

Does New Jersey's Law Against Discrimination Cover Correctable Impairments Not Covered by the ADA?

Richard G. Rosenblatt
Morgan, Lewis & Bockius LLP

On June 22, 1999, the United States Supreme Court held, in a trilogy of cases, that the Americans with Disabilities Act (ADA) does not cover persons with correctable impairments. *See Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139 (1999) (applicants for pilot positions not “disabled” despite myopia when, with corrective measures, applicants function identically to individuals without similar impairments); *Albertsons, Inc. v. Kirkingburg*, 119 S. Ct. 2162 (1999) (individual with monocular vision not disabled where brain fully compensates such that vision is unaffected); *Murphy v. United Parcel Serv., Inc.*, 119 S. Ct. 2133 (1999) (high blood pressure not a disability where controlled by medication) (hereinafter, these cases are referred to as “the *Sutton* Trilogy”). Employer groups trumpeted these cases as a major victory. Yet, courts in states such as New Jersey, New York and Pennsylvania, all which have their own anti-discrimination laws, will have to confront this same issue under those state laws. By way of example, New Jersey courts have not addressed whether the ADA’s New Jersey counterpart, the Law Against Discrimination (LAD), covers persons with correctable impairments. This article explores that issue.

An assessment of the *Sutton* Trilogy’s potential relevance under the LAD requires review of the Supreme Court’s reasoning. The majority in *Sutton* offered three primary rationales. First, the ADA requires -- in the present indicative verb form -- that an impairment “substantially limit[]” a person in a major life activity. 119 S. Ct. at 2146. The majority reasoned that if Congress had intended to cover corrected impairments, it would have modified the phrase “substantially limits” with “could” or “would” or “might.” *Id.* Second, the ADA requires a case-by-case analysis. *Id.* at 2147. If impairments were examined in their unmitigated states -- without regard to actual impairment -- inappropriate generalized categories of disabilities (for example, all persons with high blood pressure or nearsightedness) would be created. *Id.* Finally, Congress expressly noted that it intended the ADA to protect the 43 million Americans *Id.* The Court recognized, however, that there would be approximately 160 million “disabled” Americans counting persons with corrected impairments. *Id.* at 2148. Accordingly, the Court held that the ADA does not cover persons with correctable impairments.

The New Jersey Supreme Court has recognized that there exists “an imputed but strong legislative intent to harmonize the State’s anti-discrimination statutes with the dominant federal view . . .” *Grigoletti v. Ortho Pharm. Corp.*, 118 N.J. 89, 108 (1990). Nonetheless, the New Jersey courts are not blindly committed to ensuring consistency with federal precedent. *See, e.g., Bergen Commercial Bank v. Sisler*, 157 N.J. 188 (1999) (25-year-old may sue for age discrimination under LAD). Moreover, because the *Sutton* Trilogy was so heavily informed by the text of the ADA, New Jersey courts could well ignore it when considering the LAD.

The LAD does not mirror the ADA. Moreover, New Jersey courts have interpreted the LAD liberally to extend its protections to persons with conditions that the ADA typically does not protect. *See, e.g., Clowes v. Terminix Int'l, Inc.*, 109 N.J. 575, 593 (1988) (alcoholism is a handicap); *Gimello v. Agency Rent-a-Car Sys., Inc.*, 250 N.J. Super. 338 (App. Div. 1991) (obesity is a handicap). These liberal interpretations can be traced to a substantive difference between the ADA and the LAD related to the required severity of an impairment. Under the ADA, a “disability” means “a physical or mental impairment that **substantially limits** one or more of the major life activities . . .” 42 U.S.C. § 12102(2) (emphasis added). By contrast, the LAD provides:

“Handicapped” means suffering from physical disability, infirmity, malformation or disfigurement which is caused by bodily injury, birth defect or illness, including epilepsy, and which shall include, but is not limited to, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment or physical reliance on a service or guide dog, wheelchair, or other remedial appliance or device, or from any mental, psychological or developmental disability resulting from anatomical, psychological, physiological or neurological conditions which prevents the normal exercise of any bodily or mental functions or is demonstrable, medically or psychologically, by accepted clinical or laboratory diagnostic techniques. . . .

N.J. Stat. Ann. § 10:5-5(q). Applying this language, the New Jersey Supreme Court has held, in contrast to the ADA, that “there is simply no basis for limiting [the LAD’s] coverage to so-called severe disabilities.” *Anderson v. Exxon Co., U.S.A.*, 89 N.J. 483, 495 (1982). Furthermore, the LAD states that it covers any person who “is or **has been at anytime** handicapped.” Read literally and in isolation, this language might suggest that the effect of corrective measures is irrelevant under the LAD. Undoubtedly, plaintiffs with correctable impairments will so argue.

Despite the LAD’s generally liberal construction, significant rationales support the conclusion that the LAD does not cover correctable impairments. First, as noted above, there is an imputed legislative intent to maintain consistency with federal law. Second, the LAD’s “has been at anytime handicapped” language is no different than the ADA’s protections of persons “with a record of impairment.” In fact, to read the “has been at anytime handicapped” language as the basis for considering uncorrected impairments ignores the LAD’s use of the present tense when defining an impairment (defining “handicap” as **suffering** from physical disability . . . or from any mental, psychological or developmental disability . . .”). As in the *Sutton* Trilogy, the legislative resort to the present indicative verb form must be given meaning.

Third, had the legislature intended to cover correctable impairments, it could have so stated. For example, Ohio’s counterpart to the LAD defines a handicap as “a medically diagnosable, abnormal condition which is expected to continue for a considerable length of time, **whether correctable or**

uncorrectable by good medical practice. . .” Ohio Rev. Code Ann. § 4112.01(A)(13) (emphasis added).

Fourth, the word “suffering” suggests a legislative intent to protect only those persons confronted with real obstacles. If it had intended to cover those who hypothetically might have to endure some discomfort or overcome some obstacle, the legislature could have stated something to the effect of that the LAD’s protections extend to anyone “having a condition” as opposed to “suffering from” a disability.

Fifth, the definition of “handicap” expressly includes “physical reliance on a service or guide dog, wheelchair, or other remedial appliance or device . . .” As an initial proposition, the explicit reference to appliances and devices without more suggests an intent not to cover disabilities correctable through medication or natural physical adaptation. Similarly, the use of the words “appliance” and “device” arguably suggest something substantial -- as opposed to the use of, for example, eyeglasses. The examples identified by the legislature -- guide dogs and wheelchairs -- buttress this conclusion.

Sixth, although some will cite the New Jersey Supreme Court’s decision in *Anderson, supra*, for the proposition that the LAD is a remedial statute that must be interpreted liberally, that case actually supports the conclusion that the LAD does **not** extend its protections to persons with correctable impairments. As the *Anderson* court noted: “The paramount purpose of the statute is to secure to handicapped individuals full and equal access to society, bounded only by the actual physical limits that they cannot surmount.” 89 N.J. at 495. This quotation implies a conclusion that the legislature intended the LAD to cover only those persons with “actual physical [and mental] limits.” *Id.* Moreover, the quotation begs the rhetorical question of how persons who, for example, must wear glasses because of nearsightedness have been denied “full and equal access to society.” As Governor William T. Cahill, New Jersey, commented upon signing the disability protections of the LAD into law, the legislature intended to enhance society through the contributions of a “newly vitalized segment of the population.” Governor William T. Cahill, *Remarks Upon Signing Disability Bill into Law* (August 1, 1972). Persons who, for example, must wear glasses or who take high blood pressure medication generally have not endured inappropriate stereotypes concerning their vitality.

The comments of the Attorney General of New Jersey in a formal opinion letter also support the premise that the purpose of the LAD is to protect those with actual, uncorrected limitations. Specifically, New Jersey’s Attorney General has opined in response to an inquiry from the Director of New Jersey’s Division on Civil Rights (DCR) that diabetes is a handicap under the LAD. Perhaps the most significant point to be made concerning this opinion is that the DCR -- the state agency responsible for enforcing the LAD -- questioned whether the LAD’s definition of “handicap” extended so far as to cover a condition such as diabetes, which obviously can be debilitating if not treated. Moreover, the Attorney General opined that diabetes is a “handicap” under the LAD because when the condition is not “**properly controlled**” it is substantially disabling. Atty. Gen. F. Op. No. 14-1974, pp.41-42 (October 7, 1974) (emphasis added). By negative implication, the opinion suggests that an impairment that is “properly controlled” at all times is not a “handicap” under the LAD.

Furthermore, review of impairments in their correctable state would not deprive those needing protection of that protection. If an impairment, even as corrected, still leaves a person with limitations, the LAD would cover that person. Moreover, a person who through corrective measures is not impaired in any way, but who is wrongfully perceived to be impaired, would still meet the definition of “handicap” under the LAD. *See, e.g., Rogers v. Campbell Foundry Co.*, 185 N.J. Super. 109, 112 (App. Div.), *certif. denied*, 91 N.J. 529 (1982); N.J. Admin. Code 13:13-1.3.

Although New Jersey courts cannot precisely follow the *Sutton* Trilogy, the result should be the same. Any other interpretation would create inappropriate generalized categories of disabilities. Moreover, it is fundamental that statutes like the ADA and the LAD are intended to protect against uninformed stereotypes that deprive capable individuals of opportunities to make valuable societal contributions. To extend the protections of these statutory initiatives to persons not in need of their protections would do a disservice to the truly disabled and would undermine societal respect for these protections.

Richard G. Rosenblatt is a Senior Associate practicing out of Morgan, Lewis & Bockius LLP's Princeton and Philadelphia offices, where he represents management in employment matters. Susan E.G. Hamilton, a Law Clerk in the Firm's Philadelphia office contributed to this article.

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