

# LEGAL BRIEFINGS



## Practical Tips When Bringing an ADA Title I Case

Bringing an ADA case in court can be a daunting task for people with disabilities and their representatives. One of the biggest challenges for people with disabilities is simply proving that they are covered by the ADA. In the wake of the Supreme Court's decisions in *Sutton v. United Airlines* and *Toyota v. Williams*, people with disabilities have had a much harder time proving in court that they have a disability under the ADA. As a result, many ADA cases are being dismissed before a judge or a jury has an opportunity to hear about the discrimination the person with a disability experienced. While there are no easy ways around this problem, the following are some ideas on how to deal with the current legal hurdles people with disabilities face when trying to prove they are covered by the ADA, as well as other practical tips when filing an ADA case.

**1. Before filing in court, exhaustion of administrative remedies is required.**

Before filing an ADA case in court, people with disabilities must “exhaust” administrative remedies by filing a charge with the Equal Employment Opportunity Commission (EEOC). Generally, the charge must be filed within 180 days of the adverse employment action. However, the filing deadline may be extended to 300 days if a state or local anti-discrimination

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law exists. The time for filing a charge of disability discrimination is extended through the use of a “work sharing agreement” the EEOC has developed with the Fair Employment Practices Agency that enforces the state or local anti-discrimination statute.

**2. To preserve a Title I claim, a complaint must be filed in court within 90 days of the EEOC’s “right to sue” letter.**

After a charge is filed with the EEOC, often the issue can be resolved through mediation or conciliation. However, if the charge is not resolved and the EEOC elects not to litigate the case, the EEOC will issue a “right to sue” letter. People with disabilities then have 90 days to file their ADA complaint in court. If the complaint is not filed within 90 days, the right to proceed with the ADA case will likely be permanently lost.

**3. The judge may appoint an attorney upon request.**

For civil cases, including cases brought under the ADA, plaintiffs do not have an absolute right to have an attorney appointed by the judge. However, in some jurisdictions, a judge may appoint an attorney to provide free representation in civil cases. People with disabilities who are seeking free legal representation can make a written request for the judge to appoint an attorney. To support this request, the plaintiff should provide the judge with confirmation of the lack of resources to hire an attorney and the unsuccessful efforts to retain an attorney. Also, the court clerk can typically provide the forms that are necessary for an indigent individual to request that court filing fees be waived.

**4. Whenever possible, plead all three prongs of the definition of disability.**

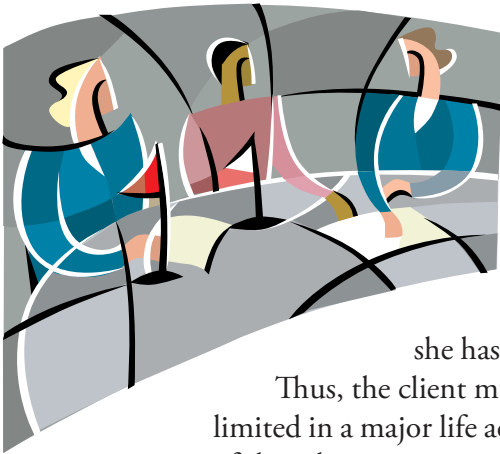
If the facts support it, it is important to plead actual disability, record of disability, and perceived disability. Many cases that have been dismissed for failing to prove the requirements for actual disability, may have survived if the second or third prongs of definition of disability had been alleged. *See, Hairman v. Village of Fox Lake*, 55 F. Supp. 2d 886 (N.D. Ill. 1999), *further discussed at* 79 F. Supp. 2d 949 (N.D. Ill. 2000) in which the court held that plaintiff did not have an actual disability because of her use of medication, but for summary judgment purposes, she presented sufficient evidence under the “regarded as” prong.

**5. Explore whether side effects of mitigating measure are substantially limiting.**

In *Sutton v. United Airlines*, the Supreme Court clearly stated that if plaintiff experiences side effects from medication or other mitigating measures, and those side effects are substantially limiting, then the plaintiff has an ADA disability. Thus, it is critical to explore with the client and her treating professionals what side effects the client experiences as a result of the mitigating measure. *See, McAlindin v. County of San Diego*, 192 F.3d. 1226 (9th Cir. 1999).

**6. When preparing for deposition or trial, the person with the disability needs to understand the ADA standards for disability and qualified.**

Many ADA cases have been lost because plaintiffs testify that they are not substantially limited in any major life activity. It is vital for the person with the disability to understand how the courts have interpreted the ADA's definition of disability and that the person with the disability must meet this definition in order to recover under the ADA. Many people living with disabilities do not believe that they have an impairment that substantially limits a major life activity.



While this can be an empowering attitude, failing to testify that the impairment substantially limits a major life activity may result in the dismissal of the case. Therefore, the definition of disability must be reviewed carefully when preparing for a deposition or trial testimony. It is also very important to explore what possible major life activities are limited as a result of the person's disability despite the fact that the plaintiff may use a mitigating measure. Additionally, the person with the disability must understand that after proving that she has a disability, she must then prove that she is "qualified."

Thus, the client must walk a fine line in testifying that she is substantially limited in a major life activity, yet is still able to perform the essential functions of the job.

**7. Role of treating professionals is critical.**

Testimony by treating professionals has also resulted in many cases being lost because the treating professional did not understand the requirements of the ADA. Many treating professionals, when trying to help the plaintiff retain or regain employment, may make overly broad statements about the plaintiff's abilities that will undercut her efforts to prove a substantial limitation in a major life activity. Conversely, some treating professionals, in their efforts to support the plaintiff's efforts to be covered by the ADA, will make overly broad statements that will inhibit the plaintiff's ability to demonstrate she is qualified and able to perform the essential job functions.

**8. Role of people who have expertise on plaintiff's disability is critical.**

Many times, the plaintiff and the plaintiff's treating professionals do not understand all of the complexities of a particular disability. When proving that the plaintiff meets the definition of disability, it may be useful for the person with the disability and her advocate to consult with people who are specialists on a particular disability or to consult with organizations that have resources and information about the disability. (For example, the American Diabetes Association has consulted on cases and provided information on the major life

activities that are impacted by diabetes, and how people with diabetes can be substantially limited despite mitigating measures.)

**9. Research which major life activities have been recognized for plaintiff's disability in previous cases.**

Because the scope of possible major life activities is not limited by the ADA or its regulations, some courts have adopted some major life activities that may not be intuitive for a particular disability. (For example, in *Cornman v. N.P. Dodge Management*, 43 F. Supp. 2d 1066 (D. Minn. 1999), a court held that a woman with cancer was substantially limited in the major life activity of sexual relations.) Accordingly, researching other cases involving the plaintiff's disability may prove useful. Additionally, creative pleading raising new life activities that have not yet been recognized is advisable.



**10. Discovery is important in a “regarded as” case.**

In a “regarded as” case, plaintiffs have to demonstrate the defendant's intent. Thus, it is important to be very thorough in discovery requests. Often e-mails or other correspondence may reveal the defendant's discriminatory reasons. (For example, in the *Haiman* case cited above, discovery produced a log that a supervisor kept in which she documented her belief that the client had a disability.) Also, the plaintiff should review whether there are any co-workers or other witnesses who could support the perceived disability claim.

**11. There are challenges when raising “working” as the sole major life activity.**

In the mitigating measures cases, and again in *Toyota v. Williams*, the Supreme Court expressed reservations that working should be recognized as a major life activity under the ADA. And even if it is recognized, the standard of proof (substantially limited in a class or broad range of jobs) is very difficult to meet. Additionally, even if the plaintiff is successful in proving she is substantially limited in working, she may face an uphill battle in proving that she is qualified.

**12. Be aware of new standard arising from the *Williams* case.**

In *Toyota Manufacturing v. Williams*, 534 U.S. 184 (2002), the Supreme Court adopted a new standard for major life activities. When Plaintiff claimed she was substantially limited in performing manual tasks, the Court stated that limiting the analysis to the tasks she performed at work was too narrow, and instead, courts must look at whether a plaintiff is substantially limited in activities that are of “central importance to most people's daily lives.” Accordingly, it is important

for the person with the disability to review how her disability limits activities that are central to most people's daily lives.

**13. Make sure the complaint tells a story.**

Although the Federal Rules of Civil Procedure only require "notice pleading," the Complaint should be detailed enough to tell a story of the discrimination the plaintiff experienced to put into context the underlying discrimination being alleged.

**14. Consider non-litigation alternatives if definition of disability claim is weak.**

If the case for definition of disability is weak, consider other strategies before filing litigation. (Once litigation is filed, defense counsel will be using whatever theories possible to dispose of the case.) Try to appeal to conscience of the corporate counsel or the image of the company if it is seen as being on the wrong side of a disability rights claim. Or, if the defendant is a governmental entity, try to work with the ADA coordinator or whatever disability-related personnel may exist.

**15. Consider state and local law claims that may not have a "substantially limited" component.**

If negotiations are unsuccessful and litigation is the only option, and it appears unlikely the person with the disability will not be able meet the ADA definition of disability, it is important to consider filing under state and local discrimination laws. (For instance, the Illinois Human Rights Act does not require proof of a substantial limitation of a major life activity. Rather, plaintiffs only have to demonstrate the existence of a physical or mental characteristic, which is unrelated to the person's ability to perform the duties of a particular job. 775 ILCS 5/1-103(I).) Accordingly, plaintiffs whose symptoms are primarily controlled by mitigating measures should review their options under state and local ordinances before proceeding with an ADA claim.

**16. Confidentiality of disability information can be preserved during litigation.**

Because of the prevalent discrimination and stigma that routinely face people with various disabilities, confidentiality can be an important issue during litigation. For instance, for people living with HIV, maintaining the confidentiality of the person's HIV status is often an important concern. People with disabilities should decide how important confidentiality of their disability is to them. Although the plaintiff's disability may be the central issue in an ADA case, the plaintiff has an option of bringing the case using a pseudonym. Using a pseudonym limits the access of third parties to identifying information about the plaintiff. Proceeding in this manner requires filing a motion with the court.

Courts routinely permit litigating under a pseudonym and opposing counsel does not usually object to proceeding in this matter.

**17. Litigation may be expedited under certain circumstances.**

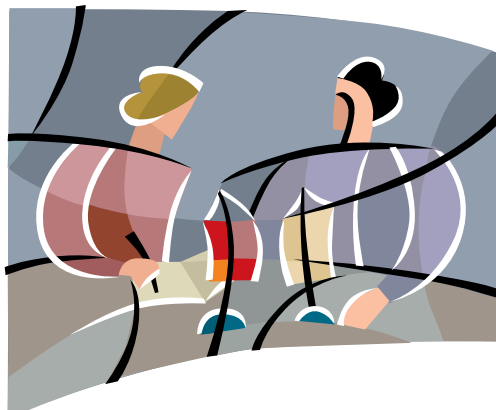
If person's disability could lead to incapacitation or death, it is prudent to seek an acceleration of the litigation process. Most courts routinely permit this, although some require medical testimony to support the need for acceleration. In addition, administrative agencies enforcing the ADA, like the EEOC, are generally willing to accelerate their investigation process when requested by charging parties who may be close to death.

**18. Evidence and video depositions may be useful when the plaintiff may be unable to testify at trial.**

If it appears that a plaintiff with a disability may die or be too ill to testify at trial, she should consider submitting to an evidence deposition prior to the trial. Also, a videotaped deposition is preferable because it allows the jury or judge to see and hear the plaintiff's story.

**19. The impact of litigation on the person's disability should be evaluated.**

Litigation is stressful enough for the general public, but for people living with certain disabilities, the stress of litigation can potentially impact their health. The person with the disability should consider these issues before proceeding and during the course of litigation.



## Conclusion

ADA litigation poses challenges of many kinds—procedural, substantive and even emotional. Hopefully, the tips listed above will provide some practical guidance as people with disabilities try to navigate the complex process of enforcing their legal rights under the ADA.

Each state has a Protection & Advocacy organization that receives federal funding to provide legal advocacy assistance to people with disabilities. While not all Protection & Advocacy organizations focus on employment discrimination litigation, the ones that do not provide representation in these cases may be able to provide self-advocacy assistance and referrals to pro bono and other legal resources. To identify the Protection & Advocacy organization in their state, people with disabilities can contact the National Disability Rights Network (NDRN) at 202-408-9514 (voice), 202-408-9521 (TTY) or [www.ndrn.org](http://www.ndrn.org).