A Smattering of ADA Cases Worth Noting for the Past Three Years (2019 to present)

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Gil v. Winn-Dixie stores (2021)

- Plaintiff with visual impairment filed Title III lawsuit in Southern District of Florida after he was unable to navigate and/or use defendant's website with his screen reader
- Website does not sell any products therein
- Customers can, however, refill prescriptions and apply RX coupons to their medications on the website

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Gil v Win-Dixie Stores

- Trial court ruled in favor of plaintiff, citing that defendant's website is "heavily integrated" with its in-store sales operations
- Eleventh Circuit Court reversed and remanded case back to trial court, citing the ordinary meaning of "public accommodation" under Title III not to include websites

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Rossman v. Dollar General Corporation et al (6:18-cv-00573

- Wheelchair user filed suit after she was unable to access the aisles of the Dollar General store because of boxes and other obstructions placed therein
- Suits across the country were joined, and eventually became certified as a class action lawsuit

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Dollar General Settlement

- Dollar General does not admit to any liability or wrongdoing in the settlement
- Dollar General will not pay out any monetary relief to class members, but will pay $1,000 to each of the lead plaintiffs
- Dollar General will stop placing boxes and unshelved items in the path of the aisles in stores
- Dollar General will train employees on disability awareness
- Dollar General will conduct quarterly ADA checks as part of its routine store inspection procedure

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Dude! Where's My Counter Space??

- Kong v. Mana Inv. Co. LLC, et al., 61 NDLR 116 (9th Cir. 2020);

- Customer in wheelchair visited coffee shop with a counter with a "parallel approach" forcing approach from a side angle due to no knee clearance underneath. The counter was 36 inches long and 36'' high.
- He also alleged that the counter surface was crowded with merchandise and displays" -- narrowing the clear width to less than 36'' violating the ADA maintenance provision requiring accessible elements to be clear of obstruction.

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Court Said No Violation Found

- Court disagreed explaining that an exception in ADA Standards "contemplates" counters less than 36" long when the counter is at an accessible height of 36" inches or lower.
- Because Section 904.4.1 permits a counter built to be less than 36" long, the coffee shop did not violate the counter design standard.
- Coffee shop is not required to "maintain" 36" of usable counter space because the CFR maintenance requirements cannot be more stringent than the [New Construction] scoping requirements.

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Architectural Barrier Removal Lessons Anyone?

- The Readily Achievable Barrier Removal standard applicable to Existing Facilities should not be enforced via strict application of the ADA 2010 Standards because they merely serve as a "guide" for readily achievable barrier removal without imposing undue burden;
- Too many ADA "drive by lawsuits" wrongly apply ADA New Construction standards to Existing Facilities.

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Bridges et al. v. Houston Methodist Hospital (2021)

- Plaintiff, joined by 116 fellow Methodist employees, argues that defendant coercing employees to take thee COVID-19 vaccination
- Defendant contends that employees are not required to take the vaccine, and that if employees choose not to be vaccinated, then they can work somewhere else

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Bridges et al. v. Houston Methodist Hospital

- Federal trial court found that employers can require their employees to be vaccinated as a condition of employment in exchange for remuneration
- EEOC guidance permits employers to require vaccination so long as employers make reasonable accommodations for employees upon request
- Court also stated that defendant implemented such a requirement in the best interest of its employees, staff, patients and their families

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An Elbow Injury? What Disability?

- Skerce v. Torgeson Elec. Co., 63 NDLR 36 (10th Cir. 2021);
- Electrician with diabetes injured elbow at work. Employer accommodated his work restrictions with light duty when available. When it was not available, he was paid by workers' comp. Two days after he let the company know he was cleared for full-duty work, the company terminated the worker based on "companywide layoffs."

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Summary Judgment based on 1990 ADA Led Jury to Erroneous Conclusion

- District Court held temporary elbow injury not protected as a disability under 1990 ADA;
- So case wrongly went to trial based on his diabetes to determine whether he had a covered disability. A jury found for the company on the ADA claim based on short duration of elbow injury as a disability.

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Wrong! Appeals Court Says Duration of Disability is Irrelevant

- Skerce v. Torgeson Elec. Co., 63 NDLR 36 (10th Cir. 2021);
- Court emphasized electrician's elbow injury prevented work for three months and limited lifting to 10 pounds for at least two months. He asserted that his injury substantially limited major life activities of performing manual tasks, lifting, and working. This means temporary injury could qualify as a disability because "duration of disability" is irrelevant under ADAAA. Instead, issue is whether the injury substantially limits one or more major life activities.

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It's Only a Migraine! Get Back to Work!

Woolf v. Strada, et al., 60 NDLR 137, No. 19-860 (2d Cir. 02/06/20);

- Sales representative had migraines that worsened while receiving increasingly poor performance reviews. He asked for a transfer within the company but was denied for being in poor standing. After a verbal warning worker informed HR and supervisors about his severe migraines.
- His neurologist explained that work-related stress was the "primary trigger" for the migraines and that he was at risk of a stroke or heart attack. Neurologist added that, absent a change in the patient's current work environment, "a medical leave of absence … alone will not significantly mitigate this stress."
- Employee asked that instead of a transfer he be permitted to perform same job with different supervisors. His request was denied and he began taking intermittent medical leave. He was terminated after another low performance review.

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District Court Erroneous Decision Based on 1990 ADA, Again!

- District Court granted summary judgment for employer on the grounds that sales rep was not disabled within 1990 ADA meaning of disability because he did not show he was substantially limited in a major life activity of working;
- This court used "working" as a physical activity that in their view was not substantially limiting; i.e., Where an employee's condition leaves him unable to perform only a single, specific job; he is not substantially impaired in the major life activity of working!

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Yes, the Appeals Court also Forgot ADAAA!

- Appeals court interpreted facts against employee: "… While the migraines affected his performance at work, he admitted that the migraines were related to stress caused by working under his direct supervisors and that he believed he could perform the same job if he were transferred to a different location or managed by different supervisors;
- Because he did not show that his migraines substantially limited his ability to work in a class or broad range of jobs, he did not have a disability covered by ADA.

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Take Away Lesson 1

- District and Appeals courts keep ignoring ADAAA shift of burden requiring employer to FIRST engage in "interactive process" and consider reasonable accommodations and avoid overly scientific analysis of disability;
- Courts erred by ignoring ADAAA broader definition of "disability" and wrongly reasoning that worker must be unable to perform a "broad range of jobs" before being found as "substantially limited" in major life activity of working; i.e., should have considered effect of Migraines on several major life activities; e.g., concentrating, thinking, seeing, walking, standing, etc.

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Take Away Lesson 2

- Even in 2021 courts still erroneously apply 1990 ADA legal frameworks no longer valid under 2008 ADAAA.
- Plaintiff or legal counsel MUST plead CORRECT applicable law; call out court on incorrect application of law; be ABSOLUTLEY accurate and STRATEGIC presenting facts because courts WILL USE FACTS against the plaintiff;
- Courts WILL NOT, in most cases, correct pleadings applying old or incorrect law – e.g. 1990 ADA.

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Take Away Lesson 3

- Clearly understand complex ADA legal frameworks; e.g., Interactive Process, Episodic/Temporary Disability as protected if Substantially Limiting, Reasonable Accommodation, etc.
- Apply ADAAA 9 Rules of Construction and Burden Shift to prove/disprove employer failures.
- Strategize ADA claims; e.g., whether employer first engaged in Interactive Process, failed to accommodate, Regarded As, Retaliated, etc.

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Where is HR When Conflicts Arise at Work?

- HR still wrongly begins reasonable accommodation process by engaging in overly-scientific analysis of "disability" INSTEAD of first engaging in Interactive Process;
- HR still wrongly counts 6 months or less duration as indicative of no covered disability instead of first determining whether episodic/temporary condition poses substantial limitation;
- HR still wrongly requires employees to return to work 100% healed before allowing return to work;
- HR typically fails to understand "regarded as" prong of definition of "disability."

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Do Courts Really Understand the "Regarded as" Prong of the ADA Definition of Disability?

- Garner v. Vendtech-SGI LLC, 63 NDLR 77 (E.D. Mo. 2021)

- Armed security officer claimed having small hands preventing discharge of assigned firearm. When hired she failed her first qualification test but eventually passed and later passed her 6 month requalification test three times. During that test she also failed 3 times.
- On her next requalification attempt she failed twice and was sent to remedial training. After training she failed twice more and complained that her firearm did not function properly. The company found the gun to be in working order. She was terminated for failure to complete weapons qualification.

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Learn from Bad Case Decisions

- District court granted summary judgment to employer;
- Employee's allegation that her hands were too small to operate assigned firearm was, without evidence of a medical diagnosis or underlying condition, insufficient to show a physical impairment covered by ADA;
- She did not allege she had an underlying condition that left her with unusually small hand and testified in deposition that her hands were of average size and did not have a medical diagnosis of small hands as disability.

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District Court Erroneous Reasoning Should Lead to Appeal

- Court reasoned that when the major life activity at issue is "working," the employee "must be "unable to work in a broad class of jobs;"
- Court uses major life activity of "working" against plaintiff to avoid recognizing other major life activities – even if albeit the "working activity" concept was correctly interpreted in this poorly pleaded case.

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Courts Ignore Rules of Construction - "Major Life Activity" [29 C.F.R. Sec 1630.2(j)(1)(i-v) and (viii)]

- An impairment need not prevent or severely or significantly limit a major life activity to be "substantially limiting" - not every impairment will be a disability;
- "substantially limits" should be construed broadly in favor of expansive coverage to the maximum extent permitted by ADA terms;
- Determination of whether impairment substantially limits a major life activity requires an individualized assessment;
- Congress' directs primary focus of ADA is whether discrimination occurred - determination of disability should not require extensive analysis;
- Determination of "major life activity" is done by comparison to most people and will not usually require scientific, medical, or statistical evidence unless appropriate;
- Individual need only be substantially limited, or have a record of a substantial limitation, in one major life activity for coverage under first or second prong of "disability" definition.

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Court Wrongly Infuses "Regarded As" Discussion Against Employee

- Court says: it is not enough for plaintiff to demonstrate that she is "regarded as" unable to perform a particular job or type of job. To be regarded as substantially limited in the major life activity of working, she must be regarded as precluded from a substantial class of jobs.
- WRONG! Employee did not plead "regarded as" claim against employer. Yet court wrongly infuses the "regarded as" prong into its incorrect analysis of "working" as a substantial limitation.
- One simply cannot make this up folks!

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Let's Understand the Regarded As ADA Protection 1

- Pleading "small hands" as disability was ill advised without medical documentation to support substantial limitation of major life activity in addition to self-contradiction by admitting hands were average size!;
- She should have claimed "regarded as" discrimination; i.e., she was fired for inability to pass shooting test because her grip was inconsistent with assigned weapon. If she had claimed that employer perceived her unqualified because her smaller grip posed a problem employer refused to allow correction with adequate size weapon, she might have been able to prove that employer regarded her as having a disability that unfairly disqualified her from job.
- Medical documentation would not be necessary because there is no disability!

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Let's Understand the Regarded As ADA Protection 2

- Lyons v. Katy Independent School District, 5th Cir., No. 19-20293 (June 29, 2020), petition for rehearing denied (July 27, 2020);
- Court noted that ADA and its implementing regulations provide that regarded-as status "shall not apply to impairments that are transitory and minor."
- Court reasoned that "[any impairment as a result of [plaintiff's] … surgery was objectively transitory and minor by her own admission because the actual or expected duration of any impairment related to the lap-band procedure was less than six months.;
- Remember: Duration is irrelevant. Teacher should have claimed the substantial limitation of the temporary impairment instead of using "regarded as" claim.

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ACB of New York, Inc. v. City of New York

- ACB of New York, on behalf of named plaintiffs and a class of people with vision impairments, filed suit, alleging that defendant's intersections are not accessible under Title II
- Plaintiffs argue that people with vision impairments do not have meaningful or equal access to defendant's pedestrian grid

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ACB of New York, Inc. v. City of New York (2021)

- DOJ Statement of Interest asserts the final plan should:
- (1) ensure that newly constructed and altered signalized intersections are accessible and that existing signalized intersections are modified such that individuals with vision-related disabilities have an equal opportunity to safely and efficiently travel within the pedestrian grid; (2) allow for the use of alternative methods to provide individuals with vision-related disabilities access to the pedestrian grid only where those methods are as effective as APS and prioritize integration; (3) consider financial and administrative burden only in choosing between equally effective alternatives, as the City has forfeited the argument that costs establish a defense to liability, *see* Order at 37; and (4) be implemented expeditiously, while prioritizing access to important areas of public life and intersections that present heightened safety risks.

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A. V. v. Douglas County School District

- Department of Justice Statement of Interest details defendant's Title II obligations through its employees and contractors, including its school resource officers
- Plaintiff was not required to request reasonable modifications under Title II
- Defendant had ample prior knowledge of plaintiff's disability and was required to make reasonable modifications during the arrest
- The instant arrest did not occur under exigent circumstances, as plaintiff did not pose a significant danger in the circumstances, so defendant was still required to make reasonable modifications under Title II

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A. V. v. Douglas County School District (2021)

- Plaintiff, an eleven-year-old child with Autism Spectrum Disorder was sitting and talking with his therapist
- School resource officers handcuffed plaintiff after he poked a classmate with a pencil earlier in the day
- Plaintiff asked that he be able to have his dad with him and to be uncuffed
- Plaintiff stated that defendant knew that he had ASD through multiple channels
- Defendant argued that plaintiff never request reasonable modifications

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Wilson v. City of Southlake (2019)

- Plaintiff appellant had one prior incident in which he became angry and threw items in his teacher's room in the presence of said teacher and school guidance counselor
- Appellant exhibited similar behavior in a second incident, during which guidance counselor called for school resource officer to just stand back and observe
- Counselor disclosed that appellant had multiple behavioral and mental disabilities to the school resource officer
- Both parties stipulated that appellant was whirling a jump rope around, claiming that it was a homemade num-chuk
- Officer heckled appellant, calling him offensive names and ignoring the fact that appellant had disabilities

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Wilson v. City of Southlake

- Fifth Circuit found there to be a genuine dispute in material fact of whether appellant whirling the jump round around was a dangerous or harmful behavior
- Court also found that there were no exigent circumstances because school resource officer arrested appellant, but all the while continued to call him names and failed to acknowledge his disabilities
- Court found that officer relied on appellant's past behavior, not his current behavior, when he wrongly asserted exigent circumstances during the arrest
- Court reversed and remanded case to trial court because there was genuine dispute of material fact

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And Now… for a Proper Application of Regarded As – Post Secondary Education

- Schimkewitsch v. New York Inst. of Tech., 61 NDLR 117 (E.D.N.Y. 2020);
- Prior to his diagnosis of anxiety disorder, a student in a physician assistant program with a 3.5 GPA appealed a grade for one of his classes and was required to appear before the academic standing committee. After the meeting, a professor allegedly advised him to "get psychiatric counseling or executive coaching.
- During a clinical rotation the student took a break to get some sleep. After three hours, he was awakened and sent home by his preceptor. At a meeting regarding the sleeping incident, false accusations alleged that he had engaged in behavior that "risked patient harm."

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Student Proved Regarded As Claim

- Statement by professor that he should get "psychological counseling or executive coaching" was followed by: 1) emergency suspension; 2) required to obtain a psychiatric clearance; 3) a diagnosis from a school-affiliated psychiatrist certifying he was fit to return to school; and 4) expulsion for violation of school policies.
- Taken together such adverse actions were sufficient to support a claim of discrimination based on perceived disability.

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Disability Not Found Based on Court Mischaracterization of Facts

- Court said while student contended anxiety disorder interfered with his ability to pursue studies, the allegations in his complaint undermined this assertion. His psychiatrist certified that his diagnosis did not impact his ability to participate in the program and he alleged that he carried a GPA of 3.5.

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Take-Away Lessons for Education-Related Disability Issues

- This case went back to using above average GPA to imply that if one has a good GPA, then one must not need an accommodation for a disability.
- This kind of mostly post-secondary related view became ill-fated after the ubiquitous California case that foreclosed a student from attending a graduate school via denial of entrance exam accommodations merely because he had an above average GPA in college.
- A psychiatrist diagnosis of a disorder while recommending that the student resume studies does not foreclose having a disability that may necessitate reasonable accommodation.

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Questions?

Please submit your questions in the Q&A Area

Questions submitted in the Chat area will not be addressed

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