

New Scholars

**ELUSIVE BUT ATTAINABLE: JUSTICE FOR
WORKERS AFFLICTED WITH FIBROMYALGIA**

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ABSTRACT

Fibromyalgia is a serious medical condition that has been misunderstood and generally disregarded by the medical community as well as by the courts. Individuals with this syndrome have been unsuccessful in their attempts to acquire protection under the Americans with Disabilities Act (ADA). While the courts see the syndrome as a medically determinable disability, their judgments are conflicting and unpredictable. This article examines how the courts have treated litigants with invisible disabilities such as fibromyalgia in ADA litigation, examines what litigants have done wrong, and discusses the guidelines proposed by Congress for inclusion within the statute. In an appendix, the article also presents proposed guidelines to help those individuals afflicted with the syndrome to navigate successfully through the administrative process and civil litigation.

Individuals who suffer from controversial diagnoses of ailments with uncertain causes that are virtually impossible for casual observers to detect are considered to be people with “invisible” disabilities. These individuals, who often suffer from conditions such as chronic pain syndrome, posttraumatic stress disorder, chronic fatigue syndrome, or severe fibromyalgia, may appear “normal” to people with

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whom they interact casually, but they may be disabled. Because they appear “normal,” people with invisible disabilities are often placed in the awkward position of having to rebut the presumption of “normalcy” (Davis, 2005).

The distinction between visible and invisible disability is not always obvious. One analysis suggests that invisible disabilities may meet all or any of the following conditions: (1) they may involve a disabling condition that cannot be easily ascertained by someone who is merely looking at the disabled person; (2) the individuals concerned may be at heightened risk for the recurrence of episodes that are painful, life-threatening, or activity-limiting; (3) individuals in this category severely limit the duration of their interactions in everyday social situations; and (4) their diagnoses may involve interpretation and require the use of judgment (Davis, 2005: 202-203). Consequently, an individual with an invisible disability must point out the existence of his or her disability to others. This is no easy task, considering that many individuals with invisible disabilities are stigmatized and are subject to some form of rejection, humiliation, or social disapproval in today's society. Generally, what one cannot see with the naked eye will require further confirmation or proof; thus, individuals with invisible disabilities are faced with a serious challenge. To be able-bodied in today's social and economic spheres is a privilege; those that fail to conform to the able-bodied standard are considered socially invisible and continue to be stigmatized and disadvantaged. This stigma constitutes a major obstacle for these individuals and presents them with a dilemma: whether they should disclose a disability or not.

Persons with invisible disabilities must inevitably provide sufficient evidence of their disabilities, often in the form of expert medical evidence. Employers have long considered such evidence as authoritative and credible. Unfortunately, however, in most cases, for individuals with invisible disabilities who suffer from chronic pain, depression, or severe anxiety there are no well-defined or objective tests that can readily identify their disabling conditions. Thus, the general consensus has been that several doctors need to confirm that an invisible disability, in fact, exists, before an individual will be considered disabled. This is partly due to current societal assumptions that these individuals may be “cheaters” or “malingerers” who are trying to obtain special treatment at the expense of others.

The challenge of providing convincing proof can be overwhelming and may cause some persons to refrain from disclosing their disability to others. Additionally, teaching others about their condition carries the risk of such consequences as isolation, indifference, and disbelief, a refusal to accommodate what the other person cannot see as a disability, or the disclosure of excessive personal information once the Pandora's box of disclosure is open.

On the other hand, silence may pose an even greater threat to the well-being of disabled individuals, exacerbating their disabilities and deepening their invisibility. Beatty and Kirby (2006: 30) identified this challenge when they wrote that “Invisibility creates a dilemma for employees seeking the benefits of legal protection against discrimination in the workplace because to receive the benefits

they must first disclose their situation. . . . Yet, the act of disclosing their difference is potentially career limiting because in doing so they create the grounds for possible stigma and discrimination.”

After disclosure, most individuals seek accommodations from their employers, either orally or in writing. Moreover, the majority actively engage in the interactive process required by the Americans with Disabilities Act (ADA) when seeking a reasonable accommodation. For most employers, offering accommodations carries the risk of arousing resentment and perceptions of inequity among coworkers (Beatty & Kirby, 2006).

Colella (2001) has found that when disabilities are invisible, self-caused, and socially undesirable, coworkers are less likely to view accommodations as justified. Gordon and Rosenblum (2001: 9) pointed out that “being part of a legally protected class challenges any possibility of equality; despite its goal of protecting groups, the law creates and reinforces the foundation for stigmatization and categorizing groups, drawing attention to differences.”

Along with stigmatization and adverse categorization, illnesses and disability are also seen as moral failures that clash with business values such as constant activity, the speed to keep up with a schedule, and the expectation of good health (Beatty & Kirby, 2006). It is business values and necessity that most employers find are in conflict with complying with a “reasonable accommodation” for individuals with an invisible disability. In short, despite an individual's invisible disability, the employer's main focus will always be, can this employee do the job, with or without an accommodation?

Performance, in this context, is the only standard on which the employer-employee relationship is built. Persons with invisible disabilities can benefit from de-stigmatization and can create a more nurturing work environment by obtaining moral and professional support from their supervisors and managers. Managerial awareness and support go a long way to improve the overall employer-employee relationship. However, when a breakdown in this relationship has occurred, most often the affected employees seek the legal protections accorded them through the Americans with Disabilities Act (ADA).

The ADA generally protects against practices that discriminate on the basis of a qualifying disability when the employee would be able to perform satisfactory work with a “reasonable accommodation.” In order to qualify for protection, an individual with an invisible disability must prove the existence of a disability as defined by the ADA (Van, 2005). Congress understood that adverse actions based upon a person's physical or mental impairment are often unrelated to the limitation caused by the impairment itself. Instead of following congressional expectations that the term “disability” would be interpreted broadly in the ADA, decisions and opinions by the Supreme Court have unduly narrowed the broad scope of protection afforded by the ADA, thereby eliminating protection for a broad range of individuals whom Congress intended to protect.

The Supreme Court and lower courts have interpreted the act with broad latitude, resulting in conflicting and unpredictable outcomes for individuals with an invisible disability. In the majority of cases, these individuals face an uphill battle, mainly because most employers file a motion for summary judgment, which allows the speedy disposition of a conflict without benefit of trial. Most employers are aware of the lack of traditional clinical evidence such as laboratory tests and X-rays, which are commonly used to prove the existence and extent of a medical condition and thus to prove the existence of a disability. Courts insist that plaintiffs overcome this first obstacle before the courts will examine the merits of any adverse actions.

Consequently, while some individuals with an invisible disability have established a prima facie case of disability, others have been unable to establish a prima facie case question for a jury on the issue of whether their condition qualifies as a disability under the act (e.g., *Beneke v. Barnhart*, 2004; *Kaley v. Icon International, Inc.*, 2001; *Sarchet v. Chater*, 1993). Because of the inconsistencies involved in establishing a prima facie case and for other reasons, both practical and ethical, the courts inevitably apply inconsistent standards (Van, 2005).

This article will explore the ways in which individuals with an invisible disability have actually been treated in litigation under the Americans with Disabilities Act, as well as the way in which an individual plaintiff can successfully pursue a claim. First, it will focus briefly on those areas that are essential to ADA protection. Second, it will provide insight on the symptoms and diagnoses of invisible disabilities and the ways in which such disabilities can substantially limit a major life activity. Third, we will see how some plaintiffs have been able to survive summary judgment and to prevail in their complaints against their employers. Further, the article will discuss in detail some instances in which plaintiffs were denied ADA protection and why. Finally, the article will discuss some possible changes to the text of the ADA at present being proposed by Congress to remedy what some have deemed the mis-interpretative guidelines of the Supreme Court that have weakened the statute so that individuals with invisible disabilities are not protected. An appendix incorporating proposed guidelines on what an individual needs to acquire ADA protection is provided at the end of the article for those who wish to maximize their chances of successfully suing under the current law. This article focuses on individuals with fibromyalgia, which is characterized by a variety of symptoms such as widespread musculoskeletal pain, fatigue, stiffness, and sleep disorders (Sturge-Jacobs, 2002).

THE AMERICANS WITH DISABILITIES ACT: WHAT PLAINTIFFS NEED TO KNOW

Under the employment provision of the ADA, which is the focus of this article, the law prohibits discrimination throughout the recruitment and job application process, in hiring, layoff/firing, advancement, compensation, training,

leave, benefits, and other terms, conditions, and privileges of employment (Levy, 1999).

In accordance with the ADA guidelines, the employment requirement should apply to employers, except for federal government agencies, labor organizations, and joint labor-management committees. The ADA defines an “employer” as a person in an industry affecting commerce that has 15 or more employees (part-time and full-time workers).

What Is the Statutory Definition of “Disabled”?

The ADA defines a “disabled individual” as one who

- has a physical or mental impairment that substantially limits one or more of the person's major life activities;
- has a record of such an impairment; or
- is regarded as having such an impairment.

First, a plaintiff must show that she suffers from a physical or mental impairment. Second, the plaintiff must identify the activity claimed as being impaired and establish that it constitutes a “major life activity.” Third, the plaintiff must show that her impairment “substantially limits” a major life activity (*Colwell v. Suffolk County Police Department*, 1998). The Supreme Court has clarified that the identified major life activity must be “of central importance to daily life” (*Toyota Motor Company v. Williams*, 2002).

The regulations under the ADA statutorily define various key terms. For example, the regulations define physical impairment as “[A]ny physiological disorder or condition, cosmetic, disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genitor-urinary; hemic and lymphatic; skin; and endocrine.” In addition, the regulations define “major life activities” as functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

Who Is a “Qualified” Individual with a Disability?

A qualified individual with a disability is a person who meets the legitimate skill, experience, education, or other requirements of an employment position that she or he holds or seeks, and who can perform the “essential functions” (i.e., the fundamental job duties) of the position with or without reasonable accommodation.

What Is a “Reasonable Accommodation”?

The Equal Employment Opportunities Commission defines reasonable accommodation as a modification or adjustment to a job, the work environment, or the way things are usually done that enables a qualified individual with a disability to enjoy an equal employment opportunity (Job Accommodation Network, 2007). Reasonable accommodations generally fall within three categories: (1) changes in the job application process in order to enable a qualified applicant to be considered for a job; (2) changes in the work environment or the manner in which the job is performed; (3) changes in order to enable an employee with a disability to enjoy benefits and privileges of employment that are equal to those of others.

When a qualified individual with a disability requests an accommodation, the employer must make a reasonable effort to provide an accommodation that is effective for the individual. The process of deciding what is “reasonable” is conducted on an individual basis, because the nature and extent of a disabling condition and the requirements of a job will vary in each case. The principal test is effectiveness (e.g., whether the accommodation will provide an individual with a disability the opportunity to achieve the same level of performance as that of an average person, or a similarly situated person without a disability, and to enjoy benefits equal to those of such other persons) (Job Accommodation Network, 2007).

FIBROMYALGIA

Fibromyalgia: An essential guide for patients and their families (Wallace & Wallace, 2003) lists some of the known facts about fibromyalgia. The condition is a form of soft tissue rheumatism. The name is a combination of three terms, fibro (from the Latin fibro, or fibrous tissue), myo (from the Greek myos, or muscle), and algia (from the Greek algos, or pain). Wallace and Wallace also point out that the condition is not a form of arthritis, since it is not associated with joint inflammation.

What Are Its Symptoms?

The Arthritis Foundation (2008) characterizes fibromyalgia as involving chronic, widespread, musculoskeletal pain and multiple tender points. Duckworth and Loy (2005) emphasize that fibromyalgia does not cause pain or swelling in the joints; rather, it produces pain in the soft tissue located around joints and in the skin and organs throughout the body. Wallace and Wallace observe, like others, that researchers have had a hard time agreeing on the cause of fibromyalgia. They state that “a variety of rheumatologists recognize two types of fibromyalgia: primary and secondary” (2003: 4-5).

The Arthritis Foundation (2008) also feels that the underlying pathologic processes and the optimal treatment of the condition are not yet well understood,

and notes that there is increasing evidence that abnormalities of the nervous system involving heightened pain perception may play a role in its development. Similarly, Duckworth and Loy (2005) agree that the cause of fibromyalgia remains elusive, but they reiterate that there are many triggering events thought to precipitate its onset, for example, viral or bacterial infections, an automobile accident, or the development of another disorder.

How Is It Diagnosed?

The diagnosis of fibromyalgia is complex, to say the least. The National Institute of Arthritis and Musculoskeletal and Skin Diseases (2007) suggests that a patient should see a doctor familiar with the syndrome and ensure that other potential causes of symptoms are ruled out before a diagnosis of fibromyalgia is made. This advice is very important, because there are currently no diagnostic laboratory tests for fibromyalgia. Some doctors may conclude that the patient's pain is not real, and dismiss the patient entirely.

On the other hand, a doctor familiar with the syndrome can make a diagnosis based on two criteria established by the American College of Rheumatology (Wolfe et al., 1990). The American College of Rheumatology, the National Institute of Arthritis and Musculoskeletal and Skin Diseases (2007), and Wallace and Wallace (2003) agree that the syndrome requires (1) a history of widespread pain lasting more than 3 months and (2) the presence of tender or trigger points. Wallace and Wallace (2003: 6) consider a tender point to be "an area of tenderness in the muscles, tendons, bony prominences, or fat pads, whereas a trigger point shoots down to another area." There are 18 possible tender or trigger points, for a fibromyalgia diagnosis, a person must have 11 or more tender or trigger points. A trigger or tender point can be similar to pulling a trigger in a gun that will echo pain away from the trigger.

In short, fibromyalgia is a syndrome rather than a disease. A particular group of symptoms define a syndrome; a disease is defined as a condition that impairs bodily functioning. Therefore, the word syndrome accurately describes fibromyalgia because it denotes a collection of signs, symptoms, and medical problems that tend to occur together but are not related to a specific, identifiable cause. When persons with disabilities are conceptualized as being abnormal, there is a tendency for people to assume that the proper metric for measuring the seriousness or "size" of a disability is one that involves an assessment of the degree to which a disabled person is different from a normal one (Davis, 2005).

This assumption is not well founded, because the principal test for an individual with an invisible disability as explained above is the overall effectiveness of an accommodation that will provide him or her the opportunity to achieve a performance level equal to that of the average person. A modification of work duties or some adjustments in the workplace environment may be useful to help with chronic pain; the majority of individuals with fibromyalgia

reported less pain, less fatigue, and better functioning status if they were employed (Bennett, 2002; Jones, Clark, & Bennett, 2002; Peterson, 2005; Reisine et al., 2003).

The Job Accommodation Network gives us some potentially useful workplace scenarios pertinent to individuals with chronic pain and fibromyalgia:

- An appointments secretary was reprimanded for poor attendance due to chronic pain. She was provided with periodic rest breaks when at work and allowed to telecommute part-time.
- A human resource manager suffered from chronic pain due to a car accident. He was having difficulty getting to work on time. He was accommodated with a flexible schedule to allow him more time to access public transit.
- A switchboard operator with chronic pain and fibromyalgia was accommodated with flexible scheduling, rest breaks, and an adjustable workstation. The adjustable workstation allowed her to alternate between a sitting and a standing position.
- An individual with chronic pain due to a back injury was having difficulty sitting throughout the day. She was accommodated with a reclining workstation.
- A medical technician with chronic pain was restricted with regard to doing repetitive work that involved typing throughout the day. He was transferred to another job requiring less repetition.
- An assembly line worker with chronic pain was having difficulty standing for long periods. He was accommodated with a sit-lean stool and antifatigue matting. (Levy, 1999: 3)

Is Fibromyalgia a Disability under the ADA?

Fibromyalgia affects individuals in different ways. Some individuals with the syndrome may experience 11 or more tender or trigger points in one region of the body, whereas others may exhibit 11 tender points scattered throughout the body, with varying degrees of pain and discomfort (National Institute of Arthritis, 2007). Duckworth and Loy (2005) have observed that some fibromyalgia victims will be classified as having a disability under the ADA and some will not. Wallace and Wallace (2003) have examined this matter and have defined several criteria that may characterize a person afflicted with the syndrome as disabled. They observe that, statistically, up to 90% of fibromyalgia employees who wish to work are able to do so. Sixty percent of this total are working full-time. Gilliland (2008) notes that disability rates as high as 44% have been reported, and that fibromyalgia is over four times more common in women than in men.

Wallace and Wallace (2003) believe that the most common reasons individuals with the syndrome say they cannot work is severe pain. This creates a problem for the employee as well as the employer because pain is a subjective matter that is hard for others with little or no knowledge of the syndrome to understand.

Moreover, other symptoms of the syndrome that may limit employment include poor cognitive functioning, fatigue, stress, inability to tolerate cold and damp work environments, and decreased stamina or endurance. Further, some individuals are unable to deal with pain. This limits these individuals' abilities in various jobs that require repetitive lifting, bending, squatting, or assuming unnatural positions while working. Thus, persons diagnosed with the syndrome have had to make major adjustments and modify their job prospects to accommodate their symptoms (National Institute of Arthritis, 2007).

Fibromyalgia and ADA Litigation

In "New diagnoses and the ADA: A case study of fibromyalgia and multiple chemical sensitivity," Ruby Afram (2004) studied fibromyalgia and ADA litigation and made the following observations:

- Motions for summary judgment by the defendants in ADA claims with regard to fibromyalgia were granted or affirmed in 33 of the 37 cases studied (almost 90%); a motion to dismiss for failure to state a claim was granted in another case.
- In only four cases did the plaintiffs survive summary judgment.
- In none of the cases is there a record of the plaintiff prevailing at trial. It is possible that these cases were settled out of court in a manner favorable to the plaintiff or are still in litigation.
- Based upon published opinions, fibromyalgia cases under the ADA appear to reflect an almost total lack of success for the plaintiffs.
- Analysis suggests a greater focus on the nature of the disease in these cases.
- The cases in which courts have excluded evidence about fibromyalgia have been cases in which causation was the key to determining liability, and there still exists a relative consensus in the medical community that there is no known cause for fibromyalgia.
- The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the person's impairment, but rather on the effect that impairment has on the life of the individual. (Afram, 2004: 107)

Afram's article, while extremely informative, nevertheless stopped short of determining why the plaintiffs failed to achieve ADA protection. For a fibromyalgia plaintiff, this conclusion might appear to be pessimistic; it is appropriate, therefore, to examine an a number of cases in detail, to determine whether a trend or pattern developed in the courts or whether the courts came to their decisions independently. Of these cases, 10 proved to be more positive as they survived motions for summary judgment or motions to dismiss. That is the key to this inquiry.

It is important to note that Afram (2004) acknowledged that although some courts in her study questioned the severity of the illness, and others questioned the

occasionally intermittent nature of its symptoms, the evidence presented by the plaintiff was sufficient in four cases to defeat a motion for summary judgment (e.g., *Carter v. General Electric Co.*, 2000; *Johns-Davilla v. City of New York*, 2000). Moreover, Afram (2004) recognized that even in the early cases, no court rejected evidence about fibromyalgia as an illness, and several courts explicitly accepted fibromyalgia as a diagnosis or stated that it qualifies as an impairment under the ADA (e.g., *Kenny v. Loyola University Chicago*, 2003; *Sarchet v. Chater*, 1993; *Walker v. Pepsi-Cola Bottling Co.*, 2000). Afram finally concluded that the medical community had the ability to detect and diagnose the condition that has led several courts to consider a plaintiff disabled within the meaning of the ADA (e.g., *Labreque v. Sodexo USA, Inc.*, 2003; *McPhaul v. Madison County Board of Health*, 2001; *Wixel v. Board of Education*, 2002).

What Must a Person with Fibromyalgia Prove in Order to Survive a Motion for Summary Judgment?

In granting a motion for summary judgment, the court is affirming the defendant's contention that the plaintiff's evidence does not present a question of material fact. A motion for summary judgment should be granted only if the pleadings, affidavits, and other evidence of record demonstrate that there is no genuine issue of material fact to be determined at trial. In considering a motion for summary judgment, the court is required to make all inferences in favor of the nonmoving party (e.g., *Alcman Servs. Corp. v. Samuel H. Bullock*, 1996). A serious problem most fibromyalgia plaintiffs face is that of determining what facts and allegations must be presented in order to survive a motion to dismiss (Van, 2005).

While most courts agree that fibromyalgia is a disability within the meaning of the ADA, the vast majority look to two important threshold issues: (1) whether an individual with fibromyalgia is substantially limited in a major life activity, and (2) whether the individual with fibromyalgia is a qualified individual with a disability as defined by the ADA. If the plaintiff meets these two criteria, the courts then concentrate on the following:

- whether the plaintiff's medical record is specific and detailed enough to include regular medical treatment documented on an ongoing basis;
- the severity, duration, and expected long-term impact on the individual's specific impairments; and
- whether (bearing in mind the fact that fibromyalgia has been a subjectively determined syndrome) the testimony of the plaintiff on the effects on his/her daily life is supported or at least not contradicted by the medical expert.

If the plaintiff can meet the above criteria, the judge or jury can infer that the individual has a disability under the ADA.

For example, in *Labreque v. Sodexo USA, Inc.* (2003), the plaintiff's complaint survived a motion for summary judgment because the court found that her fibromyalgia substantially limited major life activities such as sitting, standing, learning, and thinking. The plaintiff prevailed because she provided medical evidence that was corroborated by medical professionals chronicling the physical limitations associated with fibromyalgia in the course of employment.

In a second example, *Wolz v. The Deaton Kennedy Co.* (2001), the court found that there was a genuine issue of fact as to whether the plaintiff was substantially limited in lifting, pulling, pushing, bending, and reaching. Again, the court allowed corroborated testimony with medical expert evidence, which precluded summary judgment for the defendants.

In a third example, *Wixel v. The Board of Education of the City of New York* (2002), the plaintiff claimed, under the Rehabilitation Act and the ADA, to be substantially limited in learning, walking, exerting herself, and attending school. The court held that the plaintiff's amended complaint properly pleaded that she was substantially disabled within the meaning of section 504 of the Rehabilitation Act and the ADA. The plaintiff had put forward sufficient facts to support her action under both statutes. Additionally, the plaintiff had submitted medical evidence from doctors documenting her disability and inability to attend school.

In a fourth example, *Smith v. Continental Casualty Co.* (2006), the plaintiff appealed against the district court's summary judgment in favor of the defendants. The plaintiff had filed a claim for short-term benefits, and the employer, Continental Casualty Co. (CCC), denied her application, deciding that the medical documentation did not support a finding of disability. The court held that

- the CCC had failed to obtain a job description prior to its initial determination that she was not disabled;
- it had failed to conduct an independent evaluation;
- there were discrepancies in the CCC medical records that were reviewed; and
- the CCC's doctor had failed to contact Smith's treating physician.

The court ruled that all the above failures supported the finding that the CCC's decision to deny benefits was arbitrary and capricious; it vacated the judgment of the district court and remanded the case to the trial court so that the plaintiff could receive full benefits.

DISCUSSION

Thus far, we have seen the courts weigh the facts more heavily in favor of the plaintiff. The following cases provide examples of the lack of properly pleaded facts, insufficient medical evidence or records, and uncorroborated testimony or evidence from medical experts; these are believed to be essential to a prima facie claim.

The courts have found that performing manual tasks where repetitive lifting or bending is required could be a major problem because of the chronic pain associated with the syndrome, which could be substantially limiting. In *Skorup v. Modern Door Corporation* (1997), however, the Seventh Circuit affirmed summary judgment against the plaintiff, because although she asserted in her brief that she could not perform any and all jobs that required repetitive stretching and pulling of the shoulder, she provided no evidence of the number of jobs from which she was excluded because of her impairment. Moreover, the court stated that she had failed to set forth evidence from which the court could determine even “general guide-posts, such as whether her impairment forecloses her from accepting a few, many, or most of the jobs in a particular class.”

In *Lutter v. Rinella Beverage Company* (2004), the plaintiff claimed he was restricted or substantially limited in his ability to maintain an active lifestyle, to work, run, perform manual tasks, move about, or perform any job requiring repetitive manual labor or heavy physical exertion. The court found that Lutter was disabled, but that he had failed to produce sufficient evidence to establish a genuine issue of fact as to his ability to perform the essential functions of a warehouse job, with or without a reasonable accommodation. The court compared the manual tasks in this case to those described in the *Toyota* case and came to the conclusion that Lutter’s limitations did not come close to involving the tasks described by the Supreme Court as having central importance to people’s lives. Lutter provided no evidence that maintaining an active lifestyle or running are of central importance to an individual’s daily life, nor any evidence that his ability to work was limited in any way.

What Significant Factors Distinguish the Cases That Failed and Those That Achieved ADA Protection?

The cases that prevailed met the standards described above with credible medical evidence, supported by testimony by medical professionals, establishing a record of long-term care and establishing that the employers knew about the disability and did not accommodate the plaintiff’s fibromyalgia. Moreover, the key factor was not the argument that fibromyalgia was not disabling in any respect (most courts agree that it is) but rather the question of how it affects daily life, whether it is substantial in manner, duration, and severity, and whether it has long-term consequences. The cases that failed did not establish the aforementioned facts and thus were denied ADA protection. Further, as noted above, fibromyalgia affects individuals in different ways, and the courts require genuine proof as to how it affects an individual and whether it meets the criteria to prove that its effects fall within the meaning of the ADA.

CONCLUSION

The Americans with Disabilities Act protects qualified disabled individuals against discriminatory treatment by their employers. Ideally, Congress intended that the act would establish a clear and comprehensive prohibition of discrimination on the basis of disability. Additionally, the act was intended to provide broad coverage and effective remedies without unnecessary and obstructive defenses.

The Supreme Court, perhaps because it saw a great intrusion into the business community and also in reaction to social norms, decided in its opinions to narrow the scope of the statute, eliminating protection for a broad range of individuals whom Congress had intended to protect (Selmi, 2008). Essentially, the court ignored statutory language, legislative history, and regulatory interpretative guidelines, focusing instead on language from the statute's preface and concluding that mitigating measures were to be considered in evaluating whether an individual has a disability under the act. Lower courts followed suit and required individuals with visible and invisible disabilities to show concrete and objective documentation of a medical condition in order to establish a prima facie claim (Selmi, 2008). This created conflicting and unpredictable outcomes for individuals with fibromyalgia, along with uncertainty and injustice in the application of the ADA as it applies to individuals with the syndrome. Amanda Van (2005) states (and the present author agrees) that the aforementioned requirement clearly creates an ambiguity in the law and the way in which it is applied, when some plaintiffs with an invisible, subjectively determined disability such as fibromyalgia are granted ADA protection and others with the same condition and symptoms are denied.

How can this injustice be remedied? Should drastic changes to the text of the ADA be proposed in order to resolve the problem of equal protection for individuals with serious medical conditions such as fibromyalgia? The answer to this inquiry is a resounding yes. Van's (2005) article proposed two amendments to the ADA: (1) to extend the act to incorporate the requirement that a plaintiff's disability be determined by a judge or jury; and (2) to allow the court to consider whether a combination of symptoms has a substantial aggregate debilitating impact.

Van's proposals are constructive and well reasoned; however, they narrow the scope and focus only on those individuals who seek protection as members of the class of people with serious conditions that can be classified as invisible; they do not include all those individuals who should fit within the statute as originally intended. In order to provide substantial coverage for all individuals who have visible as well as invisible disabilities, a more constructive and practical approach to changing the actual statutory language is needed.

The Supreme Court's creative interpretation of the statute has not gone unnoticed by Congress. In fact, Congress has noted that 90% of ADA plaintiffs lose their claims in court, and that many people with serious medical conditions

are found not to be covered by the act. In response to the Supreme Court's decisions and opinions narrowing the scope of the statute, and in order to reinstate the original congressional intent regarding the definition of disability, Congress has proposed to clarify those sections of the act that should afford protection to all individuals with visible and invisible disabilities in two new bills, which I believe will be effective in achieving uniformity in answering the question, "What is a disability?"

The introduction and passage of proposed bills H.R.-3195 and S-1881 will be a fine start to the attempt to expand the definition of disability, which has been narrowed by the Supreme Court. These new proposed bills will make the following changes in the statutory language, changes that will be significant for individuals with fibromyalgia:

- They provide a definition for disability that mimics the original.
- They revise "mitigating measures" and strike the use of mitigating measures in determining whether an individual has a physical or mental impairment.
- They define mental and physical impairments (these include the musculoskeletal impairments that characterize fibromyalgia).
- They redefine the term "qualified" individual.
- They define "adverse actions."
- They provide that the statute will be broadly construed rather than narrowly interpreted by the courts.

The aforementioned changes, if the bills are passed, will have a significant impact on individuals with fibromyalgia for several reasons. First, the proposed language of the statute refocuses the definition of disability, which will include those individuals with fibromyalgia by the incorporation of musculoskeletal disorders of the body. As noted above, the Arthritis Foundation and other medical professionals have characterized the syndrome as chronic widespread musculoskeletal pain; thus, fibromyalgia will now fall within the definition of a physical impairment or condition affecting one of the bodily systems.

Second, the term "mitigating measures" will be redefined in the statute; this will mean that any treatment, medication, or reasonable accommodation will not be considered in determining disability. For individuals with fibromyalgia, the fact that pain is episodic or latent will not be taken into account when disability is assessed. Third, the phrase "regarded as or having a record of physical or mental impairment" will have a significant impact, especially if fibromyalgia plaintiffs have informed their employer of their condition and engaged in the interactive process as required by the act, and the employer has refused to give them a reasonable accommodation.

These modifications, along with some proposed guidelines in the attached appendix, would unquestionably create a brighter picture for individuals with invisible disabilities such as fibromyalgia and would allow them to obtain justice.

APPENDIX: ESTABLISHING DISABILITY

As noted above, if it can be proven that fibromyalgia substantially limits a major life activity and a record of the illness can be established, it is more likely that a plaintiff will be afforded the protection of the ADA. Listed below are some general rules of thumb that have proven successful in the courts in acquiring ADA protection.

Medical Documentation

It is imperative that claims relating to fibromyalgia be documented by a competent physician (most typically a rheumatologist). The rheumatologist must take the time to accomplish the following:

1. make his/her diagnosis of fibromyalgia using the diagnostic criteria established by the American College of Rheumatology;
2. make sure that the restrictions imposed on an individual by the disease are established by a body of clinical records reflecting ongoing medical care and assessment. (Wasserman, n.d.)

The physician may administer the following tests to help establish a medically determinable impairment in individuals with fibromyalgia:

- elevated antibody to EBV capsid antigen equal to or greater than 1:5120 or early antigen equal to or greater than 1:640;
- abnormal MRI scan of the brain;
- neurally mediated hypotension as shown by tilt table testing or another clinically acceptable form of testing;
- other tests, such as those dealing with abnormal sleep or exercise intolerance. (Potter, n.d.)

The physician will need superior charting and greater attention to detail. Charting means that the medical records detail the tracking of failed therapies as well as documenting symptoms and function. The record should include both medical and work history. Reliance on shorthand statements in which the diagnosis appears unsubstantiated and unexplained throughout the chart will be simply unacceptable. The information listed above develops a comprehensive record of the disability that details the severity, duration, and impact of the impairment.

Additionally, the individual can document the effects of fibromyalgia on his or her daily life by keeping a journal. The effects can also be documented by family members, relatives, physical therapists, rehabilitation workers, pain specialists, or other medical professionals associated with the plaintiff.

Disclosure to the Employer

Employees can also create an evidentiary record by doing the following:

- developing a short list of reasonable accommodations that will enable employees to complete the essential functions of their job;
- documenting the disclosure and efforts to obtain reasonable accommodations;
- developing a written letter to the employer in which an employee discloses that she or he is a person with a disability covered by the ADA and is requesting a reasonable accommodation enabling her or him to complete the essential functions of the job. Written documentation of the efforts made will provide the employee with evidence if problems arise later;
- preparing a brief, functional description of what fibromyalgia is and how it relates to the employee's work. The employee should focus on what he can do, rather than what he cannot do as a result of fibromyalgia; and
- engaging in an interactive process with the employer as required by the ADA.

What the Employee Should Do if He or She Is Discriminated Against

If an employee is discriminated against by an employer, the ADA requires the aggrieved employee to take steps to ensure that he or she has exhausted all administrative remedies before filing a civil action in court. Thus, the employee must do the following:

- develop a record of workplace incidents in which the employer has refused or violated the medical restrictions set forth by the employee's treating physician and has refused to honor the reasonable accommodation worked out by both parties;
- develop a record of those individuals to whom the employee has complained, for example, to union representatives, supervisors, coworkers, and EEO representatives, and their responses. This establishes that the employee is engaging in protected activity by putting the employer on notice that the employee is complaining of ADA violations and opposing those actions taken by the employer that violate the statute; and
- contact the employee's regional disability and business technical assistance center for information materials, technical assistance, or training on the ADA or contact the Job Accommodation Network (JAN). The network's mission is to assist the hiring, retraining, retention, or advancement of persons with disabilities.

Evidence

Probative evidence is needed on specific adverse effects of fibromyalgia (the level of severity that imposes restrictions upon the plaintiff in comparison to the

average person in the general population). Conclusory testimony or statements are insufficient. The evidence must be legally sufficient, as stated above, relative to the extent of the condition where a jury or trier of fact could reasonably find that the employee is substantially limited in a major life activity and is a qualified individual with a disability.

Further evidence may also include sworn affidavits from union representatives, coworkers, supervisors, medical professionals, or family members who have firsthand knowledge of the effects fibromyalgia has on the plaintiff's daily life activities and of adverse actions such as suspensions, discharge, harassment, or threats by the employer.

Moreover, acquiring expert medical testimony from physicians that will establish the disability, its symptomatology, its effects on the plaintiff's major life activities and work environment, the employer's failure to accommodate the plaintiff's medical restrictions, and a broad list of jobs that the plaintiff can perform with or without a reasonable accommodation will greatly enhance the plaintiff's case. In short, an individual with fibromyalgia should not be denied ADA protection if he or she gathers this information.

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