

Dealing With Workplace Disabilities Under The ADA (Part 1)

Anne Marie Estevez and Athalia E. Lujo

A. Introduction

1. Employees' injuries, illnesses, and other disabilities pose complex legal problems for employers. Among the various statutes with which employers must comply when dealing with ill, disabled, or absent employees is the Americans with Disabilities Act (ADA), 42 U.S.C. §§12101-12213 (2006). Employers must consider how, if at all, they can accommodate disabled employees effectively in the workplace in order to avoid potentially costly litigation under the ADA.

B. What Constitutes A Disability Under The ADA?

1. An individual seeking protection under the ADA must establish that he or she has an "impairment" that "substantially limits one or more major life activities." 42 U.S.C. §12102(2).
2. *Parsing The Definition Of "Disability" Under The ADA*
 - a. *Impairment*
 - i. The "impairment" standard set forth in the regulations is largely self-explanatory. It includes any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting any of the major body systems. 28 C.F.R. §36.104(1)(i). It also includes any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and (special

Anne Marie Estevez is a partner, and Athalia E. Lujo is an associate, in the Miami office of Morgan Lewis & Bockius LLP.

A complete set of the materials from which this outline was drawn may be purchased at www.ali-aba.org.

learning disabilities. *Id.* §36.104(1)(ii). Finally, an impairment can be a contagious or noncontagious disease or condition, such as a hearing impairment, cancer, heart disease, diabetes, HIV disease, or alcoholism. *Id.* §36.104(1)(iii).

b. *Substantial Limitation*

i. In contrast to “impairment,” the “substantially limits one or more major life activities” standard requires a more complicated analysis. A major life activity is substantially limited if it is “restricted as to the conditions, manner, or duration under which [it] can be performed in comparison to most people.” *Id.* §36.104 app. B.

ii. In *Toyota Motor Mfg, Kentucky, Inc. v. Williams*, the Supreme Court explained that the word “substantial” “clearly precludes impairments that interfere in only a minor way with the performance of manual tasks from qualifying as disabilities.” 534 U.S. 184, 197 (2002). Whether a particular impairment is severe enough to substantially limit, rather than “interfere in only a minor way,” with an employee’s performance of a major life activity, is an individualized inquiry, and accordingly, the courts are sometimes inconsistent in determining whether particular impairments are substantially limiting to affected individuals.

(1) *EEOC v. Sears, Roebuck & Co.*, 417 F.3d 789 (7th Cir. 2005): The plaintiff, who was unable to walk one city block without her leg becoming numb, was arguably substantially limited in the major life activity of walking compared to the walking that most ordinary people do daily.

(2) *Wood v. Crown Redi-Mix, Inc.*, 339 F.3d 682 (8th Cir. 2003): The plaintiff, who was unable to walk more than a quarter of a mile without rest, frequently used a cane, and whose leg occasionally collapsed beneath him, was only moderately, rather than substantially, limited in his ability to walk.

(3) *Holt v. Grand Lake Mental Health Center, Inc.*, 443 F.3d 762 (10th Cir. 2006): The plaintiff was not substantially limited in the major life activity of caring for one’s self because of her cerebral palsy. The court stated that the plaintiff’s specific limitations, such as difficulty chewing and swallowing, inability to cut her own nails, and inability to button her clothes, were not sufficient to show that the plaintiff was severely restricted in caring for herself.

(4) *Williams*, 534 U.S. 184: The plaintiff was not substantially limited in the major life activity of performing manual tasks, because even though she avoided sweeping, quit dancing, occasionally sought help dressing, and reduced playtime with children and gardening time, “even after her condition worsened, she could still brush her teeth, wash her face, bathe, tend her flower garden, fix breakfast, do laundry, and pick up around the house.” *Id.* at 202 (emphasis added).

(5) *Samuels v. Kansas City Missouri School Dist.*, 437 F.3d 797 (8th Cir. 2006): Plaintiff was not substantially limited in a major life activity because plaintiff’s impairment was not long-term or permanent, but was expected to last no more than two months.

(6) *White v. Honda of America Mfg Inc.*, 241 F. Supp. 2d 852 (S.D. Ohio 2003): Plaintiff was not substantially limited in the major life activity of breathing because of her asthma. The court

stated that her asthma “comes and goes and does not constantly affect her.” *Id.* at 856. In this case, the plaintiff’s asthma affected her only when she breathed certain irritants, and she was able to drive, pump her own gas, walk, exercise, smoke cigarettes, and go to restaurants.

(7) *Taylor v. Woodbridge*, 2003 U.S. Dist. LEXIS 9889 (E.D. Mo. Apr. 7, 2003): Plaintiff’s asthma substantially limited her ability to breathe, bringing her within the definition of “disability” under the ADA.

(8) *Taylor v. Lenox Hill Hosp.*, 2003 U.S. Dist. LEXIS 5429 (S.D.N.Y. Apr. 2, 2003): Inability to lift more than 40 pounds is not substantially limiting since the average person in the general population may not be able to lift more than 40 pounds.

c. *Mitigating Measures*

i. The Supreme Court made the “substantially limiting” inquiry somewhat less complicated with its trio of decisions in *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555 (1999); *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999); and *Murphy v. United Parcel Service*, 527 U.S. 516 (1999). Specifically, the Court declared that the determination of whether an individual is substantially limited must be made in light of the positive (or negative) effects of mitigating measures. Lower courts and employers are left to debate whether an impairment has been effectively mitigated in any particular case. For example:

(1) *Orr v. Wal-Mart Stores, Inc.*, 297 F.3d 720 (8th Cir. 2002), *cert. denied*, 541 U.S. 1070 (2004): The court would not speculate on what limitations might occur if diabetes was not treated; the plaintiff’s diabetes was controlled by mitigating measures, i.e., insulin injections and diet, and there was no evidence of substantial limitation of a major life activity.

(2) *Branham v. Snow*, 392 F.3d 896 (7th Cir. 2004): The court held that even with the use of mitigating measures, the plaintiff’s diabetes substantially limited the major life activity of eating.

(3) *Collado v. United Parcel Serv. Co.*, 419 F.3d 1143 (11th Cir. 2005): The court held that no jury could reasonably find that the plaintiff’s insulin-dependent diabetes substantially limited his eating or any other major life activity, when all the plaintiff asserted was that he had to monitor his blood sugar and eat carefully, because “[m]any people have to monitor their food intake for health and lifestyle reasons, and avoiding ‘mostly sugars’ is not ‘significantly restricted’ for this purpose.” *Id.* at 1156.

(4) *Stalter v. Board of Coop. Educ. Servs. of Rockland County*, 235 F. Supp. 2d 323 (S.D.N.Y. 2002): The court rejected defendant’s contention that a janitor with cerebral palsy was not substantially limited in communicating because of his use of gestures, sounds, and a special device, and held that the plaintiff was disabled under the ADA because, even though he was able to communicate, he was substantially limited in the major life activity of speaking.

ii. The courts have also left open for debate the question of whether mitigating measures should be considered when the employee refuses to take advantage of them. *Compare Hein v. All America Plywood Co.*, 232 F.3d 482 (6th Cir. 2000) (holding that plaintiff/truck driver was not disabled because his hypertension was controlled by medication; the fact that plaintiff likely would have “run

out of medicine” had he accepted his employer’s assignment to make an out-of-town delivery was plaintiff’s own fault) and *Tangires v. Johns Hopkins Hosp.*, 79 F. Supp. 2d 587 (D. Md.), *aff’d without opinion*, 230 F.3d 1354 (4th Cir. 2000) (holding that plaintiff’s asthma was not substantially limiting because it was correctable by medication even though plaintiff refused to take the medication because of a reluctance to take steroid drugs), *aff’d*, 230 F.3d 1354 (4th Cir. 2000), with *Finical v. Collections Unlimited, Inc.*, 65 F. Supp. 2d 1032 (D. Ariz. 1999) (refusing to evaluate plaintiff’s hearing limitation with hearing aids, where plaintiff did not use them because they picked up too much background noise) and *Rodriguez v. ConAgra Grocery Prods. Co.*, 436 F.3d 468 (5th Cir. 2006) (holding that plaintiff’s failure to control his diabetes was irrelevant where the basis of plaintiff’s claim was not that he was actually disabled, but that the defendant refused to hire him because it perceived him as being disabled).

d. *Major Life Activities*

i. The “major life activity” prong of the definition of “disability” similarly can be difficult to apply. In *Williams*, the Supreme Court instructed that in order to qualify as a major life activity, an activity must be “of central importance to daily life.” 534 U.S. at 198. The Supreme Court recognized in *Williams* that Congress did not intend to protect “everyone with a physical impairment that preclude[s] the performance of some isolated, unimportant, or particularly difficult manual task...” 534 U.S. at 197. Moreover, the relevant inquiry is “not whether the [individual] is unable to perform the tasks associated with her specific job.” *Id.* at 200-01 (emphasis added). The Court stated that “household chores, bathing, and brushing one’s teeth are among the types of manual tasks of central importance to people’s daily lives.” *Id.* at 202.

ii. Since the ADA’s enactment, the EEOC has aggressively and expansively shaped the concept of “major life activities,” extending protection from the ability to provide self-care, perform manual tasks, walk, see, hear, speak, breathe, learn, and work, to the ability to sit, stand, lift, and reach, and then to the ability to think, concentrate, interact with others, and sleep. Some courts have been receptive to the argument that seemingly “minor” life activities are merely a subset of the “major life activities” and therefore satisfy the “major life activity” prong of the definition of a disability under the ADA.

(1) *Heiko v. Colombo Savings Bank, F.S.B.*, 434 F.3d 249 (4th Cir.), *cert. dismissed*, 127 S.Ct. 34 (2006): The court held that waste elimination is a major life activity, which was substantially limited by the plaintiff’s end-stage renal disease.

(2) *Carr v. Publix Super Markets, Inc.*, 170 Fed. Appx. 57 (11th Cir. 2006): The court stated in a footnote that “[w]hile [the plaintiff] may have argued (though he did not) that the basic motor function of ‘lifting’ is itself a major life activity...we doubt that a lifting limitation states a *per se* ADA disability.”

(3) *Gillen v. Fallon Ambulance Service, Inc.*, 283 F.3d 11 (1st Cir. 2002): The court held that lifting, “whether lifting pen to paper or glass to mouth,” is a major life activity.

(4) *Marinelli v. City of Erie*, 216 F.3d 354 (3d Cir. 2000): The court held that housework is not a major life activity, but lifting is.

(5) *Sinkler v. Midwest Property Mgmt. Ltd. P'ship*, 209 F.3d 678 (7th Cir. 2000): The court held that getting to and from work assignments is not a major life activity, but is a “sub species” of either “working” or “driving,” both of which are major life activities.

e. *Working As A Major Life Activity*

i. In *Sutton*, the Supreme Court indicated its skepticism and “conceptual difficulty” with the EEOC’s decision to include “working” in the definition of “major life activity.” 119 S. Ct. 2139 (1999). However, the Court did not rule on this issue. In January 2002, the Court reiterated its skepticism in *Williams*. 122 S. Ct. 681 (2002). Most circuits have concluded that working is, as the EEOC has declared, a major life activity.

ii. Assuming the courts continue to recognize “working” as a major life activity, the “substantially limited from working” analysis will continue to pose complicated issues for employers. A person need not be totally unable to work in order to be substantially limited in working. According to the EEOC, the person must be significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes, compared to an average person with similar training, skills, and abilities. *EEOC Technical Assistance Manual* ¶¶ 100, 120, at §2.1. The Supreme Court has accepted this class-based inquiry, stating that “assuming [but not deciding] that working is a major life activity, a [plaintiff] would be required to show an inability to work in a ‘broad range of jobs,’ rather than [in] a specific job” in order to demonstrate a substantial limitation. *Williams*, 122 S. Ct. at 693 (quoting *Sutton*, 527 U.S. at 492).

(1) *Marinelli v. City of Erie*, 216 F.3d 354 (3d Cir. 2000): A shift crew member with the City Highway Department who had substantial arm and neck pain was not disabled because the mere inability to perform a single, particular job—driving a snow plow and operating other tools when it was cold and wet—did not establish a sufficient limitation with respect to working.

(2) *Rhoads v. Fed. Deposit Ins. Corp.*, 257 F.3d 373 (4th Cir. 2001), *cert. denied*, 535 U.S. 933 (2002): An asthmatic plaintiff who suffered from smoke-induced asthma and migraines failed to establish that she was substantially limited in her work where she only presented evidence that she was unable to function in one particular smoke-infested office; she also presented evidence that when permitted to work from home (a smoke-free environment) she performed at a “very high level.”

(3) *MacKenzie v. Denver*, 414 F.3d 1266 (10th Cir. 2005): Employee’s inability to work under a certain supervisor because of stress that aggravated his coronary condition did not substantially impair that employee’s ability to work.

(4) *Fricke v. E.I. DuPont Co.*, 2007 WL 328683 (6th Cir. Jan. 31, 2007): Employee was not disabled, because “[p]ersonality conflicts, workplace stress, and being unable to work with a particular person or persons do not rise to the level of a ‘disability’ or inability to work for the purposes of the ADA.” *Id.* at *5

C. When Is An Individual With A Disability “Qualified”?

1. ADA protection only extends to an individual with a disability who is “qualified.” 42 U.S.C. §12112(a). An individual is qualified if he can perform the “essential functions” of the job with or without accommodation. *Id.* §12111(8). The determination of whether an individual with a disability is qualified within the meaning of the ADA is not always clear-cut.
2. The essential functions of a job must be “fundamental” rather than “marginal.” *Skerski v. Time Warner Cable Co.*, 257 F.3d 273, 279 (3d Cir. 2001). The factors that can be considered in determining the “fundamental” nature of a job function include: “(1) whether the performance of the function is the ‘reason the position exists’; (2) whether there are a ‘limited number of employees available among whom the performance of the job function can be distributed’; and (3) whether the function is ‘highly specialized so that the incumbent in the position is hired for his or her expertise.’” *Id.*; 29 C.F.R. §1630.2(n)(2). Furthermore, the regulations promulgate seven factors to be used by courts in “identifying the essential functions of a job,” including: “(i) the employer’s judgment as to which functions are essential; (ii) written job descriptions prepared before advertising or interviewing for the job; (iii) the amount of time spent on the job performing the function; (iv) the consequences of not requiring the incumbent to perform the function; (v) the terms of a collective bargaining agreement; (vi) the work experience of past incumbents in the job; and/or (vii) the current work experience of incumbents in similar jobs.” 29 C.F.R. §1630.2(n)(3); *see generally D’Angelo v. ConAgra Foods, Inc.*, 422 F.3d 1220, 1229-34 (11th Cir. 2005).
 - a. *Ray v. Kroger Co.*, 264 F. Supp. 2d 1221 (S.D. Ga.), *aff’d without opinion*, 90 Fed. Appx. 384 (11th Cir. 2003): A supermarket employee with Tourette’s Syndrome who let loose outbursts of profanity and racial epithets in front of customers was not a qualified individual under the ADA. The court acknowledged that the employee was disabled because of his inability to communicate with others over extended periods of time. However, it was beyond dispute that the plaintiff could not perform an essential function of his job—interacting with customers without offending the customers—because his condition caused him to blurt out curse words and racial slurs, which are by their nature offensive. The court stated that the termination was based on the employee’s misconduct and did not violate the ADA “‘even if the misconduct [was] related to a disability.’” *Id.* at 1228 (quoting *Jones v. Am. Postal Workers Union*, 192 F.3d 417, 429 (4th Cir. 1999)).
 - b. *Kinlaw v. Alpha Baking Co.*, 2003 U.S. Dist. LEXIS 8319 (N.D. Ill. May 14, 2003): The court denied the employer’s motion for summary judgment because there was a question of material fact as to whether the ability to work 10.25-hour shifts at an office/dispatch job was an essential function of the job. The employee, a baking company delivery driver who was given the office job after injuring his back, presented evidence that such a requirement was not included in written job descriptions, that he, in fact, worked less than 10.25 hours while he was on shift, and that, after he was fired, other employees shared the shift, working six hours at a time.
 - c. *Rehrs v. Iams Co.*, 486 F.3d 353 (8th Cir. 2007): The employer’s rotating shift schedule for all production-level technicians like the plaintiff was an essential function of the job, where the company made no exceptions to the rotating shift schedule, and believed that it increased training, productivity, and opportunities for promotion and development.

d. *Koshko v. General Electric Co.*, 2003 U.S. Dist. LEXIS 4823 (N.D. Ill. Mar. 20, 2003): An employee with intermittent explosive disorder represented a threat to others and had no cause of action against his employer under the ADA following his termination after he injured himself during an angry outburst at his own work station.. During the outburst, he threatened to kill a manager and bloodied his hand when he slapped it on a tabletop. Although the court stated that he had a disability, it held that he was not a qualified individual because of the danger to other workers caused by his condition. The court thus granted summary judgment to the employer.

e. *Barnhart v. Wal-Mart Stores, Inc.*, 2006 WL 3147301 (11th Cir. Nov. 3, 2006): An individual with a hearing impairment was not qualified for employment as a Loss Prevention Associate, because he was unable to remain in communication with other Loss Prevention Associates via walkie-talkie while maintaining consistent visual contact with a suspected shoplifter; and the accommodation of a two-way pager would require him to take his eyes off the suspect.

Part 2 will appear in the October issue and will cover reasonable accommodations and practical responses.

To purchase the online version of this article, go to www.ali-aba.org.