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Co-founder of Levin & Nalbandyan, LLP, partner Jacob Nalbandyan heads the civil litigation department focused on labor and employment law. He argued for plaintiff-appellant in *Castro-Ramirez v. Dependable Highway Express, Inc.*, an associational disability discrimination case. Kelly (Ka In) Chan is a member of the employment litigation department at Levin & Nalbandyan, LLP, where she practices labor & employment law. Passionate about justice, she works hard to make sure her clients get rightfully compensated, and volunteers in multiple legal clinics.

MCLE Self-Study:

ASSOCIATIONAL REASONABLE ACCOMMODATIONS? DEFINITELY MAYBE!

By Jacob Nalbandyan and Kelly (Ka In) Chan

INTRODUCTION

As associational disability discrimination laws take shape in California, we must familiarize ourselves with their interplay with related reasonable accommodation and interactive process laws. This is particularly pressing in light of the current lack of guidance from California courts. To examine the state of affairs pertaining to the latter two in the context of associational disability, this article will look at the relevant statutes and the cases related to associational disability discrimination. By dissecting relevant cases and the underlying statutes, the authors conclude that because associational disability discrimination protections exist, so must related protections against the failure to reasonably accommodate and participate in an interactive process.

In California, the Fair Employment and Housing Act (FEHA)[1] affords wide protections to employees with disabilities. It imposes strict affirmative duties on the employer in this regard, all of which are aimed at maintaining a healthy continuity of employment both for the interests of employees and employers. In this regard, the Legislature has declared these protections a matter of public policy,[2] which must, therefore, be at the heart of the discussions surrounding related legal issues.

A more complex issue arises in this legal space, however, when it comes to whether the same protections apply to an employee who is not disabled but is, instead, merely associated with a disabled person but needs a reasonable accommodation, i.e., flex schedule or intermittent leave.

— Inside the Law Review —

Under federal law, the answer is definitely no.[3] But under California law, presently the answer is definitely maybe.

RELEVANT STATUTES

At the outset, FEHA's anti-discrimination provision makes it unlawful for an employer to terminate or discriminate against an employee because of disability.[4] It also makes it unlawful for an employer to "fail to make reasonable accommodation for the known physical or mental disability" of an employee or to refuse to engage in an interactive process in search of reasonable accommodations.[5] So far, from its plain language, FEHA seems to protect only those who are themselves disabled, right?

Not so. Enter Government Code section 12926(o), which states, in relevant part, that "'disability' . . . includes . . . that the person is associated with a person who has, or is perceived to have" a disability.[6]

Accordingly, by the virtue of plug-and-play analysis, while FEHA protects an employee's actual disability, it also protects that employee's association with another who has a disability even though the employee does not. The California Court of Appeal has twice said so in the context of associational disability discriminatory firings, but has remained silent (somewhat) on the issue of whether an employer *must* also provide reasonable accommodations in this context by engaging an interactive process.[7]

This silence has put both California employers and employees in a conundrum, illustrated by the following hypothetical:

> *Johnny has worked for XYZ, Inc. for three months and just learned that his wife has become wheelchair-bound, necessitating that he occasionally arrive late to or leave early from work. He approaches the HR boss, Jane, who thinks to herself: "I know I can't fire him because that might constitute associational disability discrimination, but there's nothing on the books requiring me to accommodate him either."*

So what should Jane do? Let's explore what is most prudent, keeping in mind the State's public policy.

RELEVANT CASES

Unfortunately, an examination of the legislative history of the relevant statutes we have examined so far reveals nothing pertaining to the intent of the Legislature. The FEHA is silent on whether the interactive process and reasonable accommodation apply equally to associational disability.[8]

Nonetheless, there are several cases in the associational disability discrimination context that indirectly shed light on the issue at hand. Acutely though, at the core of each of those cases, and factually, is an employee's need for a reasonable accommodation because of that employee's association with a disabled person.

Take note of how each played out.

ROPE V. AUTO–CHLOR SYSTEM OF WASHINGTON, INC. (2013)

Rope v. Auto–Chlor System of Washington, Inc. was the first published case in California that discussed associational disability discrimination under FEHA. In *Rope*, the court established that FEHA affords a cause of action for associational disability discrimination.[9]

There, an employee requested a paid leave of absence to donate a kidney to his sister, and the employer terminated him.[10] At the demurrer stage, the *Rope* court found a reasonable inference that the employer committed associational disability discrimination, because it "acted preemptively to avoid an expense stemming from [the employee's] association with his physically disabled sister."[11] The court held the employee had met his burden "to show the adverse employment action occurred under circumstances raising a reasonable inference that the disability of his relative or associate was a substantial factor motivating the employer's decision."[12]

Rope did not discuss the applicability of FEHA's interactive process and reasonable accommodation provisions to employees associated with disabled persons. However, key facts presented in that case turned on a denial of reasonable accommodations for time off not because of one's own disability, but that of another. This holding supported an associational disability discrimination finding when it led to job loss.

KOUROMIHELAKIS V. HARTFORD FIRE INS. CO. (D. CONN. 2014)

Kouromihelakis v. Hartford Fire Ins. Co. is another case with similar facts in the District Court of Connecticut regarding the federal Americans with Disabilities Act (ADA). It ruled that a reasonable inference could be made that the employee was discriminated against based on the association he had with a disabled person.[13]

The employee alleged that he requested a change in hours under the employer's flex time policy to accommodate for his responsibilities to his

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disabled father. The employer denied employee's request and subsequently terminated him.[14] The court concluded that the employee's allegations were sufficient to establish a plausible associational disability discrimination claim, because they supported a reasonable inference that the employer terminated the employee based on a belief about future absences.[15]

At its core, *Kouromihelakis* is yet another case supporting associational disability discrimination in a factual context where an employee needed a reasonable accommodation, but lost his job instead.

CASTRO-RAMIREZ V. DEPENDABLE HIGHWAY EXPRESS, INC. (2016)

Three years after *Rope* was decided, a divided Court of Appeal revisited the issue of associational disability discrimination relying, in part, on *Kouromihelakis* for contextual support. Interestingly, the majority first issued an opinion explicitly on point holding that an employee associated with a disabled employee was entitled to a reasonable accommodation under FEHA, but then vacated it for a toned-down remix of the original on this very issue.[16]

In its now-vacated opinion, the majority explained that reasonable accommodation is intertwined with the employee's discrimination case.[17] The majority further opined that by FEHA's plain language, association with a physically disabled person is itself a disability. Thus, an employer is obligated to reasonably accommodate an employee who is associated with a disabled person.[18]

However, in its revised opinion, which is now published law, the majority turned down the temperature on this issue, but refused to hold back its thoughts on it. "[W]e do not decide this point. We only observe that the accommodation issue is not settled and that *it appears significantly intertwined with the statutory prohibition against disability discrimination*. . . ."[19] Nevertheless, the majority noted, "[w]hen [Government Code section 12940(m)] requires employers to reasonably accommodate 'the known physical . . . disability of an applicant or employee,' read in conjunction with other relevant provisions, subdivision (m) may reasonably be interpreted to require accommodations based on the employee's association with a physically disabled person."[20]

In *Castro-Ramirez*, the employee alleged that he was terminated by the employer after he refused to work the assigned shift because it impacted his ability to leave early enough from work to provide dialysis to his disabled son.[21] The majority found there was no apparent reason why the supervisor could not have scheduled the employee for one of the eight earlier available shifts.[22] Based on these facts, the majority held that a reasonable inference could be made that the employer "acted proactively to avoid the nuisance [the employee's] association with his disabled son would cause [the supervisor] in the future," supporting his associational disability discrimination claim.[23]

This too was a case at its heart about an employee's need for a reasonable accommodation, as immediately recognized by the court. In the end, it triggered associational disability discrimination liability exposure regardless.

Unsurprisingly, met the majority opinion a strong dissent. In the majority's view, the interpretation of FEHA should part ways from the federal decisional authority when the statutory language of ADA and FEHA is not parallel, like in the associational disability context.[24] The majority found the ADA structurally different from FEHA because ADA does not define the term "disability" itself as including association with the disabled.[25] Still, the dissent refused to construe FEHA as departing from the ADA in this context. Indeed, consistent with the ADA and Circuit Court opinions interpreting it, the dissent opined that FEHA does not extend accommodation rights to a non-disabled employee's disabled associates.[26]

IMPLICATIONS GOING FORWARD

Interestingly, a very recent federal case in the Southern District of California adopted *Castro-Ramirez* as it pertains to reasonable accommodation protections in the context of associational disability. In *Castro v. Classy Inc*., the court stated that "while the California Supreme Court has not yet held that FEHA provides a cause of action for associational discrimination, the decisions of California's appellate courts are 'not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest

court of the state would decide otherwise.'"[27] In doing so, the court interpreted that Government Code section 12926 (o) indeed applies to FEHA's reasonable accommodation provision in the same way it prohibits associational discrimination.[28]

In sum, FEHA's associational disability discrimination prohibition appears inseparable from the issue of reasonable accommodation, which also triggers the duty to engage in an interactive process. That is to say, the same set of facts have repeatedly triggered associational disability discrimination protections. To avoid the conundrum highlighted in our hypothetical above, they must also trigger the related reasonable accommodation and interactive process protections. This view is also consistent with California's stated public policy.

Although the issue is not yet settled, best practices dictate that a California employer should provide reasonable accommodations in this context to limit liability exposure stemming from an almost inevitable wrongful associational disability discrimination claim should it lead to a job loss, as evidenced by the cases examined above.

Returning back to our HR friend Jane in the hypothetical above, to limit her company's liability, she should accommodate Johnny in the same way she would if Johnny were himself disabled.

ENDNOTES

1. Cal. Gov't Code §§ 12900-12999 (West 2021).
2. Cal. Gov't Code §§ 12920-12921 (West 2021).
3. *Larimer*, at 700; *Erdman v. Nationwide Ins. Co.*, 582 F.3d 500, 510 (3d Cir. 2009) ("the association provision does not obligate employers to accommodate the schedule of an employee with a disabled relative"); *Den Hartog v. Wasatch Acad.*, 129 F.3d 1076, 1084-85 (10th Cir. 1997) (employer not required to provide employee with a reasonable accommodation for his son's disability); *Tyndall v. National Educ. Ctrs. of Calif.*, 31 F.3d 209, 214 (4th Cir. 1994) ("The ADA does not require an employer to restructure an employee's work schedule to enable the employee to care for a relative with a disability").
4. Cal. Gov't Code § 12940(a)(1) (West 2021).
5. Cal. Gov't Code §§ 12926(m)-(n) (West 2021).
6. Cal. Gov't Code § 12926(o) (West 2021).
7. *Rope v. Auto-Chlor Sys. of Washington, Inc.*, 163 Cal. Rptr. 3d 392, 410–412 (2013), *superseded by statute as stated in Castro-Ramirez v. Dependable Highway Express, Inc.*, 207 Cal. Rptr. 3d 120 (2016).
8. *Discrimination—Employment and Housing*, 1987 Cal. Legis. Serv. 605 (West); *Discrimination—Civil Rights—General Amendments*, 1999 Cal. Legis. Serv. Ch. 591 (A.B. 1670) (West); *Civil Rights—Medical And Physical Disability And Mental Condition*, 2000 Cal. Legis. Serv. Ch. 1049 (A.B. 2222) (West); *Employment—Disability Accommodations—Religious Accommodations*, 2015 Cal. Legis. Serv. Ch. 122 (A.B. 987) (West); *Labor And Employment—Discrimination—Unlawful Practices*, 2017 Cal. Legis. Serv. Ch. 799 (A.B. 1556) (West).
9. *Rope v. Auto-Chlor Sys. of Washington, Inc.*, 163 Cal. Rptr. 3d 392, 410-412 (2013), *superseded by statute as stated in Mathews v. Happy Valley Conference Center, Inc.*, 43 Cal. App. 5th 236 (2019).
10. *Rope* at 399-400, 412.
11. *Id.* at 412.
12. *Id.*
13. *Kouromihelakis v. Hartford Fire Ins. Co.*, 48 F. Supp. 3d 175 (D. Conn. 2014).
14. *Id.* at 180-81.
15. *Id.*
16. *Castro-Ramirez v. Dependable Highway Express, Inc.*, 200 Cal. Rptr. 3d 674, 683 (2016), *reh'g granted, opinion not citable* (Apr. 27, 2016), *vacated*, 207 Cal. Rptr. 3d 120 (2016); *Castro-Ramirez v. Dependable Highway Express, Inc.*, 207 Cal. Rptr. 3d 120 (2016).
17. *Castro-Ramirez*, 200 Cal. Rptr. 3d at 683.
18. *Castro-Ramirez*, 200 Cal. Rptr. 3d at 684.
19. *Castro-Ramirez*, 207 Cal. Rptr. 3d 120, 129 (italics added).
20. *Id.* at 128-129.
21. *Id.* at 132-33.
22. *Id.* at 132.
23. *Id.* at 132.
24. *Id.* at 133.
25. *Id.*
26. *Id.* at 144-45 (Grimes, J., dissenting).
27. *Castro v. Classy Inc*, No. 3:19-CV-02246-H-BGS, 2020 WL 996948, at *5 (S.D. Cal. Mar. 2, 2020) (citing *Kwan v. SanMedica International.*, 854 F.3d 1088, 1093 (9th Cir. 2017).
28. *Id.*