William & Mary Journal of Race, Gender, and Social Justice

Volume 25 (2018-2019)
Issue 3

Article 8

June 2019

A Reasonable Solution for Working Parents: Expanding Reasonable Accommodation Under the Americans with Disabilities Act to Parents of Children with Disabilities

Katherine Lease

A REASONABLE SOLUTION FOR WORKING PARENTS: EXPANDING REASONABLE ACCOMMODATION UNDER THE AMERICANS WITH DISABILITIES ACT TO PARENTS OF CHILDREN WITH DISABILITIES

> *The obligation for working mothers is a very precise one: the feeling that one ought to work as if one did not have children, while raising one's children as if one did not have a job.*[1]

ABSTRACT

There is a growing intersection between a woman's child-rearing and work responsibilities, but federal law inadequately addresses this issue. For mothers who have a child with a disability, they face increased parenting demands, which often lead to detrimental changes in their employment status and negative perceptions of their work ability and commitment. Many women face expectations to simultaneously be the perfect mother and the ideal worker, but this is largely unattainable when faced with the demands of raising a child with a disability.

This Note will explore the development and inadequacy of the current protection against association discrimination, that is, discrimination based on one's association with a person with a disability. This Note will explain how these parents are likely to experience the effects of their child's disability in profound ways and how this translates to discrimination in the workplace.

This Note suggests a solution to help working parents who are the primary caregivers of a child with a disability. This proposal will extend the reasonable accommodation provision under the Americans with Disabilities Act to cover primary caregivers of children with disabilities. This Note will explain why these primary caregivers will most often be women and will discuss the significance of this expansion for the women within this class. This Note will conclude by explaining the implications of this expansion to caregivers of other classes, such as caregivers of the elderly.

---

1. Jennifer Parris, *The Working Mother Conundrum*, 1 MILLION FOR WORK FLEXIBILITY (Dec. 14, 2015) (quoting ANNABEL CRABB, THE WIFE DROUGHT (2015)), https://www.workflexibility.org/the-working-mother-conundrum [https://perma.cc/8NBF-SZ2V].

INTRODUCTION

Title VII of the Civil Rights Act of 1964 protects people from discrimination based on their race, color, religion, sex and national origin.[2] More specifically, disability civil rights were solidified through the Rehabilitation Act of 1973,[3] and most prominently through the Americans with Disabilities Act (ADA) in 1990.[4] This landmark federal legislation contains a little-known provision that extends some protection to a much smaller class of people.[5] The provision, known as the "association provision," prohibits discrimination based on a relationship or association with an individual with a disability, regardless of whether that person has a disability themselves.[6] This is intended to prevent adverse employment actions against those

2. 42 U.S.C.A. § 2000e (West 1964).
3. 29 U.S.C.S. § 701(b)(1)–(5) (LexisNexis 1973).
4. 42 U.S.C.S. § 12101(b)(1)–(4) (LexisNexis 1990).
5. 42 U.S.C.S. § 12112(b)(4) (LexisNexis 1990).
6. *Id.*

who have an association to a person with a disability, including parents who care for their children with disabilities.[7]

Despite the creation of these disability-centric laws, federal fair employment practice laws do not specifically prohibit discrimination against caregivers as a protected class.[8] Without a protected category, caregivers must ensure that they fit the specific framework[9] under the ADA's association provision in order to bring a successful claim of discrimination against their employers.[10] Even with this provision, it has proven to be extremely difficult to make a successful prima facie case under the law.[11] Because of this, parents need alternative solutions that can protect them both while they are working and when they need to take varying lengths of leave from their jobs to tend to child-rearing responsibilities.[12]

This Note suggests a solution to provide enhanced protections to ensure that parents do not encounter discrimination in the workplace while caretaking for their child with a disability. Part I will provide a brief history of the development and purpose of the association provision under the ADA. Part II will analyze the challenges associated with raising a child with a disability and the specific implications of doing so for mothers. Part III will argue that the reasonable accommodation provision of the ADA should be extended to those parents who are the primary caretakers of children with disabilities.[13] This Part will also discuss how these parents, most often mothers, experience their child's disability in a "derivative" manner, such that they themselves experience the effects of the child's disability.[14]

---

7. *See* Joan C. Williams & Consuela A. Pinto, *Family Responsibilities Discrimination: Don't Get Caught off Guard*, 22 LAB. L. 293, 313 (2007).

8. *See* Naomi C. Earp, *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities,* EEOC (May 23, 2007), https://www.eeoc.gov/policy/docs/caregiving.html [https://perma.cc/9KFR-H8YD]. Despite this, there are various situations in which discrimination against caregivers can constitute unlawful disparate treatment, so caregivers can find a claim of action under the ADA. *Id.*

9. *See* Den Hartog v. Wasatch Acad., 129 F.3d 1076, 1081–82 (10th Cir. 1997) (providing the commonly used framework for proving a successful cause of action under this provision).

10. *See* Lawrence D. Rosenthal, *Association Discrimination Under the Americans with Disabilities Act: Another Uphill Battle for Potential ADA Plaintiffs*, 22 HOFSTRA LAB. & EMP. L.J. 132, 143 (2004) (highlighting the major reasons why association discrimination claims often fail).

11. *Id.* at 144.

12. *See, e.g.*, Rachel Arnow-Richman, *Incenting Flexibility: The Relationship Between Public Law and Voluntary Action in Enhancing Work/Life Balance*, 42 CONN. L. REV. 1081, 1084 (2010); Marianne DelPo Kulow, *Legislating a Family-Friendly Workplace: Should It Be Done in the United States?*, 7 NW. J.L. & SOC. POL'Y 88, 91 (2012).

13. *See* 42 U.S.C.S. § 12111(9) (LexisNexis 1990).

14. Karen Syma Czapanskiy, *Disabled Kids and Their Moms: Caregivers and Horizontal Equity*, 19 GEO. J. POVERTY LAW & POL'Y 43, 61 (2012). A caregiving parent of a child with a disability experiences disability in a derivative manner. The parent's exclusion from

Accordingly, this Note will argue that mothers should be entitled to stronger protection under the law.[15] Furthermore, Part III will explain that such reasonable accommodations do not need to rise to the same level of accommodations for those employees with a disability but should, at the very least, include provisions to allow increased flexibility in the caregiver's work schedule.[16] Part IV will address and respond to anticipated criticisms of the proposal. Finally, Part V will illustrate how the extension of reasonable accommodations can similarly assist primary caretakers of the elderly, who are also often women.[17]

I. ASSOCIATION PROVISION IN A NUTSHELL

A. What Is the Purpose of the ADA?

In 1990, President George H.W. Bush enacted the ADA, after a decades-long battle within the disability community for equal rights.[18] President Bush proclaimed, "Let the shameful wall of exclusion finally come tumbling down," declaring that Americans with disabilities are equal members of society and accordingly deserve legal protection to ensure access to mainstream life.[19] The ADA guarantees that those with disabilities have an equal opportunity to achieve the same level of performance as their nondisabled colleagues in all aspects of life.[20] With this goal in mind, Title I of the ADA was created to prohibit employment discrimination for all private, as well as state or local government employers, with fifteen or more employees.[21]

Under the ADA, a qualified person with a disability is entitled to a reasonable accommodation that will put them on an equal footing with nondisabled employees.[22] A reasonable accommodation includes a modification or adjustment to the job application process, to the job environment or manner in which the job is performed, or to the non-job area that enables the person to enjoy the same benefits and

---

the labor market is a result of the child's special need for care and the market's inability to structure employment for caregivers of children with special needs. *Id.* at 66.

15. *See id.* at 61.

16. § 12111(9).

17. Joan C. Williams et al., *Protecting Family Caregivers from Employment Discrimination*, AARP PUB. POL'Y INST. 2 (Aug. 2012).

18. *ADA—Findings, Purpose, and History*, ADA NAT'L NETWORK, https://www.adaanniversary.org/findings_purpose [https://perma.cc/UL89-XLBU].

19. President George H.W. Bush, *Remarks of President George Bush at the Signing of the Americans with Disabilities Act*, EEOC 35TH ANNIVERSARY, https://www.eeoc.gov//eeoc/history/35th/videos/ada_signing_text.html [https://perma.cc/K9YC-RX9B].

20. WILLIAM D. GOREN, UNDERSTANDING THE ADA 1 (Am. Bar Ass'n eds., 4th ed. 2013).

21. 42 U.S.C.S. § 12111(5)(A) (LexisNexis 1990).

22. 42 U.S.C.S. § 12111(9) (LexisNexis 1990).

privileges as other nondisabled employees.[23] Employers are not required to provide an applicant or employee without a disability a reasonable accommodation because this legal duty applies only to qualified employees with disabilities.[24] Thus, those who are caregivers of children with disabilities are not afforded the same accommodations under the law.[25]

B. How Did the Association Prong Develop?

In addition to traditional concerns, Congress also considered caregivers for people with disabilities when developing the ADA.[26] When Congress debated the law, associative discrimination was an important discussion: "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."[27] At the time of the passage of the ADA in the early 1990s, heightened focus on the Acquired Immunodeficiency Syndrome (AIDS) epidemic brought this particular provision to the forefront of the debate.[28] For example, testimony provided before the House and Senate subcommittees by a woman who was fired from her job because her employer learned of her son's AIDS diagnosis was influential in the passage of the provision.[29] This law was a clear response to discrimination against caregivers or anyone else associated with a person who had AIDS.[30]

Yet, despite this legislative intent, these protections were not meant to extend so broadly beyond the person with the disability.[31] Therefore, associates of a person with a disability have very little leeway or flexibility when their caretaking duties interfere with

---

23. *See id.*

24. *See* RUTH COLKER & BONNIE POITRAS TUCKER, THE LAW OF DISABILITY DISCRIMINATION HANDBOOK: STATUTES AND REGULATORY GUIDANCE 29 (Anderson Publ'g Co. eds., 3d ed. 2000).

25. *See id.*

26. *See* Rosenthal, *supra* note 10, at 137.

27. *Id.*

28. *See* Josephine Gittler & Sharon Rennert, *HIV Infection Among Women and Children and Antidiscrimination Laws: An Overview*, 77 IOWA L. REV. 1313, 1324 (1992).

29. *See* Den Hartog v. Wasatch Acad., 129 F.3d 1076, 1082 (10th Cir. 1997) (citing H.R. Rep. No. 101-485, pt. 2, at 30 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 312).

30. At the time, there was a falsely held belief that AIDS was contagious via common contact. Elizabeth Landau, *HIV in the '80s: 'People Didn't Want to Kiss You on the Cheek,'* CNN (May 25, 2011, 7:42 AM), http://www.cnn.com/2011/HEALTH/05/25 /edmund.white.hiv.aids/index.html [https://perma.cc/3YVD-8ZBM] ("And back when people thought HIV could be transmitted through saliva or tears, they would limit their casual contact . . . . 'Mothers didn't want me picking up their babies. People didn't want to kiss you on the cheek. People certainly didn't want to have sex with you . . . .'").

31. *See* 42 U.S.C.S. § 12101(b)(1)–(4) (LexisNexis 1990).

work responsibilities.[32] If a nondisabled employee violates an employer policy, such as attendance or tardiness, he or she can legally be dismissed, regardless of whether the absence or tardiness was related to caretaking of the relative with a disability.[33] Even though this association provision exists, the current legal protections for caretakers are not nearly as broad or protective as are the protections for a qualified person with a disability.[34]

C. What Conduct Does the Association Provision Prohibit?

The provision prohibits a variety of discriminatory conduct.[35] The most basic prohibition is refusing to hire an individual who has a child with a disability based on the assumption that the applicant will be distracted at work and generally unreliable.[36] The protection also extends to currently employed persons who, for example, may be denied a promotion or opportunity for advancement based on the assumption that the employee will not be as dedicated as another employee.[37]

Additionally, health care and increased insurance costs are considered within the provision, so that employers cannot deny health care coverage because of an employee's dependent with a disability.[38] Therefore, rejecting an applicant based on a potential for increased health insurance costs or subjecting the employee to different terms and conditions of insurance is strictly prohibited under the law.[39]

D. How Does the Association Prong Work Within the ADA?

Unlike many other federal statutes that have broad protection for certain classes,[40] the ADA at its core only protects an individual with a qualified disability.[41] A disability is defined as a "physical or mental impairment that substantially limits one or more major life activities of such individual."[42] Before the ADA Amendment Act of 2008 (ADAAA), a qualifying disability was narrowly construed by the

32. *See* Rosenthal, *supra* note 10, at 138.
33. *See id.*
34. *See id.* at 205.
35. *See Questions and Answers About the Association Provision of the Americans with Disabilities Act*, EEOC, https://www.eeoc.gov//facts/association_ada.html [https://perma.cc/43NL-8HHJ].
36. *See id.*
37. *See id.*
38. *See id.*
39. *See id.*
40. *See, e.g.*, 42 U.S.C.A. § 2000e (West 1991); 29 U.S.C.S. § 623(a) (LexisNexis 2008).
41. *See* 42 U.S.C.S. § 12102(1)(A) (LexisNexis 1990).
42. *Id.*

courts, limiting the initially intended expansive breadth and scope of the law.[43] Today, even with the broader definition under the ADAAA, caregivers trying to claim association discrimination still must first prove that their relative is "qualified" as having a disability under the law.[44] Once the person is determined to have a qualifying disability, the parent or other caretaking relative must also demonstrate that they have a sufficient relationship with the qualified person.[45] Overcoming these initial hurdles are imperative to a successful claim under the provision.[46]

Although there have not been many successful actions under this provision, one case created the framework for such claims that is still used today.[47] In *Den Hertog v. Wasatch Academy*, the plaintiff was discharged from her job because her son, who had bipolar affective disorder, attacked members of the school community.[48] She sued under the association provision.[49]

The court considered the suggestions of both parties and the established case law decided under the ADA's generic provisions to create a four-step test to establish a prima facie case for association discrimination:

> 1. [was the] plaintiff . . . "qualified" for the job at the time of the adverse employment action;
> 2. [was the] plaintiff . . . subjected to an adverse employment action;
> 3. [was the] plaintiff . . . known by h[er] employer at the time to have a relative or associate with a disability; [and]
> 4. [did] the adverse employment action occur under circumstances raising a reasonable inference that the disability of the . . . associate was a determining factor in the employer's decision[?][50]

The plaintiff bears the burden to demonstrate the existence of these four factors.[51] After the prima facie case is satisfied, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason

---

43. *Fact Sheet on the EEOC's Final Regulations Implementing the ADAAA*, EEOC, https://www.eeoc.gov//laws/regulations/adaaa_fact_sheet.cfm [https://perma.cc/R3PB-XZPH].

44. This can sometimes be a difficult threshold to meet. *See, e.g.*, Tyndall v. Nat'l Educ. Ctrs., 31 F.3d 209, 214 (4th Cir. 1994).

45. The scope of the provision is not limited to familial relationships, but must be "close enough" to fit the purpose of the ADA. COLKER & TUCKER, *supra* note 24, at 28.

46. *See* Den Hartog v. Wasatch Acad., 129 F.3d 1076, 1083 (10th Cir. 1997).

47. *Id.* at 1081–82.

48. *Id.* at 1077.

49. *Id.* at 1080.

50. *Id.* at 1085.

51. *See id.*

for the adverse action.[52] To rebut this, the plaintiff must prove that the actual, pretextual reason for the adverse action is discrimination.[53]

Lawrence Rosenthal, a law professor and ADA scholar, explains how this task is not an easy one for plaintiffs, as evidenced by the very low success rates for these types of claims.[54] Rosenthal discusses the major reasons why plaintiffs have been unable to prevail under association claims.[55] One reason he cites is the difficulty in proving the relative has a "disability" within the definition of the law.[56] Another challenge is demonstrating a protected relationship or a "close enough" association with an individual with a disability.[57] Plaintiffs must also prove that the adverse employment actions they suffered were "serious enough" to find an ADA violation.[58] Another challenge is the "knowledge requirement," in which plaintiffs must prove that their employer knew of an associative disability and acted based on this knowledge.[59] Further, some plaintiffs mistakenly attempt to argue that their employer failed to accommodate them; however, the association provision does not require reasonable accommodations for nondisabled employees.[60] Finally, plaintiffs have the burden to prove discriminatory motive or pretext and often are unable to present necessary facts to raise a reasonable inference that there was a sufficient connection between the disability and the adverse employment action.[61] All of these obstacles make it difficult for a plaintiff to prevail on an association claim.[62] Despite these numerous challenges, this law currently remains the primary way for relatives or associates of a person with a disability to bring a discrimination claim under the ADA.[63]

---

52. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). This burden-shifting analysis is implemented when there is no direct evidence of discrimination.

53. *See id.* at 804.

54. *See* Rosenthal, *supra* note 10, at 144.

55. *See id.*

56. *Id.* at 145. With the 2008 Amendment, disability is more broadly construed and thus the challenges in this prong have likely lessened in recent years. Americans with Disabilities Act Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

57. Rosenthal, *supra* note 10, at 154. Although the court conceded the relationship does not need to be familial, it must be an association that Congress intended to protect. *Id.* at 157.

58. *Id.* at 158. These adverse actions must be "ultimate employment decisions"; the ADA was not meant to cover every decision made by employers that could have a "tangential effect upon those ultimate decisions." *Id.* at 159.

59. *Id.* at 163.

60. *See id.* at 169.

61. *See* Rosenthal, *supra* note 10, at 180.

62. *See id.* at 144.

63. The ADA is the most well-known provision, but there are other laws that can also provide protection. *See, e.g.*, Family and Medical Leave Act, 29 U.S.C. §§ 2601–2619 (1993); Employment Retirement Income Security Act, 29 U.S.C. §§ 1000–1461 (1974).

II. IMPLICATIONS FOR MOTHERS: RAISING A CHILD WITH A DISABILITY

Traditionally, women are expected to take the bulk of the caregiving duties when raising children.[64] Although societal norms have shifted as more women continue to join the workforce, women still experience significant disruptions to their employment prospects when they have a child.[65] This is particularly relevant when that child has a disability and requires additional care.[66] Due to outdated yet lasting expectations, a woman in the workplace inherently faces negative stereotypes as her commitment to her job is questioned by the potential for, or existence of, a family.[67] A mother who spends a significant amount of time and resources raising a child with a disability is likely to be greatly disadvantaged in the workplace.[68]

A. Cultural Development of Mothers in the Workforce

Long before the ADA, children with disabilities were segregated from society, put into institutions, and housed away from their families for extended periods of time.[69] This meant that parents often did not partake in raising their own child if he or she had a disability.[70] Beginning in the mid-1960s, courts began to declare these practices unconstitutional, and states began to release children with disabilities into mainstreamed society without any community or home development.[71] Around the same time, the passage of the Civil Rights Act of 1964 expedited the mass entrance of women into the workforce.[72] Many children with disabilities returned to their homes at the same time that large numbers of women were entering the workforce.[73] Despite this increase in female work outside the home, husbands

---

64. *See* Lindsay R.B. Dickerson, *"Your Wife Should Handle It": The Implicit Messages of the Family and Medical Leave Act*, 25 B.C. THIRD WORLD L.J. 429, 431, 443 (2005) (reviewing SUSAN J. DOUGLAS & MEREDITH W. MICHAELS, THE MOMMY MYTH (New York: Free Press 2004)).

65. *See* Katelyn Brack, Note, *American Work-Life Balance: Overcoming Family Responsibilities Discrimination in the Workplace*, 65 RUTGERS L. REV. 543, 544 (2013).

66. *See id.* at 549.

67. Megan Erb, Note, *Red Light, Green Light: Assessing the Stop and Go in the Advancement of Women in the Legal and Business Sections*, 14 WM. & MARY J. WOMEN & L. 393, 396 (2008).

68. *See, e.g.*, Czapanskiy, *supra* note 14, at 57 (explaining that seventy percent of caregivers made a change in employment because of their caregiving responsibilities).

69. *Id.* at 50.

70. *See id.*

71. *See id.* The Supreme Court in *Olmstead v. L.C. ex rel. Zimring* held that undue institutionalization of people with disabilities was prohibited as a form of discrimination under the ADA. 527 U.S. 581, 597 (1999).

72. *See* Brack, *supra* note 65, at 546.

73. *See* Czapanskiy, *supra* note 14, at 50; *see also* Brack, *supra* note 65, at 546.

traditionally expected their wives to perform the same amount of housework and child care as before this shift.[74] At this point, the conflict between parenting and work life began to increase dramatically.[75]

As more mothers entered the workforce, sex discrimination became a ripe issue for courts to address.[76] In 1971, the Supreme Court in *Phillips v. Martin Marietta Corp.* held that an employer could be liable under Title VII of the Civil Rights Act for maintaining a policy that rejected female applicants with preschool aged children, while hiring males with similarly aged children.[77] Initially, the lower court sided with the employer, reasoning that mothers "should put their family obligations first and that this necessarily would result in lower productivity in the workplace for working mothers."[78] The lower court's ruling reflected a commonly held belief that mothers should be mothers before employees.[79] The Supreme Court ultimately rejected this notion, and Justice Marshall's concurrence noted that it was Congress's intent to prevent employment decisions based on stereotyped characterizations of sex.[80] Instead, Justice Marshall stated that employment opportunities should only be limited to criteria that are gender-neutral.[81] Since then, courts have recognized and prohibited discrimination in the workplace based on common gender stereotypes related to caregiving.[82]

From the 1980s into the 1990s, the new cultural focus was "new momism."[83] This concept advanced a position that mothers are the ideal primary caretakers of their children, and in order to be a good mother, a woman must devote all of her time, energy, and attention to her children.[84] However, this idea did not demand a woman should stay home.[85] Instead, it asserted that since women have experienced life in the workforce, they should now have sufficient knowledge to

---

74. *See* P.K. Runkles-Pearson, Note, *The Changing Relations of Family and the Workplace: Extending Anti-Discrimination Laws to Parents and Nonparents Alike*, 77 N.Y.U. L. REV. 833, 834 (2002).

75. *See id.*

76. *See, e.g.*, Lynn Povich, *Women in the Workplace: How 'Good Girls' Fight Back*, L.A. TIMES (Oct. 7, 2012), https://articles.latimes.com/2012/oct/07/opinion/la-oe-povich-newsweek-discrimination-gender-20121007 [https://perma.cc/NBY8-C3D6].

77. *See* Phillips v. Martin Marietta Corp., 400 U.S. 542, 542 (1971).

78. Martha Chamallas, *Mothers and Disparate Treatment: The Ghost of* Martin Marietta, 44 VILL. L. REV. 337, 340 (1999) (describing the lower court's holding).

79. *Id.* at 345.

80. *Phillips*, 400 U.S. at 545 (Marshall, J., concurring).

81. *Id.* at 547.

82. *See* Brack, *supra* note 65, at 548.

83. Alison A. Reuter, Comment, *Subtle but Pervasive: Discrimination Against Mothers and Pregnant Women in the Workplace*, 33 FORDHAM URB. L.J. 1369, 1401 (2006).

84. *See id.*

85. *See id.*

make the "right choice" to stay home with their children.[86] This represented a marked shift back to the ideals of the 1950s with heightened, and often unrealistic, expectations for mothers.[87]

Importantly, in 1989, the Supreme Court held in *Price Waterhouse v. Hopkins* that gender stereotyping is unlawful, indicating the Court's support for gender equality in the workforce.[88] Similarly, in 2003, the Supreme Court recognized that gender stereotypes about caregiving lead to discrimination in the workplace.[89] Finally, in *Back v. Hastings on Hudson Union Free School District*, the Second Circuit held that employment action based on stereotypes of motherhood is a form of discrimination.[90]

Despite these legal advances and recognition, as a result of their physical needs, women typically must take off time from work following child-rearing.[91] This time with the child leads to learning about the child's needs and forming a strong, natural bond.[92] Based on existing leave policies and the nature of postnatal newborn caregiving, there are visible gendered patterns that reflect underlying stereotypes regarding caretaking.[93] Immediately following childbirth, perceptions of men's and women's parenting competence are formed and ultimately determine the long-term division of child-rearing responsibilities.[94] Women inevitably take some leave when they give birth to or adopt children, and therefore they will naturally assume

---

86. *See id.*

87. *See id.* at 1402.

88. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) ("An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not.").

89. *See generally* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003). The Court explained:

> Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued to regard the family as the woman's domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers' stereotypical views about women's commitment to work and their value as employees.

Id. at 736.

90. *See* Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 122 (2d Cir. 2004).

91. *See* Laura Fijolek McKain, *When Can I Go Back to Work After Delivery?*, BABY CTR., https://www.babycenter.com/404_when-can-i-go-back-to-work-after-delivery_1156149.bc [https://perma.cc/7B6J-FT8B].

92. Dickerson, *supra* note 64, at 441.

93. *See* Joanna L. Grossman, *Job Security Without Equality: The Family and Medical Leave Act of 1993*, 15 WASH U. J.L. & POL'Y 17, 30 (2004).

94. *See id.*

greater caretaking responsibilities.[95] For those mothers who have a child with a disability, the responsibilities are even greater, yet there is still no realistic solution for this large class of women who continue to struggle when faced with conflicting demands.[96]

B. Physical and Emotional Impact of Caregiving

Disability is a prevalent part of family life, affecting many mothers.[97] About one in ten families with children under eighteen years of age have a child with a disability.[98] Raising a child with a disability is a time-intensive endeavor with lasting physical and mental effects on the parents.[99] The average caretaker spends thirty hours a week providing care; in fact, one in four caretakers provide more than forty hours of care a week.[100] These lengthy hours, which are often in addition to other responsibilities such as caring for other children, takes a physical toll on caregivers.[101] There is also an emotional strain on the family unit as a whole.[102] This includes parents worrying not only about "test results, operations, high temperatures, infections, the next therapy sessions, the fight for the right services, the concerns about the future," but also juggling the needs and wants of their other children who may not understand the increased challenges of raising a child with a disability.[103] Much of the emotional strain also comes from the overlapping responsibilities between caregiving and work demands, ultimately leading to increased stress, fatigue, and unhappiness for mothers in this situation.[104]

---

95. *See id.* at 31.

96. *See* Czapanskiy, *supra* note 14, at 73.

97. The 2000 Census Report counted 72.3 million families, and nearly 28.9% of those families reported having at least one family member with a disability. QI WANG, DISABILITY AND AMERICAN FAMILIES: 2000, U.S. CENSUS BUREAU 1, 3 (2005). One in three families with female householders and no husbands reported having a family member with a disability. *Id.* at 5.

98. *See* Linda Stahl & Courtney B. Perez, *Gender, Pregnancy and Caregiver Discrimination Law: You've Come a Long Way Baby!*, 69 ADVOC. 57, 66 (2014).

99. *See* Czapanskiy, *supra* note 14, at 55–56.

100. *See id.* at 56. This totals to an average of 9.5 years over a caregiver's lifetime. *Id.*

101. *Id.* at 56 (discussing that twenty percent of caregivers reported having fair/poor health and over forty percent have moderate or high levels of physical strain).

102. *See, e.g.*, Miriam Gwynne, *A Mother's Perspective: A Disabled Child Is a Disabled Family*, HUFFPOST (Mar. 25, 2016, 3:04 PM), https://www.huffingtonpost.com/miriam-gwynne/a-mothers-perspective-a-disabled-child-is-a-disabled-family_b_9525316.html [https://perma.cc/QEL9-UMJN].

103. *Id.*; *see also* Jeff Howe, *Paying for My Special-Needs Child*, TIME (June 24, 2014), http://time.com/money/2793944/paying-for-my-special-needs-child [https://perma.cc/RPS5-U6KJ].

104. *See infra* Section II.C.

C. Effect on Employment

Raising a child with a disability affects parents on a personal level, but their challenges also extend into the workplace.[105] Nearly seventy percent of parental caregivers make a change in employment due to the demands of raising a child with a disability.[106] These changes are due largely in part to established employment stereotypes and standards.[107] There is an employer perception that women will reduce their workplace commitment because of their child-rearing responsibilities.[108] This is known as "maternal profiling," as employers assume that young women pose a higher risk of exiting the labor force, so they are labeled as "riskier hires."[109] Employers assume that their employees will follow outdated, prescribed gender norms and that women will be less committed and attentive to their work due to family commitments.[110]

Another issue is the pay-gap between working fathers and mothers.[111] Young working men and women without children earn roughly the same amount of money.[112] However, as women approach the age of thirty-five and begin to have children, this trend changes.[113] The pay-gap between men and women dramatically widens around this age when many women's "demands of childcare, parental leave, and career advancement converge."[114] The numbers are staggering, as a mother who works outside the home makes seventy-one cents for every dollar the working father makes.[115]

Furthermore, women are more likely to be impacted by inflexible work schedules.[116] This is because men have better access to flexible employment, and managers are more likely to grant flexible schedules

---

105. *See* Czapanskiy, *supra* note 14, at 57.

106. *Id.* at 56 (discussing that one-third of mothers had to reduce their work hours or take less demanding jobs. Three-fourths of mothers came to work late, left work early, or took additional time off).

107. *See, e.g.*, Keith Cunningham-Parmeter, *(Un)Equal Protection: Why Gender Equality Depends on Discrimination*, 109 NW. U. L. REV. 1, 4 (2014).

108. *See id.*

109. *Id.* at 5.

110. *See* Dickerson, *supra* note 64, at 443.

111. *See, e.g.*, Nara Schoenberg, *The Other Wage Gap: Moms are Paid Less than Dads*, CHI. TRIB. (May 23, 2017, 8:46 AM), https://www.chicagotribune.com/lifestyles/parenting/sc-moms-make-less-study-0523-20170522-story.html [https://perma.cc/79SC-M2TZ].

112. *See* Cunningham-Parmeter, *supra* note 107, at 9.

113. *See id.* at 10.

114. *Id.* (footnote omitted).

115. *See* Schoenberg, *supra* note 111. A mother must work about a year and five months to make as much money as a working dad typically earns in one year.

116. *See* Robert C. Bird, *Precarious Work: The Need for Flextime Employment Rights and Proposals for Reform*, 37 BERKELEY J. EMP. & LAB. L. 1, 3 (2016).

to men as they grow in status.[117] Additionally, men have more opportunities to gain management positions where they can set their own schedules or structure work around any caretaking duties they may have.[118] In contrast, women are more often fearful to request flexible schedules due to their fears of the request negatively impacting the impression of their peers.[119]

Ultimately, there is no question that having a child will impact a woman in all aspects of her life: physically, emotionally, and in the employment sector.[120] Compounding these typical effects with the added weight of raising a child with a disability, creates even further concerns for mothers who are balancing competing demands.[121]

III. EXTENDING REASONABLE ACCOMMODATIONS

A. Derivative Disability

"[C]hildren do not operate independently in the world. They operate dependently; they need a caregiver."[122] For many parents raising a child with a disability, they experience their child's disability in a derivative manner.[123] This is because a child with a disability depends even more so on their parent, to such an extent that the child's disability becomes an integral part of the parent's daily reality.[124] Martha Fineman, a leading scholar on family law and feminist jurisprudence, characterizes this relationship as a "derivative dependency."[125] She explains how caretaking interferes with a parent's ability to pursue employment options, thus shifting his or her energy from personal growth opportunities to time-intensive child caretaking labor.[126] For parents who are in the workforce, they have a strained standing in the public sphere due to caretaking demands in the private sphere.[127] This poor relationship is due to workplaces that typically "operate in modes incompatible with the idea that workers

117. *See id.* at 4.

118. *See* Valentina Zarya, *Working Flexible Hours Can Hurt Your Career—but Only If You're a Woman*, FORTUNE (Feb. 21, 2017), http://fortune.com/2017/02/21/flexible-schedule-women-career [https://perma.cc/P2HQ-D34W].

119. *See id.*

120. *See* McKain, *supra* note 91.

121. *See* Gwynne, *supra* note 102.

122. Czapanskiy, *supra* note 14, at 60.

123. *See* Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. GENDER SOC. POL'Y & L. 13, 20 (2000).

124. *See* Czapanskiy, *supra* note 14, at 61.

125. Fineman, *supra* note 123, at 20.

126. *See id.*

127. *See id.*

also have obligations for dependency," incorrectly assuming that "workers are those independent and autonomous individuals who are free to work long and regimented hours."[128] Thus, these workplace expectations of the ideal worker conflict with realities of caretaking demands of a child with a disability.[129]

Further, the unfortunate reality is that raising a child with a disability is costly.[130] Research shows that having a child with a disability is highly associated with poverty in families.[131] As of 2000, the poverty rate for families with a child with a disability is twenty-one percent higher than families without a child with a disability.[132] Relatedly, mothers who are caretakers are more likely to be employed part-time or work jobs with less earning potential.[133] Ultimately, a decrease in career productivity and an increase in typical child-rearing costs is a detrimental combination for many families, and mothers are hit especially hard.[134] Thus, because the effects of raising a child with a disability are so disabling to the parents themselves, there needs to be a viable solution in the workplace to accommodate these parents.

B. Temporary Fix: Increased Awareness

Currently, parents who face discrimination in the workplace due to the disability of their child must file suit under a patchwork of federal and state laws.[135] "Family caregiver discrimination" can be brought roughly under seventeen legal theories, creating a lack of cohesion and piecemeal coverage that fails to protect parents.[136] This inevitably creates confusion for those attempting to navigate these complex laws and their threshold requirements, because there is no clear federal employment law that protects caretakers.[137] Thus, the first step for change is to increase awareness and understanding of

128. *Id.* at 21.

129. *See id.*

130. *See* Jennifer Pokempner & Dorothy E. Roberts, *Poverty, Welfare Reform, and the Meaning of Disability*, 62 OHIO ST. L.J. 425, 441 (2001).

131. *See id.*

132. Hannah Steinfeld & Yanilsa Frias, *Raising Children with Special Needs—Are Mothers Disabled Too?*, 1 MILLION FOR WORK FLEXIBILITY (Nov. 12, 2014), https://www.workflexibility.org/millennial-voice-raising-children-with-special-needs-mothers-disabled [https://perma.cc/W9RL-URXT].

133. *See, e.g.*, Craig Guillot, *The Cost of Raising a Special Needs Child*, MINT LIFE (July 23, 2013), https://blog.mint.com/planning/the-cost-of-raising-a-special-needs-child-0713 [https://perma.cc/36V6-WS33] ("[M]others of children with autism earn 35% less than mothers of children without autism.").

134. *See generally id.*

135. *See* Williams et al., *supra* note 17, at 10.

136. *Id.*

137. *See id.* at 13.

the current laws. This will help in the interim period before substantive change can occur.[138]

"The first step toward change is awareness."[139] Such awareness will assist parents in protecting themselves in the workforce.[140] Enhanced awareness should occur in a three-tiered process.[141] First, the employee needs to know her legal rights.[142] Second, the employer needs to understand its legal obligations.[143] Lastly, the employer must adequately communicate the law to employees and must enforce the law with fidelity.[144]

1. Employee's Rights

The workplace is comprised of parents, both mothers and fathers, who must balance family responsibilities and work.[145] As of 2016, out of approximately eighty-two million families in the United States, eighty percent of these families had at least one employed member.[146] Thus, working parents comprise a large portion of the workforce and have unique, yet largely unknown, rights based on this classification.[147]

On February 15, 2012, the Equal Employment Opportunity Commission (EEOC) held a press conference to discuss unlawful discrimination against workers with caregiving responsibilities.[148] An attorney reporting for the EEOC stated that "[f]ederal and state family medical leave, accommodation, and anti-discrimination laws have varying eligibility requirements, causing widespread confusion among employers and employees regarding which laws apply."[149] She continued to explain that the EEOC frequently receives phone calls on their

138. *See id.*

139. *Nathaniel Branden Quotes*, BRAINY QUOTES, https://www.brainyquote.com/quotes/nathaniel_brandon_163773 [https://perma.cc/4PPY-F7VQ].

140. *See* Williams et al., *supra* note 17, at 13.

141. *See id.*

142. *See id.*

143. *See id.*

144. *See id.*

145. *See Employment Characteristics of Families—2017*, U.S. DEP'T LABOR: BUREAU LAB. STAT. 2 (Apr. 19, 2018).

146. *See id.*

147. *See id.*

148. *See Unlawful Discrimination Against Pregnant Workers and Workers with Caregiving Responsibilities*, EEOC (Feb. 15, 2012), https://www.eeoc.gov/eeoc/meetings/2-15-12/index.cfm [https://perma.cc/N2L3-YW34].

149. Sharon Terman, Senior Staff Attorney, Gender Equity and LGBT Rights Program: Legal Aid Society—Employment Law Center, Written Statement in *Unlawful Discrimination Against Pregnant Workers and Workers with Caregiving Responsibilities*, EEOC (Feb. 15, 2012), https://www.eeoc.gov/eeoc/meetings/2-15-12/terman.cfm [https://perma.cc/8ADG-U3C3] [hereinafter Terman Testimony].

helpline from workers who are confused or have had their jobs threatened by an employer who is either unaware of their legal obligations, or has disregarded them entirely.[150] Therefore, although employees have various legal rights as parents, there is great confusion as to what these rights are and how they should be carried out in the workplace.[151]

2. Employer's Obligations

Under the ADA, employers have obligations to ensure that their employees have adequate knowledge of the law.[152] Employers are in a better position to know and understand the law and thus have posting requirements describing what federal discrimination laws apply.[153] These posting notices must be clearly marked so that the employee is easily aware of her rights.[154] Based on the type of work and the employees in each setting, it is the employer's responsibility to determine what accommodations would be necessary to address the application of such discrimination laws.[155]

3. Awareness and Enforcement of Laws

As evidenced above, both employees and employers have duties and obligations under these laws.[156] The process of determining qualification and eligibility requires cooperation between the employer and the employee.[157] A working parent has the right to know about the laws that protect him or her.[158] At the same time, the employer has an obligation to adequately inform these parents of any law that applies to them.[159] Aside from general awareness, it is

150. *See id.*

151. *See id.*

152. *See, e.g.*, *"EEO is the Law" Poster*, EEOC, https://www1.eeoc.gov/employers/poster.cfm [https://perma.cc/6L7Y-CYEH].

153. *See id.*

154. *See ADA and FMLA: What Are Your Notice and Posting Requirements?*, ADA NAT'L NETWORK, https://adata.org/news/ada-and-fmla-what-are-your-notice-and-posting-requirements [https://perma.cc/C4US-MVTT].

155. *See 10 Employment Laws that Supervisors Need to Know*, EMP. RES. CTR. (Oct. 2, 2013), https://www.yourerc.com/blog/post/10-Employment-Laws-that-Supervisors-Need-to-Know.aspx [https://perma.cc/58ZE-LW85].

156. *See supra* Sections III.B.1, III.B.2.

157. *See Youth, Disclosure, and the Workplace: Why, When, What, and How*, OFF. DISABILITY EMP. POL'Y, https://www.dol.gov/odep/pubs/fact/ydw.htm [https://perma.cc/35MN-LM2P].

158. *See id.*

159. *See* Terman Testimony, *supra* note 149.

important that the law is enforced with fidelity.[160] It is not enough for an employer to inform its employees of the existence of a law, yet not carry out its obligations under such law.[161] Thus, with proper awareness and enforcement—employee and employer working together—there will be a better understanding and application of the law that purports to protect caregivers.[162]

A suggestion for increasing awareness is to conduct targeted trainings during onboarding of new employees. Currently, the EEOC offers limited outreach to assist in educating employees and employers on how to prevent discrimination.[163] Such trainings have been stressed at the highest level of importance, as evidenced by directives from the United States Supreme Court and the EEOC.[164] While employers are providing employees with information on Title VII or Occupational Safety and Health, they should feasibly be able to provide information regarding the ADA and association discrimination.[165] Thus, rather than creating new training programs or expending more money, employers should combine already existing training programs to include a clear and concise illustration of these discrimination laws.

C. Permanent Fix: Reasonable Accommodation

While increased awareness, stronger understanding, and enhanced trainings on the current laws are an important first step in protecting parents, substantive change is imperative. Currently, parents with a child with a disability are most likely to find a cause of action under the ADA's association provision.[166] Often, mothers will be most affected by their child's disability, due to gender stereotypes,

160. *See id.*

161. *See id.*

162. This process mirrors what the ADA already set out to achieve in the "interactive process" of requesting reasonable accommodations. The employer can ask relevant questions to enable an informed decision and the employee should share their problem and why she believes it is related to a disability. Layla G. Taylor, *An Introduction to the Reasonable Accommodation Process Under the ADA and the Rehabilitation Act*, ABA YOUNG LAW. DIVISION (Feb. 28, 2013), https://www.americanbar.org/groups/young_lawyers/publications/the_101_201_practice_series/an_introduction_to_the_reasonable_accommodation_process_under_the_ada_and_the_rehabilitation_act [https://perma.cc/3DDW-H7YS].

163. *See Federal Training & Outreach*, EEOC, https://www.eeoc.gov/federal/training/index.cfm [https://perma.cc/T6UZ-JJE9].

164. *See Legal and Regulatory: Training: What Training Must Employers Provide to Employees?*, SOC'Y FOR HUM. RESOURCE MGMT. (Mar. 26, 2013), https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/whattrainingmustemployersprovidetoemployees.aspx.

165. *See id.*

166. *See supra* Part I.

workplace norms, and their role as primary caretaker, and thus may be more likely to file a claim under this provision.[167]

However, "very few plaintiffs who have attempted to use the ADA have been successful."[168] These challenges extend to those attempting to use the association provision, such as failing to demonstrate that the relative has a "disability" within the meaning of the ADA, failing to demonstrate their relationship is protected, failing to prove the plaintiff suffered an adverse employment decision, failing to prove that the employer knew of the disability or failing to prove the employer's discriminatory motive.[169] Because of the various obstacles in successfully bringing a claim, caregivers need another avenue to ensure their rights in the workplace are protected under the ADA.[170] This protection can come in the form of a reasonable accommodation.[171] The ADA requires a "reasonable accommodation to qualified individuals with disabilities who are employees or applicants for employment, unless to do so would cause undue hardship."[172]

Such accommodations can include physical changes, accessible technologies and communications, and policy enhancements.[173] For example, a policy enhancement could consist of adjusting a work schedule for an employee with a chronic medical diagnosis, who must attend medical appointments, allowing him to make up work at an alternate time or place.[174] Undue hardship is judged in terms of the cost of the proposed accommodation, resources of the employer, and the extent that the accommodation would change the nature of the function being performed.[175] An employer can consider these factors and use them as a defense when denying an employee with a disability reasonable accommodation.[176]

---

167. *See supra* Part II.

168. Rosenthal, *supra* note 10, at 132. Even with the broad ADA Amendment in 2008, there are still numerous threshold requirements for plaintiffs that hinder a successful claim under the association provision. *See* ADA Amendments Act of 2008, Pub. L. No. 110-324, 122 Stat. 3553 (2008).

169. *See* Rosenthal, *supra* note 10, at 144.

170. *See id.* at 135.

171. *Id.* at 169.

172. *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, EEOC (Oct. 17, 2002), https://www.eeoc.gov/policy/docs/accommodation.html [https://perma.cc/4QXQ-7Y2U] [hereinafter *Enforcement Guidance*].

173. *See Accommodations*, U.S. DEP'T LAB. OFF. DISABILITY EMP. POL'Y, https://www.dol.gov/odep/topics/Accommodations.htm [https://perma.cc/43XY-XDKU].

174. *See id.*

175. *See* Michael C. Wilhelm, *What Constitutes an Undue Hardship Under the Americans with Disabilities Act (ADA)?*, LEXOLOGY: BRIGGS & MORGAN (Dec. 19, 2012), https://www.lexology.com/library/detail.aspx?g=7856df3b-069b-4a41-b652-222e5e1b87ee [https://perma.cc/L3E9-DFVC].

176. *See id.*

Currently, this provision does not extend to those with an association to a person with a disability.[177] The reasonable accommodation provision of the ADA should extend to parents who are primary caretakers of children with disabilities. This accommodation should only extend to those parents who are the primary caretakers of the child with a disability, that is, the parent who has the greatest responsibility for the daily care and rearing of the child.[178] Due to reasons explained above,[179] mothers are often the primary caretakers, and so this change would most directly affect women. However, the law would apply equally to whichever parent was the primary caretaker of the child. Accordingly, if both parents were equal primary caretakers, such that each parent provided fifty percent of the caretaking duties, then both parents could seek a reasonable accommodation. However, the balancing test would weigh more in favor of those parents who manage most of the child-rearing responsibilities, such as single working parents with one hundred percent of the parenting duties, regardless of gender.

The reasonable accommodation that these caregivers need most desperately is a flexible work schedule without fear of retaliation, lack of advancement, or any other adverse employment action.[180] Parenting a child with a disability can require multiple doctor appointments, therapy visits, or alternate school arrangements due to special education, thus, the need for flexibility is imperative for these parents.[181] Importantly, courts have held that leave time is considered a reasonable accommodation and therefore can serve as a viable solution for these parents.[182]

A typical requirement of a full-time employee in a traditional work environment is a minimum eight hour day, five days a week, also known as the "full-time face-time" norm.[183] This employment structure assumes that workers have no caregiving or domestic responsibilities, and was initially designed for men who had their wives at home to care for the children.[184] Proposals for adjusting this nine

177. *See* Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2, 104 Stat. 328 (1991).

178. *Primary Caretaker Law and Legal Definition*, US LEGAL, https://definitions.uslegal.com/p/primary-caretaker [https://perma.cc/6X5A-CPVV] (last visited Apr. 5, 2019).

179. *See supra* Part II.

180. *See* Steinfeld & Frias, *supra* note 132.

181. *See id.*; *see also* Howe, *supra* note 103.

182. For example, in *Criado v. IBM Corp.*, the court stated that "[a] leave of absence and leave extensions are reasonable accommodations in some circumstances." 145 F.3d 437, 443 (1st Cir. 1998).

183. Arnow-Richman, *supra* note 12, at 1083.

184. *See* Lane C. Powell, *Flexible Scheduling and Gender Equality: The Working Families Flexibility Act Under the Fourteenth Amendment*, 20 MICH. J. GENDER & L. 359, 370 (2013).

to five norm, such as providing some voluntary scheduling accommodations, have been growing in popularity.[185] This includes the "four in forty" work week, which provides a full day off to provide family care, while working ten hours during the other four days of the week.[186] Another solution to the typical rigid workplace hours is telecommuting.[187] Such proposals have even reached the federal level, including the Working Families Flexibility Act.[188] This Act would have provided an employee the right to request alternative work arrangements without the fear of negative work repercussions.[189]

However, despite these flexible work arrangements increasing in popularity and gaining some national support, they are far from commonplace.[190] The need for a collaborative and interactive workplace, in which employers and employees feel comfortable in discussing a flexible arrangement that works for them, is pressing.[191] A fast-paced career should not be a goal only for those without children or those with partners who can be full-time parents, but for anyone who desires it. The proposals for changing the workplace are plentiful, so it is time for workplace norms to adjust to demands of working parents.[192]

D. Current Direction in State Law

California has already attempted to expand reasonable accommodations to associational disability claims in a notable 2016 case.[193] Unfortunately, the expansion was soon after denied on rehearing by the California Court of Appeals.[194] The court in *Castro-Ramirez v. Dependable Highway Express* initially held that the California Fair Employment and Housing Act (FEHA) created a duty to provide reasonable accommodations to an applicant or employee who was

185. *See* Brianne M. Sullenger, Comment, *Telecommuting: A Reasonable Accommodation Under the Americans with Disabilities Act as Technology Advances*, 19 REGENT U. L. REV. 537, 544 (2007).

186. Arnow-Richman, *supra* note 12, at 1084.

187. *See* Sullenger, *supra* note 185, at 544.

188. *See* Kulow, *supra* note 12, at 100.

189. The legislation has failed to pass at the federal level. *See id.*

190. In 2012, only seven percent of employers allowed their employees to work a compressed work week; only twenty-seven percent allowed employees to change starting and quitting times; and only two percent allowed paid work at home. Powell, *supra* note 184, at 361 n.9.

191. *See id.*

192. *See id.*

193. Castro-Ramirez v. Dependable Highway Express, Inc., 200 Cal. Rptr. 3d 674, 683 (Cal. Ct. App. 2016).

194. *See id.* at 123–24; *see also* Colleen Regan, *Something We Said? Court Backs off Accommodation Duty for Associational Disability*, SEYFARTH SHAW (Feb. 22, 2017), https://www.calpeculiarities.com/2017/02/22/something-we-said-court-backs-off-accommodation-duty-for-associational-disability [https://perma.cc/E6FK-C9BJ].

associated with a person with a disability.[195] The court construed FEHA broadly, arguing that a physical disability includes "the person [who] is associated with a person who has, or is perceived to have a physical disability."[196]

However, the court distinguished their holding from the ADA and conceded that the ADA's language only requires reasonable accommodations for applicants who themselves have disabilities.[197] Upon rehearing, the court retreated from their holding following the plaintiff's abandonment of his claim.[198] Based on the quick retraction of the ruling, it is clear that "the accommodation issue is not settled and that it appears significantly intertwined with the statutory prohibition against disability discrimination."[199] Ultimately, the court recognized that the California law may be reasonably understood to require reasonable accommodations for relatives,[200] maintaining their interpretation that an association with a person with a disability is in fact a disability itself.[201] Despite this decision being overturned, the case represents an important initial shift towards reconsidering the reasonable accommodation standard on a national level.[202]

This case was the first to consider an expansion of reasonable accommodation under the broader California statute.[203] As the court ultimately left the issue undecided, it is likely that the issue will be raised again: "No other court has recognized such a duty. This issue likely will remain on the horizon until resolved finally. If such an accommodation obligation exists, it poses a potential minefield for employers."[204] Until this is revisited by the courts or the legislature,

---

195. *Castro-Ramirez*, 200 Cal. Rptr. 3d at 683.

196. *Id.* at 682 (citation omitted). This broad understanding of the definition of disability closely aligns to the concept of derivative disability, in that caretakers of individuals with disabilities experience the effects of the disability on their own daily lives. *See supra* Section III.A.

197. The court stated:

> Unlike FEHA, the ADA does not define the term 'disability' itself as including association with the disabled. It merely defines discrimination based on association as one type of 'discriminat[ion] against a qualified individual on the basis of disability.' One cannot, therefore, read 'association with a disabled person' into the ADA whenever one sees the term 'disability.'

Castro-Ramirez, 207 Cal. Rptr. 3d at 685.

198. *See id.* at 139.

199. *Id.* at 129.

200. *Id.*

201. *Id.* The court recognized that association and caretaking of an individual with a disability requires so much that it can be considered a disability itself.

202. *See* Paul R. Lynd, *California Wades into Unknown: Possible Accommodation of Employee's Association with Disabled Person*, ARENT FOX LLP (Sept. 9, 2016), https://www.lexology.com/library/detail.aspx?g=307d60f6-96f7-421e-a80b-bb4aef3249c9 [https://perma.cc/9KBE-NNXB].

203. *See id.*

204. *Id.*

the reasonable accommodation provision remains limited only to those with a qualifying disability.[205]

E. How the Expansion Would Work

If the ADA was amended to create language that expanded reasonable accommodations to caregivers, a balancing test would be necessary.[206] Undue hardship, for example, would still be a consideration.[207] Thus, if a caregiver requested an accommodation that would require significant difficulty or expense, an employer could decide, on a case-by-case basis, whether the requested accommodation is feasible.[208] The employee has the right to ask for clear documentation of why the accommodation was denied, as well as information on how to appeal the decision.[209]

Another consideration should be whether the employee is a single parent or is in a co-parenting relationship, where caretaking duties are evenly split. For single parents who are seeking the accommodation of a flexible schedule, it should be given more weight if they are the sole provider for their families. Other factors that should be considered are the number of other children, typical number of hours spent on caretaking, availability of outside support, and financial status.[210] Because one of the most important accommodations for caregivers is flexible scheduling, this request by employees should be given the most weight when balancing the accommodation with undue hardship.[211]

The burden of proof scheme would remain as currently articulated, in which the employee needs to show the accommodation is reasonable in light of his or her circumstances.[212] After this, the burden shifts to the employer to prove the accommodation would cause an undue hardship and substantial harm.[213] Many judicial opinions on this issue have been solely decided based on undue hardship, when the actual hardship has not been thoroughly examined.[214] While undue hardship is a factor to be considered, employers must present sufficient evidence that they have considered various accommodations,

205. *See* 42 U.S.C.S. § 12111(8)–(9) (LexisNexis 1990).
206. *See* Wilhelm, *supra* note 175.
207. *See id.*
208. *See id.* Such factors to consider in the undue hardship analysis include: nature and cost of the accommodation, financial resources of the facility, and type of operation of the entity. *See* § 12111(10)(B).
209. *See Enforcement Guidance*, *supra* note 172.
210. *See id.*
211. *See* Powell, *supra* note 184, at 361 n.9.
212. *See* U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 405 (2002).
213. *See id.* at 391.
214. *See* Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 543 (7th Cir. 1995).

looking at the cost-benefit analysis of the requested accommodation and the feasibility of the accommodation as it relates to the essential work functions of the employee.[215] Employers should be familiar with this test, as the framework has been well-established since the passage of the ADA and it can be easily applied to this situation.[216]

In light of likely employer push-back on the proposal, it is important to note that the employer would retain some discretion in this process.[217] They would continue to have the right to request related documentation that would establish the associate has a qualified disability,[218] and that the employee is the primary caretaker of the relative with a disability.[219] Additionally, the employer can choose among reasonable accommodations which are the least costly or burdensome, given that the accommodation is still effective in alleviating the employee's stated issue.[220] However, an employer should not retaliate when the employee asks for a reasonable accommodation.[221] Employees should feel comfortable in asking for the schedule that allows them to work most productively while also managing their caretaking responsibilities. The process in asking for an accommodation should be a collaborative one, where the employer and employee work together to determine what is feasible and reasonable for both parties. This proposal will ultimately allow working parents a means to balance caretaking duties and work duties, without allowing either responsibility to hinder the other.

IV. ANTICIPATED CRITICISMS

There has been push-back to the suggestion of expanding reasonable accommodations to those beyond qualified individuals with a disability.[222] Already in existence is the Family Medical Leave Act

215. *See* Sullenger, *supra* note 185, at 555.

216. *See* Bird, *supra* note 116, at 1.

217. *Enforcement Guidance*, *supra* note 172.

218. *See id.*

219. To determine whether a parent or caretaker is the "primary caretaker," factors to consider are direct-caretaking responsibilities such as: bathing, grooming, meal planning, purchasing clothes, health care, teaching of reading, writing and math skills. As more fathers share caretaking responsibilities, it is possible that both parents are equally primary caretakers, but all relevant factors should be considered in making the determination. *Child Custody Basics*, FINDLAW, https://family.findlaw.com/child-custody/child-custody-basics.html [https://perma.cc/2SSR-MV8Q].

220. 29 C.F.R. pt. 1630 App. § 1630.9 (1997). For example, if the employer can either give off one full day a week for the employee's caretaking responsibilities or grant the employee the ability to work less hours each day; the employer can have discretion in setting a schedule that allows a more efficient way to manage both work and family obligations.

221. 42 U.S.C.S. § 12203 (LexisNexis 1990).

222. For example, the California expansion stood as law for only a few months before the Court of Appeals retracted its holding. Castro-Ramirez v. Dependable Highway Express, Inc., 207 Ca. Rptr. 3d 120, 124, 130 (Cal. Ct. App. 2016).

(FMLA) which provides twelve weeks of unpaid leave to care for a new child, to attend to a serious health condition, or to care for a seriously ill family member.[223] However, there are numerous limitations and critiques to this Act that have been examined by scholars.[224] The biggest critique is that this leave is not paid, so many employees simply cannot afford to take the leave to which they are entitled.[225] Even further, the FMLA has been unable to alleviate the daily and unexpected "work/family" conflict, such as taking a child to the doctor, staying home if the babysitter is ill, and attending parent-teacher conferences.[226] Instead, an extension of the reasonable accommodation provision would cover these activities for caretakers of children with disabilities. These parents, who do not need a full leave period, can request a flexible schedule that will enable them to take limited periods of leaves, even as short as one hour, to care for their child.[227] Because the FMLA is intended to only cover long-term and serious illnesses, the Act simply does not align with the immediate needs of these parents.[228] Further, the Act has not led to advances in gender equality in the workplace or at home, as men remain less likely to take leave, and women are much more likely to take leave for family caretaking needs.[229] Ultimately, the FMLA is not sufficient to handle the concerns of the class of caregivers discussed in this Note and fails to provide sufficient protections for working mothers.[230]

Another legal framework that already exists is the right-to-request legislation, which is currently the law in the state of Vermont.[231] This framework grants an employee the right to ask for flexible work arrangements, for specific obligations on a periodic basis, such as once or twice a year.[232] Employers cannot retaliate against employees for making the request and employers must meaningfully

223. 29 U.S.C.A. § 2612(a)(1) (West 2000).

224. Such limitations include the size of employer, requiring at least fifty employees; and the length of employment by the employee before taking leave, requiring more than one year of work and at least 1,250 hours worked. These provisions exclude a large percentage of employees who will not be covered by the Act. Nicole Buonocore Porter, *Finding a Fix for the FMLA: A New Perspective, A New Solution*, 31 HOFSTRA LAB. & EMP. L.J. 327, 340–41 (2014).

225. *See id.* at 341.

226. *Id.* at 340–41.

227. There is an FMLA provision that allows for intermittent leave, but it is not required by the law and it is at the complete discretion of the employer. This Note's proposed extension would be a mandate on employers. *See Fact Sheet #28F: Qualifying Reasons for Leave Under the Family and Medical Leave Act*, U.S. DEP'T LAB. DIVISION (July 2015), https://www.dol.gov/whd/regs/compliance/whdfs28f.htm [https://perma.cc/H7RU-R667].

228. Kulow, *supra* note 12, at 94.

229. Porter, *supra* note 224, at 339.

230. *See id.* at 339–40.

231. *See* VT. STAT. ANN. tit. 21, § 309 (2014).

232. *See* Bird, *supra* note 116, at 29.

consider the request.[233] Critics of this Note's proposal may argue that since this legislation is already in place, such a large statutory amendment is unnecessary. However, currently, only Vermont and the City of San Francisco have adopted such a framework.[234] The legislation only allows periodic requests and is not sufficient to meet the more frequent requests and changing schedules of caregiving parents.[235] Further, the law allows employers to deny an employee's scheduling request for a bona fide business reason, such as increased cost or the employer's inability to meet organizational needs, or customer service demands if they granted a scheduling request.[236] Thus, although this law is a step in the right direction, it still gives the employer too wide of latitude to restrict an employee's ability to successfully obtain a flexible work schedule.[237]

Another critique of this expansion is likely to come from employers who will argue that expanding reasonable accommodations to this large number of employees is not feasible. They would likely point to the FMLA's intermittent leave policy, which allows employees to take leave in small blocks of time for a single qualifying event.[238] Such intermittent leave can be unscheduled, particularly disruptive to certain employers, such as nurses or pilots, and may unfairly burden the other employees.[239] Such concerns may also be extended to this Note's proposal. However, it is the goal that such parents will have advanced notice for most of their caretaking responsibilities, such as anticipated doctor's visits or therapies. If an employee and employer work together to create a predetermined weekly or monthly schedule, this will enable the employee to schedule all appointments during that personal time.[240]

V. IMPLICATIONS FOR CARETAKERS OF THE ELDERLY

Expanding reasonable accommodations to parental caretakers of children with disabilities has been the focus of this Note; however, this accommodation can also reasonably extend to those caretakers

233. *See id.*

234. *See id.* at 30.

235. *See id.*

236. *See* Melissa Greenberg, *Unpredictable Scheduling Practices and Scheduling Legislation: An Explainer*, ON LABOR (June 15, 2016), https://onlabor.org/unpredictable-scheduling-practices-and-scheduling-legislation-an-explainer [https://perma.cc/3WBW-PFZQ].

237. *See id.*

238. *See* Bird, *supra* note 116, at 11. This policy has been noted to be the most difficult for employers to manage and oversee.

239. *See id.* at 37.

240. For example, if the employer grants a four-day work week, the employee can use his or her one day off for any appointments or related child-rearing responsibilities.

of the elderly. The population of U.S. citizens over the age of sixty-five has grown from thirty-five million in 2000 to forty-nine million in 2016.[241] This currently accounts for about fifteen percent of the total population.[242] Women unsurprisingly account for seventy percent of all elder care.[243] Daughters and granddaughters often become primary caretakers of their parents and parents-in-law.[244] Remarkably, "women can expect to spend [eighteen] years caring for elderly relatives."[245] This population of caretakers are likely to be in the workforce, so the problem of balancing work and family responsibilities once again becomes critical.[246]

Similar to caretaking of a child with a disability, these caregivers will usually take periodic time off to take their aging parent to a doctor's appointment or tend to personal care.[247] Similar to stereotypes against working parents, those with eldercare responsibilities often encounter bias or discrimination in the workplace based on assumptions of lack of commitment or lack of competence.[248] Thus, these caregivers would likely benefit from the reasonable accommodation expansion.[249] The expansion would allow caregivers to remain on a level playing field with their co-workers without worrying about such family responsibilities.[250]

CONCLUSION

In the years following the passage of the ADA, great strides have advanced the rights of people with disabilities. Many children with disabilities grow up to be well-adjusted, independent, and often

---

241. *See* THE NATION'S OLDER POPULATION IS STILL GROWING, CENSUS BUREAU REPORTS, U.S. CENSUS BUREAU (June 22, 2017), https://census.gov/newsroom/press-releases/2017/cb17-100.html [https://perma.cc/L6XM-PQK8].

242. *See id.*

243. *See* Peggie R. Smith, *Elder Care, Gender and Work: The Work-Family Issue of the 21st Century*, 25 BERKELEY J. EMP. & LAB. L. 351, 360 (2004).

244. *See id.* at 361.

245. *Id.* at 353.

246. *See* Williams et al., *supra* note 17, at 2.

247. *See id.* at 4.

248. *See id.* at 6.

249. *See id.* at 8.

250. *See id.*

> Legislation to prohibit workplace discrimination against family caregivers would not give any group special rights. It would simply require employers to treat workers with caregiving responsibilities the same way they treat other employees. Such legislation would address the fact that employers sometimes impose unwarranted penalties on workers with caregiving responsibilities due to stereotypes that such employees are less competent or less committed to work.

Id. at 12.

employed members of society.[251] These achievements are due in large part to their parents who sacrifice more than most to ensure their child has every opportunity to achieve such success. Unfortunately, these successes often come at a cost to the parent who raised them.[252] Employment takes a back seat for many of these parents, because the conflicting demands are simply unmanageable. The needs of children with disabilities are so great, and the rigidity of many workplaces creates a serious issue for these parents.[253]

The time has come to recognize rights for caretakers. The mother who had to quit her job to care for her child full-time. The mother who took a pay cut to work a part-time job to ensure her child attended doctor appointments. The mother who missed out on a promotion because her boss assumed she would be less committed than her male counterparts. The mother who was fired because she was late to work when her child with autism had a meltdown. The illustrations are endless, but the solution is currently non-existent.

While the ADA purports to protect this class of parents through the association provision, it is clearly not enough. This Note proposes a concrete, viable solution that will help working parents. An expansion of the reasonable accommodation provision, especially flexible scheduling opportunities and an interactive process between employers and employees, will finally enable these parents to be on an equal playing field in the workplace. Regardless of status: single father or mother, a married mother or father, the primary caretaker of a child with a disability will be protected by this proposal. With the expansion of reasonable accommodations in the workplace, caregivers will finally have a legal solution to the constant strain between family and work responsibilities.

KATHERINE LEASE*

---

251. *See, e.g.*, Jerome J. Schultz, *Managing Social-Emotional Issues of Adults with Learning Disabilities*, LEARNING DISABILITIES ASS'N AM., https://ldaamerica.org/managing-social-emotional-issues-of-adults-with-learning-disabilities [https://perma.cc/L9SV-EUKP].

252. *See generally* Donna Anderson et al., *The Personal Costs of Caring for a Child with a Disability: A Review of the Literature*, 122 PUB. HEALTH REP. 1 (2007).

253. *See id.* at 4.

* Katherine Lease is a 2019 JD Candidate at William and Mary Law School. She has a BA in American Studies from Fordham University. The author would first like to thank Professor Christina Jones who introduced her to the idea of association discrimination, which became the foundation of this Note. The author would also like to thank all of her family and friends for supporting her through this journey, to Amanda for shaping her life in every way, to Dad for providing endless support and advice, and to Mom for exemplifying what a supermom is and inspiring her to shed light on the thankless work parents do to raise children with disabilities. Finally, the author would like to thank the *Journal of Race, Gender, and Social Justice* for the selection of this Note and for providing an avenue to advocate for the vast community of caregivers that often go unnoticed in the legal world.