GILBERT RUSSELL MCWHERTER PLC
Gateway Plaza | 5409 Maryland Way, Suite 150 | Brentwood, TN 37027 | 615.354.1144 (T) | 731.664.1540 (F)

May 31, 2013

Honorable Judge Sharp
United States District Court
for the Middle District of Tennessee

Re: Letter Brief of Amici in No. 3:10-cv-1230,
Newcomb v. Allergy ENT Associates of Middle Tennessee, P.C.

Dear Judge Sharp:

Amici Tennessee Employment Lawyers Association and the Disability Law and Advocacy Center of Tennessee submit the following letter brief in support of the Plaintiff's Rule 59(e) motion in the instant case.

I. Introduction

Amici write for a limited purpose—to point out legal errors in the Court's analysis of "disability" under the ADA Amendments Act of 2008 (ADAAA).[1] Because the ADAAA's changes are so significant, because there are still relatively few cases interpreting it (particularly in this Circuit), and because past case law deviated from Congressional intent in interpreting the ADA, Amici believe it critical to inform courts of the proper statutory analysis.

Amici's position is that the Court's summary-judgment decision reflects ADAAA errors in prong one and prong three of the disability definition. First, the Court applied the pre-ADAAA analysis of the "regarded as" prong rather than the greatly expanded ADAAA analysis. The law no longer requires proof that the employer mistakenly believed the individual has an impairment that substantially limits a major life activity. Second, with regard to "actual" disability, the Court incorrectly suggested that limitations must be permanent or long term, and appears to have incorrectly assessed the full duration and impact of Plaintiff's condition. The Court also appears to assume that an "actual" disability should reflect a limitation as substantial as do those conditions listed at 29 C.F.R. § 1630.2(j)(3)(iii). Amici argue that this is not the purpose of that regulatory list.

Amici bring these arguments to the Court's attention in an effort to correct perceived errors. The undersigned also note that the Memorandum opinion is now reported on Westlaw and Lexis,[2] and other courts routinely rely on such citations in analyzing the ADAAA. Amici respectfully request that the Court reconsider its disability analysis in order to conform to Congressional intent.

---

[1] Thus, for example, Amici take no position on the Plaintiff's non-disability claims.
[2] *Newcomb v. Allergy & ENT Assocs. of Middle Tenn., P.C.*, 2013 WL 1874257, 2013 U.S. Dist. LEXIS 63377 (M.D. Tenn. May 3, 2013).

II. "Regarded As"

The Court's Memorandum opinion states that: "To establish a 'regarded as' claim under these facts, Newcomb must show that Allergy ENT 'mistakenly believed that she had a physical impairment that substantially limits one or more major life activities.'" Doc. No. 67 at 13, 2013 WL 1874257, at *7. In so holding the Court cited two cases—*Watts v. United Parcel Serv.*, 378 F. App'x 520, 525 (6th Cir. 2010), and *Daugherty v. Sajar Plastics, Inc.*, 544 F.3d 696, 704 (6th Cir. 2008). But both of those cases were decided under pre-ADAAA law,[3] relying on *Sutton v. United Air Lines*, 527 U.S. 471, 489 (1999).[4]

In stark contrast to the above, under the ADAAA an individual is "regarded as" having a disability "if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment *whether or not the impairment limits or is perceived to limit a major life activity*." 42 U.S.C. § 12102(3)(A) (emphasis added). *See also* 29 C.F.R. § 1630.2(*l*)(1).). Judge Nixon recognized and correctly applied this standard in *Saley v. Caney Fork, LLC*, 886 F. Supp. 2d 837, 849–852 (M.D. Tenn. 2012) (denying summary judgment in ADAAA "regarded as" case and explaining appropriate analysis of such claims).

One of the stated purposes of the ADAAA was "to reject the Supreme Court's reasoning in *Sutton v. United Air Lines, Inc.* with regard to coverage under the third prong of the definition of disability …." Pub. L. 110–325, § 2(b)(3), 122 Stat. 3553 (Sep. 25, 2008) (citation omitted).[5] "Congress rejected court decisions that had required an individual to establish that a covered entity perceived him or her to have an impairment that substantially limited a major life activity." 29 C.F.R. Part 1630 App., § 1630.2(l), 76 Fed. Reg. 16978, 17014 (Mar. 25, 2011). *See also Fleck v. WILMAC Corp.*, 2011 WL 1899198, at *6 (E.D. Pa. May 19, 2011) (noting the "ADAAA's de-emphasis on an employer's beliefs as to the severity of a perceived impairment"). Thus, prior "regarded as" case law is superseded by the ADAAA. *Snyder v. Livingston*, 2012 WL 1493863, at *7–8 (N.D. Ind. Apr. 27, 2012); *Dube v. Texas Health and Human Services Comm'n*, 2011 WL 3902762, at *4 (W.D. Tex. Sept. 6, 2011) ("Defendant relies upon cases applying the much narrower, pre-ADAAA definition of "regarded as" disabled, which are not relevant."); *Loperena v. Scott*, 2009 WL 1066253, at *12 n.10 (M.D. Fla. Apr. 21, 2009).

By statute, the proper "regarded as" analysis in this case would ask (1) whether the Plaintiff had an actual or perceived physical or mental impairment, and if so, (2) whether there is sufficient evidence that the Defendant terminated her (or subjected her to other prohibited acts) because of that actual or perceived impairment. 42 U.S.C. § 12102(3)(A). As to the first element, an "impairment" includes any physiological disorder or condition affecting one or more body systems, such as the musculoskeletal system. 29 C.F.R. § 1630.2(h). Plantar fasciitis satisfies this by definition—inflammation of the thick tissue on the bottom of the foot.[6] Even under the

---

[3] *Watts*, *supra*, 378 F. App'x at 525 n.7 ("However, we have recently held that 'the ADA Amendments Act does not apply to pre-amendment conduct.'").

[4] *Watts*, *supra*, 378 F. App'x at 525; *Daugherty*, *supra*, 544 F.3d at 704.

[5] The statutory purposes of the ADAAA are also set out in the Historical and Statutory Notes to 42 U.S.C. § 12101.

[6] *See, e.g.*, the A.D.A.M. Medical Encyclopedia (last reviewed Mar. 1, 2012), available online at

much more restrictive analysis that existed prior to the ADAAA, plantar fasciitis was considered an impairment. *See, e.g., Etheridge v. FedChoice Federal Credit Union*, 789 F. Supp. 2d 27, 36 (D.D.C. 2011). The Defendant's summary-judgment motion does not argue to the contrary, and its briefing repeatedly refers to the Plaintiff's condition as an "impairment." That is sufficient to establish the first element.[7]

The second element in the ADAAA's "regarded as" analysis in this case is whether the Defendant terminated the Plaintiff because of her plantar fasciitis. Amici take no position on that fact-based issue here; as stated above, they instead seek to correct perceived legal errors.

III. "Actual" Disability

In its Memorandum opinion the Court recognized that the ADAAA mandates broad construction of the definition of disability. Doc. No. 67 at 11–12, 2013 WL 1874257, at *6. The Court also recognized the truism that not *every* impairment is substantially limiting, even under a broad construction. Doc. No. 67 at 12, 2013 WL 1874257, at *6, citing the EEOC regulations at 29 C.F.R. § 1630.2(j)(1)(ii). But Amici believe that the Court made some missteps in trying to navigate between these two guideposts.

A. Duration

First, the Court relied on pre-ADAAA case law—*Roush v. Weastec*, 96 F.3d 840, 843 (6th Cir. 1996)—holding that temporary restrictions generally cannot be substantially limiting. Doc. No. 67 at 11, 2013 WL 1874257, at *6. But *Roush* was decided based on then-current regulations defining "substantially limits" to require either utter inability or a severe restriction on the ability to perform major life activities, and also mandating a focus on permanent or long-term impact. *Roush*, *supra*, 96 F.3d at 843, *citing* 29 C.F.R. § 1630.2(j)(1) and (2) (1995).

In the ADAAA, however, Congress expressly rejected that "severely restricts" regulatory standard. Pub. L. 110–325, § 2(b)(4), 122 Stat. 3553 (Sep. 25, 2008).[8] Current regulations are quite different from those in effect in 1996. They explicitly state that "[t]he effects of an impairment lasting or expected to last *fewer than six months can be substantially limiting* within the meaning of this section." 29 C.F.R. § 1630.2(j)(1)(ix) (emphasis added). The duration of an impairment is now just one factor. 29 C.F.R. Part 1630 App, § 1630.2(j)(1)(ix). *See also Price v. UTi, U.S., Inc.*, 2013 WL 798014, at *3 (E.D. Mo. Mar. 5, 2013) ("an impairment need not be permanent or long-term"); *Mercer v. Arbor E & T*, 2012 WL 1425133, at *6 (S.D. Tex. Apr. 21, 2012) (observing that "[f]ederal courts in Texas have applied the ADAAA's broader definition of 'disability' to include impairments that either are not of long duration or are 'episodic or in remission.'"); *Patton v. eCardio Diagnostics LLC*, 793 F. Supp. 2d 964, 968 (S.D. Tex. 2011) (same); *Feldman v. Law Enforcement Associates Corp.*, 2011 WL 891447, at *9 (E.D.N.C. Mar.

---

http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0004438/.

[7] The ADAAA does create a defense to coverage if the impairment is both transitory *and* minor, 42 U.S.C. § 12102(3)(B); 29 C.F.R. § 1630.15(f), but the uncontested evidence in this case is that it was neither, having lasted for several years and (among other things), required substantial medical care and treatment, and caused pain requiring prescription pain medication. *See* Part III.B below. In any event the Defendant has neither pled nor argued the defense.

[8] Set out in the Notes to 42 U.S.C. § 12101

10, 2011) ("[E]ven if Feldman's TIA 'only temporarily limited [his] ability to work, the stringent requirements of Toyota Motor may be rejected by the amended statute in favor of a more inclusive standard.'").

By way of example, the EEOC states that a "back impairment that results in a 20–pound lifting restriction that lasts for several months" is sufficient. *Id. See also Duggins v. Appoquinimink School Dist.*, ___ F. Supp. 2d ___, 2013 WL 472283, at *3 (D. Del. Feb. 5, 2013) (six-month bout of severe depression, which might recur and which prevented work for a month, "inevitably" qualifies as a disability); *Nayak v. St. Vincent Hosp. and Health Care Center, Inc.*, 2013 WL 121838, at *3 (S.D. Ind. Jan. 9, 2013) (pleading that pregnancy-related complications lasted eight months sufficient, in light of regulations); *Kravtsov v. Town of Greenburgh*, 2012 WL 2719663, at *11 (S.D.N.Y. July 9, 2012) (non-employment claim) ("temporary impairments can qualify as substantially limiting").[9]

In sum, there is no longer any minimum duration. *See, e.g.*, Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008, Question 10;[10] Questions and Answers for Small Businesses: The Final Rule Implementing the ADA Amendments Act of 2008, Question 8;[11] 76 Fed. Reg. 16978, 16982 (Mar. 25, 2011) ("several" months is enough but there is no specific minimum duration; need not last as long as six months); *Cohen v. CHLN, Inc.*, 2011 WL 2713737, at *8 (E.D. Pa. July 13, 2011) ("As discussed above, the ADAAA mandates no strict durational requirement for plaintiffs alleging an actual disability.").

B. Facts

In the instant case it was uncontested that Plaintiff has suffered from plantar fasciitis since 2005.[12] She began medical treatment for the condition in 2006.[13] Furthermore, excerpts of her medical records, which Defendant submitted in support of its Motion for Summary Judgment, reflect that she suffered foot pain prior to her August 2007 injury (necessitating a course of cortisone injections ending in July 2007, and only stopping then because such injections should be limited).[14] Even after her fracture had healed, the Plaintiff continued to need pain medication for her plantar fasciitis at least through June of 2008,[15] and there is no evidence that the condition ever went away. In any event, three years of symptoms is more than "short term" and more than "several months."[16]

---

[9] *See also* Statement of Rep. Nadler, 154 Cong. Rec. at H6064, H6065, and H6067 (June 25, 2008), rejecting pre-ADAAA analysis in *Pimental v. Dartmouth-Hitchcock Clinic*, 236 F. Supp. 2d 177 (D.N.H. 2002), which had found that cancer requiring 8 months leave was too "short-term."

[10] Available online at http://www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm.

[11] Available online at http://www.eeoc.gov/laws/regulations/adaaa_qa_small_business.cfm.

[12] Defendant's Statement of Undisputed Facts No. 6, Doc. No. 41 at 3; Plaintiff's Response in Opposition, Doc. 40 at 1, *citing* Newcomb Depo. p. 82.

[13] Plaintiff's Response in Opposition, Doc. 40 at 1, *citing* Newcomb Depo. p. 82–83.

[14] Doc. 34, Ex. D, at 1.

[15] *Id.*at 5.

[16] Note, too, that multiple impairments can combine to substantially limit one or more major life activities. 29 C.F.R, Part 1630 App, § 1630.2(j)(1)(ii). That was also the case pre-ADAAA. *See, e.g., Switala v. Schwan's Sales Enterprise*, 231 F. Supp. 2d 672, 681 (N.D. Ohio 2002) (court "must consider whether plaintiff's impairments, together or separately, prevent or severely restrict him from [major life] activities"); 29 C.F.R. Part 1630 App § 1630.2(j) (1994); EEOC Compliance Manual § 902.4(e), superseded by the ADAAA. Thus, the impact of the heel

C. Pain

In addition, "an individual whose impairment causes pain or fatigue that most people would not experience when performing that major life activity may be substantially limited." 29 C.F.R. Part 1630 App., § 1630.2(j)(4). *See also Lema v. Comfort Inn*, 2013 WL 1345510, at *9 (E.D. Cal. Apr. 3, 2013) ("referring to increased pain, fatigue, and instability"); *Howard v. Pennsylvania Dept. of Public Welfare*, 2013 WL 102662, at *11 (E.D. Pa. Jan. 9, 2013) (pain during activities bolsters conclusion that fibromyalgia is a disability); *Molina v. DSI Renal, Inc.*, 840 F. Supp. 2d 984, 994–995 (W.D. Tex. 2012) (sufficient evidence based on back pain when performing several major life activities); *Gaus v. Norfolk Southern Ry. Co.*, 2011 WL 4527359, at *18 (W.D. Pa. Sept. 28, 2011) (chronic pain clearly affects one or more body systems).[17]

D. Viewed Without Regard to Mitigating Measures

Moreover, under the ADAAA, whether an impairment is substantially limiting must now be assessed without regard to mitigating measures. 42 U.S.C. § 12102(4)(E)(i); 29 C.F.R. § 1630.2(j)(1)(vi). In other words, court must consider how the person would be affected if he or she were not using such measures, which include medication, medical supplies, equipment, mobility devices, or reasonable accommodations. 42 U.S.C. § 12102(4)(E)(i). The record evidence here is that the Plaintiff required cortisone injections and pain medication, and at times wore a boot and had to avoid standing, walking, or weight-bearing. The proper analysis is whether a rational juror could view her as substantially limited compared to most people, if she had been given no pain medications or cortisone shots, and if she had been forced to stand and walk all day, with no boot and no crutches. Amici believe the answer is yes.

E. Misapplication of the (j)(3)(iii) List

The Court stated that it did not require extensive analysis to determine that the condition here was not substantially limiting, even after the 2008 amendments. In support it cited only the EEOC regulation listing various examples of impairments that substantially limit a major life activity, including "mobility impairments requiring the use of a wheelchair." Doc. No. 67 at 12, 2013 WL 1874257, at *6, *citing* 29 C.F.R. § 1630.2(j)(3)(iii). The implication is that because the Plaintiff's condition did not rise to that level, it was clearly not substantially limiting.

The error the Court made was in assuming that the (j)(3)(iii) list reflects the severity required to be substantially limiting, much like the "listed impairments" used in the determination of Social Security disability. But rather than suggesting the minimum requirements, the EEOC's (j)(3)(iii) list serves the opposite function. It lists conditions at the other end of the spectrum, namely, those so severe that they present a particularly easy call, i.e., conditions that will virtually always be a disability. *See* 29 C.F.R. § 1630.2(j)(3)(ii) ("Given their inherent nature, these types of impairments will, as a factual matter, virtually always be found to impose a substantial limitation

---

fracture on top of the plantar fasciitis could properly be considered in this case, in addition to the facts described above.

[17] Even before the ADAAA, courts have recognized that pain can reflect a substantially limiting impairment. *See, e.g., Roush v. Weastec, Inc.*, 96 F.3d 840, 844 (6th Cir. 1996) (pain without medication, and even with medication).

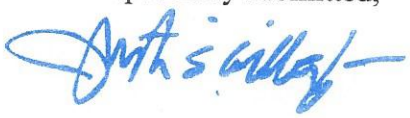
on a major life activity. Therefore, with respect to these types of impairments, the necessary individualized assessment should be particularly simple and straightforward.").

The list cannot properly be used to set the disability bar. Even before the ADAAA, when prior law required a "demanding standard" of proof,[18] courts did not require the use of a wheelchair in order to prove a substantial limitation in walking or standing.[19] That certainly cannot be the standard now, given that Congress has expressly rejected that "demanding standard," Pub. L. 110–325, § 2(b)(4), 122 Stat. 3553 (Sep. 25, 2008) (citation omitted),[20] and now requires that the disability definition "be construed … in favor of broad coverage of individuals … *to the maximum extent permitted by the terms of this Act*." 42 U.S.C. § 12102(4)(A) (emphasis supplied); 29 C.F.R. § 1630.1(c)(4) (same).

Conclusion

For the reasons stated above, Amici request that the Court correct legal errors in its Memorandum opinion of May 3, 2013, as set out above.

Respectfully submitted,



Justin Gilbert
On behalf of Amici Tennessee Employment Lawyers Association, and
Disability Law and Advocacy Center of Tennessee

---

[18] *See Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184, 197 (2002).

[19] *See, e.g.*, 29 C.F.R. Part 1630 App., § 1630.2 (j) (1994) (walking substantially limited if, for example, an individual "can only walk for very brief periods of time."); *Patten v. Wal-Mart Stores East, Inc.*, 300 F.3d 21, 23 (1st Cir. 2002) (Charcot-Marie-Tooth disease substantially limited "ability to walk or stand for a long time," resulting in leg pains and an "unusual gait"); *Schroeder v. Suffolk County Community College*, No. 07-CV-2060, 2009 WL 1748869, at *7 (E.D.N.Y. June 22, 2009) (plaintiff had periodic foot pain and numbness every day, used various means to relieve the pain, used a cane outside work, and his condition was long-term and likely permanent); *Belk v. Southwestern Bell Telephone Co.*, 194 F.3d 946, 950 (8th Cir. 1999) (plaintiff's "gait is hampered by a pronounced limp"); *Johnson v. Maryland*, 940 F. Supp. 873, 877 (D. Md. 1996) ("[T]he Court finds that Johnson's walking with a limp constitutes a substantial limitation of a major life activity and thus a disability under the ADA for purposes of the Motion for Summary Judgment."), *aff'd per curiam*, No. 96-2655, 1997 WL 240823 (4th Cir. May 12, 1997) (unpublished); *Perez v. Philadelphia Housing Authority*, 677 F. Supp. 357, 360–361 (E.D. Pa. 1987) (plaintiff whose considerable pain affected her ability to walk had a disability under Rehabilitation Act); EEOC Enforcement Guidance: Workers' Compensation and the ADA, Question 14, Ex. B (July 6, 2000) (assuming that badly fractured ankles that partially heal but result in inability "to walk and stand for more than short periods of time" is a disability).

[20] Set out in the Notes to 42 U.S.C. § 12101.