A Disabled Definition

By Richard G. Finch

The Americans with Disabilities Act (ADA) of 1990 defines "disability" as "(A) a physical impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment."[1] "The ADA's definition of disability is drawn almost verbatim from the definition of 'handicapped individual' included in the Rehabilitation Act of 1973, 29 U.S.C. § 706(8)(B) (1988 ed.), and the definition of 'handicap' contained in the Fair Housing Amendments Act of 1988, 42 U.S.C. § 3602(h)(1) (1988 ed.)."[2] The Rehabilitation Act of 1973 originally merely prohibited discrimination against the disabled in federally funded programs, and the notorious vagueness of its definition of "disability" therefore went unnoticed by the public. The subsequent Fair Housing Amendments Act of 1988 did create a private right of action in favor of those illegally discriminated against in the sale or rental of housing in the private sector,[3] but again this rarely affected anyone outside of landlords and those dealing in real estate. The ADA, however, created a private right of action in favor of the "disabled" against, among others, private employers of more than 15 employees.[4]

The ADA places the disabled in a protected category in matters of hiring, firing, and career advancement.[5] Further, a "qualified individual with a disability" is entitled to a "reasonable accommodation" if necessary to perform a job, unless this would involve an "undue hardship" to the employer.[6] This is obviously a more burdensome (and vague) requirement than the simple neutrality required of employers in other civil rights legislation dealing with "race, color, sex, national origin, religion, or age," which were purportedly models for the ADA.[7] Congress, in enacting feel-good legislation with the intent of leaving it to the courts to fill in the blanks, has spawned 15 years' worth of litigation about who is "qualified," what accommodation is "reasonable," when an accommodation that is "reasonable" may nevertheless impose an "undue hardship" on the employer, and, perhaps most importantly, what condition meets the essential threshold of qualifying as a "disability."

Fast Facts:

- **The National Organization on Disabilities currently puts the number of men, women, and children in the United States with "disabilities" at 54 million.**
- **The Americans with Disabilities Act places the disabled in a protected category in matters of hiring, firing, and career advancement.**
- **The ADA definition of disability that permits a plaintiff to bring suit if he or she merely has "a record of" an impairment, or even is "regarded as having" an impairment should be eliminated.**

Clearly, those who are "disabled" under the ADA encompass far more than the blind, deaf, and those confined to wheelchairs, which would be the examples of "disability" most familiar to the general public. The National Organization on Disabilities currently puts the number of men, women, and children in the United States with "disabilities" at 54 million.[8] It must have dawned on Congress just how vague the definition of "disability" was when, rather than define what a disability *was,* it began to find it easier to define what it was *not.* For example, someone currently engaged in the illegal use of drugs is not a "qualified individual with a disability," but a person who is enrolled in or has successfully completed a supervised drug rehabilitation program may be, as may a person who is "erroneously regarded in engaging in such use, but is not engaging in such use."[9] For some reason, Congress also thought it prudent to clarify that transvestitism is not a disability.[10]

Congress did not think it prudent to clarify whether needing corrective lenses was a disability. Certainly, the ability to see is a "major life activity" that may be "substantially limited" due to a variety of conditions. But what if the person's vision can be made normal with glasses? Is such a person "disabled," or at least "regarded as" disabled, within the meaning of the ADA? The First, Second, Third, and Seventh Circuits ruled that "self-accommodation" or "mitigation" such as wearing glasses could not be considered in determining whether a person is disabled; the Fifth Circuit held that only some impairments should be considered in their uncorrected state; and the Tenth Circuit decided that even a severely myopic person was neither disabled nor regarded as disabled if his or her vision could be corrected with glasses to the point where he or she could lead a normal life. The United States Supreme Court resolved the split, 7–2, in favor of the Tenth Circuit's interpretation, contrary to the position taken by the Justice Department.[11]

Regardless of the merits of the decision, one needs to ask how companies with as few as 15 employees are supposed to comply with a statute whose interpretation on such a basic issue so sharply divided the federal courts and experts in the Justice Department, even nine years after the statute was enacted. Complicating the issue is the fact that the ADA covers much more than the relationship between employers and employees, such as the right to equal access to public accommodations. Therefore, the disability that places an individual under the protection of the ADA need not inhibit the individual's job function. For example, the Supreme Court held that HIV infection, even when asymptomatic, was a "disability" within the meaning of the ADA because it "substantially limits" the "major life activities" of sexual relations and reproduction.[12] Although HIV does not prevent either intercourse or conception, a woman infected with HIV "imposes on the man a significant risk of becoming infected" and also faces approximately a 25 percent chance of having an HIV-infected child.[13]

Although the Supreme Court's opinion on HIV involved a public accommodation (specifically, whether a dentist was required to treat an HIV-positive patient), the Court noted in support of its opinion that the Equal Employment Opportunity Commission's guidelines also considered asymptomatic HIV infection to be a disability.[14] Since the definition of "disability" is the same for both public accommodation and employment protection, the courts would therefore extend the same protection to asymptomatic HIV-positive employees alleging discrimination by their employers. But since the reasoning for extending such protection is dependant entirely upon the fact that HIV substantially limits the major life activities of sexual relations and reproduction, it follows that any other medical condition that substantially limits those major life activities would likewise be considered a disability protected by the ADA. That may include, most obviously, other sexually transmitted diseases, impotence, and infertility. One district court stated that "this opinion need not address whether such a condition [impotence] could ever constitute a disability, because the testimony cited for that asserted impairment indicates only that he had a temporary problem while taking a previous medication."[15] While courts debate whether and under what circumstances impotence may be a

disability under the ADA,[16] other courts have held as a matter of law that multiple sclerosis is not a disability protected by the ADA if the condition only results in moderate restrictions on walking and lifting.[17] It appears that no plaintiff has yet argued that a condition such as multiple sclerosis may be a disability for a reason similar to one of the reasons that asymptomatic HIV infection is a disability: there is a significant risk that that the condition may be passed on to a child, and therefore, it interferes with the major life activity of reproduction, notwithstanding the fact that it does not substantially interfere with job performance. As screening for various genetic disorders becomes more prevalent, an increasing number of conditions that may or may not significantly limit an employee's ability to perform job functions may nevertheless be held to be a disability within the meaning of the ADA.

Under typical circumstances, an employer may not be aware that an employee suffered from conditions such as impotence or infertility, so outlawing discrimination against such an employee may be somewhat superfluous. But judicial interpretation of the ADA has created the anomalous situation that conditions that do not impact job functions may nevertheless be considered "disabilities" covered by the anti-discrimination provisions of the ADA, while conditions that do impact job functions may not. For example, a mechanic whose duties included operating a commercial vehicle was fired for having blood pressure higher than Department of Transportation (DOT) requirements. His doctor testified that when medicated, he functioned normally in everyday activities. The Supreme Court affirmed a ruling that hypertension is not a "disability" if it can be controlled by medication.[18] It must be emphasized that the Supreme Court did not hold that it was reasonable for the employer to fire the employee because he did not meet the requirements set by the DOT. Rather, even though the employee did not meet the requirements set forth by the DOT, the Supreme Court held that his condition was not a disability, nor was he "regarded as disabled" by his employer. To confuse things further, the Court noted that "the question whether petitioner is disabled when taking medication is not before us; we have no occasion here to consider whether petitioner is 'disabled' due to limitations that persist despite his medication or the negative side effects of his medication." The Supreme Court therefore left it open to a future plaintiff to argue that although hypertension itself is not a disability (even though if left untreated it can result in debilitating or even fatal strokes or heart attacks), a side effect of the medication used to control hypertension may result in the plaintiff being deemed "disabled." This would be particularly true if either the hypertension itself or the medication used to control it rendered the plaintiff unable to engage in what has already been determined to be a "major life activity" of sexual relations or reproduction.[19]

This situation could be improved if Congress amended the definition of "disabled" to an objective criteria that can be more readily and consistently applied. Models for this are available. For example, the Family Medical Leave Act defines "serious health condition" to be an illness, injury, impairment, or physical or mental condition that involves (1) inpatient care in a hospital, hospice, or residential medical care facility; or (2) continuing treatment by a health care provider.[20] In the case of the ADA, there is no public policy reason for imposing the requirement of in-patient care on an employee who is seeking only an accommodation or freedom from discrimination. However, imposing the requirement that an employee who has a treatable condition must seek treatment in order to be eligible for protection under the ADA would reduce the incentive for claiming that every imperfection is a disability. It would also eliminate the subjective analysis as to whether the disability "substantially limits" an activity and whether that activity constitutes a "major life activity." This requirement could be statutorily waived for individuals who have specified disabilities that cannot be effectively treated, such as blindness, deafness, and paralysis, provided that such conditions do not prevent the employee from performing the job in question. Moreover, the ADA definition of disability that permits a plaintiff to bring suit if he or she merely has "a record of" an impairment, or even is "regarded as having" an impairment, should be eliminated to focus judicial resources on cases involving the truly disabled. Such reforms would be a step toward restoring fairness and predictability in anti-discrimination law. ◆

Richard G. Finch is a graduate of Albion College (B.A., cum laude, 1993) and Wayne State University Law School (J.D., 1996). He is an associate of Lacey & Jones, L.L.P., of Birmingham, Michigan, with a defense practice in commercial litigation, negligence, and employment discrimination.

Footnotes

1. 42 USC 12001(2).
2. *Bragdon v Abbott,* 224 US 624, 631–632 (1998).
3. 42 USC 3613.
4. 42 USC 12111(5)(A).
5. 42 USC 12112.
6. 42 USC 12112(5).
7. 42 USC 12001(a)(4).
8. Congress found in 1990 that there were 43 million Americans with "one or more physical or mental disabilities" and that this number was bound to increase with an aging population. 42 USC 12001(a)(1). The 1990 census put the total population of the United States at just under 249 million.
9. 42 USC 12114.
10. 42 USC 12208.
11. *Sutton v United Air Lines,* 527 US 471 (1999).
12. *Bragdon v Abbott,* supra.
13. Id.
14. Id.
15. *Korzeniowski v ABF Freight Sys,* 38 F Supp 2d 688, 692 (ND Ill 1999).
16. See, e.g., *McAlindin v County of San Diego,* 192 F3d 1226, 1234 (CA 9, 1999) (holding impotence caused by plaintiff's mental impairment substantially limiting); *Buskirk v Apollo Metals,* 116 F Supp 2d 591, 598 (ED Pa 2000) (holding plaintiff's testimony and wife's affidavit regarding sexual function insufficient to create genuine issue of material fact); *Hiller v Runyon,* 95 F Supp 2d 1016, 1021 (SD Iowa 2000) (holding testicular cancer-related condition substantially limited ability to engage in sexual relations and reproduce).
17. *Wynn v Whitney Holding Corp,* 220 F Supp 2d 582 (MD La 2002).
18. *Murphy v United Parcel Service,* 527 US 516 (1999).
19. But see *McGraw v Sears, Roebuck & Co,* 21 F Supp 2d 1017 (ED Minn 1998), holding inter alia that menopause is not a "disability" under the ADA.
20. 29 USC 2611(11).