

# Suit Over Flatulent Pork Roll Employee Raises Rare ADA Claim

## Articles

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A suit alleging a Trenton pork roll company fired its comptroller because of his flatulence drew widespread media coverage, but the plaintiff's rarely-litigated cause of action was lost in all the attention.

Disability law experts said the plaintiff faces an uphill battle in her suit, which brings a claim for discrimination by association, alleging she suffered harassment from bosses over her husband's health problems.

Louann Clem's suit against Case Pork Roll Co. drew the attention of media outlets in Taiwan, India, Great Britain and all over the United States, all of which generally focused on the firing of Clem's husband for flatulence after he had gastric bypass surgery. But the plaintiff's husband, who was comptroller for the company, is not a party in the suit because his case is pending before the U.S. Equal Employment Opportunity Commission.

Clem's suit, filed in federal court in Trenton in October, claims she suffered discrimination by association under the Americans With Disabilities Act (ADA). After her husband had surgery in 2010, he suffered side effects such as diarrhea and flatulence, according to the suit. Working as his administrative assistant, Clem alleges, she caught flak from the company's president and owner when her husband's odor problems got worse in 2013. When her husband was fired from his job as comptroller in February 2014, she "terminated her employment because of the harassment and discrimination her husband faced as a result of his disability and the resulting symptoms," the suit says.

The ADA includes a provision barring discrimination in employment based on a relationship or association with a person with a disability. The provision applies whether or not the employee or job applicant themselves has a disability. The provision applies to any relationship where the employer is motivated by the individual's relationship with a person who has a disability.

To establish a case of associational discrimination under the ADA, courts have held that a plaintiff must demonstrate that he or she is qualified for the position, that the employee is subject to an adverse employment action, that the employee was known to be associated with a disabled person, and that the adverse employment

action occurred under circumstances that raise a reasonable inference that the disability was a determining factor in the decision.

Lawrence Rosenthal, associate dean for academics at Northern Kentucky University Chase College of Law, has written on the subject of associational discrimination under the ADA.

Rosenthal said Clem's first hurdle is proving that her husband's problems constitute a disability under the ADA. Recent amendments to the ADA have made that task easier, and further assistance would be provided if the obesity is caused by an underlying health condition, Rosenthal said.

He said Clem may run into trouble due to the fact that she decided to quit her job, however.

Clem's suit gives little indication of the frequency or duration of the allegedly harassing comments, Rosenthal said. Courts take very different views about whether conduct is sufficiently severe or pervasive to qualify as an actionable, hostile work environment, he said.

"Without knowing the frequency of the comments, it is hard for me to guess whether most courts would consider those statements to be sufficiently severe or pervasive. Also, it is unclear to me whether the plaintiff is also asserting a separate, constructive discharge action. But if she is, the standard for a constructive discharge based on a hostile environment is a high one for a plaintiff to establish," Rosenthal said.

"She was not fired. Also, she might not be able to meet the threshold required for proving a hostile environment existed, or that there was a basis for constructive discharge," he added.

"It appears that it is relatively clear that the employer treated her the way it did because of her husband's condition, but I think the bigger question is whether the employer's conduct was bad enough to constitute an actionable hostile environment, or form the basis of a constructive discharge," he said.

**Peter Frattarelli**, the chair of the labor and employment department at Archer in Haddonfield, said associational discrimination claims are rare, although he's seen them in the context of parents with handicapped children and in disputes involving interracial couples.

"To show they don't like you because you're married to a disabled person—it's pretty hard to find that type of evidence. The hurdle is you have to be in a situation where you can show through direct evidence that they're treating you differently," he said.

Frattarelli said he has doubts about whether Clem's husband can qualify as disabled under the ADA. The odor problem does not lend itself to a finding of disability, he said.

"If I was his attorney, I would say they were treating him differently because he had the surgery," Frattarelli said.

Frattarelli also questioned whether the plaintiff has made the requisite showing to establish that her bosses' alleged badgering about her husband's problems gave her no choice but to leave.

"Unless there's a lot more, I don't see how she's going to get a constructive discharge here," he said.



Christine Amalfe, chair of the employment and labor department at Gibbons in Newark, likewise said she thought the plaintiff's decision to walk away from her job is a weak spot in the case.

"Frankly, it doesn't seem to rise to the level of hostile work environment. Looking at her facts, I wouldn't describe anything [her bosses] said or did as hostile," Amalfe said.

For a successful associational discrimination claim, the plaintiff must show harm was inflicted directly on her, and a claim that she suffered due to harm inflicted on her relative is insufficient, Amalfe said.

"If she is harmed because they discriminated against him, she has no claim. If she is harmed because they discriminated directly against her because of the disability of her husband, she is an aggrieved person," Amalfe said.

"The actual plaintiff bringing the claim had to suffer some real harm. Did this plaintiff suffer any real harm? I'm not so sure," she said.

Case Pork Roll filed a motion to dismiss the suit Nov. 23. The company said the suit failed to plausibly establish that Clem's husband was disabled under the ADA, and that Clem was subject to a hostile work environment under the ADA.

In its motion to dismiss, Case Pork Roll said the plaintiff's husband was fired because customers visiting the company headquarters in Trenton made complaints about his odor, and because of his "delinquent bookkeeping practices." The bosses' comments to the plaintiff about her husband's health problems "do not come close" to creating a hostile work environment, Case Pork Roll said in court documents.

Case Pork Roll said the plaintiff's complaint should be dismissed because it "falls far short" of meeting the applicable federal pleading standards, lacking even "threadbare recitals" of the plaintiff's claims.

Benjamin Widener of Stark & Stark in Lawrenceville, who represents Case Pork Roll, would not discuss the plaintiff's claims in the case, except to say that they "have absolutely no legal or factual merit" and added that his client "intends to vigorously defend itself."

David Koller, the Philadelphia lawyer representing the plaintiff, did not respond to requests for comment about the suit.

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