffs must be aware, however, that if the state law does not prohibit association-based discrimination, this avenue will be foreclosed. In such cases, plaintiffs might be able to pursue local laws, as was the case in *Abdel-Khalek v. Ernst & Young, LLP.*,[532] where, although the court rejected the plaintiff's state-law claim because there was no association-type language in the state statute, the plaintiff's association claim based on New York City's Administrative Code survived the defendant's motion to dismiss because there was textual support in the Administrative Code for a discrimination claim based on association with an individual with a disability.[533]

Thus, when facing an association-type discrimination claim, plaintiffs should also explore the possibility that state or other local laws might provide an avenue of relief. Although not every state or local law contains an association provision similar to the ADA, if such a provision exists, perhaps the state court will give it a more expansive interpretation than the federal courts are giving the ADA's association provision. If such a provision exists, and if the local law is interpreted more broadly than the ADA (with respect to the "disability" definition or with respect to the scope of the association provision), then ADA association plaintiffs should definitely add one of these claims to the federal claim.

As the previous sections of this article have demonstrated, plaintiffs who find themselves unable to pursue a claim under the ADA's association provision might have alternative avenues of relief. Specifically, if the facts of their cases fit into the anti-coercion provision of the ADA, the anti-retaliation provision of the ADA, ERISA, the FMLA, or state or local law, these plaintiffs should attempt to pursue these avenues as well. Although none of these options can guarantee a successful outcome for a plaintiff, the more causes of action these plaintiffs can pursue, the greater their chances of finding a statute that might provide relief.

VI. CONCLUSION

Just as many plaintiffs who have attempted to use the ADA to combat adverse employment actions they believe occurred as a result of their own disabilities have failed, most plaintiffs who have attempted to use the association provision of the ADA have also struggled to prevail.

532. No. 97 CIV-4514, 1999 U.S. Dist. LEXIS 2369 (S.D.N.Y. Mar. 5, 1999).

533. *Id.* at *27, *29.

Regardless of the numerous reasons why these plaintiffs lose, it is clear that most plaintiffs who have attempted to use this provision have been unsuccessful.

Because of the narrow interpretation courts have given the ADA and the association provision contained within it, it is unlikely that plaintiffs attempting to use that provision to recover for some type of adverse employment action will be successful. Therefore, these individuals must find different avenues of relief. Some of these plaintiffs might find help under the anti-coercion and the anti-retaliation provisions of the ADA, under ERISA, under the FMLA, and perhaps under state and local law. Although these statutes provide no guarantees of success, plaintiffs should attempt to seek relief under them if they believe they have suffered an adverse employment action as a result of their association or relationship with an ill individual. Perhaps the facts of a particular case, although not sufficient to prove a cause of action under the association provision of the ADA, will prove sufficient under a different statutory provision.

Just as the ADA has proven to be ineffective for individuals with physical or mental impairments, it has also proven to be ineffective for those who have relatives or associates with these types of health conditions. Unless and until Congress and the courts broaden the ADA's protection, the dreams of the proponents of the ADA will remain just that, and the ADA will continue to be a very ineffective piece of "landmark" legislation.