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▶ *Explaining “Not Disabled”
Cases Ten Years After the
ADAAA: A Story of
Ignorance, Incompetence,
and Possibly Animus*



Definition of Disability

- Physical or mental impairment that substantially limits one or more major life activities; or
- A record of such an impairment; or
- Being regarded as having such an impairment.

Roller Coaster Ride of the ADA

- Passed in 1990 with overwhelming bipartisan support.
- Supreme Court began narrowly construing definition of disability in 1999, leading to “backlash” against the ADA.
- Congress passed ADA Amendments Act (ADAAA) in 2008, with the goal of expanding the ADA’s protected class.
- First five years (2009–2013): Most courts were reaching the right result.

ADAAA Highlights

- Did not change basic definition of disability. Added several interpretive provisions.
- Court's "demanding standard" language in *Toyota* was incorrect and Act should be interpreted in favor of broad coverage. Punted to EEOC to define "substantially limits."
- Expressly rejected "mitigating measures" rule announced in *Sutton*: courts should determine whether an impairment substantially limits a major life activity without regard to ameliorative effects of mitigating measures.

ADA Highlights (continued)

- Broadened list of major life activities (new in *italics*): caring for oneself, performing manual tasks, seeing, hearing, *eating, sleeping, walking, standing, lifting, bending*, speaking, breathing, learning, *reading, concentrating, thinking, communicating*, and working.
- Major life activities include major bodily functions, including functions of immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.
- Episodic or in remission impairments.
- Changes to “regarded as”: plaintiff suffered an adverse action “because of an actual or perceived impairment *whether or not the impairment limits or is perceived to limit a major life activity.*”



2014–2018 Cases

- Search terms (all federal cases, published and unpublished): “definition /2 disability & ADA” (January 1, 2014–December 31, 2018)
- 976 cases.
- 210 cases where plaintiff was erroneously found not disabled.
- Errors: Ignorance, Incompetence, and Possibly Animus

Ignorance

- 54 cases where courts were presumably unaware that the ADAAA exists (did not cite to any provision of ADAAA).
- Examples: walking with a walker, multiple sclerosis, seizure disorder, kidney transplant and lupus, mental illnesses.
- 11 cases where only ADAAA provision courts cited to was list of major life activities.
- 34 cases where courts failed to cite to new “regarded as” rule.

Incompetence

- Attorneys presumably not citing to ADAAA at all. (54 + 34 “ignorance” cases)
- 19 other pleading failures.
 - Many relied on working.
 - Claimed major life activities not on list—e.g., quickness on his feet, going to church, skipping.
 - Conclusory allegations.
- Failure to use “major bodily functions” or “episodic or in remission” provisions (34 cases)

Incorrectly Decided Cases by the Courts: Incompetence or Animus?

- Eight cases required long-term impairment.
- Eight cases used the old *Sutton* mitigating measures rule. (E.g., hypertension or depression controlled by medication, monocular vision, ADHD)
- Six cases involved improper application of major bodily functions provision and/or episodic provision.

▶ *Marquez v. Glendale Union High School District*, (D. Ariz. 2018)

- Brain cancer.
- Court acknowledged major bodily functions provision, and the regulations, which state that cancer will “virtually always” limit normal cell growth.
- “Plaintiff has not indicated whether she experiences any symptoms from her brain tumor, or alleged that such symptoms impact her ability to work.”

▶ *Scavetta v. Dillon Companies, Inc.*, 569
F. App'x 622 (10th Cir. 2014)

- Rheumatoid arthritis (RA).
- Jury trial. Court refused plaintiff's request to instruct jury on major bodily functions provision (π was arguing immune and musculoskeletal functions).
- At trial, doctor testified about RA being an auto-immune disorder and explained how it attacks the joints, causing pain, stiffness, swelling, and fatigue. Court said doctor's testimony was about general progression of disease and not specific to plaintiff.
- Tenth Circuit affirmed lower court's instruction, noting that plaintiff's testimony was more individualized, but only focused on her daily activities and not on her "major bodily functions."

Incorrectly applying new “regarded as” provision

- 23 cases incorrectly applied “regarded as” provision.
- *Welch v. Level 3 Communications*: MS and seizures. Employer knew about her MS but not aware of specific problems it was causing.
- *Jordan v. City of Union City, Ga.*: Anxiety disorder. “You’ve got some anxiety issues that you need to deal with . . . It’s not going to be here.”
- Incorrect application of “transitory and minor” exception to regarded as coverage. Many courts only looked at “transitory” and ignored “minor.”



Implications

- More education is needed for judges, their clerks, and attorneys.
- Are we heading towards another backlash?
- Areas of further exploration:
 - No medical evidence
 - Used plaintiff's testimony to conclude plaintiff was not disabled.
 - Focus on plaintiff's ability to do his job rather than substantial limitation on other major life activities.
 - Are some courts getting it wrong more than others? Are some impairments faring worse than others?