No. _____

In The
Supreme Court of the United States

NICOLE COLTON,

Petitioner,

v.

FEHRER AUTOMOTIVE,
NORTH AMERICA, LLC,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

APPENDIX

Lee D. Winston
Counsel of Record
Roderick T. Cooks
WINSTON COOKS, LLC
351 24th Street North
Box 122
Birmingham, AL 35203
(205) 502-0940
(205) 278-5876 (Fax)
lwinston@winstoncooks.com

Counsel for Petitioner

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

TABLE OF CONTENTS

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-12039
Non-Argument Calendar

D.C. Docket No. 4:19-cv-00653-CLM

NICOLE COLTON,
Plaintiff-Appellant,
versus

FEHRER AUTOMOTIVE, NORTH AMERICA, LLC,
Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Alabama

(July 21, 2021)

Before JORDAN, GRANT, and LUCK, Circuit

Judges. PER CURIAM:

The Americans with Disabilities Act, as the name implies, protects only those with disabilities. The district court dismissed Nicole Colton's ADA lawsuit because of one fatal flaw: she failed to sufficiently allege that she was a person with a disability. Colton alleged that she was short (just 4'6") but, the court said, she did not tie that physical characteristic to a physical impairment. So the court dismissed her claims for discrimination and retaliation. Because we agree that Colton failed to sufficiently allege that she was disabled, we affirm.

I.

When reviewing a motion to dismiss, we "accept the allegations in the complaint as true and construe them in the light most favorable to the plaintiff." *Henderson v. McMurray*, 987 F.3d 997, 1001 (11th Cir. 2021). But Nicole Colton's complaint doesn't give us much to work with. We know that in April 2018, she was assigned, through a temp agency, to work for FEHRER Automotive, an automobile interior manufacturing facility. She had worked there a few years earlier without incident. But this time, there was a problem: they assigned her to work at a table that was too tall for her 4'6" stature. When she asked the individuals training her for a shorter table or a step stool, they declined.

Undeterred, Colton complained to FEHRER's human resource representative. But she was brushed off. Instead, a few days later, FEHRER terminated her employment and marked her personnel file as ineligible for rehire. The company said that she was "not a good fit" for FEHRER, but the training coordinator confided that she was

labeled as a "red flag" because she "asked too many questions."

Colton responded by filing a timely charge of discrimination and retaliation with the Equal Employment Opportunity Commission and received a right-to-sue letter. She then filed a complaint in federal court. The district court, though, dismissed Colton's complaint without prejudice, after determining that she failed to state a claim of discrimination or retaliation. This appeal followed.

II.

We review de novo a dismissal for failure to state a claim upon which relief may be granted. *Henderson*, 987 F.3d at 1001.

III.

A.

We start with Colton's discrimination claim. The ADA prohibits employment discrimination against a qualified individual on the basis of disability. 42 U.S.C. § 12112(a). To state a claim of discrimination in violation of the ADA, a plaintiff must allege sufficient facts to plausibly suggest that (1) she suffers from a disability, (2) she is a qualified individual, and (3) that a "covered entity" discriminated against her on account of her disability. *Surtain v. Hamlin Terrace Found.*, 789 F.3d 1239, 1246 (11th Cir. 2015). Colton's claim falters on that first prong.

Under the ADA, individuals have a "disability" if they have (A) "a physical or mental impairment that

substantially limits one or more major life activities of such individual"; (B) "a record of such an impairment"; or (C) are "regarded as having such an impairment." 42 U.S.C. § 12102(1). Here, Colton claims her "short stature" is her physical impairment, and that her height substantially limits her "activities of daily living such as reaching." Colton, though, cannot cram her short stature into the definition of "disability" with such conclusory allegations.

The ADA does not define the word "impairment." But the EEOC, pursuant to its statutory authority to issue regulations implementing the ADA, has provided a reasonable definition for us: "Any *physiological disorder or condition*, cosmetic disfigurement, or anatomical loss affecting one or more body systems . . . . " 29 C.F.R. § 1630.2(h)(1) (emphasis added); 42 U.S.C. § 12205a; *see also Harrison v. Benchmark Elecs. Huntsville, Inc.*, 593 F.3d 1206, 1214 (11th Cir. 2010) (noting that while administrative interpretations of an act by its enforcing agency are not controlling, we will look to them for guidance). It has also offered further interpretive guidance, recognizing that the word "impairment" does "not include physical characteristics such as eye color, hair color, left-handedness, *or height*, weight, or muscle tone that are within 'normal' range and are not the result of a physiological disorder." 29 C.F.R. pt. 1630, App'x § 1630.2(h) (emphasis added).

Given these definitions, the facts pleaded in Colton's complaint establish only that her height was a physical characteristic. She pleads no facts whatsoever suggesting that her height was due to a "physiological disorder or condition." *See Morriss v.*

BNSF Ry. Co., 817 F.3d 1104, 1109 (8th Cir. 2016) (holding that for obesity to "qualify as a physical impairment—and thus a disability—under the ADA, it must result from an underlying physiological disorder or condition")[1]; *EEOC v. Watkins Motor Lines, Inc.*, 463 F.3d 436, 443 (6th Cir. 2006) ("consistent with the EEOC's own definition, we hold that to constitute an ADA impairment, a person's obesity, even morbid obesity, must be the result of a physiological condition").

Moreover, we must view height as a physical characteristic, not an "impairment," under guidance from the Supreme Court. In *Sutton v. United Air Lines*, the Court noted when reviewing an ADA claim that employers are "free to decide that physical characteristics or medical conditions that do not rise to the level of an impairment—such as one's *height*, build, or singing voice—are preferable to others." 527 U.S. 471, 490 (1999) (emphasis added).[2]

---

[1] FEHRER erroneously stated that in a previous opinion our "Court agreed [with *Morriss*] that 'the ADA does not prohibit discrimination based on a perception [of] a physical characteristic.'" This is a mischaracterization. We quoted this language from *Morriss* in *a parenthetical* to support the point that "Section 12102(3)(A) does not, by its terms, extend to an employer's belief that an employee might contract or develop an impairment in the future." *EEOC v. STME, LLC*, 938 F.3d 1305, 1316 (11th Cir. 2019). But we never adopted this rule as binding precedent.

[2] Colton urges that *Sutton* was abrogated by later amendments to the ADA. But those amendments did nothing to alter the ADA's definition of "disability" as an "impairment," and therefore this remains good law. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 322 (2012) ("[i]f a statute uses words or phrases that have already received authoritative construction by the jurisdiction's court of

Though these examples may, arguably, be considered dicta, we have often repeated that "there is dicta, and then there is Supreme Court dicta." *Schwab v. Crosby*, 451 F.3d 1308, 1325 (11th Cir. 2006). We do not "lightly cast aside" this guidance from the Supreme Court—particularly when it aligns with the ADA's text and the EEOC's regulations and interpretive guidance. *Id.* (quotation omitted). Claiming to be short without alleging any underlying physiological disorder is simply not enough to allege a disability under the ADA.

Apparently realizing the weakness of her argument, Colton pivots and tries to argue that even if her height is *not* an impairment, FEHRER regarded her as having a disability, which is sufficient under the ADA. *See* 42 U.S.C. § 12102(1)(C). But again, Colton's claim suffers from poor pleading. A person is disabled under the "regarded as" clause of the ADA if her "employer perceives her as having an *ADA-qualifying disability*, even if there is no factual basis for that perception." *Carruthers v. BSA Advert., Inc.*, 357 F.3d 1213, 1216 (11th Cir. 2004). So Colton would at the very least have to allege that FEHRER regarded her as having a physiological disorder, even if she did not. *EEOC v. STME, LLC*, 938 F.3d 1305, 1318 (11th Cir. 2019) (dismissing a "regarded as" disabled claim because the plaintiff did not allege that the employer perceived an employee as having "an existing impairment at the time it terminated her employment"). Though she alleged facts showing that FEHRER thought of her as "short," nothing in her complaint or attached exhibits even hint at

---

last resort . . . they are to be understood according to that construction").

FEHRER considering this to be the result of a physiological disorder or condition.

Because Colton neither pleaded a physical impairment, nor facts suggesting that FEHRER regarded her as having a physiological disorder or condition, we agree with the district court that she failed to adequately plead that she had a "disability" under the ADA.

B.

We next turn to Colton's second claim: that FEHRER retaliated against her for "opposing and reporting discrimination in employment." As Colton tells it, after she asked for a reasonable accommodation, FEHRER terminated her employment and decided to "red flag" her personnel file—adding a note that she "will not be eligible for rehire." This, she argues, constituted retaliation under 42 U.S.C. § 12203(a).

The ADA prohibits employers from "discriminat[ing] against any individual because such individual has [1] opposed any act or practice made unlawful by this chapter or because [2] such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter." 42 U.S.C. § 12203(a). Our Court has adopted Title VII's framework for ADA retaliation claims. *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278, 1287 (11th Cir. 1997). That is, the plaintiff must allege sufficient facts to plausibly suggest that there was "(1) statutorily protected expression; (2) adverse employment action; and (3) a causal link

between the protected expression and the adverse action." *Id.*; *Surtain*, 789 F.3d at 1246.

To state a claim that FEHRER retaliated against her, Colton needs to allege enough facts to suggest that she engaged in statutorily protected expression, either because she "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" under the ADA, *or* "opposed any act or practice made unlawful" by the ADA. 42 U.S.C. § 12203(a). That first option is easily dealt with. We have interpreted this "participation clause" to require a plaintiff to allege facts suggesting that her employer retaliated against her for participating in "proceedings and activities which occur in conjunction with or after the filing of a formal charge with the EEOC," *not* for "participating in an employer's internal, in-house investigation, conducted apart from a formal charge with the EEOC." *EEOC v. Total Sys. Servs., Inc.*, 221 F.3d 1171, 1174 (11th Cir. 2000). Colton alleges that she was terminated and "flagged" before ever filing an EEOC charge, so this option cannot apply here.

Her other option is to allege that FEHRER retaliated against her for "oppos[ing] any act or practice made unlawful by" the ADA. 42 U.S.C. § 12203(a). Though the act she opposed did not have to actually be unlawful, she needed to allege facts suggesting that she had a good faith, objective belief that the employer's conduct was unlawful. *Howard v. Walgreen Co.*, 605 F.3d 1239, 1244 (11th Cir. 2010). She has not.

Colton says she was retaliated against because she opposed "discrimination in employment"—in other words, FEHRER's refusal to accommodate her. Though Colton may have *subjectively* thought that

FEHRER was discriminating against a person with a disability by failing to accommodate her short height, the district court correctly observed that "any such belief was not objectively reasonable given existing law." The Supreme Court's opinion in *Sutton* and the EEOC's interpretive guidance have clearly stated that height is only a physical characteristic, not a disability. *See Furcron v. Mail Ctrs. Plus, LLC*, 843 F.3d 1295, 1311 (11th Cir. 2016). Because Colton did not allege facts suggesting that she opposed unlawful conduct or that she reasonably believed that she was opposing unlawful discrimination, she did not state a plausible retaliation claim.

AFFIRMED.

FILED
2020 May-05 PM 03:59
U.S. DISTRICT COURT
N.D. OF ALABAMA

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA MIDDLE DIVISION

Case No. 4:19-cv-653-CLM

NICOLE COLTON,
Plaintiff,
v.

FEHRER Automotive, North America, LLC,
Defendant.

MEMORANDUM OPINION

Plaintiff Nicole Colton ("Plaintiff" or "Colton") is 4'6" tall. Colton alleges that defendant FEHRER Automotive, North America, LLC ("Defendant" or "FEHRER") violated the Americans with Disabilities Act of 1990 ("ADA") by failing to make reasonable accommodations for her short stature and retaliating against her for requesting such accommodations. Doc. 1, 4-5. FEHRER has moved to dismiss Colton's complaint because it fails to plead a claim that would entitle Colton to relief. Doc. 18. FEHRER's motion is due to be granted for the reasons detailed within.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 8(a)(2) requires a plaintiff to provide "a short and plain statement of the claim showing that the pleader is entitled to relief." To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the "[f]actual allegations [in the complaint] must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citation omitted). This "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* (citation omitted). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. 544, 556).

STATEMENT OF THE FACTS[1]

FEHRER manufactures interior parts for automobiles. A temporary work agency assigned Colton to work at FEHRER's plant in Gadsden. When Colton arrived for work, FEHRER placed her on assembly—the only position available. Colton's short stature limits her reach, which immediately caused problems with Colton's ability to perform the job she was assigned.

So Colton asked her training coordinator to either accommodate her short stature or move her to

[1] For FEHRER's Rule 12 motion, the Court considers the facts alleged in Colton's complaint (doc. 1) and documents attached to, referenced in, or quoted from in her complaint (docs. 1-1, 21-1, EEOC letter and file).

a different position within the plant. When her training coordinator refused, Colton made the same request to FEHRER's on-site Human Resources representative. He also refused.[2]

FEHRER instead determined that Colton was "not a good fit" and terminated her employment. FEHRER also noted in Colton's personnel file that she would not be rehired.

Colton timely filed a charge of discrimination and retaliation with the Equal Employment Opportunity Commission ("EEOC") and received a right-to-sue letter. This complaint followed.

DISCUSSION

Colton pleads two counts in her complaint: (1) discrimination in violation of 42 U.S.C. § 12112(a) and (2) retaliation in violation of 42 U.S.C. §12203(a). Doc. 1. The Court addresses each in turn.

I. Discrimination

The ADA prohibits employers from discriminating "against a qualified individual on the basis of disability[.]" 42 U.S.C. § 12112(a). Colton alleges that her "short stature" constitutes a

---

[2] Colton alleges in her complaint that FEHRER employees were unwilling to discuss or provide reasonable accommodations to assist her work on the assembly line (doc. 1-1 at ¶¶13, 16), but her EEOC File suggests that FEHRER offered to provide Colton with an accommodation but Colton only wanted to move to a different position—and none were available (doc. 21-1). For the purpose of the Rule 12 motion only, the Court will assume that, as pleaded, FEHRER did not offer an accommodation, despite the document Colton provides that seems to suggest otherwise.

disability (Doc. 1 at 2) and that FEHRER discriminated against her because of her short stature. So, as a threshold matter, the Court must determine whether Colton's height (4'6") constitutes a "disability" under the ADA. If it does not, Colton fails to state a claim that entitles her to relief.

A. Actually Disabled

The ADA defines "disability" as "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment…." 42 U.S.C. § 12102. Congress did not define the term "physical or mental impairment" in the ADA, but the EEOC defines a physical impairment as a "physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine," 29 C.F.R. § 1630.2(h)(1), and the EEOC's interpretation is entitled to judicial deference under *Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837 (1984). As a result, for Colton's height to be a "disability" within the meaning of the ADA, her height must be a "physiological disorder or condition … affecting one or more body systems."

Read plainly, the EEOC definition of "physical impairment" requires (a) some type of disorder or pathology of the body that (b) affects one or more body systems. Colton's height fails to satisfy this

definition because Colton has not alleged that her height is due to any disorder or pathology.

Colton's height is properly viewed as a physical *characteristic*, not a physiological condition or disorder. And the Court refuses to read the ADA to elevate a physical characteristic—even if it is outside the normal or average range of individual variation—to the status of a "disability," unless the atypical characteristic results from a physiological disorder.

This Court refuses to elevate height from a characteristic to an impairment, in part, because the Supreme Court similarly refused to do so in *Sutton v. United Air Lines, Inc.*: "An employer is free to decide that physical characteristics or medical conditions that do not rise to the level of an impairment—such as one's *height*, build, or singing voice—are preferable to others[.]" 527 U.S. 471, 490-91 (1999) (emphasis added).

It is true, as Colton points out, that Congress amended the ADA in 2008 to overrule certain aspects of the *Sutton* decision. *See* Pub. L. 110-325. But the amendments broadened the scope of the phrase "that substantially limits one or more major life activities…." *See id.* §2(b), §4; they did not alter the phrase "physical or mental impairment." In other words, Congress made it easier to prove that a person who suffers from a "physical or mental impairment" is "substantially limited" by that impairment, but that person still has to suffer from a "physical or mental impairment" in order to be "disabled" within the meaning of the act.

Applying the "prior-construction canon," Congress' retention of the phrase "physical or mental impairment" post-*Sutton* requires this Court to

construe the phrase in the same manner that the Supreme Court construed it in *Sutton*. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: the Interpretation of Legal Texts* at 322-26 (defining the "prior-construction canon" to mean that "if a statute uses words or phrases that have already received authoritative construction by the jurisdiction's court of last resort … they are to be understood according to that construction"). If the Supreme Court said that "height" is a physical characteristic, not an impairment, then so will this Court. *See Sutton,* 527 U.S. at 490.

Because Colton failed to plead facts that would establish that her short stature is a "physical or mental impairment," as that phrase is defined by the EEOC, the Court finds that Colton has failed to plead that she suffers from a "disability" under the ADA.

B. Regarded as Disabled

Colton also contends that, whether or not she was actually disabled, FEHRER regarded Colton as having a "disability" (doc. 21 at 10-12), and that is enough to establish an entitlement to protection under the ADA. *See* 42 U.S.C. § 12102(1)(C) (defining "disability" to include an individual "being regarded as having such an impairment [*i.e.* a 'physical or mental impairment that substantially limits one of more major life activities']"). This argument fails.

FEHRER employees were no doubt aware of Colton's height and the challenges that Colton's height caused her when performing tasks on the assembly line. But, again, height itself is not a

disability under the ADA; Colton would need to prove that FEHRER perceived that Colton's height resulted from a physiological disorder or condition, thereby rendering her disabled under the ADA. *See Carruthers v. BSA Advertising, Inc.*, 357 F.3d 1213, 1216 (11th Cir. 2004) ("Under the 'regarded as' prong, a person is 'disabled' if her employer perceives her as having an *ADA-qualifying disability*….") (citation omitted) (emphasis added).

Colton pleads no facts in her complaint that would prove that FEHRER believed her short stature resulted from a "physiological disorder or condition … affecting one or more body systems," 29 C.F.R. § 1630.2(h)(1), rather than a simple physical characteristic. In fact, the emails that Colton offers from her EEOC file make it clear that FEHRER considered Colton's short stature to be a "safety" and "ergonomic" issue, not an issue of actionable disability. *See* Doc. 21-1 at 1 ("So we have hired a worker that is very short and she is complaining about not being able to reach things and it will definitely be an ergonomic issue if we do not find a solution"); doc. 21-1 at 3 ("She also was informed that we were in the process of making her job more accommodating per safety protocol. She did not seem to like that, but we let her know that this has nothing to do with her, it is a safety standard that has to be met by the company.").

Because Colton fails to plead facts that would prove FEHRER perceived her height as a disability under the ADA, Colton cannot rely on the "regarded as" clause to state a claim of discrimination. 42 U.S.C. § 12102(1)(C).

* * *

Because Colton fails to plead facts that would establish that she suffered from a "disability" under the ADA, Count 1 is due to be dismissed for failure to state a claim, and the Court needn't address FEHRER's remaining arguments against that count.

II. Retaliation

In Count II, Colton claims that FEHRER violated the ADA by retaliating against her for "reporting and opposing discrimination." Doc. 1, ¶26. Specifically, Colton alleges that she "complained to HR" after her training coordinator refused to give her an accommodation or move her to a different position (doc. 1, ¶16, ¶27) and that FEHRER retaliated by terminating her and banning her from consideration for future openings at the Gadsden facility. Doc. 1, ¶27.

The ADA makes it unlawful to "discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter." 42 U.S.C. § 12203(a). This provision, like its almost identical counterpart in Title VII, contains two protective harbors: the "opposition" clause and the "participation" clause. Colton does not plead in her complaint which clause her claim falls under, so the Court addresses both.

1. Participation Clause: The participation clause prohibits an employer from discriminating against an individual "because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing

under this chapter." 42 U.S.C. § 12203(a). The plain language of this clause limits it to actions pursued by the employee "under this chapter;" that is, actions within the formal EEOC process. Complaints made internally—*e.g.*, complaints to the HR department—are not entitled to protection under the clause. *See E.E.O.C. v. Total Sys. Services, Inc.*, 221 F.3d 1171, 1174 (11th Cir. 2000). As a result, Colton's alleged complaint to FEHRER's HR department and her requests for accommodation are not activities protected under the clause. Therefore, Colton has failed to plead a claim under the retaliation clause that could entitle her to relief.[3]

2. Opposition Clause: The opposition clause prohibits employers from retaliating against an employee who "has opposed any act or practice made unlawful by this chapter[.]" 42 U.S.C. § 12203(a). As detailed in Part I, Colton fails to plead facts that would establish that FEHRER committed an unlawful act or practice, so Colton necessarily fails to plead that FEHRER retaliated against her because she "opposed any act or practice made unlawful by this chapter[.]" *Id.*

Furthermore, for an employee's activity to enjoy protection under the "opposition" clause, her opposition must be "reasonable"—*i.e.*, the employee must reasonably believe that the act or practice she is opposing violates the ADA. This requirement of reasonableness includes both a subjective and an objective component. The subjective component requires that the employee be acting in good faith.

---

[3] Colton does not allege that her EEOC charge (doc. 1-1) supports a retaliation claim. Nor could she, as she did not file the charge until after FEHRER terminated her employment and flagged in her file that she would not be eligible for re-hire.

The objective component requires that her belief be objectively reasonable given existing law. *See Standard v. A.B.E.L. Services, Inc.*, 161 F.3d 1318, 1328 (11th Cir. 1998). While Colton may have believed in good faith that her height was a "disability" under the ADA, any such belief was not objectively reasonable given existing law. The Supreme Court's opinion in *Sutton* and the EEOC's interpretive guidance make it clear enough that merely being of short stature is not a disability under the ADA. Any contrary belief would not be objectively reasonable.

As a result, Colton has failed to plead a claim under the retaliation clause that could entitle her to relief. Because Colton fails to plead a viable claim under the participation clause or the retaliation clause, Count II is due to be dismissed for failure to state a claim that could entitle her to relief.

CONCLUSION

Colton has failed to state a claim of discrimination or retaliation that would entitle her to relief. As a result, FEHRER's motion to dismiss Colton's complaint (doc. 18) is due to be granted.

The Court will enter a separate order consistent with this opinion.

DONE on May 5, 2020.

/s/

COREY L. MAZE
UNITED STATES DISTRICT JUDGE

Filed September 16, 2021

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 20-12039-BB

NICOLE COLTON,
Plaintiff - Appellant,

versus

FEHRER AUTOMOTIVE, NORTH AMERICA, LLC,
Defendant - Appellee.

Appeal from the United States District Court
for the Northern District of Alabama

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: JORDAN, GRANT, and LUCK, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Panel Rehearing is also denied. (FRAP 40)

§ 12101. Findings and purpose
(a) Findings
The Congress finds that--
(1) physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination; others who have a record of a disability or are regarded as having a disability also have been subjected to discrimination;
(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;
(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;
(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;
(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;
(7) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and
(8) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.
(b) Purpose
It is the purpose of this chapter--
(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and
(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

§ 12101. Findings and purpose, 42 USCA § 12101

§ 12102. Definition of disability

Currentness

As used in this chapter:

(1) Disability

The term "disability" means, with respect to an individual--

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

(B) a record of such an impairment; or

(C) being regarded as having such an impairment (as described in paragraph (3)).

(2) Major life activities

(A) In general

For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

(B) Major bodily functions

For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

(3) Regarded as having such an impairment

For purposes of paragraph (1)(C):

(A) An individual meets the requirement of "being regarded as having such an impairment" 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.
(B) Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.
(4) Rules of construction regarding the definition of disability
The definition of "disability" in paragraph (1) shall be construed in accordance with the following:
(A) The definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter.
(B) The term "substantially limits" shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.
(C) An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.
(D) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.
(E)(i) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as--
(I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;
(II) use of assistive technology;

(III) reasonable accommodations or auxiliary aids or services; or
(IV) learned behavioral or adaptive neurological modifications.
(ii) The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.
(iii) As used in this subparagraph--
(I) the term "ordinary eyeglasses or contact lenses" means lenses that are intended to fully correct visual acuity or eliminate refractive error; and
(II) the term "low-vision devices" means devices that magnify, enhance, or otherwise augment a visual image.

§ 12102. Definition of disability, 42 USCA § 12102