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# Deafness as a Disability: A Discussion of the ADAAA Principles

By Jeffrey Campolongo All Articles

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Jeffrey Campolongo

In 2008, Congress undertook a task that was over 20 years in the making. The Americans with Disabilities Act Amendments Act of 2008 (ADAAA) was supposed to signal a new way for federal courts, judges, lawyers and litigants to evaluate disability claims. The emphasis would shift from whether a person had an actual disability, to whether discrimination actually occurred.

The preamble to the ADAAA, 42 U.S.C. § 12101(a)(6), specifically rebuked lower courts that incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities. Courts were instructed by Congress to broadly interpret the ADAAA in favor of coverage, thereby protecting more Americans from discrimination.

The ADAAA even redefined certain major life activities, and included the term "hearing" in the new congressional mandate. The revised ADA regulations were similarly amended to make it abundantly clear: "It should easily be concluded that the following types of impairments will, at a minimum, substantially limit the major life activities indicated: Deafness substantially

limits hearing." So naturally, the first case in Pennsylvania to take on the issue of deafness as an actual disability would be interpreted in a manner consistent with Congress' specific instructions, right? The issue of disability now being removed from the equation, courts could get to the business of enforcing discrimination law, correct? Well, not so fast.

In what can only be called a shocking ADA decision by the U.S. District Court for the Eastern District of Pennsylvania, plaintiff Christine Mengel was found not to meet the legal definition of a disabled individual because she "only provided evidence of hearing loss in one ear rather than bilateral deafness." A synopsis of *Mengel v. Reading Eagle*, No. 11-6151, (E.D. Pa. Mar. 29, 2013), was published in the April 16 edition of *The Legal* (<http://tinyurl.com/cqexa6b>) and summarized by my esteemed colleague, Sid Steinberg, in his April 10 article, "Partial Deafness Found to Not Be a Disability Under the ADAAA" (<http://tinyurl.com/d29kf6e>). News of the *Mengel* decision quickly spread through social media and became the topic of heated discussion on employment law and ADA blogs (see, e.g., <http://goo.gl/n7heu>).

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What was not covered in the previous articles was, what I believe, a complete disregard for the principles of the ADA. A careful review of the decision reveals how the district court inaccurately cited the holding of a single case purported to support the *Mengel* decision.

Upon further review, the district court relied on the following facts to support the conclusion that partial deafness does not constitute a disability: "[Mengel] testified that her deafness in her left ear was not a distraction ... and she did not mention any specific instances where her hearing loss caused a problem other than that she 'didn't hear some things.'" The district court also cited Mengel's deposition testimony that she "had difficulty hearing in noisy environments such as the newsroom in which she worked." It is obvious that Mengel was downplaying the effect of her hearing loss, but even those statements emphasize that she was not able to hear things at work. Apparently not recognizing the usefulness of hearing things at work, the district court found that this type of limitation did not even raise an issue of fact sufficient to withstand summary judgment. Remembering, of course, that not only did the amended act address hearing as a major life activity, but the regulations also taught us that deafness is one of the impairments that should be easy to conclude as disabling.

The only support the district court drew upon for this decision was a case from the U.S. District Court for the Southern District of Texas, Houston Division, which the district court incorrectly (and unfortunately) interpreted, *Durrenberger v. Texas Department of Criminal Justice*, 757 F.Supp.2d 640 (S.D. Tex. 2010). The district court explained that Jeremy Joseph Durrenberger did not find sufficient evidence of partial hearing being substantially limiting, therefore the plaintiff's claims could not withstand summary judgment. The district court quoted what it perceived to be Durrenberger's reasoning: "Having hearing difficulty visiting in a noisy room is not substantially limiting considering others also have difficulty in the noisy environment."

The most unfortunate part of the opinion was that the quoted portion above, in actuality, was taken from the defendant's brief and was included in the *Durrenberger* decision as part of the court's recitation of the defendant's argument. It was not part of the court's holding in any way, shape or form. The reality of the *Durrenberger* case is this: The *Durrenberger* court not only rejected the defendant's argument, it actually granted summary judgment to the plaintiff, finding that "Durrenberger is significantly restricted as to the manner under which he can perform the major life activities of hearing and communicating as compared to the manner under which the average person in the general population can perform those activities." The district court here completely missed the analysis and holding of the *Durrenberger* case, relying instead on defense arguments that were taken completely out of context and wholly unrelated to the holding.

The second part of the court's analysis concerning Mengel's perceived disability is equally flawed. The district court found sufficient evidence that the employer may have regarded Mengel as having a disability, which also affords protection under the ADA even in the absence of an actual disability. However, the court found that no causal link could exist between a perceived disability and Mengel's termination because Mengel had been partially deaf since 2007 and was not terminated until 2009.

Despite the fact that the passage of time neither restored Mengel's hearing, nor ended the side effects such as dizziness, loss of balance and difficulty concentrating, in the district court's view sufficient time had passed to negate any impact the perceived disability could have on the employer's decisions. Mengel had apparently been deaf for too long to seek protection under the ADA. Using the court's logic, when an employer delays firing a disabled employee for a period of time, it would effectively be off the hook. It would be like telling a plaintiff in a race case that, even though you have been African-American your whole life, you weren't fired until 2009, so there's nothing we can do for you.

Litigators can certainly use this decision as a teaching moment. This case is an example for clients who are too prideful to see themselves as victims, or to categorize themselves as "disabled." It is a lesson on how seemingly innocuous testimony can be interpreted. It is not uncommon for disabled individuals to try to de-emphasize or discount the degree of limitation or impact a disability has on their daily activities, particularly in the workplace. Plaintiffs need to understand the effect that disabilities can truly have on them, and that testimony that downplays those effects is counterproductive in a discrimination case as it can, as here, influence the court to believe that the individual really does not suffer from significant adverse effects of the impairment. •

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