

CHAPTER THREE

SPECIFIC IMPAIRMENTS

Whether an individual has an impairment that substantially limits a major life activity is made on a case by case basis. *Bragdon v. Abbott*, 524 U.S. 624 (1998); Interpretive Guidance on Title I of the Americans With Disabilities Act, Appendix to 29 CFR 1630.2(j). An impairment is substantially limiting when it prevents an individual from performing a major life activity or when it significantly restricts the condition, manner, or duration that an individual can perform a major life activity. 29 CFR 1630.2(j). Moreover, as the Supreme Court noted in *Bragdon*, 524 U.S. at 641:

In the end, the disability definition does not turn on personal choice. When significant limitations result from the impairment, the definition is met even if the difficulties are not insurmountable.

The Court in *Bragdon* also noted that, “the ADA addresses substantial limitations on major life activities, not utter inabilities.” *Id.* at 661.

I. MITIGATING MEASURES AND ASSISTIVE DEVICES

In considering whether an individual is substantially limited in a major life activity and thus has a disability, we examine the effects of the medical condition in light of any corrective or mitigating measures. Dramatic changes in the legal landscape occur often in the area of disability employment law, as illustrated by the unfortunate timing of the EEOC AJ who rendered a decision finding that a determination of whether or not an individual has a disability is made without regard to mitigating measures. On appeal, *Ganson v. Potter, Postmaster Gen., USPS*, EEOC No. 01A01214 (February 12, 2004), the Commission observed somewhat sympathetically that:

We note, however, that on the day the AJ issued his decision, the Supreme Court ruled that, in reaching a determination on whether an individual is substantially limited, we must examine his condition as it exists after corrective or mitigating measures are used to combat the impairment. *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 482 (1999).

Pity too the poor complainant who knew his case could not withstand scrutiny on appeal only hours after receiving the news. Fortunately for the complainant, the Commission found he was substantially limited in the ability to work and the result remained favorable to the complainant.

A. TO BE SUBSTANTIALLY LIMITED MEANS SIGNIFICANTLY RESTRICTED AS COMPARED TO THE AVERAGE PERSON IN THE GENERAL POPULATION

As noted in 29 CFR 1630.2(j)(ii), an individual's ability to perform a major life activity must be:

Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

Most practitioners carefully consider the effects of the complainant's impairment on his or her major life activities, but too often make the mistake of not actually considering how any limitation compares "to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." Presenting evidence of how long or how far a complainant can walk (or how much poundage he or she can lift or how little he or she can see) is fine, but often more evidence is required to prove that the limitations from the impairment are substantial, particularly as compared to others in our society.

1. Focus Should Be on the Manner of Performing or Duration That the Major Life Activity Can Be Done

Consider this passage from the First Circuit's decision in *Gillen v. Fallon Ambulance Service, Inc.*, 283 F.3d 11, 23 (1st Cir. 2002), (a case that in my opinion includes one of the most eloquent explanations of what substantially limited means under the ADA) where the court found a one-handed plaintiff substantially limited in the ability to lift although she could lift up to 90 pounds, far more than the average person in the general population:

A missing hand is a more profound impairment than a simple inability to lift objects over a certain weight. Such an impairment poses a type of restriction on lifting not shared by a significant portion of the populace. While most people can use two hands to pick up a plate or carry groceries (or even do both at the same time), a one-handed individual must develop an array of techniques to overcome her innate limitation. Even if she is able to lift more poundage than many two-handed individuals, the manner in which she lifts and the conditions under which she can lift will be significantly restricted because she only has one available limb. In this sense, at least, the appellant's lack of a hand will substantially limit her ability to lift notwithstanding her extraordinary efforts to compensate for her impairment.

Many of us would fail to consider that the manner of lifting by a one-handed person is different than it is for most of us—failing to consider the evidence that most people can lift packages in one hand and open doors with the other. Yet, it is precisely this sort of evidence that led the court to conclude that Gillen’s case should proceed even though it came on the heels of the Supreme Court’s decision in *Albertsons Inc. v. Kirkingburg*, 527 U.S. 555 (1999), where the Supreme Court found a mechanic with monocular vision was not substantially limited in the ability to see because there was no evidence that the limitations on his vision from his one good eye were substantial compared to the average person in society.

2. Impact on Major Life Activities Must Be Long-Term or Potentially Long-Term

The limitations on major life activities resulting from an impairment must be long-term or potentially long-term, as opposed to temporary or transitory. *See Russell v. Henderson, Postmaster Gen., USPS*, EEOC No. 01981160 (April 3, 2001) (citing EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities (March 25, 1997) at question 10). There are times when the duration of the effects of an impairment may not be known with any certainty and the possibility that the medical condition may affect one or more major life activities will support a conclusion that the individual has a disability. Yet “some conditions may be long-term, or potentially long-term, in that their duration is indefinite and unknowable or is expected to be at least several months. Such conditions, if severe, may constitute disabilities.” EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities (March 25, 1997) at question 7.

II. SPECIFIC IMPAIRMENTS CONSIDERED IN EEOC DECISIONS

In the section that follows, we consider specific impairments that may or may not have been found to be disabilities.

A. ALCOHOLISM

DIAGNOSIS OF ALCOHOLISM INSUFFICIENT ABSENT EVIDENCE OF SUBSTANTIALLY LIMITING EFFECTS

Sullivan v. Neiman Marcus, 358 F.3d 110 (1st Cir. 2004).

A diagnosis of alcoholism was not sufficient to establish a disability where there was no evidence complainant was substantially limited in any major life activity. Without determining whether working was a major life activity, the court found the complainant was not substantially limited in the ability to work and thus not disabled under the meaning of ADA.

[See additional discussion of this case in Chapter 4, under the heading, “Working.”]

NO DUTY TO ACCOMMODATE ALCOHOLIC POLICE OFFICER WHERE DISABILITY NOT DISCLOSED UNTIL AFTER NOTICE OF TERMINATION

Hernandez v. England, Sec’y, Dept. of Navy, EEOC No. 01A41079 (March 30, 2004).

[See a discussion of this case in Chapter 8, under the heading “A Request for Reasonable Accommodations Does not Require an Employer to Excuse Past Misconduct.”]

NO NOTICE OF DISABILITY MEANS NO LIABILITY

Sabados v. McCullough, Jr., Chairman, TVA, EEOC No. 01A23952 (May 25, 2004).

An employee, forced to resign from his chemistry superintendent position after testing positive for alcohol while on emergency call for an emergency response team, was not found to be a victim of disability discrimination. The Commission reasoned that because the agency had no notice that complainant had any type of alcohol problem before the incident that led to his termination; the agency was justified in its actions. “Without notice of complainant’s medical condition, the agency was not required to provide reasonable accommodation of complainant’s condition related to his positive ‘for cause’ test.”

FEDERAL EMPLOYERS ARE NO LONGER OBLIGATED TO OFFER ALCOHOLIC EMPLOYEES A “FIRM CHOICE”

Johnson v. Babbitt, Sec’y, Dept. of Interior, EEOC No. 03940100 (March 28, 1996).

The Commission used this case as an opportunity to clarify that the doctrine of “firm choice” was no longer applicable in the federal sector. Firm choice required federal employers, as a means of reasonable accommodation to allow employees a final opportunity to seek treatment for alcoholism before the agency could impose severe discipline such as termination. The Commission held that:

It is well established that alcoholism is a disabling condition for purposes of the disability discrimination protections of the Rehabilitation Act of 1973. *Ruggles v. Department of the Navy*, EEOC Petition No. 03840216 (November 17, 1989). Based upon the parties’ stipulation that the sole issue to be determined was whether the agency met its duty to accommodate an employee with the disability of alcoholism, jurisdiction on the basis of alcoholism is assumed. [Footnote omitted.]

As part of a showing of disability discrimination, petitioner typically must establish that there is a causal relationship between his stipulated alcoholism and the attendance deficiencies that resulted in the subject adverse action, i.e., his termination. The parties stipulated to this nexus.

Next, a petitioner must show under normally applicable analysis that he is a qualified individual with a disability. 29 C.F.R. § 1614.203(a)(6). We find that the parties implicitly stipulated that petitioner is a qualified person with a disability through their stipulation that the sole issue to be determined was whether the agency fulfilled its legal obligation to provide petitioner a firm choice. The clear suggestion here is that if petitioner showed firm choice was not provided, he would prevail in his disability claim.

The doctrine of firm choice is designed to force the employee to confront his alcoholism and seek treatment. It consists of warning the alcoholic employee with performance or conduct problems that he will receive discipline, up to and including removal, if he does not enter into and follow through with a program that treats alcoholism. [Footnote omitted.] We find, however, that federal employers are no longer required to provide the reasonable accommodation of firm choice under section 501 of the Rehabilitation Act, because the Rehabilitation Act Amendments of 1992 changed the applicable standard.

...

In essence, the doctrine of firm choice has historically required federal employers to excuse the violation of otherwise-uniformly-applied job performance or conduct standards by giving the employee with alcoholism the firm choice of entering into and completing treatment, or receiving discipline, up to and including removal. We find that section 501, as amended by the Rehabilitation Act Amendments of 1992 to incorporate ADA employment standards, no longer requires that a firm choice be provided.

The agency was not therefore required to provide petitioner a firm choice between treatment and removal, and properly removed him for being AWOL and giving false information to a management official. Accordingly, we conclude that the petitioner was not discriminated against when he was removed.

[This case is discussed in more detail in Chapter 13, under the heading, "Application of the ADA to Drug Addiction & Alcoholism."]

Martin v. Runyon, Jr., Postmaster Gen., USPS, EEOC No. 01954089 (March 27, 1997).

[See the discussion of this case later in this chapter, under the section “(HIV) Human Immunodeficiency Virus.”]

ALCOHOLISM MAY BE A DISABILITY UNDER THE REHABILITATION ACT

Whitlock v. Donovan, 598 F. Supp. 126, *aff'd sub nom. Whitlock v. Brock*, 790 F.2d 964, (D.C. Cir. 1986).

One of the first major decisions concerning the duty to provide reasonable accommodation to federal employees who suffer from alcoholism, this decision relied largely upon the affirmative actions requirements of Section 501 of the Rehabilitation Act to determine that the Department of Labor had failed to provide a “firm choice” between discipline and treatment. Note that as discussed elsewhere in more detail, the doctrine of “firm choice” is *no longer required* because of the 1992 amendments to the Rehabilitation Act. As the court observed (at 598 F. Supp. at 129, 136):

Alcoholism is a handicapping condition for purposes of the handicap discrimination protections of the Rehabilitation Act of 1973. Both the Attorney General, 43 Op. Att’y Gen. No. 12 (1977), and the Secretary of the then Department of Health, Education and Welfare, 42 Fed. Reg. 22686 (May 4, 1977), have so concluded, and the courts are in accord. *See, e.g., Tinch v. Walters*, 573 F. Supp. 346, 348 (E.D. Tenn. 1983); *Simpson v. Reynolds Metals Co.*, 629 F.2d 1226, 1228, 1231 n. 8 (7th Cir. 1980); *Davis v. Bucher*, 451 F. Supp. 791, 796 (E.D. Pa. 1978).

B. ALLERGIES

ALLERGY TO MARIJUANA NOT SUBSTANTIALLY LIMITING

Hickman v. Ashcroft, Attorney Gen., Dept. of Justice, EEOC No. 01A11797 (December 20, 2001).

An employee who had an allergy to marijuana was found not to have a disability because he was not substantially limited in any major life activity. Specifically, the employee alleged he was substantially limited in the ability to work. The complainant was not hired in a competitive selection for a special agent/criminal investigator and alleged discrimination because of an allergy to marijuana. The agency had previously placed complainant on retirement disability because of a respiratory allergy to marijuana, but some nine years later, the Office of Personnel Management advised complainant to return to work because the agency erroneously placed him on medical retirement. After returning to work at a lower graded position, he sought promotion to the position at issue and the Commission succinctly disposed of the claim, noting that: