

Practical Tips When Litigating Definition of Disability Under the ADA

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In the wake of the Supreme Court's decisions on mitigating measures in 1999 and its subsequent decision in *Toyota v. Williams* in 2002, people with disabilities have had a much harder time proving in court that they have a disability under the ADA. As a result, many ADA cases are being dismissed before a judge or a jury has an opportunity to hear about the discrimination the person with a disability experienced. While there are no easy ways around this problem, the following are some ideas on how to deal with the current legal hurdles plaintiffs face when trying to prove that they are covered by the ADA.

- 1. Whenever possible, plead all three prongs of the definition of disability**

If the facts support it, it is important to plead actual disability, record of disability, and perceived disability. Many cases that have been dismissed for failing to prove the requirements for actual disability, may have survived if the second or third prongs of definition of disability had been alleged. *See, Haiman v. Village of Fox Lake*, 55 F. Supp. 2d 886 (N.D. Ill. 1999), *further discussed at* 79 F. Supp. 2d 949 (N.D. Ill. 2000) in which the court held that plaintiff did not have an actual disability because of her use of medication, but for summary judgment purposes, she presented sufficient evidence under the "regarded as" prong.
- 2. Explore whether side effects of mitigating measure are substantially limiting.**

In the mitigating measures cases, the Supreme Court clearly stated that if plaintiff experiences side effects from medication or other mitigating measures, and those side effects are substantially limiting, then the plaintiff has an ADA disability. Thus, it is critical to explore with the client and her treating professionals what side effects the client experiences as a result of the mitigating measure. *See, McAlindin v. County of San Diego*, 192 F.3d. 1226 (9th Cir. 1999).
- 3. When preparing for deposition or trial, make sure client understands ADA standards for disability and qualified.**

Many cases involving mitigating measures have been lost because plaintiffs testify that they are not substantially limited in any major life activity. It is vital to explain to the client how the ADA defines disability and that the client must meet this definition in order to recover under the ADA. Many people living with disabilities do not believe that they have an impairment that substantially limits a major life activity. While this is an empowering attitude, failing to testify that the disability substantially limits a major life activity may result in the dismissal of the case. Therefore, the definition of disability must be reviewed carefully with the client when preparing for a deposition or trial testimony. It is also very important to explore with the client what possible major life activities are limited as a result of the client's disability despite the fact that the client may use a mitigating measure. Additionally, the client must understand that after proving that she has a disability, the client must also prove that she is qualified. Thus, the client must walk a fine line in testifying that she is substantially limited, but still able to perform the essential functions of the job.

4. Consult closely with client’s treating professionals before they put anything in writing or testify.

Testimony by treating professionals has also resulted in many cases being lost because the treating professional did not understand the requirements of the ADA. Many treating professionals, when trying to help the client retain or regain employment, may make overly broad statements about the plaintiff’s abilities that will undercut the plaintiff’s efforts to prove a substantial limitation in a major life activity. Conversely, some treating professionals, in their efforts to support the plaintiff’s efforts to be covered by the ADA, will make overly broad statements that will inhibit the plaintiff’s ability to demonstrate she is qualified and able to perform the essential job functions. Accordingly, consulting with plaintiff’s treating professionals is crucial.

5. Consult with people who have expertise on your client’s disability.

Many times, the client and the client’s treating professionals do not understand all of the complexities of a particular disability. When proving that the client meets the definition of disability, it may be useful to consult with people who are specialists on a particular disability or to consult with organizations that have resources and information about the disability. (For example, the American Diabetes Association was very helpful on a 7th Circuit amicus brief we wrote to demonstrate the nature of the diabetes, the major life activities that are impacted by diabetes, and how people with diabetes can be substantially limited despite mitigating measures.)

6. Research which major life activities have been recognized for your client’s disability in previous cases.

Because the scope of possible major life activities is not limited by the ADA or its regulations, some courts have adopted some major life activities that may not be intuitive for a particular disability. (For example, in *Cornman v. N.P. Dodge Management*, 43 F. Supp. 2d 1066 (D. Minn. 1999), a court held that a woman with cancer was substantially limited in the major life activity of sexual relations.) Accordingly, researching other cases involving the client’s disability may prove useful. Additionally, creative pleading raising new life activities that have not yet been recognized is advisable.

7. Discovery is critical in a “regarded as” case.

In a “regarded as” case, plaintiffs have to demonstrate the defendant’s intent. Thus, it is important to be very thorough in discovery requests. Often e-mails or other correspondence may reveal the defendant’s discriminatory reasons. (For example, in the *Haiman* case cited above, discovery produced a log that a supervisor kept in which she that documented her belief that the client had a disability.) Also, explore thoroughly with the client whether there are any co-workers or other witnesses who could support the perceived disability claim.

8. Avoid “working” as a major life activity if at all possible.

In the mitigating measures cases, and again in *Toyota v. Williams*, the Supreme Court expressed reservations that working should be recognized as a major life activity under the ADA. And even if it is recognized, the standard of proof (substantially limited in a class or broad range of jobs) is very difficult to meet. Additionally, if you are successful in proving the client is substantially limited in working, you face an uphill battle in proving that the client is qualified.

9. Be aware of new standard arising from the *Williams* case.

In *Toyota v. Williams*, the Supreme Court adopted a new standard for major life activities. When Plaintiff claimed she was substantially limited in performing manual tasks, the Court stated that limiting the analysis to the tasks she performed at work was too narrow, and instead, courts must look at whether a plaintiff is substantially limited in activities that are of “central importance to most people’s daily lives.” Lower courts have extended the Court’s analysis to other major life activities such as lifting (*see, Mack v. Great Dane Trailers*, 308 F.3d 776 (7th Cir. 2002)) and seeing (*see, EEOC v. United Parcel Service, Inc.*, 306 F.3d 794 (9th Cir. 2002)). Accordingly, it is important to review with the client how her disability limits activities that are central to most people’s daily lives.

10. Make sure the complaint tells a story.

Although the Federal Rules of Civil Procedure only require “notice pleading,” the Complaint should be detailed enough to tell a story of the discrimination the client experienced. A “fleshed out” Complaint makes the judge aware of the underlying facts in the event the defendant seeks to dismiss the case because the plaintiff fails to meet the definition of disability. By knowing the facts, the judge may be less willing to dismiss a case that is compelling. Also, a detailed complaint can be effective to use with the press. If you can get the press interested in the discriminatory treatment the plaintiff experienced, the defendant may be more motivated in settling a case quickly, even if the plaintiff is vulnerable on the definition of disability. When using the press, consider community allies as well. (For instance, after receiving a copy of the Complaint in an ADA case we filed, the local center for independent living staged a protest at the defendant’s place of business and the case settled soon thereafter.)

11. Consider non-litigation alternatives if definition of disability claim is weak.

If the case for definition of disability is weak, consider other strategies before filing litigation. (Once litigation is filed, defense counsel will be using whatever theories possible to dispose of the case.) Try to appeal to conscience or image of the corporate counsel (We were successful in getting a major company to resolve an HIV discrimination case without litigation because corporate counsel did not want to damage the company’s image as a support of AIDS causes.) Or, if the defendant is a governmental entity, try to work with the ADA coordinator or whatever disability-related personnel may exist. (For instance, the City of Chicago has a separate disability office that has been useful to resolve disputes, but we cannot contact that office once litigation has been filed.)

12. Consider state and local law claims that may not have a “substantially limited” component.

If negotiations are unsuccessful and litigation is the only option, and it appears unlikely the client will be able to meet the ADA definition of disability, it is important to consider filing under state and local discrimination laws. (For instance, the Illinois Human Rights Act does not require proof of a substantial limitation of a major life activity. Rather, plaintiffs only have to demonstrate the existence of a physical or mental characteristic, which is unrelated to the person’s ability to perform the duties of a particular job. 775 ILCS 5/1-103(I).)

Accordingly, plaintiffs whose symptoms are primarily controlled by mitigating measures should review their options under state and local ordinances before proceeding with an ADA claim.