

I. BASIC POINTS

§2:01 A. Plaintiff's Burden

The first consideration of the plaintiff's attorney in all ADA cases is whether the plaintiff is within the protected class. Too often plaintiffs' counsel, especially those experienced in discrimination cases under the Civil Rights Act of 1964, assume that the mere assertion that the person is disabled is enough to show that the plaintiff is within the protected class. On the contrary, the courts require the disabled civil rights claimant to produce affirmative and substantive evidence regarding his medical condition, the manner in which the condition affects his life, and the degree to which he experiences that limitation, just to establish the threshold fact that he is a disabled person and has the right to have his claim heard.

The plaintiff's burdens of proof and persuasion on this threshold issue of membership in the protected class are more often subject to challenge in disability discrimination cases than in similar cases of race, gender or other discrimination under the Civil Rights Act of 1964. Under the Civil Rights Act of 1964, the defendant rarely disputes the claimant's race, color, gender or other protected classification. The claimant's membership in the protected class often is self-evident or is established by stipulation of fact. Disability status, however, often is not self-evident. (The ADA definition of disabled includes individuals with disabilities not readily apparent to the casual observer.) As a result, the plaintiff often must produce medical testimony regarding the nature of the claimed disability and testimony from the individual regarding the effect of the disability on his or her life activities, or both. This substantive evidence goes to show that the plaintiff has standing in the protected class; it does not address the central issue of the defendant's unlawful conduct.

defense challenge redirects the focus of the case away from the defendant's conduct and places it on the plaintiff. Second, the challenge to the plaintiff's disability status is an indirect attack on the plaintiff's credibility. Essentially, the defense is asserting that the plaintiff is not what he claims to be and is seeking to claim a privilege and benefit to which he is not entitled. Thus, it is best to avoid altogether a defense challenge to the disabled status of the plaintiff.

§2:02 B. Statutory Definition of Disability

The ADA defines a disabled person as an individual who:

- Has a physical or mental impairment that substantially limits one or more major life activities;
- Has a record of such an impairment; or
- Is regarded as having such an impairment.

42 U.S.C. §12102(2). The plaintiff need only establish one of these three forms of disability to show that she is within the protected class.

§2:03 1. Requires Individual Assessment

The definition of disability is broad, but is structured with reference to the individual claiming under the statute, not to generalized assumptions or characterizations of a particular diagnosis or condition. Thus, the determination of whether a person is or is not within the ADA's definition of disability requires an individualized assessment of the impact that the condition has on that individual's life activities. *See*, 534 U.S. 184, 122 S.Ct. 681 (2002); *Bragdon v. Abbott*, 524 U.S. 624, 118 S.Ct. 2196 (1998).

§2:05 3. Source of Statutory Language

The definition of disability in the ADA is not new to the body of federal civil rights law. The definition first appeared in this form as the definition of a “handicapped” person under the Rehabilitation Act of 1973, as amended (29 U.S.C. §706(8)(B)), and later appeared in the 1988 amendments to the Fair Housing Act (42 U.S.C. §3602 (h)(1)).

The repetition of the well-established definition, alone, would suggest that Congress intended that the definition in the ADA be construed consistently with the prior enactments that use the same language. *See Bragdon v. Abbott*, 524 U.S. 624, 118 S.Ct. 2196 (1998). However, Congress explicitly stated in the statute that “disability” and other provisions of the ADA should have at least the same meaning and provide at least the same level of protection to a disabled person as that provided in the Rehabilitation Act 1973. 42 U.S.C. §12201(a) (“Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under Title V of the Rehabilitation Act of 1973 [29 U.S.C. 790 et seq.] or the regulations issued by the federal agencies pursuant to such Title.”). The regulations promulgated under the Rehabilitation Act formed the basis for the regulations under the ADA and, for the most part, the regulatory language implementing the statutes is identical. *See, e.g.*, 45 C.F.R. §84.3.

§2:06 C. Three-Step Analysis

The first step in determining whether a person has a disability under 42 U.S.C. §12102(2)(A)—a physical or mental impairment that substantially limits a major life activity—is to identify the physical or mental impairment that forms the basis of the disability. *See* §2:16 *et seq.*

The second step is to identify the life activities that are affected by the impairment. Identifying which life

The two other types of disability recognized by the ADA—regarded as disabled and record of disability—are discussed at 2:96 *et seq.* and 2:111 *et seq.* This three-step analysis applies equally to those definitions of “disabled.” A person who complains that he is “regarded as” disabled will have to show that he is regarded as a person who has a substantial limitation in a major life activity. A person with a record of a disability will have to show that the disability of which he has a record was one that substantially limited a major life activity.

[§§2:07 - 2:15 Reserved]

II. PHYSICAL OR MENTAL IMPAIRMENT

§2:16 A. Broadly Defined in Regulations

The first step in the analysis of an ADA claim is to identify the physical or mental impairment that forms the basis of the disability. The statute does not define the terms “physical or mental impairment,” but the regulations do.

Physical impairment is any physiological disorder or condition, cosmetic disfigurement or anatomical loss affecting one or more of the body systems. *Toyota Motor, Mfg. v. Williams*, 534 U.S. 184, 122 S.Ct. 681 (2002). The body systems include the neurological, musculoskeletal, special sense organs, respiratory system including the speech organs, cardiovascular, reproductive, digestive, genito-urinary, hemic, lymphatic, endocrine and skin. *Id.* Mental impairments include any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness and specific learning disabilities. *Bobreski v. Ebasco-Raytheon Constructors*, 216 F.3d 1071 (2nd Cir. 2000).

§1630.2(h); 28 C.F.R. §35.104; 49 C.F.R. §37.3. The Supreme Court attached special importance to the Health and Human Services regulations in *Bragdon v. Abbott*, 524 U.S. 624, 118 S.Ct. 2196 (1998), and in *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 119 S.Ct. 2139 (1999). The Court looked to those regulations as an important guide to what Congress understood the term “disability” to mean at the time of the ADA’s enactment. In addition, because Congress explicitly expressed its intent that the ADA was to be interpreted in accordance with the Rehabilitation Act, the Supreme Court has looked to the Health and Human Services regulations with special interest and has not placed primary reliance on the regulations adopted under the ADA after its enactment. This approach is unusual because ordinarily a statute’s implementing regulations are given deference by the Court if their interpretation is reasonable and consistent with the purposes of the enactment.

§2:17 B. Impairment Per Se

The regulatory definitions of physical or mental impairment do not list or specify the particular conditions or diagnoses that would constitute an impairment. The language of the regulations is deliberately broad to include any discernible condition that affects the ordinary function of one of the major body systems. The EEOC Interpretive Guidance, however, acknowledges that some conditions are substantially limiting by their very nature and constitute a physical impairment per se. The Guidance includes a representative list of such impairments, which includes “such diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness and drug addiction and alcoholism.” EEOC

tics that are not impairments and cannot form the basis of a disability. Traits, such as left-handedness, poor judgment, poor impulse control, eye color or hair color, body shape, body type, or body size, pregnancy, a predisposition to illness or disease, and advanced age are not impairments within the meaning of the statute and cannot form the basis of a disability. *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 119 S.Ct. 139 (1999).

§2:19 1. Height and Weight

The distinction between a trait or characteristic and an impairment is not always plain. For example, height, weight, and muscle tone that are within the range of an average person in the general population and are not the result of a physiological disorder are considered a trait or characteristic. Yet, if an individual has a body shape that is outside the range of the average person in the general population and is the result of a physiological condition, the condition is not a mere trait, but an impairment.

In *American Motors Corp. v. Wisconsin Labor and Industry Review Commission*, 350 N.W. 2d 120, 119 Wis. 2d 706, 1 AD Cases 611 (1984), the court concluded that, under the state disability statute, a woman who was denied employment as an automobile industry worker because the employer considered her to be too short in stature was not a person with an impairment. The court reasoned that although the woman’s height (4’ 10”) was shorter than the average, it was not so extreme as to constitute an impairment, nor was her short stature the result of any physiological defect, disorder, or other physical abnormality. In contrast, the court in *Dexler v. Tisch*, 660 F.Supp.1418, 1425 (D. Conn. 1987), concluded that a male postal worker with achondroplastic dwarfism, who was four feet, five inches in height, had an impairment. The court reasoned that Mr. Dexler’s body type was an impairment and a disability because it was the result of a “growth disorder that affects all four extremities and results in short limbs and short stature.” *Id* at 1419.

with a low proportion of fat and a high proportion of muscle. The court concluded that Tudyman had no impairment because her weight was within the normal range and was not the result of any physiological disorder. Similarly, in *Underwood v. Trans World Airlines, Inc.*, 710 F.Supp. 78 (S.D.N.Y. 1989), a mildly overweight plaintiff was found not to have an impairment because her excess weight was not extreme and she had not been diagnosed with any particular or discernable physiological disorder or medical anomaly. In *EEOC v. Texas Bus Lines*, 923 F. Supp. 965 (S.D. Tex. 1996), on the other hand, the court found that the plaintiff was regarded as having an impairment due to her weight.

§2:20 2. Personality Traits

Common personality traits or characteristics generally are not mental impairments. Traits like poor judgment, poor impulse control or quick temper are ordinary personality characteristics, not impairments that can form the basis of a disability. If, however, these characteristics are so severe that they constitute symptoms of, or are the result of, a mental or psychological disorder they may constitute a mental impairment. For example, if an individual obsesses over things to the point the person is considered to have obsessive-compulsive disorder, the individual may have a mental disorder that constitutes an impairment.

§2:21 3. Socio-Economic Factors

Social, economic, environmental, cultural and educational characteristics or disadvantages generally are not impairments that can form the basis of a disability. Plaintiff's counsel must examine the reason that the condition exists to distinguish a trait from an impairment. For example, counsel must look behind the plaintiff's inability to read to determine whether an impairment exists. If the plaintiff is unable to read because of a social or educational disadvantage, the inability to read is a trait or characteristic of the individual. If, however, the individual is unable to read because of

impairment may be adduced from the individual himself, describing the fact of the impairment, or from health care providers who have diagnosed the condition or identified the impairment in the individual. The amount of proof a plaintiff will have to present will generally be determined by whether his condition is commonly known and accepted as an impairment. Anatomical loss, loss of speech, hearing or sight, or illnesses that are commonly known to be a disorder affecting a major body system can be proven in most cases with the testimony of the individual. The individual may need only identify the lost limb, the absence of a sensory ability, or the presence of cancer or emphysema to show that he has an impairment. If the allegation of the impairment is corroborated by the observable absence of the limb, lost sense, labored breathing or other obvious condition, then the defendant may agree to stipulate that the person has an impairment.

If possible, obtain a stipulation as to the disability status of the plaintiff early in the litigation. Defendants frequently challenge the disability status of the plaintiff in part because the ADA requires a case-by-case determination, but more importantly because there are so few defenses available to the defendant that the effort is brought to bear on threshold issue of whether the plaintiff is even covered by the Act. In some cases defense counsel may vigorously challenge the disability status of the plaintiff even when he does not intend to try the issue of disability status. Defense counsel may elect to put the plaintiff to the task of preparing that issue for trial, only to concede that the person is disabled on the eve of trial. The purpose of this strategy is to occupy plaintiff's counsel's time with preparing complex proof of disability status for trial and to distract from preparation of other aspects of the case. Defense counsel then develops his defenses and ignores the issue of disability status, knowing that he will not challenge that issue.

Unless or until the issue is conceded, the plaintiff must still prepare the case. A way to avoid this trap is to move for summary judgment on the issue of disabili-