Berkeley Journal of

Employment and Labor Law

VOLUME 44 2023 NUMBER 2

ARTICLES

Caregiver Accommodation

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In 2020, there were approximately 53 million Americans caring for a family member with a disability. Each day, many of these American caregivers face an incredibly difficult dilemma: lose their livelihood (and the health insurance and financial benefits that it provides) or sacrifice their loved one's care. Low-income individuals and single parents are particularly vulnerable.

Unfortunately, the Americans with Disabilities Act of 1990 (ADA), as amended, does not currently provide robust protection for these individuals. This is because it prohibits associational discrimination, which means that the ADA forbids covered employers from discriminating against employees or applicants due to their known association, familial or not, with a person with a disability. However, it does not require employers to engage non-disabled employees and applicants in a good faith interactive process to find a reasonable accommodation that would enable them to continue their employment while caring for their disabled loved ones. To the contrary, the

DOI: https://doi.org/10.15779/Z38930NW3W

† The author thanks her research assistants—Kim Tomkies, Megan Neal, Aren Hendrickson, and Danny Cundiff—for their many valuable contributions to this article. She also thanks her colleagues at Wake Forest who provided thoughtful feedback, particularly Mike Green, Ron Wright, Mark Hall, Meghan Boone, Marie-Amelie George, and Allyson Gold.

ADA currently permits employers to reject caregivers' requests for reasonable accommodation out of hand.

This troubling divergence between what the ADA should do and what it actually does prompts the narrow question that this Article explores: whether the ADA's associational discrimination provision should be amended to require covered employers, under certain limited circumstances, to at least engage in a good faith interactive process with employee-caregivers of people with disabilities regarding their requests for reasonable accommodation where those requests directly relate to the frequent, substantive, and continual care they must provide to family members with disabilities. Because caregivers should not be forced to choose between their jobs and their loved ones, this Article contends that Title I of the ADA should be amended to require covered employers to at least engage in a good faith interactive process with caregivers of people with disabilities to determine whether a reasonable accommodation may be provided that will enable caregivers to effectively perform the essential functions of their jobs while still providing adequate care for their disabled loved ones.

INTRODUCTION

Meet Violet—a dedicated employee and devoted, single mother. For the last five years, Violet has worked as a teller at ABC Bank, a national corporation with hundreds of branches across America. During that time, Violet has consistently received positive reviews and experienced no performance issues. But three months ago, Violet's life was turned upside down when her four-year-old son, Aidan, was suddenly diagnosed with a rare and serious disorder. The healthcare providers in the small, rural town where Violet and Aidan reside are ill-equipped to adequately provide for his long-term, medical needs. As a result, Aidan's pediatrician has recommended that, if possible, Violet and Aidan relocate three hours away to Cincinnati, Ohio, where Aidan can receive the sophisticated care he requires at the Cincinnati Children's Hospital.

Without hesitation, Violet promptly asks her supervisor, Ms. Jones, if it is possible to transfer to any one of the ten ABC branches in and around Cincinnati. She also provides supporting medical documentation for the request. Much to Violet's surprise, Ms. Jones dismisses Violet's request out of hand, without even examining the documentation. "If you wanna move, then quit and find a new job there," Ms. Jones explains dispassionately. Five

minutes later, Violet leaves Ms. Jones' office, stunned, panicked, and disappointed. What will she and Aidan do now?

Sadly, Violet is not alone. In 2020, there were approximately 53 million Americans providing care for a relative with a disability.[1] Every day, many of these American caregivers face the same dilemma as Violet: lose their livelihood (and the health insurance and financial benefits that it provides) or sacrifice their loved one's care. Low-income individuals and single parents are particularly vulnerable. As you read Violet's story, you may have wondered, "Isn't Ms. Jones legally obligated to at least explore the feasibility of a transfer?"

Perhaps surprisingly, the answer is no. The Americans with Disabilities Act of 1990 (ADA), as amended, prohibits *associational discrimination*, which means that the ADA forbids covered employers like ABC from discriminating against employees or applicants due to their known association, familial or not, with a person with a disability.[2] For example, it would be unlawful for Ms. Jones to fire Violet *because* her son has a disability. It is equally well settled, however, that employers like ABC are *not* required to work with covered employees and applicants to find a reasonable accommodation that would enable them to continue their employment while caring for a loved one with a disability. Thus, Ms. Jones has absolutely no obligation to engage in a good faith process with Violet to determine whether ABC could transfer her without experiencing an undue hardship. Therefore, Ms. Jones is well within her legal rights to dismiss Violet's request without any meaningful consideration.

This troublesome divergence between what the ADA *should* do and what it actually does prompts the narrow question that this Article explores: whether the ADA's associational discrimination provision should be amended to require covered employers, under certain circumstances, to at least engage in a good faith interactive process with employee-caregivers of people with disabilities regarding their requests for reasonable

1. AARP, *New Study Reveals Number of Unpaid Caregivers in America Grew by 9.5 Million in Five Years to Total 53 Million* (June 17, 2020), https://press.aarp.org/2020-6-17-New-Study-Reveals-Unpaid-Caregivers-in-America-Grew-By-9-Million-to-53-Million [https://perma.cc/GH55-LH8V] ("A new study from the National Alliance for Caregiving (NAC) and AARP finds that the number of family caregivers caring for an adult or child with special needs in the United States increased by 9.5 million from 2015 to 2020 and now encompasses more than one in five Americans.").

2. 42 U.S.C. § 12112(b)(4); *see also* U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-NVTA-2005-4, QUESTIONS & ANSWERS: ASSOCIATION PROVISION OF THE ADA (2005) [https://perma.cc/HSP5-GBBS] ("Does the ADA require an employer to provide a reasonable accommodation to a person without a disability due to that person's association with someone with a disability? No. Only qualified applicants and employees with disabilities are entitled to reasonable accommodation. For example, the ADA would not require an employer to modify its leave policy for an employee who needs time off to care for a child with a disability."); 29 C.F.R. § 1630.8 ("It is unlawful for a covered entity to exclude or deny equal jobs or benefits to, or otherwise discriminate against, a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a family, business, social or other relationship or association.").

accommodation where those requests directly relate to the frequent, substantive, and continual care they must provide to disabled loved ones.[3] This Article proposes that Title I of the ADA be amended to require covered employers to meaningfully consider caregiver requests for reasonable accommodations under limited circumstances and to forbid retaliation against caregivers for making such requests.

Accordingly, this Article proceeds as follows. Part I explores the legislative history and intent of the ADA, particularly its remedial spirit and purpose. It also addresses the ADA's unique requirement that employers provide reasonable accommodations to qualified employees and applicants with disabilities, unless doing so will impose an undue hardship. Part II explains why the ADA's associational discrimination provision has been consistently interpreted to excuse covered employers from any obligation to provide a reasonable accommodation to an employee-caregiver of a person with a disability. Part III argues that Title I of the ADA should be amended to require covered employers to engage in a good faith interactive process with caregivers of people with disabilities regarding their requests for reasonable accommodation, at least under certain circumstances.[4] Part IV examines why amending the ADA is the best solution and discusses what such an amendment might entail.[5]

I. THE ADA

A. The ADA's History, Purpose, and Intent

According to the Centers for Disease Control and Prevention (CDC), an estimated 26% of Americans have a disability, which encompasses a whopping 61 million people.[6] And this number has likely increased due to

3. This question has not been heavily explored in the literature. *But see* Katherine Lease, Note: *A Reasonable Solution for Working Parents: Expanding Reasonable Accommodation under the Americans with Disabilities Act to Parents of Children with Disabilities*, 25 WM. & MARY J. RACE, GENDER, & SOC. JUST. 709 (2019).

4. The Article is appropriately limited in scope. It focuses exclusively on Title I of the ADA. A discussion of other state and local statutes that bar disability discrimination generally exceeds the scope of the Article. Nor will the Article focus on pregnancy, breastfeeding, and lactation as a basis for a requested accommodation as those conditions warrant special, separate consideration. The Article focuses solely on private sector employers already covered by Title I of the ADA, not on public employers, such as state and local governments. Nor will it address the potential implications of other labor and employment laws. Portions of this Article have been excerpted from Abigail Perdue, EXPLORING DISCRIMINATION: SEX, DISABILITY, AND GENETIC INFORMATION (2021).

5. As will be explained *infra*, this Article does not advocate for the adoption of a statutory provision that would provide a wholesale, all-inclusive right to accommodation for any known associate of a person with a disability.

6. Press Release, Ctrs. for Disease Control & Prevention, *Disability Impacts All of Us* (Aug. 16, 2018), https://www.cdc.gov/ncbddd/disabilityandhealth/infographic-disability-impacts-all.html#:~:text=61%20million%20adults%20in%20the,have%20some%20type%20of%20disability

the devastating COVID-19 pandemic. Sadly, people with disabilities have historically endured stigmatization, segregation, and discrimination. For centuries, they have been marginalized, denied employment and other opportunities, involuntarily confined to institutions ill-suited to meet their medical needs, and even sterilized to prevent their procreation.[7] Overt disability discrimination was historically justified by allegations that people with disabilities drained community resources without meaningfully contributing to societal advancement. Such harmful stereotypes and the insidious discrimination they fuel have, in turn, diminished the ability of people with disabilities to pursue educational and employment opportunities.[8] Perhaps as a result, still today, people with disabilities consistently experience lower rates of employment,[9] higher rates of persistent poverty,[10] and lower median monthly earnings than the non-disabled.[11]

Fortunately, attitudes toward disability began to change in the mid-twentieth century when consensus regarding the treatment of disability shifted from confinement to rehabilitation.[12] These evolving attitudes resulted in large part from the treatment of World War II veterans suffering war-related disabilities, news outlets exposing neglect and abuse of institutionalized patients, and activism focused on the rights and equality of people with disabilities.[13] That activism spurred the enactment of various state and federal statutes that prohibit disability discrimination in diverse areas from housing and transportation to education and employment.[14]

The most well-known of these federal statutes is the Americans with Disabilities Act of 1990 (ADA), as amended. It was later amended by the ADA Amendments Act of 2008 (ADAAA), which took effect in 2009.[15] The ADAAA made clear that as a remedial statute, the ADA should be liberally construed to effectuate its remedial spirit and purpose.[16]

[https://perma.cc/A89T-X2MZ]; Press Release, Ctrs for Disease Control & Prevention, *1 in 4 U.S. Adults Live with a Disability* (Aug. 16, 2018), https://www.cdc.gov/media/releases/2018/p0816-disability.html.

7. Perdue, *supra* note 5, at 228.

8. *Id*.

9. Press Release, U.S. Census Bureau, *Nearly 1 in 5 People have a Disability in the U.S., Census Bureau Reports*, U.S. CENSUS BUREAU (July 25, 2012), https://www.census.gov/newsroom/releases/archives/miscellaneous/cb12-134.html [https://perma.cc/3LDL-36HN] (reporting that in 2010, 41% of Americans age 21 to 64 with a disability were employed compared to 79% of non-disabled Americans).

10. *Id.* (As of 2010, "[a]mong people age 15 to 64 with severe disabilities, 10.8 percent experienced persistent poverty; the same was true for 4.9 percent of those with a non-severe disability and 3.8 percent of those with no disability.").

11. *Id.*

12. Perdue, *supra* note 5, at 228.

13. *Id*.

14. *Id.* at 229.

15. ADA Amendments Act of 2008, 42 U.S.C. § 12101 *et seq.*

16. 42 U.S.C. § 12101; *see also* Nat'l Fed'n of the Blind v. Scribd, Inc., 97 F. Supp. 3d 565, 571 (D. Vt. 2015); Kinney v. Yerusalim, 812 F. Supp. 547, 551 (E.D. Pa. 1993) ("As a remedial statute [the

B. Reasonable Accommodation under the ADA

The ADA is one of the most comprehensive anti-discrimination statutes in America to date. Title I of the ADA prohibits disability discrimination in employment, including hiring, firing, and demotion.[17] Specifically, it prohibits covered entities from discriminating "against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[18] Title I also prohibits discriminatory recruitment, advertising, and interviewing practices.[19] Some circuits have also interpreted the ADA to prohibit disability-based harassment that rises to the level of a hostile work environment.[20]

Title I applies to, *inter alia*, a private sector employer that has 15 or more employees on its payroll for 20 or more, non-consecutive calendar workweeks in either the current or prior calendar year.[21] Limited exceptions to coverage do exist, such as for the U.S. government and Native American tribes.[22]

The Equal Employment Opportunity Commission (EEOC) is the federal agency that initially investigates charges of disability discrimination in employment.[23] In fact, a Charging Party must file a Charge of Discrimination

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ADA] must be broadly construed to effectuate its purposes."), *aff'd*, 9 F.3d 1067 (3d Cir. 1993); Lincoln CERCPAC v. Health & Hosps. Corp., 920 F. Supp. 488 (S.D.N.Y. 1996).

17. 42 U.S.C. § 12112(b)(1-3) ("As used in subsection (a), the term 'discriminate against a qualified individual on the basis of disability' includes—(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee; (2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs); (3) utilizing standards, criteria, or methods of administration—(A) that have the effect of discrimination on the basis of disability; or (B) that perpetuate the discrimination of others who are subject to common administrative control . . .").

18. *Id*. § 12112.

19. *See id.*

20. *See, e.g.*, Fox v. Gen. Motors Corp., 247 F.3d 169 (4th Cir. 2001) (concluding that a hostile work environment claim is actionable under the ADA); Flowers v. S. Reg'l Physician Servs., Inc., 247 F.3d 229 (5th Cir. 2001) (same).

21. 42 U.S.C. § 12111(5)(A); *see also* 29 C.F.R. § 1630.2(e)(1).

22. 29 C.F.R. § 1630.2(e)(2).

23. 42 U.S.C. § 12117.

with the EEOC or its state counterpart before filing suit in federal court.[24] Notably, however, an EEOC determination is not binding on a court.[25]

The EEOC also issues non-binding interpretative guidance about the ADA and promulgates implementing regulations about the ADA. These regulations define important terms used in the ADA. For example, 29 C.F.R. § 1630.2(n) defines *essential functions* as "the fundamental job duties of the employment position . . . ." A job function may be considered essential if "the reason the position exists is to perform that function," a "limited number of employees [are] available among whom the performance of that job function can be distributed," and/or "[t]he function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function."[26] In assessing whether a function is essential, courts consider, *inter alia*, "[t]he employer's judgment," "[w]ritten job descriptions prepared before advertising or interviewing applicants for the job," the approximate time spent performing that function, and "[t]he current work experience" of other people performing that job.[27]

Title I protects a *qualified individual with a disability*, which means a person who "satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires and, with or without reasonable accommodation, can perform the essential functions of such position."[28] In other words, a person with a disability is only *qualified* if the person can perform the essential functions of the job—with or without a *reasonable accommodation*.[29] A *reasonable accommodation* constitutes "a modification or an adjustment to a job or the work environment that will enable a qualified applicant or employee with a disability to participate in the application process or to perform essential job

24. *Id.*; *see also* Booth v. City of Roswell, 754 Fed. App'x 834, 836 (11th Cir. 2018) ("Before filing suit under the ADA, a plaintiff must exhaust her administrative remedies by filing a charge with the EEOC."); Parry v. Mohawk Motors of Mich, Inc., 236 F.3d 299, 309 (6th Cir. 2000) ("Under the ADA, a claimant who wishes to bring a lawsuit claiming a violation of the ADA must file a charge of discrimination with the EEOC within 300 days of the alleged discrimination.").

25. *See, e.g.*, E.E.O.C. v. Am. Airlines, Inc., 48 F.3d 164, 169 (5th Cir. 1995) ("We disagree with [the] EEOC's reading . . . and its conclusion."); Woodbury v. Victory Van Lines, 2019 WL 5830764, at *3 (D. Md. Nov. 7, 2018) ("EEOC investigatory findings simply are not binding on federal courts . . ."); Gerator Corp. v. E.E.O.C., 592 F.2d 765, 768 (4th Cir. 1979) (stating that an EEOC determination, standing alone, "is lifeless, and can fix no obligation nor impose any liability on [the employer]"); E.E.O.C. v. Harvey L. Walner & Assocs., 91 F.3d 963, 968 n. 3 (7th Cir. 1996) (stating that an EEOC determination "is only an administrative prerequisite to a court action and has no legally binding significance in subsequent litigation") (citation omitted); McClure v. Mexia Indep. Sch. Dist., 750 F.2d 396, 400 (5th Cir. 1985) (noting that "EEOC determinations and findings of fact" are "not binding on the trier of fact").

26. 29 C.F.R. § 1630.2(n)(2).

27. *Id.* § 1630.2(n)(3).

28. *Id.* § 1630.2(m).

29. *Id.* § 1630.9(d).

functions."[30] Common examples include but are not limited to schedule modifications, the provision of auxiliary aids or special equipment, job reassignment, or flexibility in how the job can be performed, such as permitting an employee to telecommute.[31]

Title I requires covered employers to engage in a good faith interactive process with persons with disabilities, whether employees or applicants, to determine whether a reasonable accommodation might exist that would enable the person to perform the essential functions of the job.[32] Furthermore, an employer may not retaliate against an employee or applicant with a disability for merely requesting an accommodation in good faith, even if it turns out that the disability is not actually covered by the ADA or the requested accommodation is unreasonable.[33]

Notably, an employer is not required to proactively ask an employee or applicant if the person needs an accommodation.[34] Rather, it is usually "the

30. U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-NVTA-2002-2, THE ADA: QUESTIONS AND ANSWERS (2002) https://www.eeoc.gov/laws/guidance/ada-questions-and-answers [https://perma.cc/7VDP-DFCB]; *see also* 29 C.F.R. § 1630.2(o) (defining "reasonable accommodation" as: "(i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or (ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable an individual with a disability who is qualified to perform the essential functions of that position; or (iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.").

31. Courts have reached different conclusions regarding whether telecommuting is a reasonable accommodation. *Compare* E.E.O.C. v. Ford Motor Co., 782 F.3d 753, 763 (6th Cir. 2015) (concluding that working remotely up to four days per week was not a reasonable accommodation because regular in-person attendance was an essential function of the position of automobile resale buyer) *with* Davis v. Guardian Life Ins. Co. of Am., 2000 WL 122357, at *5 (E.D. Pa. Feb. 1, 2000).

32. 42 U.S.C. § 12112(b)(5) ("As used in subsection (a), the term 'discriminate against a qualified individual on the basis of disability' includes . . . not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity . . ."); *see also id.* § 12112(a) ("No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures . . .").

33. 42 U.S.C. § 12203; *see also* 29 C.F.R. § 1630.12 ("(a) *Retaliation.* It is unlawful to discriminate against any individual because that individual has opposed any act or practice made unlawful by this part or because that individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing to enforce any provision contained in this part. (b) *Coercion, interference or intimidation.* It is unlawful to coerce, intimidate, threaten, harass or interfere with any individual in the exercise or enjoyment of, or because that individual aided or encouraged any other individual in the exercise of, any right granted or protected by this part."); *see also* Adams v. Persona, 124 F. Supp. 3d 973 (D.S.D. 2015) (holding that a former employee had alleged a prima facie case of disability discrimination where he alleged, *inter alia*, that he was terminated shortly after he requested time off to receive rehabilitation arising from his alcoholism).

34. *See, e.g.*, Barnard v. L-3 Commc'ns Integrates Sys. L.P., Civ. Action No. 3:16-CV-0282-D, 2017 WL 3726764, at *5 (N.D. Tex. Aug. 30, 2017) (quoting Loulseged v. Akzo Novel Inc., 178 F.3d 731, 735 n.4 (5th Cir. 1999)) ("'Employers cannot be expected to anticipate all the problems that a disability may create on the job and spontaneously accommodate them. Accordingly, the burden is on the

responsibility of the employee [or a third party] to inform the employer that an accommodation is needed"; the employer need not engage in speculation.[35] Some exceptions do exist, as when an employer knows that an employee is experiencing persistent employment issues due to a disability or if the person's disability prevents the person from seeking an accommodation.[36] Requests for accommodation can be oral or written, and no specific words must be used.[37] In fact, a request for an accommodation could pass muster even if it did not explicitly mention "accommodation."[38]

In making this request, the employee or applicant must provide the employer with sufficient information to determine whether the sought accommodation is reasonable, and in turn, the employer must be willing to consider various potential accommodations that might be suitable.[39] In other words, both parties must engage in the "interactive process" in good faith.[40]

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employee to request an accommodation.'"); E.E.O.C. v. Agro Dist., LLC, 555 F.3d 462, 471 (5th Cir. 2009) ("When a qualified individual with a disability requests a reasonable accommodation, the employer and employee should engage in flexible, interactive discussions to determine the appropriate accommodation.").

35. U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-NVTA-1992-1, YOUR EMPLOYMENT RIGHTS AS AN INDIVIDUAL WITH A DISABILITY (1992) https://www.eeoc.gov/laws/guidance/your-employment-rights-individual-disability [https://perma.cc/UX3H-T48K]; *see also* Brady v. Wal-Mart Stores, Inc., 531 F.3d 127, 135 (2d Cir. 2008); Gantt v. Wilson Sporting Goods Co., 143 F.3d 1042, 1046–47 (6th Cir. 1998); Hedberg v. Ind. Bell Tel. Co., Inc., 47 F.3d 928, 931–33 (7th Cir. 1995); U.S. EQUAL EMP'T OPPORTUNITY COMM'N, EEOC-CVG-2003-1, ENFORCEMENT GUIDANCE ON REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT (2002), Question 2 (noting that a third party may seek a reasonable accommodation on behalf of an employee or applicant).

36. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, EEOC-CVG-2003-1, ENFORCEMENT GUIDANCE ON REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT, *supra* note 36 (Question 40); *see also* Barnett v. U.S. Air, Inc., 228 F.3d 1105, 1112 (9th Cir. 2000), *vacated on other grounds*, 535 U.S. 391 (2002).

37. *See* U.S. EQUAL EMP'T OPPORTUNITY COMM'N, EEOC-CVG-2003-1, ENFORCEMENT GUIDANCE ON REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT, *supra* note 36 (Questions 1, 3); *see also* Smith v. Henderson, 376 F.3d 529, 535 (6th Cir. 2004).

38. *See* U.S. EQUAL EMP'T OPPORTUNITY COMM'N, EEOC-CVG-2003-1, ENFORCEMENT GUIDANCE ON REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT, *supra* note 36 (Questions 1, 3).

39. *See, e.g.*, Schaffhauser v. UPS, Inc., 794 F.3d 899, 906 (8th Cir. 2015) (internal citations omitted) ("To determine whether an accommodation for the employee is necessary, and if so, what that accommodation might be, it is necessary for the employer and employee to engage in an 'interactive process.' This interactive, accommodation-seeking process must be initiated by the disabled employee, who must alert his employer to the need for an accommodation and provide relevant details of his disability.").

40. *See, e.g.*, Emmell v. Phoenixville Hosp. Co., LLC, 303 F. Supp. 3d 314, 328–29 (E.D. Pa. 2018) (citation omitted) ("To prove that an employer failed to provide reasonable accommodations by failing to engage in good faith in an interactive process, a plaintiff must show that '1) the employer knew about the employee's disability; 2) the employee requested accommodations or assistance for his or her disability; 3) the employer did not make a good faith effort to assist the employee in seeking accommodations; and 4) the employee could have been reasonably accommodated but for the employer's lack of good faith.'") (citation omitted); Colwell v. Rite Aid Corp., 602 F.3d 495, 504 (3d Cir. 2010 (same); Steenmeyer v. Boeing Co., 92 F. Supp. 3d 1024, 1030 (W.D. Wash. 2015) ("If an employee identifies a disability that

In at least one instance, a court has determined that an employer could subsequently remedy its alleged failure to properly engage in an interactive process by later providing a reasonable accommodation.[41]

A covered employer is not required to offer the requested accommodation; instead, the employer can offer a different accommodation so long as it is reasonable.[42] For example, in *Harmer v. Virginia Electric and Power Co.*, an employee with bronchial asthma sued his employer under the ADA after it rejected his request that the employer ban smoking at the workplace.[43] In rejecting the employee's motion for summary judgment, the court determined that a widescale smoking ban was unreasonable, particularly since the employer had made other accommodations, such as providing smokeless ashtrays and air purifiers, as well as prohibiting smoking in restrooms, conference rooms, and hallways near the employee's cubicle.[44] Nor are employers required to create or find a position for an applicant or employee for which the person is not qualified.[45]

Deciding what constitutes a reasonable accommodation is a fact-intensive determination that varies case by case. In fact, sometimes an employer must provide multiple accommodations or provide a different

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may require accommodation, the employer has a mandatory duty under the ADA to engage in a good faith interactive process of identifying essential and nonessential job tasks and possible accommodations, assessing the reasonableness and effectiveness of the accommodations, and implementing the accommodation most appropriate for the employee and employer that does not impose an undue hardship on the employer.")

41. Mobley v. Allstate Ins. Co., 531 F.3d 539, 546 (7th Cir. 2008).

42. 29 C.F.R. § 1630.2(o).

43. Harmer v. Va. Elec. & Power Co., 831 F. Supp. 1300, 1302 (E.D. Va. 1993).

44. *Id.* at 1304, 1306.

45. *See, e.g.*, 42 U.S.C. § 12112(b)(5)(A); *id.* § 12111(9); Butler v. WMATA, 275 F. Supp. 3d 70, 85 (D.D.C. 2017) ("As with other forms of reasonable accommodation, the reassignment process should be a two-way street. While the employee has an 'obligation to demonstrate that there existed some vacant position to which he could have been reassigned,' the employer has 'a corresponding obligation to help [the employee] identify appropriate job vacancies (since plaintiffs can hardly be expected to hire detectives to look for vacancies).'")(citation omitted); Aka v. Washington Hosp. Ctr., 156 F.3d 1284, 1305 (D.C. Cir. 1998) (stating that an employee need not be reassigned if no vacant position exists, and employers are not required to "bump" an employee, or to create a new position); Terrell v. US Air, 132 F.3d 621, 626 (11th Cir. 1998) (holding that the employer was "not required to *create* a part-time position for [employee] where all part-time positions had already been eliminated from the company"); Waton v. Lithonia Lighting, 304 F.3d 749, 751 (7th Cir. 2002) (concluding that the employer was not required to create a new light-duty position for an employee who was unable to perform her job duties due to a shoulder injury); Huber v. Wal-Mart Stores, Inc., 486 F.3d 480, 480 (8th Cir. 2007) (reversing the district court's grant of summary judgment to the plaintiff because "an employer who has an established policy to fill vacant job positions with the most qualified applicant is [not] required to reassign a qualified disabled employee to a vacant position . . . [if] the disabled employee is not the most qualified applicant for the position"); *id.* at 483 ("In the Seventh Circuit, ADA reassignment does not require an employer to reassign a qualified disabled employee to a job for which there is a more qualified applicant, if the employer has a policy to hire the most qualified applicant. . . the ADA is not an affirmative action statute and does not require an employer to reassign a qualified disabled employee to a vacant position when such a reassignment would violate a legitimate nondiscriminatory policy of the employer to hire the most qualified candidate.").

accommodation if the person's condition changes over time.[46] Notably, a reasonable accommodation is only required for individuals who have a disability or record of disability, not persons suing under the "regarded as" prong of the ADA.[47]

Furthermore, an employer is not required to provide an accommodation if doing so will cause an undue hardship, which refers to a "significant difficulty or expense," monetary or otherwise.[48] For example, in *U.S. Airways v. Barnett*, the Supreme Court held that absent special circumstances, a requested accommodation could impose an undue hardship if it requires the employer to violate the rules of a well-established seniority system.[49]

Deciding what constitutes an undue hardship is also a fact-intensive determination that varies case by case.[50] In making this determination, courts consider, *inter alia*, "the nature and net cost of the accommodation," the employer's size, number of employees, "overall financial resources" and "type of operation," as well as "the impact of the accommodation" on the facility's operations, business, and other employees.[51] Determining whether a requested accommodation will impose an undue hardship may also require consideration of whether outside sources, tax deductions, [52] or tax credits[53]

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46. *E.g.*, Ralph v. Lucent Tech., Inc., 135 F.3d 166, 172 (1st Cir. 1998) ("The duty to provide reasonable accommodation is a continuing one, however, and not exhausted by one effort.").

47. 29 C.F.R. § 1630.2(o)(4).

48. *Id.* § 1630.2(p)(1).

49. U.S. Airways v. Barnett, 535 U.S. 391, 394 (2002) ("to show that a requested accommodation conflicts with the rules of a seniority system is ordinarily [sufficient] to show that the accommodation is not 'reasonable.' Hence such a showing will entitle an employer/defendant to summary judgment on the question—unless there is more. The plaintiff remains free to present evidence of special circumstances that make 'reasonable' a seniority rule exception in the particular case. And such a showing will defeat the employer's demand for summary judgment.").

50. *See* 42 U.S.C. § 12111(10)(B).

51. *Id.*; *see also* 29 C.F.R. § 1630.2(p)(2) ("(i) The nature and net cost of the accommodation needed under this part, taking into consideration the availability of tax credits and deductions, and/or outside funding; (ii) The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources; (iii) The overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type and location of its facilities; (iv) The type of operation or operations of the covered entity, including the composition, structure and functions of the workforce of such entity, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity; and (v) The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.").

52. *See, e.g.*, 26 U.S.C. § 190 (stating that a taxpayer can deduct expenses to remove architectural and transportation barriers to the elderly and people with disabilities).

53. *See, e.g., IRS Tax Credits and Deductions*, U.S. DEP'T OF JUST., https://www.ada.gov/taxcred.htm [https://perma.cc/9ERB-JPZ5] ("To assist businesses with complying with the ADA, Section 44 of the IRS Code allows a tax credit for small businesses and Section 190 of the IRS Code allows a tax deduction for all businesses. The tax credit is available to businesses that have total revenues of $1,000,000 or less in the previous tax year or 30 or fewer full-time employees. This credit can cover 50% of the eligible access expenditures in a year up to $10,250 (maximum credit of $5000). The tax credit can be used to offset the cost of undertaking barrier removal and alterations to improve

could assist the employer in funding the accommodation. In fact, employers can even ask employees or applicants to pay a portion of the cost of the accommodation if its expense is the basis of the hardship.[54]

II. ASSOCIATIONAL DISCRIMINATION UNDER THE ADA

A. Scope and Coverage of the ADA's Associational Discrimination Provision

Title I of the ADA also prohibits associational discrimination in employment. Specifically, 42 U.S.C. § 121112(b)(4) clarifies that "the term 'discriminate against a qualified individual on the basis of disability' includes . . . excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association," such as a spouse or child.[55]

However, a familial relationship is not always necessary to obtain relief.[56] By way of illustration, the EEOC states that associational discrimination would occur if "[a] restaurant owner discovers that the chef's boyfriend is HIV-positive . . . [and] [t]he owner, fearing that the employee will contract the disease and transmit it to the customers through food, terminates the employee."[57] Furthermore, in *E.E.O.C. v. DynMcdermott*

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accessibility; providing accessible formats such as Braille, large print and audio tape; making available a sign language interpreter or a reader for customers or employees, and for purchasing certain adaptive equipment. The tax deduction is available to all businesses with a maximum deduction of $15,000 per year. The tax deduction can be claimed for expenses incurred in barrier removal and alterations."); *Tax Benefits for Businesses who have Employees with Disabilities*, INTERNAL REVENUE SERV., https://www.irs.gov/businesses/small-businesses-self-employed/tax-benefits-for-businesses-who-have-employees-with-disabilities [https://perma.cc/NX2P-4F98] (discussing the Disabled Access Credit, Barrier Removal Tax Deduction, and Work Opportunity Tax Credit).

54. U.S. EQUAL EMP. OPPORTUNITY COMM'N, THE ADA: YOUR RESPONSIBILITIES AS AN EMPLOYER,

https://www.eeoc.gov/eeoc/publications/ada17.cfm [https://perma.cc/LL3S-2C48].

55. 42 U.S.C. § 12112(b)(4); *see also* Morgenthal ex rel. Morgenthal v. Am. Tel. & Tel. Co., Inc., Case No. 97-CIV-6443-DAB, 1999 WL 187055, at *2 (S.D.N.Y. 1999) (involving alleged associational discrimination against parent-employee because of his son's autism); Leavitt v. SW & B Const. Co., LLC, 766 F. Supp. 2d 263, 279-83 (D. Me. 2011) (involving a husband's allegation that he was discriminated against because of his disabled wife); Trujillo v. PacifiCorp, 524 F.3d 1149, 1155-57 (10th Cir. 2008) (parents/son).

56. *See* GARY PHELAN & JANET BOND ARTERTON, DISABILITY DISCRIMINATION IN THE WORKPLACE § 4:16 ("The expansive scope of 'covered relationships' is reflected by: (1) the ADA's legislative history, which provides that it extends to family members, spouses, friends, care providers and people who perform volunteer work for persons with disabilities, and (2) the House Education and Labor Committee's and House Judiciary Committee's rejection of amendments that would have limited the provisions to relatives 'by blood, marriage, adoption or guardianship.'") (internal citations omitted).

57. U.S. EQUAL EMP. OPPORTUNITY COMM'N, QUESTIONS AND ANSWERS ABOUT THE ASSOCIATION PROVISION OF THE AMERICANS WITH DISABILITIES ACT (Oct. 17, 2005), https://www.eeoc.gov/facts/association_ada.html [https://perma.cc/H54N-JCAY]. *But see* Oliveras-Sifre

Petroleum Operations Co., the Fifth Circuit denied summary judgment to the employer where a hiring officer alleged that he had been discriminated against in violation of the ADA because he objected to his supervisor's decision to reject an applicant in part because the applicant's wife had cancer.[58]

However, not all alleged associations qualify for protection under the ADA. For example, in *E.E.O.C. v. Massage Envy-South Tampa*, the plaintiff-employee alleged that she was fired from her job as a massage therapist because her employer feared that she would contract Ebola during an upcoming trip to Africa.[59] The Eleventh Circuit reasoned that her associational discrimination claim was too tenuous because there was no known association with a specific person with a disability.[60]

Moreover, only "associates" have standing to sue under the ADA's association discrimination provision. For example, the ADA does not permit a person with a disability to sue an associate's employer for associational discrimination. By way of illustration, in *Willson v. Association of Graduates of the U.S. Military Academy*, the court held that a disabled wife lacked standing to sue her husband's employer for associational discrimination.[61] The Alumni Association had hired her husband to fundraise from wealthy donors, but his wife was unable to accompany him to fundraising events because she suffered from Lyme disease, chronic fatigue syndrome, and depression.[62] The couple sued under the ADA, alleging that the Alumni Association fired the husband because of his wife's disabilities.[63] The court dismissed the wife's ADA claim, reasoning that nothing in the plain language of 42 U.S.C. § 12112(b)(4) or the precedent interpreting it indicated that the wife had standing to sue for associational discrimination.[64]

Significantly, the ADA's associational discrimination provision applies to both employees and applicants.[65] They need not be disabled, have a record

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v. P.R. Dept. of Health, 214 F.3d 23, 26 (1st Cir. 2000) (rejecting plaintiffs' ADA association discrimination claim because they alleged that they were discriminated against due to their AIDS advocacy, not a specific and known association with a person who had AIDS); Lester v. Compass Bank, Case No. 96-AR-0812-S, 1997 WL 151782, at *3 (N.D. Ala. 1997) (denying a plaintiff's ADA association discrimination claim, where he alleged that he was fired because he recommended that his employer hire an applicant with a disability); O'Connell v. Isocor Corp., 56 F. Supp. 2d 649, 653 (E.D. Va. 1999) (reasoning that merely being the coworker of a person who has a disability did not entitle the plaintiff to protection under the ADA's association discrimination provision).

58. E.E.O.C. v. DynMcdermott Petroleum Operations Co., 537 Fed. Appx. 437 (5th Cir. 2023).

59. E.E.O.C. v. Massage Envy-South Tampa, 309 F. Supp. 3d 1207, 1210 (M.D. Fla. 2018).

60. *Id.* at 1214–15.

61. Willson v. Ass'n of Graduates of the U.S. Mil. Acad., 946 F. Supp. 294, 296 (S.D.N.Y. 1996).

62. *Id.*

63. *Id.*

64. *Id.*

65. *E.g.*, Padilla v. Buffalo State Coll. Found., Inc., 958 F. Supp. 124, 128 (W.D.N.Y. 1997) (concluding that a job applicant had raised a genuine issue of material fact under the ADA as to whether an employer had engaged in associational discrimination when it withdrew its offer of employment to the

of disability, or be perceived as disabled to fall within its embrace. Rather, to prevail on a claim of associational discrimination, the plaintiff must establish that the adverse employment action occurred because of the plaintiff's known association with a person who has a disability, though that need not be the sole cause of the adverse employment action.[66]

One notable exception is that an employer may terminate an employee whose association with a disabled person poses a direct threat to the workplace.[67] In determining whether a direct threat exists, courts consider various factors, including "[t]he duration of the risk," "nature and severity of the potential harm," as well as its "likelihood" and imminence.[68] For example, in *Den Hartog v. Wasatch Academy*, the Tenth Circuit held that "the ADA permits an employer to discipline or discharge a non-disabled employee whose disabled relative or associate, because of his or her disability, poses a direct threat to the employer's workplace."[69] There, Den Hartog's son, who suffered from bipolar affective disorder, had acted violently toward people in the community, threatened the headmaster's children, assaulted a former classmate, and thus, posed a direct threat to others on campus.[70] As a result, the Tenth Circuit held that Wasatch could

applicant shortly after she requested time off to take her disabled daughter to the Mayo Clinic for consultation and testing).

66. *See, e.g.*, Lewis v. Humboldt Acquisition Corp., Inc., 681 F.3d 312, 314-17 (6th Cir. 2012) (concluding that a but-for standard applies to claims arising under Title I of the ADA unlike the sole cause standard applicable to claims arising under the Rehabilitation Act or the motivating factor standard applicable to claims arising under Title VII, because it would be erroneous to read language into the ADA that is only found in those two distinct statutes); *id*. at 318–19 ("No matter the shared goals and methods of two laws . . .we should not apply the substantive causation standards of one antidiscrimination statute to other anti-discrimination statutes when Congress uses distinct language to describe the two standards. Just as we erred by reading the 'solely' language from the Rehabilitation Act into the ADA based on the shared purposes and histories of the two laws so we would err by reading the 'motivating factor' language from Title VII into the ADA. Shared statutory purposes do not invariably lead to shared statutory texts, and in the end it is the text that matters.") (internal citation omitted); *see also* Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 962 (7th Cir. 2010) (same); Murray v. Mayo Clinic, 934 F.3d 1101, 1107 (9th Cir. 2019) ("We join our sister circuits in holding that ADA discrimination claims under Title I must be evaluated under a but-for causation standard."); Willson, 946 F. Supp. at 296 (stating that a plaintiff alleging association discrimination under the ADA need only prove that the association was a "substantial factor," not the sole factor, motivating the adverse employment decision). Although the but-for causation standard applies to federal ADA claims, different standards may apply to state and local laws that prohibit disability discrimination in employment. *See, e.g.*, Castro-Ramirez v. Dependable Highway Express, Inc., 2 Cal. App. 5th 1028, 1042 (2016) (when deciding a case arising under California's Fair Employment and Housing Act, the appellate court explained, "A jury could reasonably find from the evidence that plaintiff's association with his disabled son was a *substantial motivating factor* in Junior's decision to terminate him . . .") (emphasis added).

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

68. PRACTICAL LAW LABOR & EMPLOYMENT, DISABILITY ACCOMMODATION UNDER THE ADA, Practical Law Practice Note 9-503-9007 at 25-26 (citing 29 C.F.R. § 1630.2(r).).

69. *Den Hartog*, 129 F.3d at 1090.

70. *Id.* at 1078–79.

lawfully terminate Den Hartog and affirmed the District Court's grant of summary judgment to Wasatch.[71]

Like the ADA, some state and local statutes also prohibit associational discrimination on the basis of disability.[72] Their statutory language often mirrors that of the ADA.[73] Notably, an association with a person with a disability does not wholesale insulate an employee or applicant from an adverse employment action. Thus, employers do not violate the ADA if they discipline, terminate, or demote an employee for reasons unrelated to the plaintiff's association with a person with a disability.[74] For example, in *Tuttle v. Baptist Health Medical Group, Inc*., the court concluded that the employer had not violated the ADA's association discrimination provision when it fired an employee whose son was HIV+ because an investigation had revealed the employee's repeated misconduct and policy violations and the people who made the firing decision were not even aware that the plaintiff's son was disabled.[75] Furthermore, the legislative history of the ADA, as well as its plain language, make clear that an employee or applicant who "violates a neutral employer policy concerning attendance or tardiness … may be dismissed even if the reason for the absence or tardiness is to care for" an associate or relative with a disability.[76]

B. Establishing a Claim of Associational Discrimination

As mentioned earlier, to establish a prima facie case of associational discrimination under the ADA, a plaintiff must prove, by preponderance of the evidence: 1) that she was subjected to an adverse employment action; (2) that she was qualified for the job at the time; [77] 3) that she was known at the

71. *Id*. at 1077–78.

72. Alex Long, *State Anti-Discrimination Law as a Model for Amending the Americans with Disabilities Act*, 65 UNIV. OF PITT. L. REV. 597, 627 (2004) ("by the time of the ADA's enactment in 1990, forty-eight states and the District of Columbia had statutes prohibiting disability-based discrimination in the private sector") (citation omitted).

73. *E.g*., Rivera v. Lutheran Med. Ctr., 866 N.Y.S.2d 520, 523 (2008) (recognizing that New York City Administrative Code § 8–107(20) prohibits employment discrimination arising from the employee's association with a person who has a disability).

74. *See, e.g.*, Noles v. Quality Estates, Inc., Case No. Civ. A. 3:02-CV-0491-D, 2003 WL 22169770, at *1-2 (N.D. Tex. Sept. 9, 2003) (concluding that no associational discrimination in violation of the ADA had occurred where the employer fired the plaintiff for an unexplained absence, even though the termination occurred a few weeks after the plaintiff informed the employer that the plaintiff's mother had been diagnosed with terminal cancer); Anthony v. United Telephone Co. of Ohio, 277 F.Supp.2d 763, 773-76 (N.D. Ohio 2002), *aff'd*, 110 Fed. Appx. 680, 681 (6th Cir. 2004) (granting summary judgment to the defendant and determining that no ADA associational discrimination had occurred where the employee's job was eliminated because of the employee's excessive absences, not her son's disability).

75. Tuttle v. Baptist Health Med. Grp., Inc., 379 F. Supp. 3d 622, 633–35, 641, 645 (E.D. Ky. 2019).

76. H.R. REP. NO. 101-485(II), at 61–62 (1990).

77. 42 U.S.C. § 12112(b)(4); 29 C.F.R. § 1630.8; *see also* Magnus v. St. Mark United Methodist Church, 688 F.3d 331, 336 (7th Cir. 2012).

time to have a relative or associate with a disability;[78] and 4) that the adverse employment action occurred under circumstances raising a reasonable inference that the disability of the relative or associate was a determining factor in the employer's decision.[79] For example, in denying a motion to dismiss, the court in *Kouromihelakis v. Hartford Fire Insurance Co*., held that a former employee had established a prima facie case of associational discrimination under the ADA where he claimed that he occasionally had to arrive late to work because of his caregiving duties for his disabled father, the employer knew this was the reason for his lateness, and he was fired after his request for flex time was denied.[80]

In the absence of direct evidence of associational discrimination, courts have applied the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green* to claims of associational discrimination under the ADA.[81] Under this framework, if the plaintiff establishes a prima facie case of associational discrimination, the burden of production shifts to the employer

78. *E.g*., Bates v. Powerlab, Inc., Case No. Civ.A.3:97-CV-2551-P, 1998 WL 292370, at *4 (N.D. Tex. May 18, 1998) (rejecting an ADA associational discrimination claim because the plaintiff did not establish that the defendant knew that the plaintiff's wife was disabled); Potts v. Nat'l Healthcare, L.P., 961 F. Supp. 1136, 1139-40 (M.D. Tenn. 1996).

79. *See* Kelleher v. Fred A. Cook, Inc., 939 F.3d 465, 467–68 (2d Cir. 2019) (quoting Graziado v. Culinary Inst. of Am., 817 F.3d 415, 432 (2d Cir. 2016)); *see also* Den Hartog v. Wasatch Acad., 129 F.3d 1076, 1085 (10th Cir. 1997) (citation omitted) ("(1) the plaintiff was 'qualified' for the job at the time of the adverse employment action; (2) the plaintiff was subjected to adverse employment action; (3) the plaintiff was known by his employer at the time to have a relative or associate with a disability; (4) the adverse employment action occurred under circumstances raising a reasonable inference that the disability of the relative or associate was a determining factor in the employer's decision."); Overley v. Covenant Transp., Inc., 178 Fed. Appx. 488, 493 (6th Cir. 2006); Wascura v. City of South Miami, 257 F.3d 1238, 1242 (11th Cir. 2001); Lynn v. Lee Mem. Health Sys., Case No. 2:15-cv-161-FtM-38DNF, 2015 WL 4645369, at *2 (M.D. Fla. Aug. 4, 2015) (concluding that the plaintiff had established a prima facie case of associational discrimination under the ADA where her employer fired and replaced the plaintiff while she was taking approved leave to care for her disabled daughter); Collins v. Sailormen Inc., 512 F. Supp. 2d 502, 508-09 (W.D. La. 2007); Pulczinski v. Trinity Structural Towers, Inc., 691 F.3d 996, 1002-03 (8th Cir. 2012) (stating that to establish an associational discrimination claim, the plaintiff must prove that the employer acted with discriminatory intent and that, but-for the plaintiff's association with a person with a disability, the adverse employment action would have not have been taken).

80. Kouromihelakis v. Hartford Fire Ins. Co., 48 F. Supp. 3d 175, 181 (D. Conn. 2014).

81. *E.g*., Stansberry v. Air Wis. Airlines Corp., 651 F.3d 482, 487 (6th Cir. 2011) ("Stansberry does not offer any direct evidence of discrimination, and his [ADA association discrimination] claim must therefore be analyzed through a *McDonnell Douglas*-like burden-shifting test."); Den Hartog, 129 F.3d at 1085 (applying the McDonnell Douglas framework to an associational discrimination claim brought under the ADA); Schmitz v. Alamance-Burlington Bd. of Ed., Case No. 1:18-CV-910, 2020 WL 924545, at *5 (M.D.N.C. Feb. 26, 2020) (in assessing an association discrimination claim arising under the ADA, the court observed, "The Fourth Circuit analyzes adverse employment actions under the ADA using the same framework as in Title VII cases."); LaVeglia v. TD Bank, NA, Case No. 2:19-cv-01917-JDW, 2020 WL 2512802, at *4 (E.D. Pa. May 15, 2020) (stating that plaintiff's associational discrimination claim under the ADA "operate[s] under the three-step *McDonnell Douglas* framework"); Dodson v. Coatesville Hosp. Corp., 773 Fed. Appx. 78, 83 (3d Cir. 2019) ("Because Dodson has offered no direct evidence of associational disability discrimination, this claim is also assessed under the McDonnell Douglas framework, which requires her to establish a prima facie case of discrimination and show that the Hospital's legitimate nondiscriminatory reason for terminating her was pretextual.").

to proffer a legitimate, non-discriminatory reason for the action.[82] Then the burden of production shifts back to the plaintiff to prove that the proffered reason is a pretext for associational discrimination.[83] For example, in *Magnus v. St. Mark United Methodist Church*, a former church secretary sued the church, alleging that she was fired because her daughter had a mental disability.[84] Magnus claimed that she was terminated the day after she arrived one hour late due to a medical situation involving her daughter.[85] The church countered that it made the decision to fire Magnus before she had arrived late and that her termination was based on her poor work performance and her refusal to work weekends.[86] The District Court ruled in the church's favor, and the Seventh Circuit affirmed.[87] Likewise, in *Stansberry v. Air Wisconsin Airlines Corp.*, the Sixth Circuit held that an airport director failed to prove associational discrimination arising from his wife's autoimmune disease in part because the airline had known of her disability for several years before terminating the director, and evidence demonstrated that he was performing unsatisfactorily.[88]

Because the associational discrimination provision of the ADA aims to prevent unfounded stereotypes and assumptions about associates of people with disabilities,[89] associational discrimination claims generally involve an adverse employment action arising from fears that a relative's disability may cause the employer to incur great expense[90] or that the employee will become disabled because of her association with a person who has a disability, such

82. *See* Dodson, 773 Fed. Appx. at 83; *see generally* Magnus v. St. Mark United Methodist Church, 688 F.3d 331, 333 (7th Cir. 2012) (determining that the church-employer did not violate the ADA because it terminated the plaintiff due to ongoing performance issues and her inability to work weekends, rather than her association with her disabled daughter).

83. *See* Dodson, 773 Fed. Appx. at 83.

84. Magnus, 688 F.3d 331, 333 (7th Cir. 2012).

85. *Id.*

86. *Id.* at 333–34.

87. *Id.* at 333.

88. Stansberry, 651 F.3d at 484–85, 488.

89. Den Hartog, 129 F.3d at 1082*; see also* Bridges v. City of Indianapolis, 1:17-CV-04705-DML-WCG, 2019 WL 3067512, at *5 (S.D. Ind. July 11, 2019); E.E.O.C. v. STME, LLC, 938 F.3d 1305, 1318-20 (11th Cir. 2019) (explaining that the associational discrimination provision "was intended to protect qualified individuals from adverse job actions based on 'unfounded stereotypes and assumptions' arising from the employees' relationships with particular disabled persons.") (quoting Oliveras–Sifre v. P.R. Dep't of Health, 214 F.3d 23, 26 (1st Cir. 2000)); *id.* at 1318–19 (explaining that the association discrimination provision "was apparently inspired in part by testimony before House and Senate Subcommittees pertaining to a woman who was fired from her long-held job because her employer found out that the woman's son, who had become ill with AIDS, had moved into her house so she could care for him.") (quoting Den Hartog, 129 F.3d at 1082); Erdman v. Nationwide Ins. Co, 621 F.Supp.2d 230, 235-36 (M.D. Pa. 2007); U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-NVTA-2005-4, *supra* note **Error! Bookmark not defined.**.

90. *See, e.g.*, Adams v. Persona, Inc., 124 F. Supp. 3d 973, 982 (D.S.D. 2015).

as by contracting her loved one's infectious disease.[91] For instance, in *Adams v. Persona, Inc.*, the court determined that the plaintiff-employee had established a prima facie case of associational discrimination where his employer knew his daughter had an autoimmune disorder prior to firing him, a company official told the plaintiff's spouse that the plaintiff had one of the highest insurance premiums of anyone at the company, and a remark was made about the health care needs of an unidentified employee's dependent increasing the employer's insurance costs by roughly twenty percent.[92]

Some courts have also upheld a "distraction theory" of associational discrimination wherein the employer bases an adverse employment action on a "fear[ ] that the employee will be inattentive at work due to the disability of the disabled person" or otherwise unable to perform the essential functions of the job due to the association.[93] In fact, to establish a prima facie case of associational discrimination in the Seventh Circuit, a plaintiff must demonstrate that "her case falls into one of the three relevant categories of expense, distraction, or association."[94]

However, it is well settled that associational discrimination claims do not embrace lawsuits alleging that an employer's healthcare plan denied benefits to an employee's disabled dependent.[95] For instance, in *Moresi ex rel. Moresi v. AMR Corp.*, the court granted the employer summary judgment because the refusal of the employer's medical insurance provider to reimburse the plaintiff for the occupational and speech therapy that his disabled daughter required did not constitute associational discrimination under the ADA.[96] Similarly, in *E.E.O.C. v. Group Health Plan*, the court concluded that the plaintiff, a retired employee, lacked standing to assert associational discrimination under the ADA arising from the refusal of the

91. *See* Timothy M. Barber, *No ADA Requirement to Alter Schedule So Worker May Care for a Disabled Relative*, 21 NO. 9 WIS. EMP. L LETTER 4 (2012).

92. *See generally* Adams, 124 F. Supp. 3d at 983–85.

93. Kelleher v. Fred A. Cook, Inc., 939 F.3d 465, 468 (2d Cir. 2019) (quoting Graziadio v. Culinary Inst. of Am., 817 F.3d 415, 432 (2d Cir. 2016)); *see* Barber, *supra* note 92.

94. Magnus, 688 F.3d at 337.

95. *See* Conner v. Colony Lake Lure, Case No. 4:97-CVO-01, 1997 WL 816511, at *10 (W.D.N.C. Sep. 4, 1997) (determining that the ADA does not bar health insurers from covering some disabilities but not others). However, several courts have held that ERISA does not preempt associational discrimination claims under the ADA. For example, in Le v. Applied Biosystems, 886 F. Supp. 717, 718 (N.D. Cal. 1995), the plaintiff-employee informed his employer that he would be donating part of his liver to his disabled daughter during an expensive procedure that would require him to take a leave of absence. When he was terminated two days later, he sued the employer, alleging that he was discriminated against under the ADA because his employer did not want to pay him medical benefits. *Id.* at 718–19. The court determined that ERISA did not preempt his ADA claim because 42 U.S.C. § 12112(b)(4) prohibits an employer from basing an employment decision on whether an employee or applicant, disabled or not, has a dependent with a disability is either not covered by the employer's insurance plan or that could increase the employer's healthcare costs. *Id.* at 720–21.

96. Moresi ex rel. Moresi v. AMR Corp., Case No. CA 3:98-CV-1518-R, 1999 WL 680210, at *1, *3 (N.D. Tex. Aug. 31, 1999).

company's health plan to cover his wife's experimental treatment for ovarian cancer.[97] Indeed, courts have generally held that an employer-provided health insurance plan's decision to deny coverage, treatment, and so forth, to an applicant or employee's dependent does not constitute associational discrimination under the ADA unless the employee is singled out or offered a different plan than other employees.[98] It is, however, illegal for a covered employer to take an adverse employment action against an employee or applicant out of a fear or stereotype that caring for that person's disabled dependent will increase health plan costs or be unduly expensive.[99]

C. Associational Accommodation

1. Why Associational Accommodation is Not Currently Required

Associational discrimination claims are "seldom litigated,"[100] perhaps because the provision is not well known and because plaintiffs asserting associational discrimination face many barriers, such as proving that the employer knew of the association and based its employment decision on the association.[101] Associational discrimination claims also fail because courts

97. E.E.O.C. v. Grp. Health Plan, 212 F. Supp. 2d 1094, 1099–1100 (E.D. Mo. 2002).

98. *See* Niemeier v. Tri-State Fire Prot. Dist., Case No. 99 C 7391, 2000 WL 1222207, at *1, *3 (N.D. Ill. Aug. 24, 2000) (denying plaintiff's association discrimination claim arising from the employer's refusal to cover his wife's infertility treatment because he was not given a different plan or fewer benefits because the employer knew his wife was disabled); Micek v. City of Chicago, Case No. 98 C 6757, 1999 WL 966970, at *6-7 (N.D. Ill. Oct. 4, 1999) (concluding that the city health plan's failure to pay for his son's speech therapy and wife's hearing aids was not unlawful); Larimer v. IBM Corp., 370 F.3d 698, 702-03 (7th Cir. 2004) (affirming district court ruling that employee failed to establish a prima facie case of retaliation under ERISA or association discrimination under the ADA, where he alleged that his employer fired him because his twin daughters were born premature and suffered from various serious medical conditions). *But see* Morgenthal ex rel. Morgenthal v. Am. Tel. & Tel. Co., Inc., Case No. 97-CIV-6443-DAB, 1999 WL 187055, at *1-4 (S.D.N.Y. Apr. 6, 1999) (denying a motion to dismiss where a father-employee alleged associational discrimination on the basis of his son's autism, where his son's autism treatment was not covered by his employer-provided health insurance policy).

99. *E.g.*, Erdman v. Nationwide Ins. Co., 582 F.3d 500, 511 (3d Cir. 2009); Clem v. Case Pork Roll Co., Case No. 15-6809, 2016 WL 3912021, at *1, *4 (D.N.J. July 18, 2016).

100. Castro-Ramirez v. Dependable Highway Express, Inc., 2 Cal. App. 5th 1028, 1036 (2016) (discussing associational discrimination under California's FEHA); *see also* Moresi ex rel. Moresi, 1999 WL 680210, at *2 ("The [ADA's] 'association provision' has not been the subject of much litigation to date."); Dessources v. Am. Conf. Inst., Case No. 12 Civ. 8105 (PKC), 2013 WL 2099251, at *3 (S.D.N.Y. May 15, 2013) (describing the associational discrimination provision within the ADA as "rarely litigated") (quoting *Larimer*, 3701 F.3d at 700); Graziadio v. Culinary Inst. of Am., 817 F.3d 415, 432 (2d Cir. 2016) ("We have not yet had occasion to consider what standard should govern such rarely litigated claims of 'associational discrimination'"); Bridges v. City of Indianapolis, Case No. 1:17-CV-04705-DML-WCG, 2019 WL 3067512, at *5 (S.D. Ind. July 11, 2019) ("This associational discrimination provision has been rarely litigated (the Seventh Circuit appears to have addressed claims under this provision only three times), but its purpose is to protect employees from adverse employment actions that are based on unfounded assumptions about the needs of a disabled person.") (citing Magnus v. St. Mark United Methodist Church, 688 F.3d 331, 336-37 (7th Cir. 2012)).

101. *See* Cusick v. Yellowbook, Inc., 607 Fed. App'x. 953, 955 (11th Cir. 2015) (rejecting ADA association discrimination because employee failed to show that his employer demoted him due to his

consistently hold that an employer is not legally obligated under the ADA to provide a reasonable accommodation to an employee or applicant because of that person's association with a person with a disability.[102]

This is because the ADA's associational discrimination provision makes no explicit and separate reference to accommodation. Nor does its accompanying regulation—29 C.F.R. § 1630.8. And no accommodation requirement was added when Congress amended the ADA in 2008, which some might view as evidence of congressional intent to omit it, rather than mere legislative oversight.[103]

Furthermore, the ADA defines "discriminate" as "not making reasonable accommodations to the known physical or mental limitations of an otherwise *qualified individual with a disability* who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or denying employment opportunities to a job applicant or employee who is an otherwise *qualified individual with a disability*, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant[.]"[104] Since employers are not required to

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child's disability and related medical costs); Young v. Gen. Motors Co., 188 Fed. App'x. 620, 620 (9th Cir. 2006) (denying ADA association claim involving salesman's allegations that he was not hired because of his wife's disability); Hilburn v. Murata Elec. N. Am., Inc., 181 F.3d 1220, 1230-31 (11th Cir. 1999) (rejecting ADA association discrimination because employee failed to establish that she was qualified for the position sought); Rocky v. Columbia Lawnwood Regional Med. Ctr., 54 F. Supp. 2d 1159, 1167-68 (S.D. Fla. 1999) (rejecting ADA association discrimination because employee failed to establish that the legitimate, non-discriminatory reason for termination was pretextual); *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, 134 (2004) (elaborating on ADA association discrimination requirements).

102. *See, e.g.*, Erdman, 582 F.3d at 510-11 (involving allegation that "Nationwide did not engage in an interactive process in or around March 2003, to reasonably accommodate [Plaintiff's] needs due to her disabled child" and had granted a "reasonable accommodation to [Plaintiff] for her disabled child but revoked it" in violation of the ADA); Reyes-Feliciano v. Marshalls, 159 F. Supp. 3d 297 (D.P.R. 2016); Fernandez-Ocasio v. WalMart P.R. Inc., 94 F. Supp. 3d 160, 171 (D.P.R. 2015); Lukic v. Eisai Corp. of N. Am., Inc., 919 F. Supp. 2d 936 (W.D. Tenn. 2013); Atkinson v. Wiley Sanders Truck Lines, Inc., 45 F. Supp. 2d 1288, 1292 n.4 (M.D. Ala. 1998), *aff'd without opinion*, 189 F.3d 486 (11th Cir. 1999) (concluding that the employer's refusal to allow the plaintiff-driver to participate in a program that would enable his diabetic wife to accompany him on trips did not violate the ADA's associational discrimination provision because the ADA does not require the employer to give the driver a reasonable accommodation related to his wife's disability).

103. Although the ADAAA did not amend the language of the associational discrimination provision and the ADAAA's legislative history reveals no notable efforts to do so, EEOC Chair Naomi Earp did predict that the ADA's associational discrimination provision "will become increasingly important as individuals with disabilities who have been living in institutional settings move into the larger community—alongside family members and friends.'" *Americans with Disabilities Act: Sixteen Years Later; Hearing before the Subcommittee on the Constitution of the Committee on the Judiciary*, 109th Cong. 85 (2006) (statement of Naomi Earp).

104. 42 U.S.C. §§ 12112(b)(5)(A)-(B) (emphasis added); *see also* Den Hartog v. Wasatch Acad., 129 F.3d 1076, 1084 (10th Cir. 1997); 29 C.F.R. § 1630.8; H.R. REP. No. 101-485(II), at 61-62 (1990).

accommodate non-disabled employees, a "qualified individual" within the meaning of the ADA's associational discrimination provision refers to a person who can perform the essential functions of the job *without* accommodation. As a result, it is well settled that the ADA does not require an employer to provide a reasonable accommodation necessary "to enable the employee to care for [an associate or family member] with a disability."[105]

The legislative history of the ADA's association discrimination provision, albeit scant, bolsters this conclusion. Indeed, it makes clear that Congress did not intend the provision to mandate caregiver accommodation, as demonstrated below:

> [A]ssume, for example, that an applicant applies for a job and discloses to the employer that his or her spouse has a disability. The employer believes the applicant is qualified for the job. The employer, however, assuming without foundation, that the applicant will have to miss work or frequently leave work early or both, in order to care for his or her spouse, declines to hire the individual for such reasons. Such refusal is prohibited…. In contrast, assume that the employer hires the applicant. If he or she violates a neutral employer policy concerning attendance or tardiness, he or she may be dismissed even if the reason for the absence or tardiness is to care for the spouse. The employer need not provide any accommodation to the nondisabled employee.[106]

As one court has observed, "[t]hese examples demonstrate that the purpose of the associational provision is to prevent an employer from making an unfounded assumption that an employee who has an association with a disabled person will miss work to care for that person. The associational provision, however, does not impose an affirmative duty upon the employer to provide any accommodation to a nondisabled employee."[107]

Moreover, the EEOC, which is charged with issuing interpretative guidance about the ADA, has consistently stated that "an employer need not provide the applicant or employee without a disability with a reasonable accommodation because that duty only applies to qualified applicants or employees with disabilities. Thus, for example, an employee would not be entitled to a modified work schedule as an accommodation to enable the employee to care for a spouse with a disability."[108] Indeed, the EEOC issued a final rule in July 1991—roughly a year after the ADA's enactment—

105. Tyndall v. Nat'l Educ. Centers, Inc. of Cal., 31 F.3d 209, 214 (4th Cir. 1994); *see, e.g.*, Kennedy v. Chubb Grp. of Ins. Cos., 60 F. Supp. 2d 384, 396 (D.N.J. 1999) (stating that the ADA did not require the employer to permit an employee without a disability to work part-time as a reasonable accommodation to enable her to care for her disabled son); 29 C.F.R. § 1630.8, Appendix.

106. H.R. REP. No. 101-485(II), at 61-62.

107. *Id*. (relying on the legislative history of the ADA's associational discrimination provision to conclude that the plaintiff was not entitled to a reasonable accommodation just because her son had a disability).

108. 29 C.F.R. § 1630.8 Appendix at 375.

clarifying that position and has unwaveringly maintained that stance ever since, reaffirming it in updated guidance.[109] As recently as 2019, the EEOC concluded that the U.S. Postal Service had not violated the ADA when it revoked an informal arrangement that management had previously made with a mechanic, allowing him to leave fifteen minutes early twice a week to pick up his son, who had cerebral palsy, from school.[110] Rather than requiring the U.S. Postal Service to show that the arrangement had imposed any sort of hardship, the EEOC simply stated that employers were not required to provide caregivers with a reasonable accommodation, so the arrangement could lawfully be withdrawn. Furthermore, the EEOC has recently issued guidance for employers, explaining that the ADA does not require them to permit an employee to work from home as an accommodation because the employee's spouse has a higher risk of severe illness from COVID-19 due to an underlying medical condition.[111]

Nor is the EEOC likely to alter its position in the future. Indeed, in April 2007, speaker Zachary D. Fasman emphasized the EEOC's unswerving stance on associational accommodation, explaining that Congress "did not intend [for the ADA] to afford reasonable accommodation to anyone other than the disabled individuals . . ."[112]

Finally, the U.S. Supreme Court is unlikely to take up this question given the near universal agreement of courts and the EEOC on this question, meaning that there is no circuit split to resolve. In fact, the Supreme Court

109. Interpretive Guidance on Title I of the Americans With Disabilities Act, 56 Fed. Reg. 34141, 35747 (July 26, 1991); Interpretive Guidance on Title I of the Americans With Disabilities Act, 29 C.F.R. Pt. 1630.8 app. at 401 (2012); U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-NVTA-2005-4, *supra* note 3 (explaining that a person without a disability is not entitled to a reasonable accommodation due to the person's association with someone with a disability because the reasonable accommodation requirement only applies to individuals with disabilities); U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-NVTA-2009-1, *Employer Best Practices for Workers with Caregiving Responsibilities* (April 22, 2009), https://www.eeoc.gov/laws/guidance/employer-best-practices-workers-caregiving-responsibilities [https://perma.cc/7MUZ-W3LP] ; *see also* Equal Employment Opportunity for Individuals with Disabilities, 56 Fed. Reg. 35,726-01 (July 26, 1991) (While not in the language of the statute itself, the final rule promulgated by the EEOC explains that the EEOC added "or otherwise discriminate against" to the text of the regulation to clarify that "harassment or any other form of discrimination" are barred under the association discrimination provision.).

110. Arthur F. v. U.S. Postal Serv., EEOC Appeal No. 0120182699 (Oct. 25, 2019), https://www.eeoc.gov/sites/default/files/decisions/2020_08_10/0120182699.pdf [https://perma.cc/99YN-GQ33].

111. EEOC, EEOC TECHNICAL ASSISTANCE QUESTIONS AND ANSWERS: WHAT YOU SHOULD KNOW ABOUT COVID-19 AND THE ADA, THE REHABILITATION ACT, AND OTHER EEO LAWS (Jun. 17, 2020), https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws [http://perma.cc/Q7Z4-FLSK].

112. Remarks of Zachary Fasman, https://www.eeoc.gov/meetings/meeting-april-17-2007-perspectives-workfamily-balance-and-federal-equal-employment/fasman [https://perma.cc/A2GZ-7648] ("[I]ndividuals with an associational relationship to a family member with a disability are not afforded 'reasonable accommodation' under the [ADA] . . .").

has only decided one case tangentially involving associational discrimination since the ADA's enactment, and it involved Title VII, not the ADA.[113]

Taken together, the plain language of the ADA's associational discrimination provision, its limited legislative history,[114] and the EEOC's consistent interpretation of it have led courts nationwide to repeatedly excuse covered employers from any legal obligation to engage in a good faith interactive process with caregivers of people with disabilities regarding reasonable accommodations they may need due to their competing caregiving and workplace responsibilities.[115]

2. Adverse Outcomes of Failing to Require Associational Accommodation

While this precedent is certainly warranted in light of the ADA's legislative history and precedent interpreting it, it has sometimes resulted in heartbreaking outcomes for non-disabled caregivers of people with disabilities. For example, in *Kelleher v. Fred A. Cook, Inc*., the Second Circuit vacated the district court's decision to dismiss the plaintiff-employee's complaint, which alleged that his former employer had terminated him out of fear that he would be distracted by his daughter's Rett Syndrome.[116] Rett Syndrome is a serious neurological disorder that impaired his daughter's "ability to speak, walk, breath, and eat, among other things."[117]

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113. In Thompson v. North American Stainless, LP, 562 U.S. 170, 172 (2011), the Supreme Court unanimously decided that Title VII's anti-retaliation provision could cover the Charging Party's fiancé who alleged that the employer fired him three weeks after his co-worker-fiance filed an EEOC Charge against it, alleging sex discrimination. The Court reasoned "that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired." *Id*. at 174. The Supreme Court rejected the same argument that opponents had once lodged against the ADA's associational discrimination provision—that adopting Thompson's position would mean that anyone with any connection to an employee or applicant could sue the employer in response to an adverse employment decision, declaring open season on employers. *Id*. at 177–78.

114. *See, e.g*., Rapid Transit Advocs., Inc. v. S. Cal. Rapid Transit Dist., 752 F.2d 373, 377 (9th Cir. 1985) ("The parties agree that the legislative history is silent as to whether Congress intended to create a private right of action. Congressional silence is not necessarily fatal to implication of a private cause of action . . . a silent legislative history obviates the need to inquire further into congressional intent."); Till v. Unifirst Fed. Sav. & Loan Ass'n, 653 F.2d 152, 161 (5th Cir. 1981) (concluding that no private remedy under the National Flood Insurance Program exists in part because the "legislative history [was] silent on the existence of a private cause of action"); U.S. v. Selby, 333 F. Supp. 2d 367 (D. Md. 2004); U.S. v. Sachakov, 812 F. Supp. 2d 198, 209 (E.D.N.Y. 2011) ("[N]othing in the legislative history of either of these two provisions indicates that Congress did not permit the punishments to be cumulative. Since the legislative history is silent, this court must assume that the crimes may be treated separately.").

115. *See, e.g*., Kennedy v. Chubb Grp. of Ins. Cos., 60 F. Supp. 2d 384, 396 (D.N.J. 1999) ("[T]he scope of the ADA does not reach that far."); Den Hartog v. Wasatch Acad., 129 F.3d 1076, 1084 (10th Cir. 1997) ("[T]he ADA does not require an employer to make any 'reasonable accommodation' to the disabilities of relatives or associates of an employee who is not himself disabled."); Tyndall v. Nat'l Edu. Ctr. Inc., 31 F.3d 209, 214 (4th Cir. 1994) (same); Reddinger v. Hosp. Cent. Servs., Inc., 4 F. Supp. 2d 405, 409 (E.D. Pa. 1998) ("[T]he ADA does not require an employer to restructure an employer's work schedule to enable the employee to care for a relative with a disability.").

116. Kelleher v. Fred A. Cook, Inc., 939 F.3d 465, 466–468 (2d Cir. 2019).

117. *Id.* at 466-68.

Kelleher was hired in 2014 as a Laborer and Operator, but after several positive reviews, he was promoted to a Truck Operator.[118] He alleged that in March 2015, he advised his boss, Brian Cook, that due to his daughter's disability "he may have to occasionally rush home to aid in her care."[119] According to Kelleher, workplace relations "deteriorated" soon thereafter, and he was assigned lower paying work.[120] He was also purportedly advised that "his problems at home were not the company's problems" and told that he would not receive a raise.[121]

Soon thereafter, Kelleher's daughter suffered a "near-fatal seizure" and was hospitalized.[122] Kelleher promptly advised Cook that, as a result, he would be absent from work that Monday.[123] When Kelleher arrived at work on Tuesday, he had been demoted to shoveling sewer systems.[124] Kelleher sought a temporary accommodation of eight-hour shifts (as opposed to 10 or 12-hour shifts), so that he could visit his daughter in the hospital, and that request was rejected.[125] "On April 16, 2015, [only] two and a half weeks after the day of work he missed for the hospital visit, Kelleher arrived to work 10-15 minutes late" and "was told to go home . . ."[126] He was terminated a month later, but his termination letter was dated April 2015.[127]

In response, Kelleher filed a Charge of Discrimination with the EEOC and later sued.[128] The district court dismissed the case, reasoning that Kelleher's termination was justified because he was "unable to be at work for the entire work day, including after the end of his shift, as the [employer] required," and the ADA did not require the employer to reasonably accommodate him because he was a non-disabled caregiver.[129]

On appeal, the Second Circuit affirmed that the ADA did not require caregiver accommodation but still vacated the district court's decision because[130] the "employer's *reaction* to such a request for accommodation can

118. *Id.* at 466.
119. *Id.*
120. *Id.* at 466–67.
121. *Id.* at 467.
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.* at 469-70 ("The complaint also satisfies the fourth element of an associational discrimination claim: an inference that the disability of the plaintiff's relative or associate was a determining factor in the employer's adverse action. Kelleher was told that 'his problems at home were not the company's problems' at the March 27, 2015 meeting…and he was effectively demoted after he missed a day's work to care for his daughter. These allegations provide all that is needed to raise a minimal inference that

support an inference that a subsequent adverse employment action was motivated by associational discrimination," noting that "Cook's demand that Kelleher 'leave his personal problems at home' after Kelleher requested one week of shortened workdays support[ed] Kelleher's claim that his later termination was motivated by associational discrimination. . . ."[131]

Similarly, in *Carmichael v. Advanced Nursing & Rehabilitation Center of New Haven, LLC*, a licensed practical nurse and single mom who was hired in 2016, received ratings of "average" and "above average" during her March 2017 review.[132] She was described as a "good nurse" and "personable."[133] But in April 2017, her 14-year-old son was hit by a motorcycle while riding his bike.[134] He suffered extensive brain injuries and had to undergo surgery.[135] Although he survived, he was left with the intellectual capacity of a preschooler.[136] Because Carmichael was a single mom with no family in the area, she relied on her son's godfather for childcare.[137] Despite the challenges, she never asked for time off, missed a shift, or even showed up late.[138] One day, her son's godfather was unable to pick him up as planned, so she brought him to work with her where she would supervise him until his godfather arrived.[139] Her supervisor let her know that she could not bring her son to work, and she was fired in August 2017, roughly four months after her son's injury.[140]

Likewise, in *Schmitz v. Alamance-Burlington Board of Education*, an elementary school teacher with no performance problems had a son who had to undergo unexpected emergency brain surgery in the fall of the school year.[141] He was then diagnosed with von Recklinghausen's Disease, a rare genetic disorder that causes tumors, which impaired his ability to "see, think,

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Kelleher's employer thought that Kelleher's daughter was a distraction, and concern over distraction was a 'determining factor' in Kelleher's termination.") (internal citation omitted).

131. *Id.* at 469-70. Notably, however, the early stage of the case likely played a pivotal role in the Second Circuit's decision. Indeed, the panel noted, "On a motion to dismiss, we do not consider potential nondiscriminatory reasons for termination; we examine the complaint to determine whether it contains 'at least minimal support for the proposition that the employer was motivated by discriminatory intent.'" *Id.* at 470. Had the case involved a more onerous burden of proof, as required for summary judgment, the panel may well have reached a different conclusion. As of June 2021, only two cases had cited *Kelleher—Carmichael* and *Schmitz*. *See* Carmichael v. Advanced Nursing & Rehab. Ctr. of New Haven, LLC, Case No. 3:19-cv-908, 2021 WL 735878, at *2 (D. Conn. Feb. 24. 2021); Schmitz v. Alamance-Burlington Bd. of Educ., Case No. 1:18CV910, 2020 WL 924545, at *9 (M.D.N.C. Feb. 26, 2020).

132. Carmichael, No. 3:19cv908, 2021 WL 735878, at *2 (D. Conn. Feb. 24. 2021).

133. *Id*.

134. *Id*.

135. *Id.*

136. *Id*. at *3.

137. *Id*.

138. *Id.* at *2.

139. *Id*. at *3.

140. *Id.* at *3–*6.

141. Schmitz, 2020 WL 924545, at *1-2.

and learn" and made him unable to walk or care for himself.[142] Afterwards, the teacher asked her principal if she could leave school each day for a few weeks at 2:30pm instead of 3:15pm to attend to her son's care.[143] She suggested that her pay be pro-rated accordingly for the 45 minutes missed.[144] Her request was denied, and the principal allegedly commenced a campaign of retaliation against her, eventually culminating in a demand that she resign.[145] In denying the defendant's motion to dismiss, the court reasoned that "[t]hough Defendant is correct in that no accommodation need be given to the associate of a disabled person, Defendant is not correct insofar as the denial of such a request cannot serve as evidence of an impermissible motive."[146]

Furthermore, in *Castro-Ramirez v. Dependable Highway Express, Inc.*, a driver with no prior performance issues whose son had to receive dialysis each evening asked his new supervisor to assign him to early shifts so that he could work a full day but still be home in time to administer his son's dialysis.[147] His supervisor refused his request and promptly fired him the very next day when he was unable to complete a late shift that would have conflicted with his caregiver duties.[148]

Disheartening cases like these illuminate the tension between the ADA's broad remedial spirit and purpose—to strike at the entire spectrum of discrimination on the basis of disability—and its failure to require employers to even consider accommodating a caregiver. Yet it is beyond dispute that the interests of people with disabilities like Kelleher's daughter and Castro-Ramirez's son are better promoted when their parent-caregivers are able to perform their jobs without sacrificing their caregiving responsibilities. Without a legal framework to ensure that, each parent was terminated, which likely resulted in a loss of much needed income and health insurance benefits for their disabled children. In this way, the ADA's dearth of clear and robust protection for caregivers harms the interests of the millions of people with disabilities entrusted to their care.

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142. *Id*.

143. *Id*.

144. *Id*. at *2.

145. *Id*. at *11 ("Finally, Defendant argues that Plaintiff's discrimination claim is based on her request for an accommodation, an accommodation she was not entitled to receive. Though Defendant is correct in that no accommodation need be given to the associate of a disabled person, Defendant is not correct insofar as the denial of such a request cannot serve as evidence of an impermissible motive.)

146. *Id*.; *see also* Kelleher, 939 F.3d at 469 ("[t]hough the ADA does not require an employer to provide a reasonable accommodation to the nondisabled associate of a disabled person, an employer's reaction to such a request for accommodation can support an inference that a subsequent adverse employment action was motivated by associational discrimination.").

147. Castro-Ramirez v. Dependable Highway Express, Inc., 2 Cal. App. 5th 1028, 1032-34 (2016) (decided under a state anti-discrimination statute).

148. *Id*. at 1033–35.

Worse yet, *Kelleher* also showcases the way in which an employer may actually rely on a caregiver's request for a reasonable accommodation, even an isolated or temporary one, to later contend that the caregiver is not qualified for the position. The Second Circuit, perhaps keenly aware that the employer's actions contravened public policy, found a creative work-around to partly salvage Kelleher's claim. Indeed, despite the fact that the plain language of the ADA's associational discrimination provision and its legislative history are silent regarding retaliation for a caregivers' request for a reasonable accommodation, the Second Circuit still concluded that the supervisor's actions were potentially unlawful if they constituted retaliation arising from Kelleher's request for accommodation. Likewise, in *Schmitz*, the court denied the defendant's motion to dismiss, reasoning that while associational accommodation is not required, the denial of such a request may still "serve as evidence of an impermissible motive."[149] Other plaintiffs have not been so lucky.

Accordingly, Part Three of the Article explores why covered employers should be required to at least engage in a good faith interactive process with employees and applicants who are caregivers of people with disabilities regarding a reasonable accommodation necessitated by the frequent, substantive, and continual care they provide to loved ones with disabilities.

III. ARGUMENTS FOR REQUIRING CAREGIVER ACCOMMODATION UNDER THE ADA

Although it is well settled that Title I of the ADA does not require covered employers to accommodate caregivers of people with disabilities, there are several compelling reasons why it should, at least in limited circumstances. Not only would such a requirement better comport with the ADA's remedial spirit and purpose, but it would also be consistent with the ADA's existing protection of non-disabled people. It would also better recognize the unique nature of disability discrimination and address loopholes in coverage left by other statutes, including the Family and Medical Leave Act of 1993. It would further promote sound public policy by reducing the disparate impact of caregiving on working women, communities of color, and other marginalized groups. Finally, amending the ADA would better comport with EEOC best practices as well as evolving societal attitudes toward caregiving, healthcare, and corporate responsibility.

A. Construing the ADA Broadly to Effective Its Spirit and Purpose

As a remedial statute, the ADA should be construed broadly to better effectuate its spirit and purpose. Requiring covered employers to engage in a

149. Schmitz, 2020 WL 924545, at *11.

good faith interactive process with caregivers of people with disabilities to determine if a reasonable accommodation will enable them to effectively perform their jobs while still promoting the health and wellness of their disabled loved ones better comports with the ADA's remedial spirit and purpose. "From its earliest incarnation in 1988 to the ultimately passed version in 1990, Congress considered [the ADA] an unabashedly liberal piece of legislation that broadly protected the disability community."[150] It is beyond dispute that the drafters of the ADA aimed for it to strike at the entire spectrum of disability discrimination, not only in employment, but also with regard to accessibility in public accommodations, within state and local government, communications, transportation, and more. Indeed, Title I states that "[n]o covered entity shall discriminate against a *qualified individual on the basis of disability* in regard to . . . [the] terms, conditions, and privileges of employment."[151] The phrase "qualified individual on the basis of disability" explicitly goes beyond merely protecting people *with* disabilities and instead targets discrimination against any "qualified individual" that is *"based on* disability. This stands in contrast to the more limited phrase "qualified individual with a disability" that is used elsewhere in the statute[152] and thus, reflects the drafters' intent for Title I to provide broader protection.

Furthermore, when courts narrowed the ADA's coverage in contravention of that legislative intent,[153] Congress responded by enacting the ADAAA, which clarified that the ADA must be liberally construed.[154] Although the question of whether to require covered employers to also consider granting reasonable accommodations to caregivers does not appear to have come up during debate over the ADAAA, doing so arguably better

150. Ruth Colker, *The ADA's Journey through Congress*, 39 WAKE FOREST L. REV. 1, 2 (2004).

151. 42 U.S.C. § 12112(a).

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

153. *See, e..g.*, Sutton v. United Air Lines, Inc., 527 U.S. 471, 482 (1999) (holding that mitigating measures must be considered when assessing if a plaintiff is "substantially limited in a major life activity" and thus disabled within the meaning of the ADA); Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 200–01 (2002), *overturned due to legislative action* (2009) ("[w]hen addressing the major life activity of performing manual tasks, the central inquiry must be whether the claimant is unable to perform the variety of tasks central to most people's daily lives, not whether the claimant is unable to perform the tasks associated with her specific job" and clarifying that an *individualized* assessment of a person's symptoms is necessary to determine if the person is disabled under the ADA because symptoms may vary from one person to another; a mere diagnosis of a condition is not dispositive.).

154. 42 U.S.C. § 12102(4)(A) ("The definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter."); *see also Disabled in Action of Pa. v. SEPTA*, 635 F.3d 87, 94 (3d Cir. 2011) (explaining that the ADA must be "liberally construed to effectuate" its remedial purpose of eliminating disability discrimination).

comports with the ADA's remedial spirit and purpose as well as with the ADAAA's explicit directive that the ADA be construed broadly.

In addition, the ADA's plain language—"on the basis of disability"—could be interpreted to encompass doctrines that impede access to the beneficial in-home care that a person with a disability needs or desires. Beginning in the 1820s, people with disabilities were often "warehoused" in institutions where too often, they suffered abuse and neglect.[155] Things changed after thousands of WWI and WWII veterans returned from war with disabilities.[156] Between 1920 and 1960, the focus shifted to rehabilitation, including at-home care, as opposed to the defunct protective isolation model that had endorsed the large-scale segregation of people with disabilities in public institutions.[157]

By way of illustration, in *Olmstead v. Zimring*, the U.S. Supreme Court held that the segregation of people with disabilities can violate Title II of the ADA."[158] As Justice Ruth Bader Ginsburg observed, "institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life."[159] The Court added that "confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment."[160] The majority relied upon the Developmentally Disabled Assistance and Bill of Rights Act of 1975, which stated that "[t]he treatment, services, and habilitation for a person with developmental disabilities . . . *should be* provided in the setting that is least restrictive of the person's personal liberty."[161] In a concurring opinion, Justice Anthony Kennedy added that "'deinstitutionalization' has permitted a substantial number of mentally disabled persons to receive needed treatment with greater freedom and dignity," while clarifying that the ADA does not require states to force people with mental disabilities out of institutions into settings, such as homeless shelters, where they lack an appropriate setting for treatment and recovery.[162] *Olmstead* perhaps demonstrates the Court's recognition of the premium

155. Perdue, *supra* note 5, at 228.

156. *Id*.

157. *Id*.; *see generally* Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 588-89 (1999) (5-3).

158. Olmstead, 527 U.S. at 587.

159. *Id*. at 600.

160. *Id*.

161. *Id*. at 599 (citing 89 Stat. 502, 42 U.S.C. § 6010(2) (1976 ed.) (emphasis added)); *see also* Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 24 (1981) (concluding that this provision of the Developmental Disabilities Assistance and Bill of Rights Act was "intended to be hortatory, not mandatory").

162. Olmstead, 527 U.S. at 609.

placed on in-home care by loved ones, which generally offers heightened "freedom and dignity," as opposed to institutionalization.

But caregivers who are unable to receive accommodation may have no choice but to institutionalize their loved ones, despite the fact that such institutionalization may severely diminish their quality of life or delay their recovery. Thus, permitting employers to reject a caregiver's request for accommodation out of hand could reduce the access that people with disabilities have to more beneficial in-home care and thus, impede the meaningful community integration discussed in *Olmstead*. By comparison, requiring employers to meaningfully consider caregiver requests for reasonable accommodation could increase access to at-home care for people with disabilities whose loved ones are otherwise unable to balance their competing caregiving and job responsibilities.

B. The ADA's Existing Protection of Non-Disabled People

Requiring covered employers to engage in a good faith interactive process with caregivers of people with disabilities also comports with the ADA's existing protection of individuals who are not disabled. As noted earlier, the ADA prohibits employment discrimination "on the basis of disability," not merely against people *with* disabilities. Indeed, Title I of the ADA not only expressly protects non-disabled associates from disability discrimination, but it also prohibits employment discrimination against individuals with a *record* of disability[163] or who are *regarded as* disabled, meaning that they are merely *perceived* as having a disability.[164] The regarded

163. This provision aims to insulate recovered substance abusers, addicts, and alcoholics from persistent employment discrimination long after they are sober due to harmful stereotypes about addiction and alcoholism. *See, e.g.*, Goldsmith v. Jackson Mem'l Hosp. Pub. Health Tr., 33 F. Supp. 2d 1336 (S.D. Fla. 1998) (involving a physician-applicant's claim that he was denied employment, in violation of the ADA, because he was a recovering alcoholic); Pace v. Paris Maint. Co., 107 F. Supp. 2d 251 (S.D.N.Y. 2000) (involving an ADA claim arising from terminated employee's status as a recovering alcoholic); Doe v. Main Line Hosps., Inc., Case No. 20-2637-KSM, 2020 WL 5210994 (E.D. Pa. Sept. 1, 2020) (involving a registered nurse's allegation that her hospital-employer terminated her, in violation of the ADA, because she was a recovering drug addict); Suarez v. Pa. Hosp. of the Univ. of Pa. Health Sys., Case No. 18-1596, 2018 WL 6249711 (E.D. Pa. Nov. 29, 2018) (involving a registered nurse arguing that, *inter alia*, her status as a recovering opioid addict caused the hospital to terminate her). In fact, the ADA even includes a safe harbor provision, which protects an individual who has "successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs" or "is participating in a supervised rehabilitation program and is no longer engaging in such use." 42 U.S.C. §§ 12114(b)(1)-(2). The ADA also protects individuals who are discriminated against because they are mistakenly believed to be current illegal drug users. *Id.* § 12114(b)(3).

164. 42 U.S.C. § 12102(1)(C); 29 C.F.R. § 1630.2(l)(1) (explaining that people may sue under the ADA's *regarded as* prong if they establish that they have been subject to an action prohibited by the ADA because of an "actual or perceived physical or mental impairment, whether or not that impairment substantially limits, or is perceived to substantially limit, a major life activity"); *see also* Conant v. City of Hibbing, 271 F.3d 782, 784 (8th Cir. 2001) ("[I]ndividuals who are 'regarded as' having a disability, but who are not actually disabled, can still fall within the protection of the ADA."); Donald v. BWX Technologies, Inc., No. 6:09CV00028, 2009 WL 2170170, at *2 (W.D. Va. July 21, 2009) ("an individual

as provision aims to prohibit employers from making employment decisions based on unfounded and even unconscious assumptions and stereotypes about disability. None of these categories encompasses individuals who *currently* have a disability within the meaning of the ADA, as amended.[165]

Taken together, the inclusion of three categories of *non-disabled* individuals in Title I arguably suggests that the drafters intended for the ADA to protect *non-disabled* individuals where doing so would advance the interests of the disabled community more broadly, such as by reducing the impact of harmful stereotypes about disability. Requiring covered employers to engage in a good faith interactive process with caregivers of people with disabilities could have an even more direct, positive impact on people with disabilities by, *inter alia*, ensuring that their caregivers do not have to choose between their employment and their loved one's quality of care. Keeping caregivers dutifully employed reduces the likelihood that their disabled dependents will lose much-needed, life-saving insurance benefits, which are often employer-provided. It also reduces the likelihood that caregivers will become unemployed, possibly plunging both them and their disabled dependents into poverty, homelessness, or reliance on public assistance. In sum, helping to keep caregivers employed without sacrificing their dependents' care is consistent with the ADA's purpose of protecting both disabled and non-disabled people from the attendant, negative consequences of discrimination based on disability.

Furthermore, a circuit split may exist regarding whether a covered employer must provide a reasonable accommodation to an individual who is regarded as disabled where doing so will not impose an undue hardship.[166] While most circuits have answered that question in the negative, in *D'Angelo v. ConAgra Foods*, the Eleventh Circuit held that, as a matter of first impression, an employer may be obligated to provide a reasonable accommodation to an employee who is regarded as disabled, even if the person's medical condition is not a disability within the meaning of the ADA.[167]

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may be 'regarded as' disabled under the ADA if her employer either mistakenly believes that she 'has a physical impairment that substantially limits one or more major life activities,' or 'that an actual, nonlimiting impairment substantially limits one or more major life activities.'").

165. 42 U.S.C. § 12102(1)(C).

166. Most circuits have concluded that employers need not accommodate a person who is regarded as disabled. *See, e.g.*, Kaplan v. City of N. Las Vegas, 323 F.3d 1226, 1232-33 (9th Cir. 2003) (deciding, as an issue of first impression, that there is "no duty to accommodate an employee I an 'as regarded' case"); Weber v. Strippit, Inc., 186 F.3d 907, 916-17 (8th Cir. 1999) (stating that a requirement that employers accommodate individuals who are regarded as disabled rather than actually disabled would produce absurd results and contravene the ADA's intent); Workman v. Frito-Lay, Inc., 165 F.3d 460, 467 (6th Cir. 1999); Newberry v. E. Tex. State Univ., 161 F.3d 276, 280 (5th Cir. 1998).

167. In D'Angelo v. ConAgra Foods, 422 F.3d 1220, 1222–23 (11th Cir. 2005), the employee took medication for vertigo, which was worsened when she was required to monitor a moving conveyor belt as part of her job. In response, she provided a note to her supervisor, asking that she be reassigned a

Although individuals who are regarded as disabled or who have a record of disability may not actually need accommodation, the same does not hold true for caregivers of people with disabilities. In the latter instance, a reasonable accommodation may be necessary to ensure the care and welfare of the dependent with the disability. For instance, a mother may need the ability to work remotely on days when her epileptic son has unexpected, severe seizures and must be under a 24-hour "seizure watch." A father may need to leave work early one day a week to ensure that his daughter receives the physical therapy that she needs. A concrete disability-related need exists, even if only for the dependent. For this reason, cases involving caregiver discrimination are materially different from those involving allegations of "regarded as" or "record of" discrimination, where no current accommodation is necessary. As a result, granting caregivers accommodation would not produce the bizarre results, which have led the majority of circuits to conclude that individuals regarded as disabled are not entitled to reasonable accommodation.

C. Best Practices

Caregiver accommodation also comports with EEOC best practices. Although EEOC guidance does not mandate that employers engage caregiver-employees in an interactive process to determine a reasonable accommodation, it has long encouraged employers to be flexible with employees who must balance work and caregiving responsibilities. For example, in 2009, the EEOC issued "best practices" regarding employees who must care for family members with disabilities. [168] The EEOC suggested

position that did not involve monitoring. She was fired after management concluded that no such positions were currently available. *Id.* at 1223–24. She sued under the ADA, alleging that her vertigo was a disability that substantially limited her in the major life activity of working. *Id.* at 1224. The court rejected her claim because her vertigo only prevented her from doing one aspect of one job, rather than a class or broad range of jobs. *Id.* at 1226–27. However, the Eleventh Circuit allowed her regarded as claim to survive and concluded that the employer might still be required to accommodate her vertigo even though it did not meet the ADA's definition of a disability. *Id.* at 1228–30. In reaching that conclusion, the Eleventh Circuit opined that the ADA "offers no basis for differentiating among the three types of disabilities in determining which are entitled to a reasonable accommodation and which are not. . . . the ADA's plain language—which treats an individual who is disabled in the actual-impairment sense identically to an individual who is disabled in the regarded-as sense—compels us to conclude that the very terms of the statute require employers to provide reasonable accommodations for individuals it regards as disabled." *Id.* at 1236. The Eleventh Circuit held that "Because a review of the plain language of the ADA yields no statutory basis for distinguishing among individuals who are disabled in the actual-impairment sense and those who are disabled only in the regarded-as sense, we . . . [hold] that regarded-as disabled individuals also are entitled to *reasonable accommodations* under the ADA." *Id*. Notably, *D'Angelo* was decided prior to the ADA Amendments Act. *See* E.E.O.C. v. Am. Tool & Mold, 21 F. Supp. 3d 1268, 1275, 1275 n.2 (M.D. Fla. 2014) (noting that the ADAAA makes it "significantly easier" to bring "regarded as" claims).

168. U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-NVTA-2009-1, EMPLOYER BEST PRACTICES FOR WORKERS WITH CAREGIVING RESPONSIBILITIES (Apr. 22, 2009), https://www.eeoc.gov/laws/guidance/employer-best-practices-workers-caregiving-responsibilities [https://perma.cc/2M56-3BZC].

that employers take "proactive measures that go beyond federal non-discrimination requirements."[169] These include, but are not limited to, telecommuting, flextime, flexible schedules, modifying overtime policies, reassigning non-essential job duties that conflict with caregiving responsibilities, offering reasonable leave, and providing support, resources, or referral services for childcare, assisted living facilities, etc.[170] While the guidance does not explicitly refer to these measures as reasonable accommodations, they are, in point of fact, exactly that—"best practices" aimed to encourage employers to accommodate caregivers, even if they are not legally obligated to do so.

D. Congressional Consideration

While the ADA and the ADAAA provoked rigorous legislative debate, caregiver accommodation was never afforded meaningful consideration, debate, and discussion by Congress. The 1988 version of the ADA contained an associational discrimination provision,[171] but concerns or questions regarding it rarely arose.[172] Those that did focused on whether it was overbroad or might invite litigation. For example, the Disability Rights Working Group submitted a Working Paper,[173] which argued that the provision might "invite frivolous lawsuits requiring employers to prove . . . that they weren't aware of the association."[174]

As a result, the initial draft was revised to state that "excluding or otherwise denying equal jobs or benefits to a qualified individual because of the *known* disability of an individual with whom the qualified individual is *known* to have a relationship or association."[175] "Known" clarifies that the "provision extends *only* to situations in which the covered entity *knows* that the non-disabled person has an association with a person with a known disability and in which discrimination has occurred on that basis."[176] The

169. *Id*.

170. *Id*.

171. Colker, *supra* note 151, at 8 (explaining that the initial draft read: "5) RELATIONSHIPS OR ASSOCIATIONS.—It shall be discriminatory to exclude or otherwise deny equal services, programs, activities, benefits, jobs, or other opportunities to an individual or entity because of the relationship to, or association of, that individual or entity with another individual with a disability.").

172. *Id*.

173. *Americans with Disabilities Act of 1989: Joint Hearing on H.R. 2273 Before the Subcomms. on Select Educ. & Emp. Opportunities of the Comm. on Educ. & Lab.*, 101st Cong. 108 (1989) (Working Paper of the Disability Rights Working Group).

174. *Id*.; *see also Americans with Disabilities Act of 1989: Hearing on H.R. 2273 Before the H. Comm. on the Judiciary*, 101st Cong. 399-400 (1989).

175. 42 U.S.C. § 12112(b)(4) (emphasis added).

176. *Americans with Disabilities Act of 1989: Hearing on H.R. 2273 Before the H. Comm. on the Judiciary*, 101st Cong. 400 (1989) (letter from the ACLU to Congressman F. James Sensenbrenner); *see also Americans with Disabilities Act of 1989: Joint Hearing on H.R. 2273 Before the Subcomms. on Select Educ. & Emp. Opportunities of the H. Comm. on Educ.& Lab.*, 101st Cong. 116 (letter from the Leadership

word "known" was added in not one, but two, spots to allay concerns that the associational discrimination provision was overbroad and would thus subject employers to baseless lawsuits.

The provision's scope also spurred debate, with some favoring narrower coverage limited to family members while others preferred more expansive coverage of any association, familial or not.[177] However, a proposed amendment, which would have restricted the scope of the associational discrimination provision to certain relationships, was ultimately defeated.[178]

In the end, however, these concerns did not prevent the ADA from garnering overwhelming bipartisan support, often from members of Congress who themselves were caregivers and relatives of people with disabilities.[179] On July 12, 1990, the House of Representatives passed the ADA in a landslide vote of 377-28 with 27 members not voting.[180] The following day, the Senate passed the bill 91 to 6 with 3 members abstaining.[181]

Conference on Civil Rights in response to the Working Paper of the Disability Rights Working Group) ("The compromise bill clarifies that the prohibition of discrimination against those who associate with people with disabilities is limited to situations where the covered entity knows about both the disability and the association. This is identical to the provision that was included last year in the Fair Housing Amendments Act of 1988.").

177. *Americans with Disabilities Act of 1989: Hearing on H.R. 2273 Before the H. Comm. on the Judiciary*, 101st Cong. 73–74 (1989) (testimony of Chai Feldblum); *Americans with Disabilities Act of 1989: Hearing on H.R. 2273 Before the H. Committee on Education and Labor*, 101st Cong. 116 (1989).

178. H.R. REP. NO. 101-485, at 62 (1990); S. REP. NO. 101-116, at 335 (1989).

179. *See* ARLENE MAYERSON, THE HISTORY OF THE AMERICANS WITH DISABILITIES ACT, DISABILITY RTS. EDUC. & DEF. FUND (1992), https://dredf.org/about-us/publications/the-history-of-the-ada/ [https://perma.cc/429K-5TLT] ("In September 1988, a joint hearing was held before the Senate Subcommittee on Disability Policy and the House Subcommittee on Select Education. Witnesses with a wide variety of disabilities, such as blindness, deafness, Down's Syndrome and HIV infection, as well as parents of disabled children testified about architectural and communication barriers and the pervasiveness of stereotyping and prejudice. . . . On May 9, 1989, Senators Harkin and Durrenberger and Representatives Coelho and Fish jointly introduced the new ADA in the 101st Congress. . . . The first hearing in the 101st Senate on the new ADA was an historic event and set the tone for future hearings and lobbying efforts. It was kicked off by the primary sponsors talking about their personal experiences with disability. Senator Harkin spoke of his brother who is deaf, Senator Kennedy of his son, who has a leg amputation, and Representative Coelho, who has epilepsy, spoke about how the discrimination he faced almost destroyed him. . . . A Vietnam veteran who had been paralyzed during the war and came home using a wheelchair testified that when he got home and couldn't get out of his housing project, or on the bus, or off the curb because of inaccessibility, and couldn't get a job because of discrimination he realized he had fought for everyone but himself . . . At this Senate hearing and in all the many hearings in the House, members of Congress heard from witnesses who told their stories of discrimination. With each story, the level of consciousness was raised and the level of tolerance to this kind of injustice was lowered. . . . After the spectacular Senate vote of 76 to 8 on September 7, 1989, the Bill went to the House where it was considered by an unprecedented four Committees. . . . Accommodating a person with a disability is no longer a matter of charity but instead a basic issue of civil rights. . . . The ADA is radical only in comparison to a shameful history of outright exclusion and segregation of people with disabilities.").

180. *ADA History – In Their Own Words: Part Three*, ADMIN. FOR COMM. LIVING (last modified July 24, 2020) https://acl.gov/ada/the-ada-becomes-law [https://perma.cc/G3GF-JHVE].

181. *Id.*

Likewise, the ADAAA aimed to supersede Supreme Court precedent, which arguably narrowed the ADA's definition of disability. Although the ADAAA did not amend the language of the associational discrimination provision and the ADAAA's legislative history reveals no notable debate about doing so, EEOC Chair Naomi Earp did predict that the ADA's associational discrimination provision "will become increasingly important as individuals with disabilities who have been living in institutional settings move into the larger community—alongside family members and friends.'"[182]

Notably, predictions that the ADAAA might open the floodgates of litigation have since been disproved. For instance, in 2021, there were only 22,843 EEOC Charges filed alleging disability discrimination, or roughly 37.2% of all Charges filed that year.[183] Associational discrimination claims make up only a miniscule percentage of ADA cases because the provision is not well known and claims arising under it are rarely litigated.[184]

The lack of discussion about associational accommodation during debate over the ADA and the ADAAA suggests that caregiver accommodation was never meaningfully contemplated or considered by Congress.

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182. *Americans with Disabilities Act: Sixteen Years Later: Hearing Before the Subcomm. on the Const. of the H. Comm on the Judiciary*, 109th Cong. 109-46 (2006) (statement of Naomi Earp).

183. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *Charge Statistics (Chares filed with EEOC) FY 1997 Through FY 2021*, https://www.eeoc.gov/statistics/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2021 [https://perma.cc/3BJY-VG48].

184. *See, e.g.*, Dessources v. Am. Conf. Inst., Case No. 12.-8105, 2013 WL 2099251, at *3 (S.D.N.Y. May 15, 2013) (describing the associational discrimination provision within the ADA as "rarely litigated") (quoting Larimer v. Int'l Bus. Machs. Corp. 370 F.3d 698, 700 (7th Cir. 2004)); Graziadio v. Culinary Inst. of Am., 817 F.3d 415, 432 (2d Cir. 2016) ("We have not yet had occasion to consider what standard should govern such rarely litigated claims of 'associational discrimination.'"); Bridges v. City of Indianapolis, Case No. 17-04706, 2019 WL 3067512, at *5 (S.D. Ind. July 11, 2019) ("This associational discrimination provision has been rarely litigated (the Seventh Circuit appears to have addressed claims under this provision only three times), but its purpose is to protect employees from adverse employment actions that are based on unfounded assumptions about the needs of a disabled person.") (citing Magnus v. St. Mark United Methodist Church, 688 F.3d 331, 336-337 (7th Cir. 2002)).

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, 132-34 (2004); *see, e.g.*, Cusick v. Yellowbook, Inc., 607 F. App'x 953 (11th Cir. 2015) (rejecting an ADA association discrimination claim because the employee failed to show that his employer demoted him because of his child's disability and related medical costs); Young v. Gen. Motors Corp., Case No. 04-16725, 2006 WL 1877205 (9th Cir. 2006); Larimer v. Int'l Bus. Machs. Corp., 370 F.3d 698, 699 (7th Cir. 2004) (denying an ADA association claim involving a salesman's allegations that he was fired because his twin daughters were born prematurely and had serious disabilities); Hilburn v. Murata Elecs. N. Am., Inc., 181 F.3d 1220, 1230-31 (11th Cir. 1999); Rocky v. Columbia Lawnwood Reg'l Med. Ctr., 54 F. Supp. 2d 1159 (S.D. Fla. 1999).

E. Influence of Other Statutes

The language of the ADA's associational discrimination provision may have been inappropriately influenced by pre-existing federal statutes that were tailored neither to employment nor to disability discrimination.

1. Fair Housing Amendments Act of 1988

The language of the ADA's associational discrimination provision may have been inspired by similar language in the Fair Housing Amendments Act (FHAA) of 1988, which may explain, at least in part, why the ADA excludes associational accommodation. The FHAA was signed into law in 1988,[185] before the ADA's enactment in 1990. The FHAA extended the protection of Title VIII of the Civil Rights Act of 1968, which prohibits discrimination on the basis of race, color, religion, sex, or national origin in housing sales, rentals, or financing, to also embrace disability and familial status.[186]

Perhaps to avoid reinventing the wheel, the drafters of the ADA may have been influenced by the FHAA's associational discrimination provision and inserted it into the initial draft of the ADA. As noted earlier, over time, the ADA provision was slightly revised to add the word "known" in two locations, but on the whole, the provisions remained highly similar. Indeed, one of the ADA's primary drafters testified before Congress that the ADA's associational discrimination provision was "identical" to its FHAA precursor.[187]

The problem, however, is that housing is a quite different context than employment. For instance, a non-disabled spouse would not need to request an accommodation on her own behalf from the pet ban at the apartment complex where she and her paraplegic son reside; instead, that request would come on behalf of her son who has the disability and the resultant need for a service animal. By contrast, in the employment context, the non-disabled caregiver may need distinct accommodations for herself, such as a transfer to

185. U.S. DEP'T OF HOUS. AND URB. DEV., *History of Fair Housing*, https://www.hud.gov/program_offices/fair_housing_equal_opp/aboutfheo/history#:~:text=Title%20VIII%20of%20the%20Act,a%20long%20and%20difficult%20journey [https://perma.cc/5KDD-MRZY]*; https://www.wilc.org/fair-housing-amendments-act-2/.*

186. HOUS. AND CIV. ENF'T SECTION, CIV. RTS DIV., DEP'T OF JUST., OPENING THE DOOR, HIGHLIGHTS IN FAIR HOUSING ACT ENFORCEMENT 3, https://www.justice.gov/crt/page/file/1496041/download [https://perma.cc/LS9S-C8KD]. Specifically, 42 U.S.C. § 3604(f)(1)(C) makes it unlawful "to discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of . . . any person associated with that buyer." Likewise, 42 U.S.C. § 3604(f)(2)(C) makes it unlawful to discriminate in the "terms, conditions, or privileges of the sale or rental of a dwelling . . . because of a handicap of . . . any person associated with that person."

187. *Americans with Disabilities Act of 1989: Hearing on H.R. 2273 Before the H. Comm. on the Judiciary*, 101st Cong. 73–74 (1989) (testimony of Chai Feldblum). *Americans with Disabilities Act of 1989: Hearing on H.R. 2273 Before the H. Comm. on the Judiciary*, 101st Cong. 399 (1989) (letter from the ACLU to Congressman F. James Sensenbrenner).

a new branch or ability to work morning shifts only, that relate to the care of her disabled son. Unlike the housing context, the son does not need the transfer or shift change for himself, but it will enable his mother to care for him and thus, enhance his welfare. To the extent the ADA drafters borrowed the language of the associational discrimination provision from the FHAA without customizing it to the nuances of disability discrimination in employment, they erred.

2. Title VII of the Civil Rights Act of 1964

Another possible reason that the ADA omits associational accommodation is the potential influence of pre-existing case law interpreting associational discrimination claims arising under Title VII of the Civil Rights Act of 1964, which was drafted nearly three decades before the ADA. Although Title VII does not contain an express associational discrimination provision, it has repeatedly been interpreted to forbid race-based associational discrimination, such as refusing to hire someone because his spouse is a member of a different race.[188]

Other striking similarities between Title VII and the ADA also exist, which may demonstrate its influence on the ADA. For instance, lawsuits under both statutes must begin with a Charge of Discrimination filed with the EEOC.[189] The remedies, enforcement provisions, definitions, statutory caps, and coverage of the two statutes are also identical or substantially similar.[190]

Perhaps to avoid reinventing the wheel, the ADA's drafters may have been influenced, consciously or not, by judicial decisions interpreting Title VII to embrace associational discrimination. In so doing, Congress arguably erred[191] because none of the traits in Title VII, except religion, require covered employers to provide a reasonable accommodation. Title VII requires a covered employer to reasonably accommodate an employee's (or applicant's) religious beliefs or practices, unless doing so would unduly burden the operations of the employer's business, financially or otherwise.[192]

188. *See, e.g.*, Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888, 889 (11th Cir. 1986) (reversing dismissal of association discrimination claim under Title VII where white male alleged that insurance company refused to hire him due to his interracial marriage).

189. 42 U.S.C.§ 12101; 42 U.S.C. § 2000e-5.

190. 42 U.S.C. § 12117(a); 42 U.S.C. § 2000e-4–e-6, e-8–e-9.

191. The Supreme Court has rarely ruled on issues involving associational discrimination. However, in Thompson v. North American Stainless, LP, 562 U.S. 170 (2011) the Supreme Court held that an employer's alleged termination of an employee in retaliation for his coworker-fiancée suing the employer for sex discrimination, if proven, could constitute unlawful retaliation in violation of Title VII.

192. U.S. EQUAL EMP. OPPORTUNITY COMM'N, *Religious Discrimination*, https://www.eeoc.gov/religious-discrimination [https://perma.cc/7YF6-DRTC]; *see also* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977) (holding that a covered employer is not required to violate a well-established seniority system in a collective-bargaining agreement in order to grant an employee's requested religious accommodation).

This fact-intensive determination[193] is made on a case-by-case basis[194] and could include various measures from a policy exemption to scheduling changes or job reassignment.

Claims of religious discrimination are the most closely related to disability because in both instances, the drafters operated under the assumption that the trait *is* relevant to employment and must be accommodated absent an undue burden. The problem, of course, is that an associate of a person who practices a particular religion faces a dilemma distinct from that of the caregiver of a disabled dependent. By way of illustration, if Kiana's spouse is Sikh and Kiana is not, then there is no accommodation that Kiana will require to promote her spouse's ability to exercise his sincerely held religious beliefs. While *he* may need an accommodation from his employer to, for instance, wear a beard or turban in contravention of his employer's appearance policy, no such accommodation would be necessary for Kiana. Their interests are distinct, so associational accommodation for Kiana is not necessary.

But the same does not hold true if Kiana's spouse were epileptic. Now, not only would the spouse likely require accommodations from his employer for his epilepsy but so might Kiana to better assist with her spouse's care. For example, she may need permission to telecommute on days when he unexpectedly experiences a grand mal seizure and must be placed on a 24-hour seizure watch. Because disability discrimination was not the focus of Title VII, precedent interpreting its prohibition of associational discrimination is arguably ill-suited to inform decisions regarding the unique needs of caregivers in the context of disability. Because of the core differences between disability and the traits protected under Title VII, including religion, the ADA's associational discrimination provision should have been carefully crafted to comport with the ADA's spirit and purpose rather than influenced by judicial interpretations of Title VII.

F. The Family and Medical Leave Act of 1993

Although ADA claims are often brought concurrently with claims under the Family and Medical Leave Act of 1993 (FMLA),[195] the FMLA does not adequately address the need for caregiver accommodation for several

193. *See, e.g., Reasonable Accommodation for Religious Beliefs or Practices Frequently Asked Questions*, U.S. CUSTOMS & BORDER PROTECTION, https://www.cbp.gov/about/eeo-diversity/reasonable-accommodation/religious-beliefs-faqs [https://perma.cc/57PH-3Y8J] (last visited Aug. 5, 2018).

194. A plaintiff can present a prima facie case of discrimination for failure to reasonably accommodate a religious belief or practice if the plaintiff can show that (1) the person "holds a sincere religious belief that conflicts with an employment requirement"; (2) has "informed the employer about the conflicts" or the employer otherwise had actual or constructive knowledge of the belief; and (3) an adverse employment action occurred because of the plaintiff's failure to comply with the conflicting employment requirement. *See* Virts v. Consol. Freightways Corp., 285 F.3d 508, 516 (6th Cir. 2002).

195. *E.g.*, Reddinger v. Hospital Central Services, Inc., 4 F. Supp. 2d 405 (E.D. Pa. 1998).

reasons. First, the FMLA only applies to, *inter alia*, employers with 50 or more employees in 20 or more workweeks the current or preceding calendar year.[196] That is far narrower coverage than the ADA, which applies, with limited exceptions, to private sector employers with 15 or more full time employees in the current or preceding calendar year. This means that many employers are not obligated to provide caregivers with FMLA leave.

Second, many caregivers would be ineligible for protection under the FMLA. By way of explanation, in order to be eligible to take leave under the FMLA, an employee must work "for a covered employer; [have] worked for the employer for at least 12 months; [have] at least 1,250 hours of service for the employer during the 12 month period immediately preceding the leave; and [work] at a location where the employer has at least 50 employees within 75 miles."[197] The requisite 12 months of employment need not be consecutive.[198] "The regulations clarify, however, that employment prior to a continuous break in service of seven years or more need not be counted unless the break in service is (1) due to an employee's fulfillment of military obligations, or (2) governed by a collective bargaining agreement or other written agreement."[199] In fact, a 2020 survey conducted by the Department of Labor (DOL) revealed that "only 56[%] of workers are eligible for job-protected leave under the FMLA," a decrease from 59% in 2012.[200] Only 19% used FMLA leave to care for a family member with a disability.[201]

In stark contrast, the ADA applies to a "known associate of a person with a disability" without regard to how many hours the associate has worked for the employer, how many employees work at the associate's specific work location, or whether the associate has been employed there for at least one

196. *See* FACT SHEET #28: THE FAMILY AND MEDICAL LEAVE ACT, WAGE & HOUR DIV., U.S. DEP'T OF LAB. (Feb. 2023), https://www.dol.gov/agencies/whd/fact-sheets/28-fmla [https://perma.cc/5CLZ-KBMN] ("The FMLA only applies to employers that meet certain criteria. A covered employer is a: [p]rivate-sector employer, with 50 or more employees in 20 or more workweeks in the current or preceding calendar year, including a joint employer or successor in interest to a covered employer; [p]ublic agency, including a local, state, or Federal government agency, regardless of the number of employees it employs; or [p]ublic or private elementary or secondary school, regardless of the number of employees it employs.").

197. *Id.*

198. *Id.*

199. FMLA FREQUENTLY ASKED QUESTIONS, WAGE & HOUR DIV., U.S. DEP'T OF LAB., https://www.dol.gov/agencies/whd/fmla/faq [https://perma.cc/G262-Y9FJ].

200. Press Statements and Releases, Nat'l P'ship for Women and Families, *New Department of Labor Family and Medical Leave Data Illustrates Gaps in Coverage, Threatening the Financial Security of American Workers* (Aug. 10, 2020), https://www.nationalpartnership.org/our-impact/news-room/press-statements/new-department-of-labor-data- shows-gap-in-coverage.html [https://perma.cc/YG86-MUL2] (52% of Latinx workers and 53% of Asian workers were eligible as compared to 57% of African American workers and 58% of Caucasian workers).

201. *Id.*

year.[202] In fact, the ADA even applies to applicants.[203] As such, the FMLA would protect far fewer caregivers than the ADA could, if amended.

Third, the FMLA's purpose is to provide a single, one-size-fits-all accommodation to caregivers—up to twelve weeks of "*unpaid*, job-protected leave for specified family and medical reasons with continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave."[204] However, caregivers of people with disabilities, particularly single parents, face mounting medical expenses, and as a result may find themselves unable to afford twelve weeks without a paycheck. According to the DOL's 2020 survey, 34% of the respondents received no pay while on leave, while another 24% received some, albeit not full, pay.[205] Virtually no part-time workers receive paid family or medical leave, and women and people of color are likelier to work part-time.[206] "Workers with low wages—those least able to afford an unpaid leave—were least likely to receive pay while on FMLA leave, with more than six in ten (61 percent) receiving no pay. And two-thirds of workers (67 percent) who did not receive full pay reported difficulty 'making ends meet.'"[207] Not surprisingly, "the most common reason for unmet need remains that a worker

202. 42 U.S.C. §12111(4).

203. 42 U.S.C. § 12212(b)(5) ("As used in subsection (a), the term 'discriminate against a qualified individual on the basis of disability' includes . . . not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity . . ."); *see also* 42 U.S.C. § 12112(a) ("No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures . . ."); *see also* EEOC Compl. Man. 7989040 (stating that the ADA's association discrimination provision protects both applicants and employees"); McKenzie v. Dovala, 242 F.3d 967, 974 (10th Cir. 2001) ("the ADA explicitly covers job applicants as well as employees").

204. *Family and Medical Leave Act*, U.S. DEP'T OF LABOR WAGE AND HOUR DIV., https://www.dol.gov/agencies/whd/fmla [https://perma.cc/V6PG-DH5J] (explaining that "[e]ligible employees are entitled to: Twelve workweeks of leave in a 12-month period for: the birth of a child and to care for the newborn child within one year of birth; the placement with the employee of a child for adoption or foster care and to care for the newly placed child within one year of placement; to care for the employee's spouse, child, or parent who has a serious health condition; a serious health condition that makes the employee unable to perform the essential functions of his or her job; any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member on 'covered active duty;' or Twenty-six workweeks of leave during a single 12-month period to care for a covered servicemember with a serious injury or illness if the eligible employee is the servicemember's spouse, son, daughter, parent, or next of kin (military caregiver leave)").

205. Press Statements and Releases, Nat'l P'ship for Women & Families, *New Department of Labor Family and Medical Leave Data Illustrates Gaps in Coverage, Threatening the Financial Security of American Workers* (Aug. 10, 2020), https://www.nationalpartnership.org/our-impact/news-room/press-statements/new-department-of-labor-data-shows-gap-in-coverage.html [https://perma.cc/YG86-MUL2].

206. *See* U.S. BUREAU OF LAB. STAT., NATIONAL COMPENSATION SURVEY: EMPLOYEE BENEFITS IN THE UNITED STATES, MARCH 2020, at tbl.31 (2020), https://www.bls.gov/ebs/publications/pdf/employee-benefits-in-the-united-states-march-2020.pdf [https://perma.cc/2ER9-94L5] (reporting 25% of full-time civilian employees and 8% of part-time employees receive this benefit).

207. New Department of Labor Family and Medical Leave Data Illustrates Gaps in Coverage, *supra* note 7.

could not afford unpaid leave."[208] And according to the National Disability Institute, "[o]ne-third of adults with disabilities had difficulty paying medical bills in the past 12 months, compared with 14 percent of adults without a disability . . . . One-sixth of adults with disabilities needed, but did not get, medical care in the last 12 months because of the cost."[209]

Nor do state laws alleviate these concerns. Indeed, only a handful of states currently offer paid family and medical leave.[210] Furthermore, caregivers have no assurance that they will receive unemployment benefits during unpaid FMLA leave given the substantial variance in unemployment benefit laws, including by whom and how long such benefits may be collected.[211] To the contrary, such questions have provoked litigation[212] that

208. *Id.* ("Seven percent of workers reported an unmet need for leave—up from five percent in 2012 . . ."). Women (9 percent) and single parents (16 percent) were likelier to report unmet need for leave. *Id.*

209. NATIONAL DISABILITY INSTITUTE, FINANCIAL INEQUALITY: DISABILITY, RACE AND POVERTY IN AMERICA 16 [hereinafter NDI REPORT].

210. As of May 2021, only a handful of states had enacted laws that guarantee *paid* time off for extended medical leave. In general, these state laws provide a portion of pay (usually 2/3 to 100% of a person's wages or salary up to a cap), and the length of permissible leave varies from 4-12 weeks. *See* COMPARATIVE CHART OF PAID FAMILY AND MEDICAL LEAVE LAWS IN THE UNITED STATES, A BETTER BALANCE (2022), https://www.abetterbalance.org/resources/paid-family-leave-laws-chart/ [https://perma.cc/94KF-4B6F].

211. Drew DeSilver, *Not All Unemployed People Get Unemployment Benefits; In Some States, Very Few Do*, PEW RSCH. CTR. (Apr. 24, 2020), https://www.pewresearch.org/fact-tank/2020/04/24/not-all-unemployed-people-get-unemployment-benefits-in-some-states-very-few-do/ [https://perma.cc/6XGL-JN7K] ("Being counted as unemployed and receiving unemployment benefits are two completely different things, and one doesn't necessarily have much to do with the other. In both cases, not working is a necessary condition but not the only one. . . . [B]enefits are capped. The caps vary widely . . . from $823 a week in Massachusetts to $235 a week in Mississippi. . . . Regional differences also show up in maximum benefit amounts. . . . Before COVID-19 began ravaging the economy, most states had set their standard duration of benefits at 26 weeks; 10 states (six of them in the South) had shorter limits, while two had longer ones (Montana at 28 weeks, and Massachusetts at 30 under certain conditions)."). Because they are still employed, albeit not paid, it is unclear whether they would be entitled to public assistance or unemployment benefits as an alternative form of compensation. State unemployment laws vary in how they define "unemployed," forcing caregivers to navigate a confusing patchwork of state laws and regulations that create uncertainty and a lack of uniformity. *See, e.g.*, WIS. STAT. § 108.04(1)(b) (stating that an employee is ineligible for benefits for any week that: 1. The employee's employment is suspended "due to the employee's unavailability for work or inability to perform suitable work otherwise available with the employer," *or* 2. The employee is on a leave of absence while he or she is "unable to work or unavailable for work," which means that a person who initiates FMLA leave is ineligible for benefits); IND. CODE § 22–4–15–1(a); F.S.A. § 443.03(12) (For purposes of Florida's unemployment compensation law, a leave of absence is equal to unemployment because a person is "unemployed" when she performs no services and receives no wages).

212. Employers may argue that employees on FMLA leave should not be entitled to unemployment benefits because their jobs are held and they are covered by the group health plan; furthermore, only employed individuals, not the unemployed, are entitled to FMLA leave in the first place. On the other hand, employees may counter that a person who is not performing work or receiving pay is unemployed, particularly if the state's unemployment law defines "employment" as "performing work for wages." *See* Texas Workforce Comm'n v. Wichita Cnty., 548 S.W.3d 489, 497 (Tex. 2018) ("We hold that the Unemployment Act expressly and unambiguously defines "unemployed" in a manner that does not require severance of the employer—employee relationship. We further hold that an individual on unpaid medical leave, even if protected under the FMLA, satisfies the Act's definition

has created significant uncertainty.[213] For example, in *Texas Workforce Commission v. Wichita County*, a tribunal determined that an employee who took unpaid FMLA leave due to anxiety and depression was entitled to receive unemployment benefits, but a district court disagreed, reasoning that she was ineligible because she never ended her employment.[214] The appellate court affirmed, but the state supreme court ultimately ruled that she remained eligible.[215] The protracted litigation in *Texas Workforce Commission* highlights the confusion and trepidation that caregivers may understandably feel when taking unpaid FMLA without any assurance that they will receive unemployment benefits during that time.[216]

Even more compelling is the fact that for many caregivers, the reasonable accommodation sought is not a single period of extended unpaid leave offered by the FMLA. Extended leave will do little to assist the mother

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of unemployed and may qualify for unemployment benefits if she meets the Act's eligibility requirements:"); Gen. Tel. Co. of Fla. v. Bd. of Rev., 356 So.2d 1357 (Dist. Ct. App. Fla. 1978) (concluding that an employee who was on a leave of absence for pregnancy and did not return to work after it expired was not entitled to unemployment benefits because she left work voluntarily and for reasons not attributable to her employer).

213. Texas Workforce Comm'n, 548 S.W.3d at 495-96 (rejecting the appellate court's reasoning that it would be "absurd" for a person to be entitled to receive unemployment benefits while taking FMLA leave, which is only available to employees and aims to hold open their position for them).

214. *Id.* at 491-92.

215. *Id.* at 492, 497.

216. In response to the COVID-19 pandemic, the federal government ushered in sweeping changes to the unemployment scheme. Families First Coronavirus Response Act, Pub. L. No. 116-127, 134 Stat. 178 (2020); CARES Act, Pub. L. No. 116-136, 134 Stat. 281 (2020); *Unemployment Insurance Relief During COVID-19 Outbreak*, U.S. DEP'T OF LAB., https://www.dol.gov/coronavirus/unemployment-insurance [https://perma.cc/5Y5Q-J7RS]. Although these measures perhaps reflect a desire to provide greater employment protection to caregivers, they are only temporary, emergency measures taken in response to the pandemic, and they are limited to caregiving responsibilities that arise from COVID. Furthermore, as rates of COVID infection continue to drop, an increasing number of states have already begun to roll back these temporary measures to address widescale labor shortages and encourage residents to return to work. *See, e.g.*, Scott Detrow, Ayesha Rascoe, & Scott Horsley, *Are Expanded Unemployment Benefits Keeping People From Returning To Work?*, NPR (May 20, 2021), https://www.npr.org/2021/05/20/998691721/are-expanded-unemployment-benefits-keeping-people-from-returning-to-work [https://perma.cc/YS8W-6FHS] ("Twenty-two Republican led states are planning to roll back expanded unemployment benefits, because they say the benefits are keeping people from returning to work."); Tomi Romm & Eli Rosenberg, *As GOP-run States Slash Jobless Aid, The Biden Administration Finds it has Few Options*, WASH. POST. (May 20, 2021), https://www.washingtonpost.com/us-policy/2021/05/20/unemployment-benefits-states-biden/ [https://perma.cc/2AK6-LFZH] ("With a federal intervention now unlikely, jobless Americans in at least 22 states including Arizona, Ohio and Texas are set to see their payments fall by $300 each week — or be wiped out entirely — as GOP governors try to force people back to work in response to a potential national labor shortage.") (The economy in April [2021] added far fewer jobs than expected, prompting Republican lawmakers and business leaders raise alarms about an emerging worker shortage. Organizations U.S. Chamber of Commerce contend that high unemployment payments are largely to blame, as Americans choose to collect benefits rather than apply for a growing number of open positions. In response, they have called on Congress to roll back the benefits before they are set to expire in early September."); Matt Stieb, *GOP Governors End COVID Unemployment Benefits to Make People Go Back to Work*, N.Y. Mag. (May 9, 2021), https://nymag.com/intelligencer/2021/05/gop-governors-end-covid-benefits-to-make-people-go-to-work.html [https://perma.cc/8TUU-FRAK].

of a three-year old with a severe disability that may require the mother to occasionally telecommute, not just for an isolated twelve-week period, but through and until her child is an adult, and sometimes even thereafter. Nor will extended FMLA leave do anything to assist Violet, who simply requested a transfer to a different branch office closer to her son's hospital and medical team. Nor does it help the plaintiff in *Carmichael*, a nurse and single mom whose teenager had sustained a traumatic brain injury that left him cognitively disabled and who simply wanted the ability to occasionally bring him to work with her under her supervision until his godfather could pick him up.[217] The father in *Castro-Ramirez* merely wanted his supervisor to assign him to early shifts so that he could work a full day but still be home in time to administer his son's daily dialysis.[218] In *Bukiri v. Lynch*, the agent requested an exemption from relocation so that his disabled wife did not experience a setback in her recovery due to the cross-country relocation that would necessitate her acquiring all new doctors.[219] The truck driver in *Atkison v. Wiley Sanders Truck Lines, Inc.* merely wanted permission to participate in a program that would allow his diabetic wife to accompany him on long trips given her health.[220] In contrast to an employer and caregiver collaboratively brainstorming possible accommodations, the FMLA proscribes a single, monolithic solution that meets some, but not most, caregivers' needs. By comparison, adding an accommodation requirement to the ADA's associational discrimination provision would empower caregivers and their employers to flexibly troubleshoot the problem together to find a

217. *See* Carmichael v. Advanced Nursing & Rehab. Ctr. of New Haven, LLC, Case No. 19-908, 2021 WL 735878 (D. Conn. Feb. 24, 2021).

218. Castro-Ramirez v. Dependable Highway Express, Inc., 2 Cal. App. 5th 1028, 1033-40 (2016).

219. The Rehabilitation Act of 1973 prohibits federal employers, including federal government contractors, from engaging in employment discrimination because of disability. Although a discussion of the Rehabilitation Act exceeds the scope of this Article, courts have also interpreted the Rehabilitation Act as not requiring federal employers to provide a reasonable accommodation to an employee-caregiver of a person with a disability. For example, in Bukiri v. Lynch, 648 Fed. Appx. 729, 730 (9th Cir. 2016), the Ninth Circuit affirmed the district court's denial of the plaintiff-employee's motion for a preliminary injunction arising from his claim that the ATF had violated the ADA's association discrimination provision by refusing his hardship request to remain in the L.A. office instead of relocating to the D.C. branch. The plaintiff-employee supported his request with medical documentation from his disabled wife's doctor, indicating that a relocation might be harmful to her because it would require her to attain new doctors, etc. Bukiri v. Lynch, Case No. SACV 15-894-JLS, 2015 WL 13358192, at *1-2 (C.D. Cal. Sept. 9, 2015). ATF countered that his wife's disability preexisted his employment. *Id.* In reaching its conclusion, the court explained:

> Although ATF chooses to accommodate employees with disabled relatives under some circumstances, it is not obligated by law to do so. Thus, even if ATF denied Bukiri's hardship request because his wife's condition pre-existed his employment, this does not demonstrate that Bukiri was transferred to D.C. because of Mrs. Bukiri's disability. . . . [B]ecause the reasonable accommodation requirement does not apply here, the policy does not raise a reasonable inference of associational discrimination. . . . Although ATF chooses to accommodate employees with disabled relatives under some circumstances, it is not obligated by law to do so.

Id. at *4 (internal citations omitted).

220. Atkison v. Wiley Sanders Truck Lines, Inc., 45 F. Supp. 2d 1288, 1291 (M.D. Ala. 1998).

mutually convenient solution, which may or may not involve temporary unpaid leave.

G. State Laws

Nor do existing state laws mandate caregiver accommodation. Even when state statutes expressly bar associational discrimination, their provisions usually mirror the ADA and fail to explicitly require employers to accommodate caregivers.[221] In addition, Fair Employment Practices Agencies (FEPAs) take their cue on interpreting these provisions from the EEOC, which has repeatedly opined that employers need not accommodate caregivers, just as state and local courts are often guided by federal precedent interpreting the ADA's association discrimination provision. As a result, most state and local laws present the same shortcomings as the ADA.

Some exceptions exist. For example, a handful of states including Alaska, Connecticut, New Jersey, Oregon, New York, and Maryland, do explicitly protect caregivers from discrimination or denote "caregiver status" as a protected trait. However, most of these statutes are "inclusive," meaning that they simply add the term "caregiver" or phrase "caregiver status" to an existing, generic anti-discrimination or human rights law, rather than crafting

221. *E.g.*, Pflanz v. City of Cincinnati, 149 Ohio App. 3d 743, 752 (2002) ("Because Ohio's handicap-discrimination law was modeled after the federal Americans with Disabilities Act ("ADA"), Ohio courts may seek guidance when interpreting the Ohio handicap-discrimination statute from regulations and cases that interpret the ADA."); Bearshield v. John Morrell & Co., 570 N.W.2d 915, 918 (Iowa 1997) ("Given the common purposes of the ADA and the ICRA's prohibition of disability discrimination, as well as the similarity in the terminology of these statutes, we will look to the ADA and underlying federal regulations in developing standards under the ICRA for disability discrimination claims."); Brown v. Oxford Bd. of Educ., Case No. UWYCV146023665S, 2017 WL 3470785, at *3 (Sup. Ct. Conn. July 6, 2017) ("Although the language of the statute does not explicitly include the duty of reasonable accommodation that is expressly required under the federal Americans with Disabilities Act (ADA), our Supreme Court has adopted the interpretation of § 46a–60(a)(1) that requires employers to make a reasonable accommodation for an employee's disability. . . . Furthermore, although the plaintiff brought the claim pursuant to Connecticut law, under § 46a–60(a)(1), our Supreme Court has held that "we review federal precedent concerning employment discrimination for guidance in enforcing our own antidiscrimination statutes."). *But see* Castro-Ramirez, 2 Cal.App.5th at 1039-40 ("We do not discard ADA precedents blindly, and indeed we often look to federal law interpreting the ADA when construing FEHA, particularly when the question involves parallel statutory language. . . . But the two statutory schemes are not coextensive. Our Legislature has expressly declared '[t]he law of this state in the area of disabilities provides protections independent from those in the [ADA]. Although the federal act provides a floor of protection, this state's law has always, even prior to passage of the federal act, afforded additional protections.' . . . One instance in which we should part ways with federal case authority is when the statutory language is *not* parallel. That is the case here. . . . The ADA creates a cause of action for associational disability discrimination using language that structurally is different than FEHA. . . . Unlike FEHA, the ADA does not define the term 'disability' itself as including association with the disabled. Instead, it 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 every use of the term 'disability' in the ADA. Because of these structural differences, including differences in language for associational disability accommodation, federal precedent . . . is less helpful than in other FEHA interpretations.") (internal citations omitted).

a customized statute for caregivers. Because these statutes do not explicitly mandate caregiver accommodation, they generally offer no more protection than the ADA. In addition, state laws vary markedly and thus, provide less predictable protection.

By way of illustration, California's Fair Employment and Housing Act (FEHA) makes it unlawful for a covered employer to discriminate against an employee or applicant because the person "is associated with a person who has, or is perceived to have" a disability.[222] In 2016, the California state court in *Castro-Ramirez v. Dependable Highway Express, Inc.*, interpreted FEHA's associational discrimination provision to prohibit a manager from terminating a non-disabled employee because he had requested a schedule modification to enable him to care for his disabled son.[223] Although the appellate court explicitly stated, "we do not decide whether FEHA establishes a separate duty to reasonably accommodate employees who associate with a disabled person," it added in dicta that FEHA "may reasonably be interpreted to require accommodation based on the employee's association with a physically disabled person" and described that question as "not settled."[224]

Castro-Ramirez involved a driver whose son required daily dialysis.[225] When Castro-Ramirez was hired, he told his employer that he must be home in time to administer his son's daily dialysis.[226] His supervisors granted the request and assigned him to shifts that commenced before noon.[227] After several years, Castro-Ramirez got a new supervisor who revoked the accommodation and began assigning Castro-Ramirez to increasingly later shifts, giving the earlier shifts that Castro-Ramirez sought to other drivers.[228] Castro-Ramirez explained that the start time was so late that it would prevent him from getting home in time to administer his son's dialysis and sought to renew his prior accommodation.[229] In response, the new supervisor threatened to fire Castro-Ramirez unless he did the assigned route, which Castro-Ramirez explained was impossible.[230] The supervisor also purportedly lied to Castro-Ramirez, telling him that he was not assigned to his usual early shift because of customer feedback; in truth, however, the customer had specifically requested Castro-Ramirez.[231] The supervisor told

222. GOV. CODE § 12926, subd.(o).

223. Castro-Ramirez v. Dependable Highway Express, Inc., 2 Cal. App. 5th 1028, 1031-32 (2016) (reversing the trial court's grant of summary judgment to the defendant).

224. *Id.* at 1038-39.

225. *Id.* at 1032.

226. *Id.* at 1032-33.

227. *Id.* at 1033.

228. *Id.* at 1033-34.

229. *Id.* at 1034.

230. *Id.*

231. *Id.*

him to return the next day to sign his termination paperwork.[232] For the next three days, Castro-Ramirez came to work requesting shifts but was refused.[233] On the third day, "DHE processed the termination as a . . . '[r]esignation,' with the stated reason being '[r]efused assignment.'"[234]

Castro-Ramirez sued DHE for, *inter alia*, disability discrimination, retaliation, and failure to provide a reasonable accommodation.[235] DHE moved the trial court for summary judgment, and the court granted the motion.[236] Castro-Ramirez appealed, abandoning his failure to accommodate claim.[237] In reversing the trial court's grant of summary judgment to DHE, the appellate court opined:

> A jury could reasonably find from the evidence that plaintiff's association with his disabled son was a substantial motivating factor in Junior's decision to terminate him, and, furthermore, that Junior's stated reason for termination was a pretext. Junior knew that plaintiff needed to finish his assigned route at a time that permitted him to administer dialysis to his son. . . . Despite knowing plaintiff's need to be home early, the month after Junior took over, he scheduled plaintiff for a shift that started at noon, later than plaintiff had ever started before. Junior did this even though eight other shifts well before noon were available, and even though DHE's customer had specifically requested that plaintiff . . . do their 7:00 a.m. deliveries. . . . (Junior told plaintiff the customer was unhappy with his work and did not want him making the customer's deliveries; in fact, the customer's feedback was quite the opposite, and plaintiff never had any performance issues at DHE.) Plaintiff told Junior he could not work the shift and route assigned to him because he had to be home to administer dialysis to his son, but he asked to return the next day for an assignment. . . . Yet Junior ignored plaintiff's requests. . . . Even though DHE's policies allowed for less severe disciplinary action than termination, for plaintiff's one-time refusal to work the shift assigned to him, Junior terminated him. One reasonable inference from these facts is that . . . plaintiff's termination for refusal to work the shift was a pretext for Junior's desire to be rid of someone whose disabled associate made Junior's job harder.[238]

But of course, a state ruling by a California court is not binding precedent in the District of Columbia or the other forty-nine states, which may have disability laws that use different language. While courts in other states and circuits may look to *Castro-Ramirez* as persuasive authority, they are unlikely to follow it, particularly when doing so would contravene

232. *Id.*
233. *Id.*
234. *Id.*
235. *Id.* at 1031, 1035.
236. *Id.* at 1035.
237. *Id.* at 1037-38.
238. *Id.* at 1042-43 (internal citations omitted).

controlling precedent in their circuit.[239] For these reasons, state and local laws, even those that explicitly address caregiver discrimination, do not obviate the need for the ADA to require covered employers to engage in a good faith interactive process with caregivers of people who have disabilities regarding reasonable accommodation.

H. Public Policy Considerations

Public policy dictates that covered employers be required to engage in a good faith interactive process with caregivers of people with disabilities regarding reasonable accommodation.

1. Attendant Negative Consequences of Caregiver Unemployment

Caregiver accommodation is an important issue that affects the lives of millions of Americans. According to data published in 2020 by the National Alliance of Caregivers (NAC) and the American Association of Retired Persons (AARP), there are approximately 53 million adults serving as caregivers[240]—a marked increase from the approximately 43.5 million caregivers in 2015.[241] To put that number in perspective, it encompasses roughly 16% of the total U.S. population in 2020.[242]

Caregiving responsibilities are not always short-term or temporary obligations. For example, of these 53 million caregivers, 14.1 million are taking care of children with disabilities from birth to age seventeen, which may ultimately constitute a lifetime responsibility.[243] Approximately 6.1 million caregivers care for adults aged eighteen to forty-nine, such as siblings or spouses, and another 41.8 million care for adults aged fifty and older, such as parents and in-laws.[244] As of 2020, roughly 24% of caregivers were caring for multiple people.[245] Furthermore, the average age of a caregiver is 49.4 years old, and only 35% of caregivers are between the ages of fifty and sixty-

239. *See, e.g.*, U.S. v. Gonzalez, 250 F.3d 923, 926 (5th Cir. 2001) (declining to follow persuasive authority because "it does not control our resolution of the issue on appeal"); McNamara v. Royal Bank of Scot. Grp., PLC, Case No. 11-cv-2137-L(WVG), 2013 WL 1942187, at *3 (S.D. Cal. May 9, 2013) ("[P]ersuasive authority is '[a] precedent that is not binding on a court, but that is entitled respect and careful consideration.' . . . Even though it discusses state laws that this Court would have been bound to follow—namely, Connecticut state law—the *Schnabel* Court's opinion is persuasive authority that does not control in this Court's application of Connecticut state law.").

240. AARP & NAT'L ALL. FOR CAREGIVING, CAREGIVING IN THE U.S. 4 (2020), https://www.caregiving.org/wp-content/uploads/2021/01/full-report-caregiving-in-the-united-states-01-21.pdf [https://perma.cc/7AEP-NQYE].

241. *Id.*

242. Dudley L. Poston, Jr., *3 Ways that the U.S. Population Will Change Over the Next Decade*, PBS NEWS HOUR (Jan. 2, 2020) https://www.pbs.org/newshour/nation/3-ways-that-the-u-s-population-will-change-over-the-next-decade [https://perma.cc/4SU3-PU4J].

243. AARP & NAT'L ALL. FOR CAREGIVING, *supra* note 241, at 4.

244. *Id.*

245. *Id.*

four.[246] This suggests that most caregivers are at the beginning or height of their careers, rather than resuming caregiving responsibilities after they retire.

Because caregivers often provide food, shelter, utilities, and substantial care to their disabled dependents, those loved ones with disabilities may end up hungry, homeless, or without much-needed medical care as an attendant negative consequence of their caregivers' unemployment. Seventy-six percent of caregivers either live with the care recipient or within twenty minutes of the home, and only 11% of caregivers live one hour or more away from the care recipient.[247] On average, a caregiver spends 23.7 hours per week caring for a person with a disability.[248] About one-third of caregivers spend 21 hours or more caring for an individual with disabilities.[249] Sixty-eight percent of caregivers spend between zero and 20 hours per week caring for an individual with disabilities.[250]

Despite the onerous burden of caregiving, which is a job all on its own, most caregivers must also work outside the home to maintain health insurance for their disabled dependents and to cover the ever-increasing costs of their care. Perhaps for this reason, 61% of caregivers report that they were employed at some point while taking care of another individual.[251] Of those employed, 60% worked 40 hours or more per week, 25% worked less than 30 hours per week, and 15% worked 30 to 39 hours per week.[252] Approximately 53% of caregivers report that their supervisors at work are aware of their caregiving responsibilities, and 34% report their supervisors have no knowledge of their caregiving responsibilities.[253]

Caregiver employment better protects people with disabilities from poverty, homelessness, food insecurity, loss of health insurance, and a litany of other negative consequences, while simultaneously reducing their reliance on taxpayer-provided benefits, including unemployment, food stamps, and public assistance. "In contemporary America, getting and keeping a decent job is the key to leading a self-sufficient life endowed with the qualities of dignity, independence, and personal autonomy . . . Without the prospect of employment, however, an individual faces a life of dependence and may

246. *Id.* at 10.

247. *Id.* at 21.

248. *Id.* at 30.

249. *Id.*; *see also* CTRS. FOR DISEASE CONTROL & PREVENTION, CAREGIVING (Apr. 2020), https://www.cdc.gov/aging/data/pdf/AGG.CAREGIVING-2018.pdf [https://perma.cc/ZRJ7-9N9U].

250. AARP & NAT'L ALL. FOR CAREGIVING, *supra* note 241, at 30.

251. *Id.* at 62.

252. *Id.* at 65.

253. *Id.*

never experience the sense of inclusive equality that other members of society take for granted."[254]

And despite the good intentions of the FMLA, which offers a single accommodation of unpaid leave, caregiving needs and responsibilities are not one-size-fits-all. To the contrary, according to the Centers for Disease Control and Prevention (CDC) and its Disability and Health Data System (DHDS), which collect state-by-state data on six broad categories of disabilities,[255] the level of care needed for people with disabilities varies. Of people with disabilities receiving care from a caregiver, about 74% require caregivers to visit once a week or more.[256] Seventeen percent require caregiver visits once or more per month, and 9% only require care a few times a year or less.[257] Approximately 63% of care recipients report a long-term physical condition, while only 30% report a short-term physical condition.[258]

2. Disparate Impact on Women in the Workforce

Expanding the ADA to require caregiver accommodation could also reduce the disparate impact on working women. Taken together, empirical research as well as anecdata reveal that caregiving responsibilities disproportionately burden women. Approximately sixty-one percent of caregivers are women.[259] The U.S. Supreme Court has acknowledged that because "'[t]wo-thirds of the nonprofessional caregivers for older, chronically ill, or disabled persons are working women," practices that "reinforce the stereotype of women as caregivers . . . exclude far more women than men from the workplace."[260] As a result, the ADA's failure to require employers to engage in a good faith interactive process with caregivers of people with disabilities may, in turn, exacerbate the barriers working women must already overcome to thrive in the workforce.

It is beyond dispute that women are disparately impacted by pervasive sex and gender stereotypes about caregiving. For instance, in *Chadwick v. Wellpoint, Inc*., a female employee with four young children sued under Title VII, alleging that her employer failed to promote her because of a sex-based

254. James Leonard, *The Equality Trap: How Reliance on Traditional Civil Rights Concepts Has Rendered Title I of the ADA Ineffective*, 56 CASE W. RES. L. REV. 1, 2 (2005).

255. *Disability and Health Data System (DHDS) Overview*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/ncbddd/disabilityandhealth/dhds/overview.html [https://perma.cc/4G6S-7HDV] (collecting data on cognitive disabilities, hearing disabilities, mobility disabilities, vision disabilities, self-care disabilities, and independent living disabilities).

256. AARP & NAT'L ALL. OF CAREGIVERS, *supra* note 241, at 4, 23.

257. *Id.*

258. *Id.* at 24.

259. *Id.* at 10.

260. Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 738 (2003) (quoting H.R. REP. NO. 103-8, pt. 1, at 26 (1993); S. REP. NO. 103-3, at 5 (1993)).

stereotype that women who are mothers, particularly of young children, neglect their jobs in favor of caregiving.[261] As the First Circuit explained:

> [U]nlawful sex discrimination occurs when an employer takes an adverse job action on the assumption that a woman, because she is a woman, will neglect her job responsibilities in favor of her presumed childcare responsibilities. It is undoubtedly true that if the work performance of a woman (or a man, for that matter) actually suffers due to childcare responsibilities (or due to any other personal obligation or interest), an employer is free to respond accordingly, at least without incurring liability under Title VII. However, an employer is not free to assume that a woman, because she is a woman, will necessarily be a poor worker because of family responsibilities. The essence of Title VII in this context is that women have the right to prove their mettle in the work arena without the burden of stereotypes regarding whether they can fulfill their responsibilities.[262]

Similarly, in *Nevada Department of Human Resources v. Hibbs*, the U.S. Supreme Court observed that "'[h]istorically, denial or curtailment of women's employment opportunities has been traceable directly to the pervasive presumption that women are mothers first, and workers second. This prevailing ideology about women's roles has in turn justified discrimination against women when they are mothers or mothers-to-be.'"[263] It further pointed out the disparate impact on men, adding that "[b]ecause employers continued to regard the family as the woman's domain, they often denied men similar accommodations or discouraged them from taking leave . . . [which] 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."[264] The Court further acknowledged that reducing the adverse impact of harmful sex stereotypes about caregiving was one of the primary reasons that Congress enacted the FMLA, explaining that "[b]y creating an across-the-board, routine employment benefit for all eligible employees, [irrespective of sex], Congress sought to ensure that

261. *See generally* Chadwick v. Wellpoint, Inc., 561 F.3d 38 (1st Cir. 2009) (holding that the plaintiff put forth sufficient evidence that a promotion denial was likely caused by sex discrimination to survive a motion for summary judgment).

262. *Id.* at 44-45; *see also* Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 120 (2d Cir. 2004) (involving a sex stereotyping claim alleging that an employer presumed that a woman could not work long hours and still "be a good mother" who demonstrates "the same level of commitment" as non-mothers); Lust v. Sealy, Inc., 383 F.3d 580, 583 (7th Cir. 2004) (upholding a jury's finding of sex discrimination where the plaintiff's supervisor admitted that he did not recommend her for a position "because she had children and he didn't think she'd want to relocate her family, though she hadn't told him that"); Sheehan v. Donlen Corp., 173 F.3d 1039, 1044-45 (7th Cir. 1999) ("a reasonable jury might conclude that a supervisor's statement to a woman known to be pregnant that she was being fired so that she could 'spend more time at home with her children' reflected unlawful motivations because it invoked widely understood stereotypes the meaning of which is hard to mistake.").

263. Hibbs, 538 U.S. at 736 (internal citation omitted).

264. *Id.*

family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that employers could not evade leave obligations simply by hiring men."[265] As a result, the "FMLA attacks the formerly state-sanctioned stereotype that only women are responsible for family caregiving."[266]

During the COVID-19 pandemic, women left the workforce in spades because they were unable to balance their existing workload with the added burdens of caring for sick loved ones and homeschooling children. But for caregivers of loved ones with disabilities, those added burdens are not a temporary byproduct of a pandemic; they are a constant state of life. Talented women who could otherwise make a valuable contribution to the workplace will disproportionately remain out of work so long as employers do not provide flexible workplace arrangements. And that exacerbates the existing lack of gender diversity across industries, particularly in positions of leadership. This adverse impact on women is two-fold because women are not only likelier to be saddled with primary caregiver responsibilities but are also likelier to end up with a disability.[267]

Notably, men are not unaffected. Indeed, by some estimates, 40% of caregivers are men, often single fathers. While it is tempting to think that sex stereotyping claims under Title VII provide legal recourse, which would render an amendment to the ADA redundant or unnecessary, men like the caregivers in *Kelleher*, *Bukiri*, *Castro-Ramirez*, and countless other cases would likely have a far more difficult time bringing a successful sex stereotyping claim under Title VII given deep-seated assumptions that women, not men, are generally the primary caregiver. A sex-neutral ADA amendment, however, could better protect them. In addition, Title VII sex stereotyping claims do little more than ADA's existing associational discrimination provision, as Title VII does not require employers to reasonably accommodate caregivers.

3. Disparate Impact on Other Vulnerable Groups

Requiring caregiver accommodation might also benefit other groups that are disparately impacted by disability, such as low-income families, communities of color, and military families.

265. *Id.* at 737.

266. *Id.*

267. DEP'T OF LAB. OFF. OF DISABILITY EMP. POL'Y, SPOTLIGHT ON WOMEN WITH DISABILITIES 4 (2021), https://www.dol.gov/sites/dolgov/files/ODEP/pdf/Spotlight-on-Women-with-Disabilities-March-2021.pdf [https://perma.cc/5YEY-QTVW].

a. Low-income families

The intersection of poverty and disability is undeniable because "disability is both a cause and consequence of poverty."[268] Perhaps not surprisingly, 27% of people with disabilities live in poverty, which is more than twice the rate (12%) of their non-disabled counterparts.[269] That "disparity . . . is most significant among non-Hispanic Whites, where adults with disabilities are two-and-a-half times as likely to live in poverty as those without a disability (24% compared with 9%)."[270] Working-age adults with disabilities are also "four times" more likely to endure food insecurity than those without disabilities.[271] And perhaps as an unhappy byproduct of their poverty and food insecurity, "[h]ouseholds with a disability are almost twice as likely [15%] than those without a disability [8%] to use alternative, often predatory, lending services . . . [that] often trap the household in a cycle of high interest loans that make it difficult for them to maintain economic stability."[272]

People with disabilities also have higher rates of unemployment, which may explain, at least in part, the higher rates of poverty observed. Less than 33% of working-age adults with disabilities are employed, compared with 75% of their non-disabled counterparts.[273] Sixty-two percent describe themselves as "not currently in the labor market," meaning that they are not actively seeking employment.[274] Relatedly, low-income adults are likelier to work the kinds of physically demanding manual labor likelier to result in injuries and adverse health consequences, such as coal miners who often develop "Black Lung" disease and asbestosis. Although poverty and disability overlap and exacerbate one another, the programs aimed at combatting them often have competing goals. For instance, anti-poverty programs and public assistance may have a requirement to work, whereas disability-related assistance may require a person to demonstrate an inability to work.[275]

Educational attainment may be another contributing factor because adults with disabilities tend to have lower levels of education than those without a disability. Twenty-one percent of adults with disabilities have less

268. DEP'T FOR INT'L DEV., DISABILITY, POVERTY, AND DEVELOPMENT 1 (2000), https://hpod.law.harvard.edu/pdf/Disability-poverty-and-development.pdf [https://perma.cc/Z5LP-4JP7].

269. NANETTE GOODMAN, MICHAEL MORRIS & KELVIN BOSTON, NAT'L DISABILITY INST., FINANCIAL INEQUALITY: DISABILITY, RACE, AND POVERTY IN AMERICA 12 (2019) [hereinafter *NDI Report*], https://www.nationaldisabilityinstitute.org/wp-content/uploads/2019/02/disability-race-poverty-in-america.pdf [https://perma.cc/X9Q3-NRFX].

270. *Id.*

271. *Id.* at 17.

272. *Id.* at 15.

273. *Id.* at 13.

274. *Id.* at 14.

275. *NDI Report*, *supra* note 270, at 5.

than a high school education compared to 11% of their non-disabled counterparts.[276] "Only 13[%] have a bachelor's degree or more compared to 31[%] of adults with no disability."[277]

The statistics are even more heartbreaking with regard to children with disabilities. Children living in poverty are nearly twice as likely to have a disability.[278] They are likelier to "have asthma, chronic illness, environmental trauma such as lead poisoning, learning problems and low birth weight that lead to disabilities."[279] And their families often lack resources necessary for their care.[280] Many, if not most, are unable to employ paid caregivers, meaning that caregiving responsibilities most often fall on a parent, grandparent, or other close relative. This is especially troubling given that the number of children with disabilities is on the rise. By 2019, that number had risen to more than three million children, which was "significantly higher" than in 2008.[281] The barriers that people with disabilities still face regarding employment and educational attainment, which result in persistent poverty, will only be exacerbated if their non-disabled caregivers are unable to attain the reasonable accommodation necessary to enable them to remain dutifully employed while still providing adequate and necessary care to their disabled loved ones.

b. Communities of Color

Because communities of color have higher rates of disability, they may also be disparately impacted by policies that wholesale deny their caregivers the right to a reasonable accommodation. According to the CDC, nearly one third of Native Americans and Alaskan Natives have a disability compared to 25% of African Americans, 20% of Caucasians, 16.7% of Hispanics, and 10% of Asians.[282] These groups also report significantly higher levels of obesity and smoking. For example, 40.6% of Native Americans and Alaskan Natives are obese and 41.2% smoke as compared to 20.3% of Asians who

276. *Id.* at 10.

277. *Id.*

278. Natalie A.E. Young & Katrina Crankshaw, *U.S. Childhood Disability Rate Up in 2019 From 2008 Disability Rates Highest Among American Indian and Alaska Native Children and Children Living in Poverty*, U.S. CENSUS BUREAU (Mar. 25, 2021), https://www.census.gov/library/stories/2021/03/united-states-childhood-disability-rate-up-in-2019-from-2008.html [https://perma.cc/94DQ-7FBQ].

279. *NDI Report*, *supra* note 270, at 5.

280. Young & Crankshaw, *supra* note 279.

281. *Id.*

282. *Adults with Disabilities: Ethnicity and Race*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/ncbddd/disabilityandhealth/materials/infographic-disabilities-ethnicity-race.html [https://perma.cc/ZY9Q-LBU9] (citing Elizabeth A. Courtney-Long et al., *Socioeconomic Factors at the Intersection of Race and Ethnicity Influencing Health Risks for People with Disabilities*, 4 J. RACIAL & ETHNIC HEALTH DISPARITIES 213 (2017)).

are obese and 12.8% who smoke.[283] According to the National Disability Institute, "African Americans are more likely than Non-Hispanic Whites to have a disability in every age group."[284] This disparity exists even when factors like educational attainment are controlled: for example, 13% "of Non-Hispanic Whites with a disability and a bachelor's degree live in poverty compared with 20 percent of African Americans, 16 percent of Latinos and 12 percent of Asians with the same level of education."[285] People of color who have disabilities also experience lower rates of employment,[286] higher rates of food insecurity,[287] reported unmet needs due to health care costs,[288] and have a greater likelihood to utilize predatory lending services.[289] Taken together, the data demonstrate that "race and disability are overlapping identities that are both related to systemic inequality."[290]

The racial gap is equally pronounced among children with disabilities. According to the U.S. Census Bureau, "American Indian and Alaska Native (AIAN) children had the highest rate of childhood disability of all racial groups, at 5.9% in 2019," followed by biracial children (5.2%) and African American children (5.1%).[291] The data demonstrate the well-established intersection between poverty, disability, and race. Indeed, "American Indian and Alaska Native households have the nation's second lowest median income and a higher percentage of American Indian and Alaska Native families live in poverty, compared to all other racial groups." They are also likelier to live in rural areas with less access to medical care, particularly maternal care.[292] As a result, failing to require caregiver accommodation disparately impacts communities of color because they experience higher rates of disability and thus, possess a greater need for disability-related caregiving.

283. *Id.*

284. *NDI Report*, *supra* note 270, at 5 (reporting that "[f]ourteen percent of working-age African Americans have a disability compared with 11 percent of Non-Hispanic Whites and eight percent of Latinos").

285. *Id.* at 12.

286. *Id.*

287. *Id.* at 18 (stating that African Americans (26%) and Latinx (27%) people with disabilities had higher rates of food insecurity than Non-Hispanic Whites with disabilities (24%)).

288. *Id.* at 16 (reporting that African Americans were the most likely to face this cost barrier (17%), followed by Non-Hispanic Whites (16%), Latinos (15%) and Asians (14%); however, the external survey referenced did not include Native Americans and indigenous peoples).

289. *Id.* at 15.

290. *NDI Report*, *supra* note 270, at 19 (internal quotation omitted).

291. Young & Crankshaw, *supra* note 279.

292. *Id.*

c. Military Families

Disability also disparately impacts veterans and by extension, their families and caregivers. According to the Bureau of Labor Statistics (2022), 4.9 million American veterans (27%) reported having a service-connected disability.[293] Although veterans experienced lower rates of unemployment than their non-disabled counterparts,[294] the caregivers of these wounded warriors may still sometimes be forced to work outside the home to make ends meet, all while providing necessary care to their veteran family members with disabilities.

Taken together, the data above paint a bleak picture for people with disabilities, and by extension, their caregivers—one that caregiver accommodation might somewhat ameliorate.

I. Evolving Attitudes

Requiring caregiver accommodation comports with evolving attitudes toward caregiving, healthcare, and corporate responsibility.

1. Evolving Attitudes about Caregiving and Healthcare

In March of 2020, the World Health Organization announced that COVID-19 had escalated into a global pandemic.[295] Schools and businesses closed. Cities went into lockdown. Panic ensued as people did not know what deadly the virus was or how it was transmitted. In the strange and frightening years that followed, attitudes toward caregiving and healthcare evolved. Signs thanking caregivers and "healthcare heroes" popped up across America. People, especially men, who had never been heavily tasked with caregiving before now, found themselves forced to stay home and work remotely, while also caring for children and other dependents who could no longer attend daycare, school, or other facilities. It is possible, perhaps even probable, that living for an extended period of time in these circumstances has fostered a heightened respect for the critical role that caregivers play in our society, as well as the challenges they face, particularly when striving to balance their caregiving responsibilities with work outside the home. Hopefully, this deeper empathy and newfound appreciation for caregivers will outlast the pandemic and engender greater support and less opposition

293. *Employment Situation of Veterans*, U.S. DEP'T OF LAB., BUREAU OF LAB. STAT., https://www.bls.gov/news.release/pdf/vet.pdf [https://perma.cc/7GX6-TQ47] (last visited on March 31, 2023).

294. *Id*.

295. *WHO Director-General's opening remarks at the media briefing on COVID-19*, WORLD HEALTH ORG. (Mar. 11, 2020), https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19—-11-march-2020 [https://perma.cc/4AH3-DK3F].

for legislative measures aimed at assisting struggling caregivers of people with disabilities.

2. Evolving Attitudes About Corporate Social Responsibility

Caregiver accommodation may even garner support from Corporate America given its renewed and more outspoken commitment to supporting social justice and anti-discrimination initiatives.[296] *Corporate social responsibility* refers to the belief that large and influential corporations should be treated as quasi-institutions accountable to the public and whose cooperation is necessary to solve social ills, such as protecting the environment or advancing civil rights.[297] Advocates of corporate social responsibility want "corporate law to evolve . . . [articulating] new responsibilities . . . [that] run not only to shareholders but to employees, suppliers, consumers, [and the] communities in which the corporation" operates.[298] As Lin (2018) explains, corporations "have long played a significant, albeit not always uniform, role . . . in almost every significant social movement in post-World War II America . . ."[299] In fact, Fortune 500 companies spend "billions" on corporate responsibility initiatives each year.[300]

The shift toward greater corporate social responsibility has been bolstered by the rise of shareholder activism. Although fewer "activist" proposals primarily aimed at promoting environmental, social, and political causes were submitted in 2019 than in 2018, more went to a vote, and those that did generally received greater support.[301] According to Haan (2020), "corporate democracy is shaping companies' social, environmental, and political policies . . ."[302]

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296. *See generally* Sarah C. Haan, *Civil Rights and Shareholder Activism; SEC v. Medical Committee for Human Rights*, 76 WASH. & LEE L. REV.1167 (2019); Haochen Sun, *Corporate Fundamental Responsibility: What Do Technology Companies Owe the World?*, 74 U. MIAMI L. REV. 898, 906, 907 (2020); Tom C. W. Lin, *Incorporating Social Activism*, 98 B.U. L. REV. 1535, 1545-46 (2018) (discussing the rise of corporate social responsibility).

297. Douglas M. Branson, *Corporate Government "Reform" and the New Corporate Social Responsibility*, 62 U. PITT. L. REV. 605, 612 (2001).

298. *Id.* at 616; *see also* Lin, *supra* note 297, at 1562 ("As businesses profess and position themselves to be socially conscious, social activists will more readily try to leverage the tools and resources of businesses towards achieving their aims.").

299. *Id.* at 1543-44.

300. *Id.* at 1567.

301. Haan, *supra* note 297, at 1225.

302. *Id.* at 1225; *see also* Branson, *supra* note 298, at 605-06 (exploring the potential rise of a new "corporate social responsibility movement" taking place in the form of the "'good governance' movement; the stakeholder versus stockholder debate; renewed calls for corporate social accounting and disclosure; the 'green' movement in manufacture and advertisement of products; advocacy of communitarian models of the corporation and of 'progressive' corporate law; and a newly strengthened environmental movement"); Douglas M. Branson, *Corporate Social Responsibility Redux*, 76 TUL. L. REV. 1207, 1221, 1225 (2002); David Monsma, *Equal Rights, Governance, and the Environment: Integrating*

Accommodating caregivers comports with this modern trend of corporate activism. As Lin (2018) observes, "[c]ontemporary social activism that partners corporations with social activists to solve large social problems could create win-win opportunities for firms and activists. Firms can enhance their brand value and create new markets for their businesses, while simultaneously helping to solve persistent social problems."[303] By way of illustration, Walmart's partnership with the Environmental Legal Defense Fund strengthened Walmart's reputation, generated new revenue streams via environmentally-safe and sustainable products, and produced cost-savings due to smarter energy practices.[304] Not surprisingly, "socially responsible businesses generate stronger returns for their shareholders and have greater brand value in the marketplace."[305] They also more easily attract socially conscious "impact investors" who invest in companies that are both profitable but also strive to positively impact the world.[306]

Perhaps as a result, corporate leaders increasingly advocate for social and political causes from civil rights to climate change.[307] And they are not just using their voices. Instead, they are also donating millions of dollars each year to support political and charitable causes as well as creating high-paying positions entirely dedicated to "corporate social responsibility," "strategic alliances," and "community investment."[308]

The ADA and ADAAA were enacted long before this emerging trend of corporate social responsibility and shareholder activism, and it would be surprising if the same corporations advocating for anti-racism and lauding

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Environmental Justice Principles in Corporate Social Responsibility, 33 ECOLOGY L. Q. 443, 449 (2006); Lin, *supra* note 297, at 1547 ("Recent episodes involving the North Carolina 'Bathroom Law' of 2016, some of the controversial early actions of the Trump Administration in 2017, and the response to the Parkland Shooting in 2018 highlight the new dynamics of contemporary corporate social activism."); *id.* at 1558 ("[T]he convergence of government and private enterprise, the rise of corporate social responsibility efforts, and the expansion of corporate political rights have collectively fostered contemporary corporate social activism.").

303. Lin, *supra* note 297, at 1580.

304. *Id.*

305. *Id.*

306. *Id.* at 1580-81.

307. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 343 (2010) ("The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons'"); Lin, *supra* note 297, at 1570-71 (noting the dramatic growth in corporate political involvement via campaign expenditures following *Citizens United*); Lin, *supra* note 297, at 1570 ("Corporate interests have expanded upon their previously outsized influence in the political system by injecting millions of dollars into the political process, both directly to campaigns and indirectly through intermediaries, without being subject to stringent disclosure rules about their expenditures.").

308. Lin, *supra* note 297, at 1546-47 ("Corporations are now frequently expected to engage in social issues through public statements, sponsorships, partnerships, and policies supporting a position or a cause. Increasingly, businesses are expected by their communities, consumers, employees, and executives to engage in social activism on issues directly or indirectly related to their core operations.") (internal citation omitted).

"healthcare heroes" would openly and actively oppose expanded protections for caregivers of people with disabilities. Companies that vocally support caregiver accommodation might enjoy similar benefits as Walmart by attracting the business and talent of the more than fifty-three million caregivers in America, not to mention the sixty-one million people with disabilities for whom they provide care.

J. Attendant Benefits

Caregiver accommodation also offers attendant economic benefits to businesses, many of which are currently experiencing labor shortages. During the pandemic, countless employees resigned due to the burden of caring for sick loved ones and homeschooling children. As the lockdowns came to an end, those demands proved temporary for some but permanent for others, including caregivers of people with permanent disabilities. Such individuals may opt not to return to the workforce unless their employers more generously accommodate their daily caregiving demands.

Furthermore, although cost concerns regarding accommodations should not be dispositive, cost studies regarding disability-related accommodation show that many employers actually save money by providing accommodations, such as flexible work-from-home arrangements. Although reliable empirical data regarding the economic impact of the ADA is scant because it has not been heavily researched, the cost studies that do exist seem to demonstrate that "many of the accommodation costs engendered by Title I are generally nonexistent or minimal" and granting accommodations can actually be "cost-effective" for employers.[309] For example, a study of 500 accommodations made between 1978 and 1997 by Sears, Roebuck, & Co. revealed that between "1978-1992 the average out-of-pocket expense for an accommodation equaled $121," which dropped to $45 between 1993 and 1996.[310] "Overall, 72% of accommodations required no cost, 17% carried an expenditure of less than $100, 10% cost less than $500, and 1% required inputs of between $500-$1000."[311] Similarly, the Job Accommodation Network advised Congress that a typical accommodation would cost roughly $200, although costs may differ by employer size, nature of the industry, etc.[312] One limitation is that the studies focus on "hard" costs and benefits, such as providing equipment, as opposed to qualitative "soft" costs and

309. Michael Stein, *Empirical Implications of Title I*, 85 IOWA L. REV. 1671, 1672 (2000); *see also* Peter Blanck, *The Economics of the Employment Provisions of the American Disabilities Act: Part I—Workplace Accommodations*, 46 DEPAUL L. REV. 877, 877 (1997) ("Presently, there exists limited systematic empirical study of Title I implementation in general, and of the economic impact of the law on employers and others in particular.").

310. Stein, *supra* note 310, at 1674.

311. *Id*.

312. *Id.* at 1674.

benefits, such as the impact on employee morale or time spent training HR personnel.[313] As a result, Stein (2000) cautions that further study is warranted.[314]

Available research also reveals that providing an accommodation can sometimes lead to overall cost-savings. In fact, one agency discovered "that for every dollar spent on accommodation, companies saved $50, on average, in net benefits. Thus, although more than [50%] of accommodations cost less than $500, in two thirds of those cases companies enjoyed net benefits exceeding $5000. . . accommodations [also] reduced . . . costly job turnover."[315]

Furthermore, Blanck (1996) contends that accommodations also produce other benefits that are more difficult to quantify, such as increased productivity, heightened commitment, "fewer insurance claims," and an improved corporate climate.[316] They also create overall "public cost savings, including reduction of disability-related public assistance obligations currently estimated at $120 billion annually," which will decrease taxpayer burdens and boost the economy.[317] In fact, according to one estimate, "for every one million disabled people employed, there would be as much as a $21.2 billion annual increase in earned income, a $2.1 billion decrease in means-tested cash income payments, a $286 million annual decrease in the use of food stamps, a $1.8 billion decrease in Supplemental Security Income payments, 84,000 fewer people using Medicaid, and 166,000 fewer people using Medicare."[318] Although data specific to caregiver accommodation is not currently available, one could expect similar cost savings and net benefits.

In addition, flexible work arrangements, which are one of the highly sought accommodations, can usually be offered for little or no cost to most employers, and the experience of the COVID-19 pandemic has debunked the long-held myth that telecommuting is per se unreasonable. Prior to the pandemic, some courts had upheld employers' refusal of employees' requests to work remotely, sometimes concluding that flexible work arrangements posed an undue hardship on employers.[319] But during the pandemic, countless

313. *Id.* at 1677.

314. *Id.*

315. *Id.* at 1674-75.

316. *Id.* at 1675.

317. *Id.* at 1676.

318. *Id.* at 1676 n.25 (citation omitted).

319. *See generally* McNair v. District of Columbia, 11 F. Supp. 3d 10, 16 (D.D.C. 2014) (concluding as a matter of law that a Hearing Examiner could not perform the essential functions of her job by working remotely at home "40 to 60% of the time for the foreseeable future"); Hall v. Verizon N.Y., Inc., Case No. 13 Civ. 5518 (NRB), 2017 WL 3605503, at *6 (S.D.N.Y. July 26, 2017) (concluding that plaintiff's proposal to telecommute was not a reasonable accommodation of her disability). *Compare* E.E.O.C. v. Ford Motor Co., 782 F.3d 753, 763 (6th Cir. 2015) (concluding that working remotely up to four days per week was not a reasonable accommodation because regular in-person attendance was an essential function of the position of automobile resale buyer), *and* Tyndall v. Nat'l Edu. Ctr. Inc., 31 F.3d 209 (4th Cir.

businesses of various sizes and across different industries permitted or required employees to work remotely for long periods of time. A PWC (2021) survey of 133 executives and 1,200 office workers in found that an overwhelming 83% of employers described pandemic-related remote work as "successful."[320] In fact, "[o]ver half of employees (55%) would prefer to be remote at least three days a week once pandemic concerns recede."[321]

Permitting caregivers to telecommute, as needed, could simultaneously benefit them, their disabled loved ones, and their employers. Indeed, flexible work-from-home arrangements have been shown to increase productivity and job satisfaction,[322] reduce absenteeism,[323] increase employee engagement,[324] reduce attrition,[325] improve morale and work quality,[326] and attract diverse, global talent without creating complex immigration issues. Significantly, these benefits remain "constant regardless of the economic climate."[327]

1994) (deciding that remote work was not a reasonable accommodation for a teacher with lupus), *with* Davis v. Guardian Life Ins. Co. of Am., Case No. CIV. A. 98–5209, 2000 WL 122357 (E.D. Pa. Feb. 1, 2000).

320. *PWC's US Remote Work Survey*, PWC (Jan. 12, 2021), https://www.pwc.com/us/en/library/covid-19/us-remote-work-survey.html [https://perma.cc/3N83-HHT6].

321. *Id.*

322. *See* Susanti Saragih et al., *Benefits and Challenges of Telework During the Covid-19 Pandemic*, 15 INT'L RSCH. J. OF BUS. STUD. 129, 130 (2022); Prithwiraj Choudhury, *Our Work-From-Anywhere Future*, HARV. BUS REV., Nov.-Dec. 2020 ("A 2015 study by Nicholas Bloom and coauthors found that when employees opted in to WFH policies, their productivity increased by 13%"); Laurel Farrer, *5 Proven Benefits of Remote Work For Companies*, FORBES (Feb. 12, 2020), https://www.forbes.com/sites/laurelfarrer/2020/02/12/top-5-benefits-of-remote-work-for-companies/?sh=2ef6f02f16c8 [https://perma.cc/G7DU-S3MX] ("Teleworkers are an average of 35-40% more productive than their office counterparts, and have measured an output increase of at least 4.4%"); *PWC's US Remote Work Survey*, *supra* note 321 (52% of executives surveyed stated that employee productivity improved during remote work).

323. *See* Farrer, *supra* note 323 ("Higher productivity and performance combine to create stronger engagement, or in other words, 41% lower absenteeism.").

324. *See* Choudhury, *supra* note 323; Farrer, *supra* note 323.

325. *See* Choudhury, *supra* note 323; Farrer, *supra* note 323 ("54% of employees say they would change jobs for one that offered them more flexibility, which results in an average of 12% turnover reduction after a remote work agreement is offered."); Saragih et at., *supra* note 323 at 130 (noting that flexible work from home arrangements increase retention, "attracting employees (61%)" and reducing "turnover (52%)"); *see generally* FAMILIES AND WORK INST., WHEN WORK WORKS: 2008 GUIDE TO BOLD NEW IDEAS FOR MAKING WORK WORK 1 [hereinafter *Bold New Ideas*] (providing examples in which employers have noticed flexible work arrangements improve employee productivity, engagement, and retention, reduce costs, turnover, and absenteeism, increase customer satisfaction and staffing coverage, and boost innovation).

326. Farrer, *supra* note 323 (discussing a study that revealed that flex-time "workers produce results with 40% fewer quality defects"); *see also* Saragih et al., *supra* note 323, at 130 (citing a 2015 study, which revealed that granting flexible work arrangements led to "employee excellence, higher commitment (74%), . . . and quality of employees' work (59%).").

327. *See generally Business Impacts of Flexibility: An Imperative for Expansion*, CORP. VOICES FOR WORKING FAMILIES (2005) [hereinafter *Business Impacts*], https://www.canada.ca/content/dam/canada/employment-social-development/migration/documents/PDFS/BusinessImpactsofFlexibility_March2011.pdf

Likewise, permitting employees to telecommute a few days per week "may lead to more efficient time use, lower stress caused by traffic and other commuting woes, and free up that time to tend to personal needs, engage in healthy physical activities, or deal with family responsibilities."[328] Because women more often serve as caregivers, they appear to benefit the most from flex-time arrangements.[329]

Granting caregivers flexible work-from-home arrangements, as needed, can even result in significant cost savings for their employers. For example, one study showed that "[o]rganizations save an average of $11,000 per year per part-time telecommuter, or 21% higher profitability."[330] By way of illustration, First Tennessee Bank's adoption of flexible work-life policies "resulted in $106 million in profits based on a 50% increase in employee retention and satisfaction and a 7% increase in customer retention."[331] Telecommuting also reduces workplace energy costs[332] and allows offices to reduce physical space needs through creative office-sharing arrangements. For example, the U.S. Patent and Trademark Office (PTO) "estimated that increases in remote work in 2015 saved it $38.2 million."[333]

Finally, at a time when energy and gasoline prices have skyrocketed and the climate change crisis is at the forefront of everyone's mind, permitting caregivers to telecommute also benefits society at large by reducing traffic, car accidents, pollution, carbon emissions, and energy consumption.[334] For example, the PTO estimates that in 2015 its remote workers "drove 84 million fewer miles than if they had been traveling to headquarters, reducing carbon emissions by more than 44,000 tons."[335]

For the foregoing reasons, the ADA ought to require covered employers to engage in a good faith interactive process with caregivers of people with disabilities regarding reasonable accommodation, at least in certain

[https://perma.cc/BZ9Y-LP3F] (observing that flexible work arrangements positively impact talent acquisition, increase employee satisfaction, dedication, retention, engagement, and productivity).

328. Mireia Las Heras, *The Benefits of Flex Work for People, Families and the Environment*, FORBES (Jan. 9, 2021), https://www.forbes.com/sites/iese/2021/06/09/the-benefits-of-flex-work-for-people-families-and-the-environment/?sh=42c8d4725be6 [https://perma.cc/G7DU-S3MX] ("[W]orking from home reduced commute-related stress by 63% while boosting overall happiness by 10% and causing a 21% reduction in multitasking that causes stress and weakens work quality.").

329. *Id*.

330. Farrer, *supra* note 323.

331. *Business Impacts*, *supra* note 328, at 18 (observing that First Tennessee Bank's adoption of flexible work-life policies resulted in increased employee satisfaction, a 7% increase in customer retention and $106 million in profits).

332. *See* Las Heras, *supra* note 329.

333. Choudhury, *supra* note 323.

334. Las Heras, *supra* note 329; *see also* Choudhury, *supra* note 323 (noting that in 2018, Americans' commute time averaged 27.1 minutes each way, or about 4.5 hours a week).

335. Choudhury, *supra* note 323.

circumstances. But how can this much needed change best be accomplished? There are several possible solutions, each of which is discussed in turn below.

IV. Amending the ADA to Require Caregiver Accommodation

There are several possible solutions to address caregiver accommodation from evolving judicial interpretation and amended EEOC guidance to amending the FMLA. For the reasons explained below, however, the ideal course of action is to amend the ADA.

A. Possible Solutions

Evolving judicial interpretation of the ADA's associational discrimination provision is the first possibility. A court deciding an issue of first impression could simply ignore persuasive authority to the contrary and interpret the provision to require caregiver accommodation. Alternatively, a court of last resort could overturn precedent from a lower court or, as seen more rarely, its own past precedent. But the U.S. Supreme Court has never ruled on an associational discrimination claim under the ADA and is unlikely to do so in the near future. Several circuits have ruled on this issue, but they are in all accord rather than split, which makes it far less likely that a rogue circuit will reach the opposite conclusion that caregiver accommodation is required.

Nor should caregivers pin their hopes on amended EEOC guidance. Despite turnover in presidential administrations, the EEOC's position that associational accommodation is not required has never altered.[336] Rather, it has been bolstered by precedent reaching the same conclusion. And even if the EEOC were to issue amended guidance, which is highly unlikely, that guidance would not be binding on courts.[337] For example, in *Georator Corp. v. E.E.O.C.*, the Fourth Circuit explained that an EEOC determination of reasonable cause, standing alone, "is lifeless, and can fix no obligation nor

336. Interpretive Guidance on Title I of the Americans With Disabilities Act, 56 Fed. Reg. 34141, 35747 (July 26, 1991) (to be codified at 29 C.F.R § 1630.8); Interpretive Guidance on Title I of the Americans With Disabilities Act, 29 C.F.R. § 1630.8 (2012); U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-NVTA-2005-4, *supra* note **Error! Bookmark not defined.** (Question Four asks whether a person without a disability is entitled to a reasonable accommodation due to the person's association with someone with a disability, and the EEOC stated no because the reasonable accommodation requirement only applies to individuals with disabilities.); U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-NVTA-2009-1, *supra* note **Error! Bookmark not defined.**.

337. *See, e.g.*, E.E.O.C. v. Am. Airlines, Inc., 48 F.3d 164, 169 (5th Cir. 1995) ("We disagree with EEOC's premised reading of *Murnane* and with its conclusion."); E.E.O.C. v. JBS USA, LLC, Case No. 8:10CV318, 2016 WL 5173222, at *2 (D. Neb. Sept. 21, 2016) ("[T]he EEOC respectfully disagrees with the Court's findings."); Woodbury v. Victory Van Lines, Case No. TDC-16-2532, 2018 WL 5830764, at *3 (D. Md. Nov. 7, 2018) ("EEOC investigatory findings simply are not binding on federal courts in the private employment context."); McClure v. Mexia Indep. Sch. Dist., 750 F.2d 396, 400 (5th Cir. 1985) (noting that "EEOC determinations and findings of fact" are "not binding on the trier of fact").

impose any liability on [the employer]."[338] Likewise, in *E.E.O.C. v. Harvey L. Walner & Associates*, the Seventh Circuit observed that an EEOC determination "is only an administrative prerequisite to a court action and has no legally binding significance in subsequent litigation."[339] As a result, it would only provide caregivers with limited assurance of protection at best and could subsequently be rejected in court. For this reason, amended EEOC guidance is not the most effective solution.

Amending the FMLA is yet another suboptimal course of action. As explained earlier, the FMLA currently offers only one accommodation—up to twelve weeks of unpaid leave—but few caregivers can afford to go without a paycheck for twelve weeks, particularly if they serve as the primary breadwinner. The accommodations they seek often include options *other* than unpaid leave, such as telecommuting, a modified work schedule, or a transfer. Furthermore, these accommodations are often necessary for a longer period than twelve weeks. Moreover, the FMLA covers far fewer employers and employees than the ADA, which would leave millions of caregivers without protection.

Although some employers voluntarily provide accommodations to caregivers, at least in certain circumstances, that coverage does not obviate the need for a federal legal requirement.[340] First and foremost, that coverage is scant and non-uniform, with only some employers, primarily larger, national corporations, offering these options, meaning that it will be unavailable to many caregivers in need. Second, even when offered, such policies would be purely voluntary, meaning that they are difficult, or impossible, to enforce as well as unreliable. The employer could conceivably withdraw or alter them at any time, leaving caregivers in an indeterminate position and perhaps without legal recourse.[341] It might also make it more difficult for caregivers to challenge instances of disparate treatment as when

338. Georator Corp. v. E.E.O.C., 592 F.2d 765, 768 (4th Cir. 1979).

339. E.E.O.C. v. Harvey L. Walner & Assocs., 91 F.3d 963, 968 n.3 (7th Cir. 1996).

340. *See, e.g.*, Pierri v. Medline Indus., Inc., 970 F.3d 803 (7th Cir. 2020) (holding that the employer was not liable for associational discrimination under the ADA where, to accommodate his need to care for his grandfather, it permitted him to work only four days per week and offered to let him work Tuesday through Saturday so he could take his grandfather to the hospital on Mondays); Anakor v. Archuleta, 79 F. Supp. 3d 257 (D.D.C. 2015) (concluding that a federal agency was not liable for associational discrimination in violation of the ADA where it refused to permanently hire an intern whose daughter had kidney disease in part because the decision was based on the intern's poor performance and at the intern's request, the agency had granted the intern a temporary duty assignment to accommodate her caregiver duties).

341. *See, e.g.*, Phelps v. Optima Health, Inc., 251 F.3d 21, 26 (1st Cir. 2001) ("The fact that appellees previously allowed Phelps to engage in a job-sharing arrangement does not obligate them to continue providing such an accommodation. . . . [T]o find otherwise would discourage employers from granting employees any accommodations beyond those required by the ADA."); Erdman v. Nationwide Ins. Co., 582 F.3d 500, 502-03, 511 (3d Cir. 2009) (involving plaintiff-employee's allegation that Nationwide violated the ADA in part because it revoked a previously granted accommodation arising from the care she provided to her disabled daughter).

the corporation chooses to grant accommodations to some employees but not to others, perhaps due to nepotism or more insidious reasons.

B. Amending the ADA

As a result, the best course of action, albeit perhaps the most difficult, is a statutory amendment to Title I of the ADA, in part because it is a federal law controlling throughout America.[342] Amending the ADA poses many barriers, although none are insurmountable. Indeed, while the ADA was rigorously debated and provoked some opposition, it ultimately engendered significant bipartisan support in both houses.[343] The ADAAA passed by an even wider margin in 2008 and enjoyed unanimous consent in the Senate.[344] Notably, many of their sponsors and most vocal supporters were family members and caregivers of people with disabilities. Although the political climate in Washington is far more polarized now than in 1990 or 2008, members from both sides of the aisle recently joined forces to quickly enact stronger protections against hate crimes for Asian Americans.[345] This offers hope that a statutory amendment to the ADA that aims to protect caregivers could likewise inspire bipartisan support. This is especially true since many Americans will become a person with a disability or a caregiver of a disabled dependent at some point in their lives. Although some classes do have a heightened risk of developing disabilities, disabilities ultimately impact

342. It is possible that other statutes, such as the FMLA, might also require amendment, but a discussion of those statutes exceeds the scope of this Article.

343. *ADA History – In Their Own Words: Part Three*, ADMIN. FOR CMTY. LIVING, https://acl.gov/ada/the-ada-becomes-law [https://perma.cc/G3GF-JHVE] ("On July 12, 1990, the House of Representatives passed the Americans with Disabilities Act on a vote of 377-28 with 27 members not voting. The next day, the Senate passed the bill on a vote of 91-6 with 3 members not voting."). The ADA was first introduced in 1988 and became law in 1990. *See also* Arlene Mayerson, *The History of the Americans with Disabilities Act: A Movement Perspective*, DISABILITY RTS. EDUC. & DEF. FUND, https://dredf.org/about-us/publications/the-history-of-the-ada [https://perma.cc/429K-5TLT] ("The first hearing . . . was kicked off by the primary sponsors talking about their personal experiences with disability. Senator Harkin spoke of his brother who is deaf, Senator Kennedy of his son, who has a leg amputation, and Representative Coelho, who has epilepsy[,] spoke about how the discrimination he faced almost destroyed him. . . . A [Vietnam] veteran who had been paralyzed during the war and came home using a wheelchair testified that when he got home and couldn't get out of his housing project, or on the bus, or off the curb because of inaccessibility, and couldn't get a job because of discrimination he realized he had fought for everyone but himself. . . . At this Senate hearing and in all the many hearings in the House, members of Congress heard from witnesses who told their stories of discrimination.").

344. Michael A. Griffin & Joseph J. Lynett, *ADA Amendments Act Passed by House and Senate*, JACKSON LEWIS, https://www.jacksonlewis.com/resources-publication/ada-amendments-act-passed-house-and-senate [https://perma.cc/UJA9-SVXJ].

345. Barbara Sprunt, *Here's What the New Hate Crimes Law Aims to Do as Attacks on Asian Americans Rise*, NPR, https://www.npr.org/2021/05/20/998599775/biden-to-sign-the-covid-19-hate-crimes-bill-as-anti-asian-american-attacks-rise [https://perma.cc/NJX6-CDJS]; *see also* Claudia Grisales, *In Rare Moment of Bipartisan Unity, Senate Approves Asian American Hate Crimes Bill*, NPR (Apr. 22, 2021), https://www.npr.org/2021/04/22/989773400/in-rare-moment-of-bipartisan-unity-senate-approves-asian-american-hate-crimes-bi [https://perma.cc/PU5Q-D88G].

every group, regardless of age, sex, religion, race, gender identity, sexual orientation, or any other protected trait. It is quite possible that an amendment of the nature proposed herein might enjoy the same widespread support, particularly given evolving attitudes toward caregiving and corporate social responsibility. A statutory amendment would supersede precedent and EEOC guidance to the contrary in the same way that the ADAAA explicitly superseded *Sutton v. United Airlines*[346] and *Toyota Motor Manufacturing, Inc. v. Williams*.[347]

To be clear, however, this Article does not advocate for the adoption of a statutory provision that would provide a wholesale, all-inclusive right to accommodation for any known associate of a person with a disability. Indeed, such an amendment would be overbroad, rather than narrowly tailored to achieve its objective. Furthermore, such an amendment would certainly provoke strong opposition, rightfully so, and never garner the support necessary for its enactment.

Not surprisingly, any amendment expanding the ADA's coverage will also likely prompt concerns regarding the statute's economic impact, particularly on small businesses still reeling from the widespread effects of the pandemic. Out of sensitivity to those very real concerns and in an effort to reach a mutually agreeable compromise, the amendment could impose constraints that would limit its reach and as a result, its impact. As Colker explains, "[t]he compromises [necessary to enact] … the ADA involved further protections for the business community by phasing in their coverage and limiting remedies that could be sought against them."[348] Moreover, enacting legislation that would drive personnel costs and litigation risk so high that businesses were forced to stop hiring, reduce their existing workforce, cut salaries, raise prices for consumers, and/or worse yet, close their doors would, of course, do more harm than good. As a result, the amendment must take these concerns into account and effectively address them.

Below is a non-exhaustive list of approaches that legislative drafters could thoughtfully explore to strike the delicate balance necessary to ensure

346. Sutton v. United Air Lines, Inc., 527 U.S. 471, 482 (1999), *overturned due to legislative action* (2009) (holding that mitigating measures must be considered when assessing if a plaintiff is "'substantially limited' in a major life activity and thus 'disabled'" within the meaning of the ADA).

347. Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 199-201 (2002), *overturned due to legislative action* (2009) (stating that "[w]hen addressing the major life activity of performing manual tasks, the central inquiry must be whether the claimant is unable to perform the variety of tasks central to most people's daily lives, not whether the claimant is unable to perform the tasks associated with her specific job" and clarifying that an individualized assessment of a person's symptoms is necessary to determine if the person is disabled under the ADA because symptoms may vary from one person to another; a mere diagnosis of a condition is not dispositive).

348. Colker, *supra* note 151, at 48.

that the amendment becomes law while simultaneously reducing the risk of its abuse to provoke frivolous litigation or adversely impact businesses.

1. **Explicitly limit the amendment's coverage only to unpaid caregivers:** First, the amendment should be limited to unpaid caregivers with a known association with a person who has one or more disabilities as defined by the ADA. This would exclude caregivers providing care to a person without a disability, a person with only a record of disability (but who is not currently disabled), and/or a person regarded as disabled within the meaning of the statute. While the plain language of the existing associational discrimination provision protects any associate, regardless of whether the associate is a relative or caregiver, the accommodation amendment would *only* apply to unpaid caregivers, not those who receive pay or other remuneration, such as free room and board, as compensation for their caregiving duties. The amendment could be further limited to immediate family members who care for their disabled dependents. However, doing so would arguably render the measure underinclusive because individuals with disabilities who are unmarried, childless, etc., are often cared for by their "chosen family"—friends who are not related by blood or marriage.[349] Accordingly, Widiss (2021) cautions that "to be effective, a policy relating to family care must be flexible enough to accommodate a wide range of caregiving relationships."[350] In addition, many caregivers provide care for disabled family members who do not live with them.
2. **Limit coverage to current employees, not applicants:** Like the FMLA, the amendment could limit its scope to current employees beginning on the first day of their employment, rather than also covering applicants. Furthermore, it could clarify that paid or unpaid interns, volunteers, and independent contractors are excluded from coverage.
3. **The amendment should define "caregiver" clearly and narrowly:** The amendment (or its promulgating regulations) should define "caregiver" explicitly, clearly, and narrowly. To further limit coverage and better ensure enactment, the definition could even define "caregiver" as a person who "currently provides uncompensated, direct, frequent, substantive, *and* recurring care for an immediate family member who has a disability during the last

349 Deborah A. Widiss, Chosen Family, Care, and Workplace, 131 Yale L.J. Forum 215, 223 (2021); see, e.g., AARP, supra note 241, at 16 (concluding 89% of those caring for adults were relatives and 10% are friends, neighbors, or other non-relatives).

350 Widiss, supra note 350, at 223.

year or preceding year." It could even limit the degree of relationship necessary to exclude more attenuated familial connections. As noted above, it should explicitly exclude caregivers who receive pay, benefits, or any other form of compensation for the care provided. To be consistent with other provisions of the ADA, the amendment should also exclude caregivers who are not currently providing care or who seek an accommodation solely for hypothetical future care.

4. **The amendment should require a clear, direct, and current nexus to care:** The amendment should clarify that the caregiver must be able to establish a clear and direct nexus between the requested accommodation and the care necessary for the person with a disability. This aims to discourage frivolous or attenuated requests, including those not supported by medical documentation.
5. **The amendment could limit covered employers:** The amendment might also be applied to a smaller subset of employers than the remainder of the ADA. For example, the ADA applies to most private sector employers with fifteen or more full-time employees in the current or preceding calendar year, while the FMLA only applies to employers with fifty or more full-time employees in the current or preceding year. The accommodation amendment could adopt a fifty-employee threshold, a twenty-person threshold (like the Age Discrimination in Employment Act), or an entirely different threshold, such as thirty employees, that will prevent the amendment from applying to the smallest employers, which may lack the financial resources necessary to provide accommodation. The amendment should also adopt by incorporation the other ADA exemptions to coverage.
6. **The amendment could be limited to accommodations that do not involve leave:** Common sense dictates that reliable, regular attendance is an essential function of any job. Furthermore, leave requests can be adequately addressed by the leave and vacation policies in existence at most, if not all, employers as well as by the FMLA. As a result, the amendment could be limited to address accommodations *other* than requests for leave, such as transfers, particular shift times, schedule changes, the ability to telecommute, flexible work arrangements, change of duty hardships, etc. It could make clear that caregiver requests for leave remain the sole purview of the FMLA.
7. **The amendment could provide financial offsets and incentives:** Not surprisingly, concerns regarding the adverse economic impact of costly accommodations and litigation regarding them spurred debate before the ADA's enactment. The accommodation

amendment raises similar concerns, but as with the ADA, cost concerns should not be dispositive, particularly when civil rights are at stake. Even so, these concerns are understandable, particularly for small and mid-sized employers. As a result, the amendment could empower employers and caregivers to creatively problem solve around the hardships relating to the accommodation costs. For example, the law could go a step further by providing employers with a tax credit to offset the cost of accommodations, at least in part, and/or by requiring the caregiver to offset the cost, in whole or in part, via prorated pay or other means. While it may seem draconian to require caregivers to pay for the accommodations they seek, at least at first glance, many caregivers would presumably prefer to keep their jobs and the attendant health benefits and insurance it provides, even for pro-rated pay, than lose the job and benefits altogether, which is often what happens under the current framework. In fact, sometimes caregivers even offer to defray the cost via prorated pay. For example, in *Schmitz*, a fourth-grade teacher asked her principal to permit her to leave school each day at 2:30 pm when classes ended to care for her disabled child, even though teachers were expected to remain until 3:15 pm.[351] In making the request, she proactively offered to have the principal pro rate her daily pay for the forty-five minutes she would not be working.[352] Yet under the ADA, as written, her offer was rejected and she was allegedly asked to resign.[353] If given the choice between termination and slightly pro-rated pay, most caregivers would probably choose the latter option as the lesser of two evils. Thus, the accommodation amendment should give both employees and their employers that flexibility.

8. **The amendment should require qualification:** The ADA clarifies that employers are only required to grant an accommodation if the person requesting it is "qualified," meaning that the person is able to perform the "essential functions" of the position, with or without a reasonable accommodation. This "qualification" requirement should be incorporated with equal force into the accommodation amendment, such that employers are not required to engage in a good faith interactive process or grant an accommodation to any person who cannot perform the essential functions of the job, even with a reasonable accommodation.

351 Schmitz v. Alamance-Burlington Bd. of Educ., Case No. 1:18CV910, 2020 WL 924545, at *2-3 (M.D.N.C. Feb. 26, 2020).

352 Id. at *4-5.

353 Id. at *5-7.

9. **The amendment should permit unrelated adverse employment actions:** Likewise, the ADA permits employers to make an adverse employment decision about a known associate of a person with a disability, so long as the decision is not based on that association. Similarly, the accommodation amendment should clarify that a caregiver's request for a reasonable accommodation does not wholly insulate the individual from any and all future adverse employment actions. However, the employer would not be permitted to base any adverse employment decision on the caregiver's perceived need for an accommodation, either now, or in the future, in retaliation for the caregiver's request for an accommodation, or because an accommodation has been or must be granted.
10. **The amendment should prohibit retaliation:** Like other federal statutes, including Title VII and the FMLA, the ADA prohibits, *inter alia*, retaliation for exercising one's statutory rights.[354] Even if an employee or applicant engages in a form of protected activity, an employer may still discipline that person for reasons *unrelated* to retaliation or discrimination. Likewise, the accommodation amendment should clearly proscribe retaliation against a caregiver for: (1) requesting and/or receiving an accommodation; (2) reporting an actual or potential violation of the amendment; and/or (3) for making a charge, testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing related to the employer's potential violation of the amendment.[355] This provision is extremely important because ADA associational discrimination claims often allege retaliation as a result of requesting an accommodation. For example, in *Kelleher*, the Second Circuit addressed a caregiver-employee's allegation that he was terminated because he requested an accommodation to care for his disabled child.[356] The Second Circuit held that an employer may not retaliate against an employee for requesting an accommodation and emphasized that this held true even though employers were not required to grant or even consider accommodation requests for non-disabled caregivers.[357] But other

354 42 U.S.C. § 12203 ("No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter. . . . It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.").

355 See 29 C.F.R. § 1630.12 (prohibiting retaliation, coercion, interference, or intimidation of individuals for exercising their rights under the ADA or aiding another to do so).

356 Kelleher v. Fred A. Cook, Inc., 939 F.3d 465, 466, 468-70 (2d Cir. 2019).

357 Id. at 469-70.

jurisdictions are not bound to follow the reasoning of the Second Circuit, however sound. To the contrary, caregivers need far more certain, reliable protection against retaliation than *Kelleher* can offer. Furthermore, prohibiting this insidious brand of retaliation comports with the ADA's spirit, purpose, legislative history, and text.

11. **The amendment could limit available remedies:** Like other federal anti-discrimination statutes, the ADA caps statutory damages. Even so, given that concerns over rising litigation costs were central to the ADA opposition, the accommodation amendment could go one step further and limit available remedies for all claims to declaratory relief, injunctive relief (i.e., reinstatement and/or providing an accommodation), backpay, attorney's fees, and court costs. In other words, monetary damages, other than backpay for unlawful termination, would never be available. In the alternative, the accommodation amendment could bar certain kinds of money damages, such as punitive damages, while reasonably capping others. The objective, of course, is to reduce the risk of frivolous, money-driven claims, easing the burden on employers, while preserving the most important remedies that caregivers seek—reinstatement and accommodation.
12. **The amendment should emphasize that an accommodation must be reasonable:** Like the ADA's existing reasonable accommodation provision and the EEOC regulation interpreting it, an employer should only be required to grant a "reasonable" accommodation, not the exact accommodation that the caregiver requests. Courts are well equipped to assess reasonableness, even in this new context, given the detailed guidance from the EEOC as well as the robust body of law on reasonableness that has developed in the last few decades. Reasonableness decisions are fact-intensive and differ case-by-case. For example, a teacher's request that she be permitted to teach her kindergarten class virtually two days a week so that she could remain at home to provide care for her disabled spouse would likely be unreasonable given the essential functions of that position, and the school would not be required to grant it. However, the same request might be reasonable for a customer service representative whose work duties can be effectively and exclusively completed via phone and computer from anywhere.
13. **The amendment could require something less onerous than undue hardship**: As noted earlier, the ADA does not require employers to grant an accommodation to a person with a disability

> where doing so would impose an undue hardship on the employer.[358] By comparison, the accommodation amendment could incorporate a slightly less onerous standard for employers that could happily balance caregiver needs with employer concerns. For example, the amendment could indicate that employers would not be required to provide the accommodation where the hardship is "substantial," "moderate," "justifiable," "more than de minimis," or "considerate." It could explicitly state, "the degree of hardship required for an employer to reject an accommodation is less than the undue hardship standard applicable with regard to accommodation requests made by applicants or employees with disability." In other words, the "undue hardship" threshold that applies to people with disabilities would be a higher bar than the "substantial hardship" applicable in caregiver accommodation claims. Courts and the EEOC are well equipped to interpret "substantial" (or any other term) over time and develop a body of law construing it. The EEOC could also promulgate interim guidance or even a regulation that further unpacks the term and provides helpful examples of the types of hardships that would or would not satisfy it.

Although the suggestions above are by no means exhaustive, they do take us a few steps closer to crafting a tailored amendment that could plausibly garner enough bipartisan support to become law. And because the new law would apply to employers across America, the amendment would have far-reaching consequences.[359] Thus, based on the reasoning above, this Article proposes the adoption of the "Caregiver Accommodation Act" (CAA), which would amend Title I of the ADA to clarify, *inter alia*, that:

Where an uncompensated caregiver to a person with a disability is qualified to perform the essential functions of the job, with or without a reasonable accommodation, and the caregiver requests in writing that the employer provide a reasonable accommodation arising from or relating to the direct, frequent, substantive, and recurring care that the caregiver currently provides to a loved one with a disability, the employer must engage in a good faith interactive process with the caregiver to determine whether a reasonable accommodation can be provided to the caregiver without imposing a substantial hardship on the employer. An employer may not retaliate against a caregiver for requesting an accommodation in good faith. An employer is not required to provide the exact accommodation that the caregiver requests, only a reasonable accommodation. An accommodation request does not

358 29 C.F.R. § 1630.2(p)(1).

359. E.g., 42 U.S.C. § 12201(b) ("Nothing in this chapter shall be construed to invalidate or limit the remedies, rights, and procedures of any . . . law of any State . . . that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter. . . .").

insulate a caregiver from an adverse unemployment action unrelated to the person's caregiving responsibilities or known association with a person who has a disability. No accommodation is required where doing so will impose a substantial hardship on the employer. An employer may require a caregiver to justify the request with supporting documentation, such as medical records relating to the person with a disability for whom the caregiver provides care. Where cost is the basis for the substantial hardship, the employer may ask the caregiver to assist with the cost or permit the employer to prorate wages to account for the cost of the accommodation.

Because disability and the attendant responsibilities of caregiving touch the lives of every American in some way, it is possible that the amendment might unify members of Congress from diverse backgrounds and both sides of the aisle, just as the ADA and ADAAA enjoyed widespread support. If, however, opponents argue that the amendment goes beyond the scope and intent of the ADA, another possibility would be to use the Caregiver Amendment Act to amend the FMLA. After all, the FMLA's legislative purpose is squarely focused on assisting people who require extended medical leave and caregivers who require such leave to care for others. For the reasons explained earlier, however, the ADA is a preferable vehicle for the amendment given its broader scope and coverage.

Even if legislative action at the federal level proves unsuccessful, states and localities could amend their anti-discrimination statutes—particularly provisions relating to caregiver status—to require employers to at least engage in a good faith interactive process with caregivers regarding reasonable accommodation. Much of the reasoning outlined in the Article applies with equal force to states and municipalities, and it is not unusual for state laws to outpace their federal counterparts. For example, New York and other states prohibited employment discrimination on the basis of sexual orientation long before the U.S. Supreme Court interpreted Title VII to do so.[360] Several states already provide more expansive anti-discrimination protections than federal law by prohibiting discrimination on the basis of, *inter alia*, marital status, parental status, etc.[361] There is no reason why states or cities, impatient for federal action, could not enact a more protective caregiver accommodation provision on their own.

Finally, even if a federal statutory amendment is out of reach, employers should still consider voluntarily offering caregiver accommodations for the reasons explained herein. Doing so will benefit businesses in countless ways and comport with the EEOC's recommended best practices for employers. While voluntary caregiver accommodation fails to provide the strength and

360. *Agency History*, N.Y. STATE DIV. OF HUM. RTS., https://dhr.ny.gov/agency-history [https://perma.cc/CD27-4FLG].

361. *See, e.g.*, CONN. GEN. STAT. § 46a-60 (2022); KY. REV. STAT. § 344.367 (2023); FLA. STAT. ANN. § 760.10 (2022).

certainty of a statutory amendment, it is certainly better than no accommodation at all.

CONCLUSION

In conclusion, caregivers should not be forced to choose between their jobs and their loved ones. Existing law fails to adequately address the unique needs of caregivers of people with disabilities. As a result, Title I of the ADA should be amended to require covered employers to at least engage in a good faith interactive process with unpaid caregivers of people with disabilities to determine whether a reasonable accommodation could be provided that will enable them to effectively perform the essential functions of their jobs while still providing adequate care for their disabled loved ones. Doing so better effectuates the remedial spirit and purpose of the ADA and comports with its broad protection of disabled and non-disabled people. Furthermore, failing to provide caregiver accommodation disparately impacts women as a class since they are more often than not, the affected caregivers. Permitting caregiver accommodation might also reduce the attendant harms of caregiver unemployment on low-income individuals, communities of color, and military families. Finally, the accommodation amendment may garner widespread bipartisan support in part due to evolving attitudes about and greater appreciation of the importance of caregiving, healthcare, and corporate social responsibility. Caregivers already sacrifice so much of their lives for others. They should not be required to sacrifice their livelihoods as well.