Finally, associational bias to get appellate ruling

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Can an employee who was terminated from his job not because he is a member of a protected class, but because of his association with someone who is, bring a claim for employment discrimination under G.L.c. 151B?

For 30 years, the administrative agency charged with enforcing Chapter 151B, the Massachusetts Commission Against Discrimination, has said yes. But in those 30 years — and, indeed, since Chapter 151B was enacted in 1946 — no Massachusetts appellate court has addressed the question.

That will finally change. This month, the Supreme Judicial Court took up the issue in the case of Flagg v. AliMed, Inc. (SJC-11182).

Flagg, an 18-year employee of AliMed, alleges that he was discharged because AliMed wanted to avoid costs associated with medical treatment for his wife, who suffered from brain cancer. A Superior Court judge dismissed the claim, concluding that Chapter 151B does not authorize an action for associational discrimination. Flagg appealed, and the SJC took the case sua sponte.

In arguing for upholding the dismissal of Flagg's claim, AliMed relies on a one-dimensional reading of the statute. Among the provisions of 151B relevant to handicap discrimination, the statute speaks of unlawful termination of an employee because of "his" handicap. See G.L.c. 151B, §4(16).

AliMed says that because Flagg was not himself handicapped, even though his wife was, the statute provides him no relief.

But while the words of §4(16) are important, they are not the only way to divine what the Legislature sought to accomplish through Chapter 151B. Even "textualist" Justice Antonin Scalia (see my review of his book, "Reading Law: The Interpretation of Legal Texts," on Oct. 8, 2012) acknowledges that no single canon of interpretation — including looking at the plain meaning of statutory language — is absolute.

The project of statutory interpretation, Scalia says, is to employ relevant canons to determine the statute's fair meaning, including what the law reasonably implies. Scalia even wrote a recent opinion that supports Flagg's view that 151B covers associational discrimination (I'll return to Scalia's opinion in a bit).

Closer to home, the SJC just last month eschewed a cold, literal reading of an employment statute, in its decision in Crocker v. Townsend Oil Co., Inc., 464 Mass. 1 (2012).

There, despite language in the Wage Act that "no [employer] shall … exempt" itself from the act's provisions by "a special contract with an employee or by any other means," the court held that an employee can waive his rights under the act if he does so unmistakably. See id. at 8.

The court expressly refused to look only at the plain meaning of the statute; it considered public policy interests favoring the enforcement of general releases and the desirability of allowing parties to settle Wage Act claims when the parties intend to do so. See id. at 7-8.

By refusing to engage in a hyper-technical reading of the statute, the court arrived at a sensible decision. The same should happen in Flagg's case.

The question now facing the SJC is whether 151B prohibits an employer from discharging a non-handicapped employee when the motivation for doing so is to avoid costs associated with the employee's handicapped spouse.

Among the useful tools for answering that question is looking at how courts in other jurisdictions have decided associational discrimination claims under statutes with similar wording to that of Chapter 151B.

On the federal side, a close analogy to 151B is Title VII. Just as G.L.c. 151B, §4(16) speaks of whether an employee was discriminated against because of "his" handicap, Title VII speaks in terms of whether an employee was discriminated against because of the race of "such individual." See 42 U.S.C. § 2000e–2(a)(1).

While Title VII says nothing about associational discrimination, the statute has been read to create a cause of action for this discrimination. See Gallo v. W.B. Mason Co. Inc., 2010 WL 4721064, at *1 (D. Mass. Nov. 15, 2010), citing Barrett v. Whirlpool Corp., 556 F.3d 502, 512 (6th Cir. 2009) ("Title VII does prohibit associational discrimination on the basis of race, when a person of one race associates with third persons of another race and is therefore subjected to discriminatory animus … the difference in race between the Title VII plaintiff and the third persons is the motivation for the discrimination").

The relationship between a non-handicapped employee and his handicapped spouse is comparable to the association between an employee of one race and a third party of another.

Applying the reasoning used in the Title VII context to Chapter 151B, one could say that an employer contravenes either statute when, in acting adversely against an employee, the employer is motivated by attributes of the employee and a third party that, taken together, implicate a protected class.

Besides Title VII, anti-discrimination statutes of foreign states, with language comparable to 151B, have also been construed to create claims for associational discrimination. For instance, Ohio Rev. Code §4112.02(A), like 151B, on its face prohibits termination of an employee because of the race or handicap of "that person."

Despite that language, the statute has been interpreted to cover associational discrimination. See Edizer v. Muskingum Univ., 2012 WL 4499030, *7 (S.D. Ohio Sept. 28, 2012) (discharged professor stated claim for handicap discrimination when she was terminated because of care-giving responsibilities for disabled son and other family members); Maxwell v. City of Columbus, 2011 WL 2493525, *4 (S.D. Ohio June 21, 2011) (white employees stated claim for race discrimination based on association with African-American co-workers); Cole v. Seafare Enters. Ltd., Inc., 1996 WL 60970, *1-2, (Ohio Ct. App. Feb. 14, 1996) (white employee stated claim for race discrimination based on association with African-Americans). See also Berry v. Frank's Auto Body Carstar, Inc., 817 F. Supp. 2d 1037, 1047-1048 (S.D. Ohio 2011) (declining to decide whether associational discrimination claim viable for employee discharged because of treatment costs associated with son's disability, but recognizing that Ohio state court decisions support the claim).

Maryland's anti-discrimination statute has been construed in a similar manner. Maryland Code Ann., State Gov't §20-606(a) prohibits discharging an employee because of "the individual's" disability. Despite the absence of an explicit provision against associational discrimination, the statute has been held to cover such bias. See Barkhorn v. Ports Am. Chesapeake, LLC, 2012 WL 2234358, *5-6 (D. Md. June 14, 2012) (Maryland statute creates cause of action for associational disability discrimination). See also Gutwein v. Easton Publishing Co., 272 Md. 563, 567-568 (Md. 1974) (predecessor to §20-606[a] contained cause of action for white employee terminated because of association with black fiancée).

Flagg's association with his handicapped wife distinguishes his case from Macauley v. Massachusetts Comm'n Against Discrimination, 379 Mass. 279 (1979). There, although sexual preference was not, at the time, defined as a protected class under 151B, there is no question in Flagg's case that handicapped persons are.

The Macauley case does not preclude the SJC from holding that, if AliMed was motivated to terminate Flagg by his association with a member of a protected class, AliMed violated 151B.

Let us return to Justice Scalia. Writing for a unanimous court in 2011, he construed Title VII's anti-retaliation provisions to grant a cause of action to an employee who was terminated not because he filed a discrimination charge, but because a fellow employee — his fiancée — did so. See Thompson v. North Am. Stainless, LP, 131 S.Ct. 863, 869-870 (2011).

The court so held even though Title VII's language authorizes a cause of action for an "aggrieved" employee who was discriminated against because "he" made a charge under Title VII. See 42 U.S.C. §2000e-3(a), & §2000e-5(b), (f)(1).

The court found that, although Thompson was terminated for his fiancée's having made a charge, he fell within the "zone of interests" protected by Title VII. See Thompson, 131 S.Ct. at 870.

In other words, Thompson's interests were not "so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." Id (internal citation omitted).

Moreover, the court said that Thompson was not an "accidental victim" of the employer's retaliation; "injuring him was the employer's intended means of harming [his fiancée]." Id.

Similar circumstances exist in Flagg's case. As Flagg claims, terminating him was AliMed's means of avoiding medical costs associated with his handicapped wife.

If the conditions in Thompson were sufficient to convince Justice Scalia, the avowed textualist, to conclude that Thompson's interests fell within the zone of Title VII, the SJC should conclude that comparable conditions in Flagg's case sweep him within the zone of interests of Chapter 151B.

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