A Comparison of the Definition of "Disability" in the Americans With Disabilities Act, The New York State Human Rights Law, and The New York City Human Rights Law
July 1, 2001

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May 11 - 12, 2001

A. Introduction

We are all accustomed to the notion that a "disability" is an impairment of some kind, whether physical or psychological. If discrimination because of disability is unlawful, it would seem, then an employer should not be allowed to fire someone just because there's something "wrong" with them. An examination and comparison of the definitions of "disability" in the Americans with Disabilities Act, the New York State Human Rights Law, and the New York City Human Rights Law -- definitions which set out most of the principles that distinguish those who are protected by these laws from those who are not -- reveals that this notion is much more accurate under the State and City laws than under the federal ADA. It follows that the State and City laws against disability discrimination are far more effective for plaintiffs and formidable for defendants than the ADA. This paper will set out and compare these differences and examine illustrative case law that focuses on those differences. For a discussion of the scope of disability discrimination protections under California law, see California Law Broadens Protections for Disabled Employees and Applicants.

B. The Statutory Definitions

1. The Americans with Disabilities Act ("ADA")

a. The ADA bars employment discrimination against "a qualified individual with a disability" because of the person's disability. 42 U.S.C. § 12112(a).
b. A "qualified individual with a disability" is someone who (i) has a disability and who, (ii) with or without reasonable accommodation, can perform (iii) the essential functions of the position at issue. 42 U.S.C. § 12111(8).

c. Section 3 of the ADA, 42 U.S.C. § 12102(2), provides that the term 'disability' means:

(A) a physical or mental impairment that substantially limits one or more of the major life activities of an individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

(Emphasis added.)

d. These qualifiers -- a disability is not just an impairment, but an impairment that "substantially limits" one or more "major life activities" -- suggest that there is a lot more to demonstrating that one is in the class protected by the ADA than just having an impairment (i.e., more than just "having something wrong" with oneself). By the terms of the statute, if a person's impairment limits a "major life activity" but does not do so "substantially," or if it "substantially limits" a "life activity" that is not "major," then her impairment is not a "disability" and she is not protected by the ADA. And while the ADA protects people from discrimination because they are perceived as having a disability, or because they have a record of disability, itprotects only those who have a record of or are perceived as having such a disability; that is, not just an impairment but one that "substantially limits" a "major life activity."

e. This is much different from protecting people against discrimination because of sex, or race, for example. Usually, it is fairly clear whether the plaintiff is in the protected class in a sex or race discrimination case. But because of the ADA's definition of "disability," the matter of who is protected by the ADA and who is not protected is not at all clear.

2. The New York State Human Rights Law ("NYSHRL")

a. The NYSHRL prohibits employment discrimination because of disability. N.Y. Exec. Law § 296(2).

b. "Disability" is defined as

"(a) a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques, or

"(b) a record of such impairment, or

"(c) a condition regarded by others as such an impairment, provided, however, that in all provisions of this article dealing with employment, the term shall be limited to disabilities which, upon the provision of reasonable accommodations, do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held."

N.Y. Exec. Law § 292(21) (emphasis added).

c. The lack of adjectival qualifiers like those contained in the ADA's definition of "disability" suggests that the NYSHRL's definition is much broader than that of the ADA, and that it is much easier to figure out who is protected and who is not. If someone has an impairment of an "anatomical, physiological, genetic or neurological condition" that can be medically diagnosed, and if the impairment does not prevent the plaintiff from performing the activities of the job at issue in a reasonable manner (or would not prevent such performance upon the employer's providing reasonable accommodations), then she has a "disability" within the meaning of the NYSHRL and she is protected. Not surprisingly, there is much less motion practice addressed to whether the plaintiff is protected by the NYSHRL than there is in ADA cases.

3. The New York City Human Rights Law ("NYCHRL")

a. The NYCHRL prohibits discrimination "because of the actual or perceived . . . disability of any person." N.Y.C. Admin. Code § 8-107(1)(b). Section 8-107(15) establishes an obligation on the part of employers to make "reasonable accommodation to enable a person with a disability to satisfy the essential prerequisites of a job" where the disability is known to the employer, although it is an affirmative defense that the plaintiff could not perform the "essential requisites of the job" even with a reasonable accommodation.

b. Definition of "disability" in the NYCHRL.

(i) "Disability" means "any physical, medical, mental or psychological impairment, or a history or record of such impairment." Section 8-102(16).

(ii) "Physical, medical, mental or psychological impairment" means (a) "an impairment of any system of the body, including, but not limited to: the neurological system; the musculoskeletal system; the special sense organs and respiratory organs, including, but not limited to, speech organs; the cardiovascular system; the reproductive system; the digestive and genito-urinary systems; the hemic and lymphatic systems; the immunological systems; the skin; and the endocrine system;" or (b) "a mental or psychological impairment."

c. Even disregarding the fact that the definition of "mental or psychological impairment" thus turns out to be "mental or psychological impairment," the NYCHRL definition of "disability" appears to be broader even than that contained in the NYSHRL. While the NYSHRL requires the impairment at least to be "demonstrable by medically accepted clinical or laboratory diagnostic techniques," there is no such requirement in the NYCHRL definition. Moreover, under the State law, at least by clear implication, the definition excludes conditions that prevent the complainant from performing the "activities involved in the job or occupation" at issue, and so it would appear that the complainant has the burden of proving that she could perform those activities if provided with reasonable accommodation. Under the City law, the issue of whether the complainant can or cannot perform "the essential requisites of the job" if the employer provides a reasonable accommodation is an affirmative defense for the employer to prove.
C. Cases That Discuss the Differences Between These Definitions

1. State Division of Human Rights v. Xerox Corp., 65 N.Y.2d 213, 491 N.Y.S.2d 106 (1985). The employer rescinded a job offer it had extended to plaintiff because the physician who conducted her pre-employment physical examination had diagnosed her as having the "disease" of "gross obesity," a condition that posed a significant risk of disability that could trigger claims under the company's insurance policies. The diagnosis was based on her being about 100 pounds over the weight range for her height according to a standard height and weight table. The plaintiff claimed her weight did not prevent her from performing any task or function, and had not interfered with her ability to raise five young children after her husband died.

The Court of Appeals noted as a threshold issue that "if a person suffers an impairment, employment may not be denied because of any actual or perceived undesirable effect ... on disability or life insurance programs. ... [E]mployment could only be refused if the condition was related to the performance of the duties of the position." 65 N.Y.2d at 218.

Then the Court rejected the employer's contention that the plaintiff did not have an impairment because there was no evidence that her condition placed any limitation on her physical or mental abilities:

[The employer's argument] might have some force under typical disability or handicap statutes narrowly defining the terms in the ordinary sense to include only physical or mental conditions which limit the ability to perform certain activities (see [the federal Vocational Rehabilitation Act, which contains the same definition of "disability" as the subsequently-enacted ADA], defining a "handicapped individual" as a person who "has a physical or mental impairment which substantially limits one or more of such person's major life activities"). However in New York, the term "disability" is more broadly defined. The statute provides that disabilities are not limited to physical or mental impairments, but may also include "medical" impairments. In addition, to qualify as a disability, the condition may manifest itself in one of two ways: (1) by preventing the exercise of a normal bodily function or (2) by being "demonstrable by medically accepted clinical or laboratory diagnostic techniques" (Executive Law § 292[20] [now 21]).
Fairly read, the statute covers a range of conditions varying in degree from those involving the loss of a bodily function to those which are merely diagnosable medical anomalies which impair bodily integrity and thus may lead to more serious conditions in the future. Disabilities, particularly those resulting from disease, often develop gradually and, under the statutory definition, an employer cannot deny employment simply because the condition has been detected before it has actually begun to produce deleterious effects. Thus, . . . complainant's obese condition itself, which was clinically diagnosed and found to render her medically unsuitable by the [employer's] own physician, constituted an impairment and therefore a disability within the contemplation of the statute.

65 N.Y.2d at 218-19 (emphasis added).

2. Hazeldine v. Beverage Media, Ltd., 954 F.Supp. 697 (S.D.N.Y. 1997). Plaintiff claimed that she was fired because of her obesity in violation of the ADA and the NYSHRL and the NYCHRL. The employer argued that her obesity was not a "disability" within the meaning of these statutes. The court dismissed her ADA claim because her obesity was not a "disability" within the meaning of the ADA. 954 F.Supp. at 702-06. However, it denied summary judgment on her NYSHRL claim, following Xerox, supra, id. at 706-07, and on her NYCHRL claim because the NYCHRL requires only that the condition "impair a body system," and there was evidence that plaintiff's obesity caused her to twist and bruise her ankles, to have heart palpitations and shortness of breath, and to experience hypertension and, some years earlier, "coronary insufficiency." This evidence would suffice to support a finding that plaintiff had a physical or medical impairment that impaired either her musculoskeletal or cardiovascular systems, and which therefore was a "disability" within the meaning of the NYCHRL. Id. at 707.

The ADA analysis proceeded from the requirement that in order to establish a prima facie case of disability discrimination, the plaintiff must show "(a) that she is disabled, (b) that she is otherwise qualified to perform her job; and, (3) that she was discharged because of her disability." Id. at 702, citing Wernick v. Federal Reserve Bank of New York, 91 F.3d 379, 383 (2d Cir. 1996); Heilweil v. Mount Sinai Hospital, 32 F.3d 718, 722 (2d Cir. 1994). If she did not have a "disability," she did not have a prima facie case. And she had no "disability" within the meaning of the ADA because while she had an impairment and proffered evidence that it limited her in certain major life activities, the limitations were not "substantial." The court observed:
To be substantially limited under the ADA, an individual must be "unable to perform a major life activity that the average person in the general population can perform" or be "significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity" compared to the average person. 29 C.F.R. § 1630.2(j)(1). In determining whether an individual is substantially limited, the nature and severity of the impairment, the duration or expected duration of the impairment, and the actual or expected permanent or long term impact of or resulting from the impairment should be considered. 29 C.F.R. § 1630.2(j)(2).

However, an impairment may affect an individual’s life without becoming disabling.

954 F.Supp. at 703 (footnote, citations omitted). Then the court considered plaintiff’s testimony that she could not shovel snow or engage in other strenuous exercise, and that she is limited in her ability to lift and carry objects weighing more than ten pounds; she also claimed that she could not kneel, and had to kick dropped objects close to a chair so that she could pick them up while sitting, and that she lost her breath and had to stop to rest after climbing stairs, raking leaves, doing housework, or walking more than five blocks. The court held, "While it is reasonable to conclude from this evidence that plaintiff's obesity affects her ability to engage in everyday activities, these allegations are not sufficient to support the conclusion that her weight substantially limits a major life activity." Id. at 703-04.

3. Reeves v. Johnson Controls World Services, Inc., 140 F.3d 144 (2d Cir. 1998). The plaintiff in Reeves was an operations supervisor at the Westchester County Airport who suffered from panic disorder with agoraphobia. When fired for what he thought was a pretext for his agoraphobia (which, of course, he asserted was either a disability or else was perceived by his employer to be a disability), he sued under the ADA and the NYSHRL, claiming that the panic attacks and symptoms of anxiety he suffered when he was alone in unfamiliar places, when he traveled in an airplane, or when he got caught in traffic tie-ups "deprived him of the major life activity of everyday mobility." He also asserted that his condition constituted a "mental . . . impairment . . . demonstrable by medically accepted clinical . . . diagnostic techniques" within the meaning of the NYSHRL. The district court granted the employer's motion for summary judgment.

The Second Circuit, while noting that the determination of whether an individual is disabled within the meaning of the ADA "is made on an individualized, case-by-case basis," 140 F.3d at 151, held that the "major life activity" prong of the ADA definition of disability is a generalized one determined by reference to what the ADA, not the individual, contemplates are major life activities, and that a plaintiff usually cannot tailor the "life activity" at issue in terms of his

own impairment: "Where a plaintiff is sufficiently mobile to travel to and from work on a regular basis, but is unable to travel over bridges or through tunnels, to board trains unaccompanied, or to drive along routes prone to traffic tie-ups and over high roads, he has not alleged a limitation of the kind of 'everyday mobility' that might constitute a 'major life activity' within the meaning of the ADA." Id. at 153. Therefore, the court affirmed dismissal of the ADA claim because plaintiff did not have a "disability" within the meaning of the ADA.

The court also affirmed dismissal of the plaintiff's perceived disability claim under the ADA because "the mere fact that an employer is aware of an employee's impairment is insufficient to demonstrate either that the employer regarded the employee as disabled or that that perception caused the adverse employment action," and plaintiff had not specified which major life activity defendants allegedly perceived as substantially limited by his agoraphobia. In addition, not only had the court already rejected "everyday mobility" as a "major life activity" but in addition, plaintiff had presented no evidence that his employer perceived it as such. Id. (citation omitted).

The outcome was much different for the NYSHRL claims. The Second Circuit observed that the district court had relied erroneously on a series of federal district court decisions in New York which had ignored Xerox, supra, and held on the basis of the legislative history of the NYSHRL that the NYSHRL definition of "disability" was intended to mirror the definition that is now contained in the ADA. Accordingly, those courts had held that to qualify as a "disability" within the meaning of the NYSHRL, the condition must be shown to "prevent the exercise of a normal bodily function" and that this phrase was similar in meaning to "substantially limits a major life activity." The Second Circuit rejected this construction (despite the fact that the it found that the legislative history argument "was a strong one"), not only because it ignores the fact that the NYSHRL definition is framed in the disjunctive (a disability is an impairment that prevents the exercise of a bodily function "OR" which is subject to clinical or laboratory diagnostic techniques) but also because the Court of Appeals had held in Xerox that the NYSHRL definition of "disability" is much broader than that set forth in the ADA:

This literal reading of the statute, taking no account of the seemingly clear legislative purpose to enact a definition of disability coextensive with comparable federal statutes, treats a medically diagnosable impairment as necessarily a disability for purposes of the NYHRL. "Thus, an individual can be disabled under the [NYHRL] if his or her impairment is demonstrable by medically accepted techniques; it is not required that the impairment substantially limit
that individual's normal activities."

140 F.3d at 155-56 (citation to Hazeldine, supra, omitted.)

D. Cases That Raise Illustrative Issues

1. Temporary Disabilities. While there is as yet in our Circuit no rule that temporary injuries are *per se* unprotected by the ADA, the Second Circuit has held that a temporary injury that lasted only three and a half months was too short in duration to be substantially impairing. *Adams v. Citizens Advice Bureau*, 187 F.3d 315 (2d Cir. 1999); see also, *Charles v. D&F Mason Inc.*, 2000 U.S. App. LEXIS 23943 (2d Cir. 2000) (unpublished).

This is not necessarily the case under the NYSHRL or the NYCHR, however. In *Fagan v. United International Insurance Co.*, 128 F.Supp.2d 182 (S.D.N.Y. 2001), the plaintiff was in an automobile accident in February 1997, severely injuring both knees. He continued to work until November 1997, primarily out of his home (consistent with his job responsibilities), without requesting any accommodation. Then he took two weeks off for knee surgery, and returned without any medical restrictions. On June 2, 1998 he had additional knee surgery. Plaintiff claimed he intended to ask for accommodation, but he was fired on June 29, 1998 for poor job performance before he had a chance to do so. The court granted the employer's motion for summary judgment on the ADA claim because a "transitory impairment is not considered substantially limiting." However, as regards the NYSHRL and NYCHR claims, the court observed that the standard for "disability" is much broader than that under the ADA, although it dismissed the entire complaint not on the merits, but on the ground that the ADA claim was the only federal law claim in the case and, having dismissed the federal claim, the court declined to exercise supplemental jurisdiction over the State and City law claims.

2. Corrective measures. At the end of its 1998-99 term, the United States Supreme Court issued three opinions holding that although the inquiry is to be made on a case-by-case basis, an impairment that can be mitigated with medicine or mechanical devices may not constitute a disability under the ADA where, in its corrected state, it does not substantially limit the plaintiff’s major life activities. *Sutton v. United Air Lines, Inc.*, 119 S.Ct. 2139 (1999) (myopia correctable with glasses or contact lenses); *Albertson's, Inc. v. Kirkingburg*, 119 S.Ct. 2163 (1999) (hypertension correctable by medicine); *Murphy v. United Parcel Service, Inc.*, 119 S.Ct. 2133 (1999) (monocular vision correctable by subconscious mechanisms developed in plaintiff’s own brain).

In *Epstein v. Kalvin-Miller, Int'l, Inc.*, 100 F.Supp.2d 222 (S.D.N.Y. 2000), the plaintiff suffered from heart disease and type II diabetes. Considering these conditions in their treated state (as required by the 1999 Supreme Court trilogy), the extent to which they limited plaintiff’s ability to walk was insufficiently significant to constitute a "substantial limitation," even though plaintiff might die if he did not take his medicines. Therefore his ADA claims were dismissed. 100 F.Supp.3d at 225-28. But the NYSHRL claims survived defendant’s motion because plaintiff’s diabetes and heart disease were demonstrable by medically accepted techniques and therefore fell within the NYSHRL definition of "disability," id. at 229-30, irrespective of their amenability to improvement by medication. The court stated specifically that the Supreme Court trilogy on assessing disabilities in their corrected state is "irrelevant to proper construction" of the NYSHRL.

3. **Obesity.** In *Xerox, supra*, the Court of Appeals held that where the employer had rescinded the plaintiff’s offer of employment because her "disease" of "gross obesity" created a risk of disability, her condition constituted a disability within the meaning of the NYSHRL. However, in *Delta Airlines v. New York State Division of Human Rights*, 91 N.Y.2d 65, 689 N.Y.S.2d 1004 (1997), the Court held that the plaintiffs did not have a "disability" within the meaning of the NYSHRL where the reason the plaintiffs were not hired was that their weight was outside the range for their height according to a standard height and weight table. The Court found that *Xerox* was "quite a distinct and legally distinguishable matter" because in that case, the plaintiff’s condition had been clinically diagnosed by the employer’s own physician, who declared her medically unsuitable, while in *Delta* the plaintiffs had failed to "establish that they are medically incapable of meeting Delta’s weight requirements due to some cognizable medical condition. That was crucial in *Xerox* and is utterly absent here. We are satisfied that weight, in and of itself, does not constitute a disability for discrimination qualification purposes and the discrimination claims in that respect are, therefore, correctly unsustainable." 91 N.Y.2d at 73.

4. **The Plaintiff Whose Supervisor Drives Him Crazy.** In *Potter v. Xerox Corp.*, 2001 U.S.App. LEXIS 329 (2d Cir. 2001) (unpublished), the plaintiff, having worked for Xerox for 31 years, left work claiming that he "suffered from panic and anxiety attacks, along with severe depression, resulting from work related stress -- or, more specifically, the stress of working with his supervisor." He asked to return to work for a different supervisor but there were no positions for which he was qualified, so his employment was terminated. He sued under the ADA and for age discrimination. Summary judgment on the ADA claim was properly entered because "if Potter can work any job provided he is assigned to a new supervisor, he is not disabled within the terms of the ADA." Assuming that the "major life activity that he claimed was limited was his ability to work, the court stated, "Because Potter's disability only prevents him
from working in one position -- the position he held under his last supervisor -- Potter's ability to work is not substantially impaired. See Heilweil v. Mount Sinai Hosp., 32 F.3d 718, 721 (2d Cir. 1994) (noting that 'a person found unsuitable for a particular position has not thereby demonstrated an impairment substantially limiting such person's major life activity of working')." 2001 U.S. App. LEXIS 329 at *5 - *6.

Would Potter have been better off suing under the NYSHRL, or the NYCHRL? Lenhoff v. Gordon Peter Getty, 2000 U.S. Dist. LEXIS 9835 (S.D.N.Y., July 17, 2000), suggests maybe not. The plaintiff in Lenhoff was in therapy as a result of job-induced stress. She sued for, inter alia, disability discrimination under the NYSHRL and the NYCHRL, alleging that her discharge was motivated by her employer's perception of her as disabled. The evidence she proffered on the disability issue consisted of (a) the employer's awareness that she was seeing a psychologist for stress, (b) the employer's assertion that her conduct "genuinely scared people" and his belief that certain employer-owned property had to be removed from her home office while she was on vacation because she might destroy it when she returned, and (c) various remarks by supervisors and co-workers to the effect that she was "crazy" and "out of control." The court rejected her claim, concluding that the employer "certainly may have perceived her as suffering from job-induced stress. The other statements . . ., when placed in their proper context, referred to Lenhoff's temperamental conduct, not her mental state. This evidence supports the contention that [the employer], at most, perceived Lenhoff to have a short temper as a result of job-induced stress. However, job-induced stress cannot be considered a disability under the NYSHRL or NYCHRL." Id. at *18 - *19 (citations omitted).

But note Ashker v. International Business Machines, 168 A.D.2d 724, 563 N.Y.S.2d 572 (3d Dep't 1990). The plaintiff alleged that, having worked satisfactorily for 33 years for IBM, one day she was told either to report to the staff psychiatrist or else to see one of her own choosing, as she was considered a danger to herself and to others. (The court noted that there were suggestions, not contained in the record, that she had "displayed argumentative and disruptive behavior."). She saw her own psychiatrist, who opined that there was not much chance of her engaging in violent behavior, but added that she would work better with a more direct management style and said she could return to work immediately. The employer, however, refused to permit her to return to her old position, and she rejected two other positions that were offered to her. She opted to retire, instead, and to sue, claiming that it was a constructive discharge. She sued, inter alia, under the NYSHRL for discrimination based on a perceived disability; i.e., that she was perceived as having a mental disability. The court held that she had adequately pleaded this claim because a disability is "a condition regarded by others as [a physical, mental or medical] impairment . . . which do[es] not prevent the complainant from performing in a reasonable manner the activities involved in the job" at issue. Lenhoff distinguished

Ashker on the grounds (a) that Ashker was decided on a motion to dismiss, and (b) there was no affirmative demand in Lenhoff that plaintiff see a psychiatrist, as there was in Ashker. Lenhoff, 2000 U.S. Dist. LEXIS 9835 at *20.

E. A Practice Pointer

In Fagan, supra, and in cases such as Sacay v. Research Found. of City University of New York, 44 F.Supp.2d 496 (E.D.N. Y. 1999), where the federal courts dismissed ADA claims because the plaintiffs did not have "disabilities" within the meaning of the ADA, the courts dismissed the entire complaints even though the plaintiffs may have had "disabilities" within the meaning of the NYSHRL or the NYCHRL. While the federal court has discretion to exercise supplemental jurisdiction over pendent state claims under the NYSHRL or the NYCHRL after the federal ADA claim is dismissed, it does not always have to exercise that discretion. See Scott v. Flaghouse, Inc., 159 F.3d 1348 (2d Cir. 1998) (unpublished), reported at 1998 WL 536764 (vacating summary judgment on NYSHRL claims and dismissing them upon affirmance of summary judgment on ADA claims, citing Lennon v. Miller, 66 F.3d 416, 426 (2d Cir. 1995)). Defendants should be aware of this issue and address it in their motions for summary judgement, and plaintiffs should be aware of it when they draft their complaints and try to find alternative bases for federal jurisdiction in addition to ADA claims.