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No Coverage for the Cantankerous? The Ninth Circuit Goes "Retro" In Finding "No Disability"

By Peter J. Petesch

Novelist Peter De Vries and, later, Yogi Berra said: "nostalgia ain't what it used to be."

In *Weaving v. City of Hillsboro*,[1] the U.S. Court of Appeals for the Ninth Circuit waxed nostalgic by *reversing* a jury and lower court finding that a police officer with Attention Deficit and Hyperactivity Disorder (ADHD) had a "disability" within the meaning of the 2008 amendments to the Americans with Disabilities Act (ADA). The Ninth Circuit held that the former officer was not disabled, because his ADHD—and associated abrasive behavior toward colleagues—did not substantially limit him in the major life activities of working or interacting with others. Before the amendments to the ADA, this decision might not have been noteworthy. Given the far more expansive interpretation of "disability" under the 2008 ADA Amendments Act (ADAAA), however, the *Weaving* case assumes the aura of a "Man Bites Dog" story by resisting the tendency of courts to err on the side of finding threshold protection under the ADAAA.

ADAAA Trends

The ADAAA was intended to turn back a series of U.S. Supreme Court and appellate court decisions restricting the scope of persons who had a "disability" under the ADA. Broadly, the ADAAA tells courts that "[t]he definition of disability shall be construed in favor of broad coverage of individuals" under the ADA, "to the maximum extent permitted by the terms" of the ADA.[2] The ADAAA changed, among other things, the interpretation of "disability" by calling for a more expansive interpretation of when a physical or mental impairment "substantially limits" a "major life activity" and therefore qualifies as a disability.

Since the ADAAA, the overall number of ADA charges before the EEOC and proportion of ADA charges within the EEOC (in relation to other anti-discrimination laws) have increased.[3] The highest number of lawsuits filed by the EEOC in 2013 involved disability discrimination claims, and ADA cases enjoy high priority under the EEOC's Strategic Enforcement Plan.[4] Predictably, under the ADAAA, courts have granted far fewer summary judgment rulings for employers

1 Case No. 12-35726 (9th Cir. Aug. 15, 2014).

2 42 U.S.C. § 12102(4)(A).

3 *See* EEOC Charge Statistics FY 1997 Through FY 2013 at www.eeoc.gov.

4 *See Annual Report on EEOC Developments: Fiscal Year 2013*, Littler Report (Jan. 22, 2014) at 14, 28.

because the plaintiff lacked standing as a covered individual with a "disability."[5] More cases focus on the "merits:" whether the plaintiff was treated differently, whether the plaintiff was "qualified" (able to perform the essential functions of the job with or without a reasonable accommodation), and whether the employer and employee followed their respective reasonable accommodation obligations.

The *Weaving* case takes on significance against the backdrop of these trends.

Facts and Background in *Weaving*: Good Cop, Bad Cop?

The plaintiff in *Weaving* was diagnosed with ADHD as a child, but initially believed that he had outgrown the condition as an adult. Over his employment history as a police officer and investigator, he received mixed reviews: sometimes described as aloof and abrasive, but also rated as helpful, competent and hard working. He joined the Hillsboro, Oregon Police Department (HPD) in 2006. While at the HPD, the plaintiff had some interpersonal difficulties with other officers and subordinates, who complained about his acerbic, sarcastic, patronizing and sometimes demeaning behavior. The HPD placed him on paid administrative leave in 2009 (after the ADAAA went into effect) pending the investigation of a subordinate's complaint alleging inappropriately harsh and bullying treatment by the plaintiff. During this leave period, the plaintiff sought an after-the-fact evaluation by a mental health professional, who concluded that some of his interpersonal difficulties and lack of empathy for others were attributable to his continuing ADHD. The plaintiff advised the HPD of his condition and asked for accommodations, including reinstatement and the opportunity to improve in his dealings with others. Shortly thereafter, the HPD concluded its investigation, and found that the plaintiff "fostered a hostile work environment for his subordinates and peers," was "tyrannical, unapproachable, non-communicative, belittling, demeaning, threatening, intimidating, arrogant and vindictive." It noted that he "does not possess adequate emotional intelligence to successfully work in a team environment, much less lead a team of police officers."

The HPD terminated the plaintiff's employment, and the plaintiff sued under the ADA. He claimed that he had a disability because his ADHD substantially limited his major life activities of working and interacting with others. He further claimed that his discharge occurred after he revealed his ADHD condition and asked for a second chance. A jury found that the plaintiff had a disability, and was terminated because of his disability. The trial court awarded him over half a million dollars in compensatory, back pay, and front pay damages, plus attorney's fees. HPD filed a motion for judgment based on insufficient evidence to support the verdict—which the trial court denied. HPD then appealed.

The Appellate Court's Finding of *No* Disability

The Ninth Circuit reversed, holding that the jury could not have reasonably found that ADHD substantially limited the plaintiff's ability to work or interact with others. It examined the EEOC's ADAAA regulations, which call for an individualized assessment of whether a condition is substantially limiting, and explain that:

> An impairment is a disability . . . if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting.[6]

Even under this more relaxed standard, the court held that the plaintiff was not substantially limited in the major life activity of working either a range of jobs or in the plaintiff's chosen field. It noted that he was able to succeed over his police officer career, but for the flaws in his interpersonal skills. The court then visited the major life activity of "interacting with others." Looking to pre-ADAAA precedent, the court recognized that "[m]ere trouble getting along with coworkers is not sufficient to show a substantial limitation."[7] It contrasted cases involving plaintiffs who were barely functional in their interactions with others. The plaintiff in *Weaving*, the court recognized, "was able to engage in normal social interactions." "His interpersonal problems existed almost exclusively in his interactions with his peers and subordinates. He had little, if any, difficulty comporting himself appropriately with his supervisors." It held that his "ADHD may well have limited his ability to get along with others. But that is not the same as a substantial limitation on the ability to interact with others." Cantankerous behavior does not equate to the required substantial limitation.

5 Stephen F. Befort, *An Empirical Examination of Case Outcomes Under the ADA Amendments Act*, 70 Wash. & Lee L. Rev. 2027 (2013).

6 29 C.F.R. § 1630.2(j)(1)(ii).

7 *Citing McAlindin v. County of San Diego*, 192 F.3d 1226, 1235 (9th Cir. 1999).

"To hold otherwise," the court reasoned, "would be to expose to potential ADA liability employers who take adverse employment actions against ill-tempered employees who create a hostile workplace environment for their colleagues."

Dissent Cries Foul

A lengthy dissent chided the majority for usurping the jury's role by reweighing the evidence and holding that the plaintiff "isn't disabled, he's just a jerk." Noting that the plaintiff's weak "emotional intelligence" was both the driving force behind his discharge as well as a recognized symptom of ADHD, the dissent opined that the jury had sufficient evidence from which to conclude that the former officer had a "disability," and that its verdict therefore should not be disturbed. His condition did not need to render him incapacitated in order to be substantially limited in the major life activity of interacting with others. The evidence that his condition made him "hostile" and "unapproachable to his coworkers" was sufficient, according to the dissent. It concluded that "[t]he law protects the disabled, not the likeable."

The Tempered Lesson That "Nostalgia Ain't What It Used to Be"

Blaming boorish behavior on a physical or mental impairment does not necessarily buy protection under the ADA. Yet, the *Weaving* case does not mean that persons with ADHD will never have "disabilities" under the ADA, or that weak "emotional intelligence" need never be accommodated in appropriate circumstances. It does not and will not return employers to pre-ADAAA days, when employers won a high percentage of cases by arguing that the plaintiff was not "substantially limited" in a major life activity, and therefore did not have a "disability." Under the old ADA and now under the ADAAA, it is never a safe strategy to rely exclusively on the argument that a plaintiff does not have a "disability"—and therefore is not protected. The *Weaving* decision does, however, underscore that this defense need not be abandoned altogether.

Even under the ADAAA, not every physical or mental impairment amounts to a "disability." In certain cases, arguing "no disability" may still be effective. The most reliable defense, however, is full and fastidious compliance with ADA obligations. Employers need to take the fluid accommodation process seriously when any employee raises the issue of disability and requests help. When faced with ADA claims, employers should be fully prepared to argue that a plaintiff was treated equally, was no longer "qualified" for a job, or that accommodations would not have rendered the plaintiff "qualified." Arguing "no disability" is now reserved for "extra credit."

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