NB: This unofficial compilation of the U.S. Code is current as of Jan. 4, 2012 (see http://www.law.cornell.edu/uscode/uscprint.html).

TITLE 42 - THE PUBLIC HEALTH AND WELFARE
CHAPTER 126 - EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES

§ 12102. Definition of disability

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.

(Pub. L. 101–336, § 3, July 26, 1990, 104 Stat. 329; Pub. L. 110–325, § 4(a), Sept. 25, 2008, 122 Stat. 3555.)

References in Text

This chapter, referred to in text, was in the original "this Act", meaning Pub. L. 101–336, July 26, 1990, 104 Stat. 327, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 12101 of this title and Tables.

The ADA Amendments Act of 2008, referred to in par. (4)(B), is Pub. L. 110–325, Sept. 25, 2008, 122 Stat. 3553. Section 2 of the Act, relating to the findings and purposes of the Act, is set out as a note under section 12101 of this title. For complete classification of this Act to the Code, see Short Title of 2008 Amendment note under section 12101 of this title and Tables.

Amendments

2008—Pub. L. 110–325 amended section generally. Prior to amendment, section consisted of pars. (1) to (3) defining for purposes of this chapter "auxiliary aids and services", "disability", and "State".

Effective Date of 2008 Amendment

Amendment by Pub. L. 110–325 effective Jan. 1, 2009, see section 8 of Pub. L. 110–325, set out as a note under section 705 of Title 29, Labor.

NB: This unofficial compilation of the U.S. Code is current as of Jan. 4, 2012 (see http://www.law.cornell.edu/uscode/uscprint.html).

TITLE 42 - THE PUBLIC HEALTH AND WELFARE
CHAPTER 126 - EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES
SUBCHAPTER IV - MISCELLANEOUS PROVISIONS

§ 12211. Definitions

(a) Homosexuality and bisexuality

For purposes of the definition of "disability" in section 12102 (2) [1] of this title, homosexuality and bisexuality are not impairments and as such are not disabilities under this chapter.

(b) Certain conditions

Under this chapter, the term "disability" shall not include—

(1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(2) compulsive gambling, kleptomania, or pyromania; or

(3) psychoactive substance use disorders resulting from current illegal use of drugs.

Footnotes

[1] See References in Text note below.

(Pub. L. 101–336, title V, § 512, formerly § 511, July 26, 1990, 104 Stat. 376; renumbered § 512, Pub. L. 110–325, § 6(a)(2), Sept. 25, 2008, 122 Stat. 3558.)

References in Text

This chapter, referred to in text, was in the original "this Act", meaning Pub. L. 101–336, July 26, 1990, 104 Stat. 327, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 12101 of this title and Tables.

Section 12102 of this title, referred to in subsec. (a), was amended generally by Pub. L. 110–325, § 4(a), Sept. 25, 2008, 122 Stat. 3555, and, as so amended, provisions formerly appearing in par. (2) are now contained in par. (1).

Prior Provisions

A prior section 512 of Pub. L. 101–336, which amended former section 706 of Title 29, Labor, was renumbered section 513.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KATE LYNN BLATT, Plaintiff, v. CABELA'S RETAIL, INC. Defendant.	**CIVIL ACTION NO. 5:14-cv-4822-JFL**

SECOND STATEMENT OF INTEREST
OF THE UNITED STATES OF AMERICA

The United States of America submits this Second Statement of Interest pursuant to 28 U.S.C. § 517,[1] and in accordance with the Court's Order of September 21, 2015 (ECF No. 62). The United States has an interest in this litigation because Plaintiff has raised a constitutional challenge to a provision of the Americans with Disabilities Act ("ADA"), specifically 42 U.S.C. § 12211(b)(1), which excludes "transsexualism . . . [and] gender identity disorders not resulting from physical impairments" from the ADA's definition of "disability" (the "GID Exclusion"). *See* Pl.'s Opp'n to Def.'s Mot. to Dismiss ("Pl.'s Opp'n") (ECF No. 23); Notice of Constitutional Question (ECF No. 24). The United States suggests that resolution of the constitutional challenge to the GID Exclusion may be avoided as a matter of statutory construction. As

[1] 28 U.S.C. § 517 provides: "The Solicitor General, or any other officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States." *See* 28 U.S.C. § 517.

explained below, under a reasonable interpretation of the statute, Plaintiff's gender dysphoria falls outside of the scope of the GID Exclusion because a growing body of scientific evidence suggests that it may "result[] from [a] physical impairment[]." This interpretation of the GID Exclusion would allow the Court to avoid the constitutional question, and thus is compelled by the doctrine of constitutional avoidance.[2]

It is well-settled that, if possible, courts should avoid resolving cases on constitutional grounds. "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Serv. v. McLaughlin*, 323 U.S. 101, 105 (1944); *see also Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193, 204-06 (2009). "[W]hen deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail." *Clark v. Martinez*, 543 U.S. 371, 381-82 (2005); *see also Siluk v. Merwin*, 783 F.3d 421, 434 (3d Cir. 2015) ("If a statute can be construed two ways, 'by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided,' our duty is to 'adopt the latter.'" (quoting *United States v. Edmonds*, 80 F.3d 810, 819 (3d Cir. 1996))).

The GID Exclusion excepts from the ADA's definition of "disability" those "gender identity disorders *not resulting from physical impairments*." 42 U.S.C. § 12211(b) (emphasis added). The statute does not define the italicized phrase, nor does the legislative history shed any light. But the applicable regulations broadly define the term "physical impairment" to mean

[2] The United States takes no position on the merits of Plaintiff's ADA claim, including whether plaintiff suffers "a physical or mental impairment that substantially limits one or more major life activities." 42 U.S.C. § 12102.

"[a]ny physiological disorder or condition" affecting various body systems including "neurological," "reproductive," or "genitourinary." 28 C.F.R. § 35.104. This definition is derived from the regulations implementing the Rehabilitation Act, the federal-sector analogue to the ADA. *See* 56 Fed. Reg. 35694, 35698 (July 26, 1991). Congress, in the ADA, required courts "to construe the ADA to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act." *Bragdon v. Abbott*, 524 U.S. 624, 631-32 (1998) (citing 42 U.S.C. § 12201(a)). And those regulations, which were in effect at the time that Congress was considering the ADA, explain that the broad coverage of the term "physical impairment" was designed to include "any condition which is . . . physical but whose precise nature is not at present known," 42 Fed. Reg. 22676, 22686 (May 4, 1977), thus leaving room for new scientific developments.

This statutory and regulatory background makes clear that, as used in the GID Exclusion, the phrase "resulting from a physical impairment" broadly encompasses GIDs rooted in biology or physiology, even if the precise etiology is not yet definitively understood. In other words, the statute distinguishes between two categories of GIDs: those that have a physical cause and those that do not. Whether a particular GID falls within the scope of the GID Exclusion (and outside the scope of the ADA's protections) turns, then, on whether it "result[s] from [a] physical impairment[]" – that is, whether it has a physical basis.

As the *amici curiae* point out, "the burgeoning medical research underlying [gender dysphoria] points to a physical etiology." *See* Br. of Amici Curiae at 15 & n.57 (ECF No. 26-1) ("[N]umerous medical studies conducted in the past six years . . . 'point in the direction of hormonal and genetic causes for the in utero development of gender dysphoria.'" (quoting Christine Michelle Duffy, *The Americans with Disabilities Act of 1990 and the Rehabilitation*

Act of 1973, *in* GENDER IDENTITY AND SEXUAL ORIENTATION DISCRIMINATION IN THE WORKPLACE: A PRACTICAL GUIDE ch.16, at 16-72 to 16-74 & n.282 (Christine Michelle Duffy ed. Bloomberg BNA 2014))); *see also* Aruna Saraswat, MD, Jamie D. Weinand, BA, BS & Joshua D. Safer, MD, *Evidence Supporting the Biologic Nature of Gender Identity*, 21 ENDOCRINE PRACTICE 199, 199-202 (Feb.2, 2015) (providing a review of data in support of a "fixed, biologic basis for gender identity" and concluding that "current data suggest a biologic etiology for transgender identity"); E.S. Smith, J. Junger, B. Derntil & U. Habel, *The Transexual Brain – a Review of Findings on the Neural Basis of Transsexualism*, NEUROSCIENCE AND BIOBEHAVORIAL REVIEWS (2015) (unedited manuscript, accepted for publication) (citing numerous studies and concluding that "[t]he available data from structural and functional neuroimaging-studies promote the view of transsexualism as a condition that has biological underpinnings"). While no clear scientific consensus appears to exist regarding the specific origins of gender dysphoria (*i.e.*, whether it can be traced to neurological, genetic, or hormonal sources), the current research increasingly indicates that gender dysphoria has physiological or biological roots.

This emerging scientific view must be assessed in light of the obligation to construe the ADA's protections broadly (and thus to treat the GID Exclusion narrowly). Because "[t]he ADA is a remedial statute, designed to eliminate discrimination against the disabled in all facets of society, . . . it must be broadly construed to effectuate its purposes." *Disabled in Action of Penn. v. Southeastern Penn. Transp. Auth.*, 539 F.3d 199, 208 (3d Cir. 2008) (internal quotations and citation omitted). This principle is reflected in the language of the statute itself. *See* 42 U.S.C. § 12102(4)(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."). And an exception – like the GID Exclusion – to a statute's "'general statement of policy' is sensibly read 'narrowly in order to preserve the primary operation of the [policy].'" *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731 (1995) (quoting *Commissioner v. Clark*, 489 U.S. 726, 739 (1989)). This approach is reinforced by the broad regulatory definition of "physical impairment" discussed above. *See Bragdon*, 524 U.S. at 632.

In light of the evolving scientific evidence suggesting that gender dysphoria may have a physical basis, along with the remedial nature of the ADA and the relevant statutory and regulatory provisions directing that the terms "disability" and "physical impairment" be read broadly, the GID Exclusion should be construed narrowly such that gender dysphoria falls outside its scope.[3] While the United States believes that this is the best interpretation of the statute, it is, at the very least, a reasonable one.[4] As such, the Court should adhere to the well-established doctrine of constitutional avoidance, should decline to address the constitutional

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[3] Even assuming *arguendo* that current medical knowledge were to indicate that all known GIDs "result[] from physical impairments," that would not render the GID Exclusion meaningless within the context of the ADA. The statute continues to require that an asserted GID that does "not result[] from physical impairment" must be excluded from coverage. If our evolving understanding of GIDs has changed the scope of the Exclusion, that would reflect the ADA's own distinction between GIDs with a physical cause and those without such a cause – a distinction drawn by Congress and inherent in the language of the GID Exclusion itself.

[4] The legislative history does not address the question of when a GID should be understood as "resulting from [a] physical impairment[]," such that it would fall outside the scope of the GID Exclusion. The legislative history regarding the GID Exclusion comes from debate of the ADA on the floor of the U.S. Senate, but the version of the Exclusion being considered at that time did not include an exception for GIDs resulting from physical impairments. *See* 135 Cong. Rec. S10765-01, 1989 WL 183216, at *S10785 (Sept. 7, 1989). That language was added by the House late in the legislative process, with little explanation. *See* Pl.'s Opp'n at 14-15 (discussing the origin of the "not resulting from physical impairments" language and the absence of legislative history). Whatever Congress intended, "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) (explaining that while Congress might not have had "male-on-male sexual harassment in the workplace" in mind when enacting Title VII, such conduct still falls within the statute's plain text and thus within its purview).

challenge to the GID Exclusion, and should instead adopt this proposed construction, under which Plaintiff's gender dysphoria would not be excluded from the ADA's definition of "disability."[5]

Dated: November 16, 2015

Respectfully submitted,

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[5] The United States respectfully reserves the right to file a statement of interest, or intervene to address the constitutionality of the GID Exclusion, in the event the Court determines that it cannot avoid reaching the issue.

CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2015, the foregoing United States' Second Statement of Interest was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Emily B. Nestler

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DISCRIMINATION ON THE BASIS OF GENDER IDENTITY

9 New York Code of Rules and Regulations (NYCRR) §466.13

466.13 Discrimination on the basis of gender identity.

(a) Statutory Authority. Pursuant to N.Y. Executive Law § 295.5, it is a power and a duty of the Division to adopt, promulgate, amend and rescind suitable rules and regulations to carry out the provisions of the N.Y. Executive Law, article 15 (Human Rights Law).

(b) Definitions.

(1) Gender identity means having or being perceived as having a gender identity, self-image, appearance, behavior or expression whether or not that gender identity, self-image, appearance, behavior or expression is different from that traditionally associated with the sex assigned to that person at birth.

(2) A transgender person is an individual who has a gender identity different from the sex assigned to that individual at birth.

(3) Gender dysphoria is a recognized medical condition related to an individual having a gender identity different from the sex assigned at birth.

(c) Discrimination on the basis of gender identity is sex discrimination.

(1) The term "sex" when used in the Human Rights Law includes gender identity and the status of being transgender.

(2) The prohibitions contained in the Human Rights Law against discrimination on the basis of sex, in all areas of jurisdiction where sex is a protected category, also prohibit discrimination on the basis of gender identity or the status of being transgender.

(3) Harassment on the basis of a person's gender identity or the status of being transgender is sexual harassment.

(d) Discrimination on the basis of gender dysphoria or other condition meeting the definition of disability in the Human Rights Law set out below is disability discrimination.

(1) The term "disability" as defined in Human Rights Law § 292.21, means (a) a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques or (b) a record of such an impairment or (c) a condition regarded by others as such an impairment, provided, however, that in all provisions of this article dealing with employment, the term shall be limited to disabilities which, upon the provision of reasonable accommodations,

do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held.

(2) The term "disability" when used in the Human Rights Law includes gender dysphoria or other condition meeting the definition of disability in the Human Rights Law set out above.

(3) The prohibitions contained in the Human Rights Law against discrimination on the basis of disability, in all areas of jurisdiction where disability is a protected category, also prohibit discrimination on the basis of gender dysphoria or other condition meeting the definition of disability in the Human Rights Law set out above.

(4) Refusal to provide reasonable accommodation for persons with gender dysphoria or other condition meeting the definition of disability in the Human Rights Law set out above, where requested and necessary, and in accordance with the Divisions regulations on reasonable accommodation found at 9 NYCRR § 466.11, is disability discrimination.

(5) Harassment on the basis of a person's gender dysphoria or other condition meeting the definition of disability in the Human Rights Law set out above is harassment on the basis of disability.

ASAN, NCTE, and LGBTQ Task Force Joint Statement on the Rights of Transgender and Gender Non-Conforming Autistic People

Autonomy, dignity, and self-determination are basic human rights. But both transgender communities and autistic communities have had to struggle to assert those rights in the face of pervasive discrimination. Autistic people who are transgender and gender nonconforming have often faced additional barriers that put those fundamental rights out of reach.

Everyone should be able to live as the gender they know themselves to be, and autistic people are no exception. But many trans and gender nonconforming autistic people find that their caregivers, healthcare providers or family members deny the validity of their gender identity and prevent them from living according to who they are. Many people mistakenly believe that autistic people can't understand their gender or make decisions about how to express it. Some assume that if autistic person doesn't identify with their gender identity, that's just a "symptom" of their autism. Others assume that all autistic individuals are men or have "extreme male brains."

Rejecting the reality of trans autistic people's gender identities can be dangerous, even life threatening. These misperceptions have led many trans autistic people to be denied the right to determine how to express their gender in their day-to-day life, make legal changes to reflect their gender, and access affirming medical care, including transition-related care.

Like many other autistic people, trans and gender nonconforming autistic people can face significant disability-related barriers, which can limit their rights to express and live out their gender. For example, autistic people are too often placed under guardianships, warehoused in institutions, or forced to depend on coercive or abusive caregivers, which can curtail their ability to make decisions about their own lives. Many autistic people also encounter health care providers that insist on getting their caregivers' consent for medical care, including transition-related care, simply because they're autistic. Many people may also be subjected to harmful "normalization" therapies that try to suppress autistic or socially nonconforming traits—which, in the case of trans or gender non-conforming autistic people, can include suppressing traits that seem inconsistent with their assigned gender. Some autistic people delay coming out or transitioning out of fear that unsupportive family members will place them under guardianships or force them into institutions in order to prevent them from living according to their gender.

Denying transgender and gender non-conforming autistic people the respect, dignity, and equal access to services that they need can worsen the social marginalization that many of them face. And it can have serious health impacts—and, sometimes, result in tragedy.

That's not right. Trans and gender nonconforming autistic people—and all transgender and gender nonconforming people—have the right to:

- have respect and dignity for the gender they know themselves to be;
- determine their day-to-day expression of their gender, such as their gender-related behavior and appearance;
- make medical decisions and access affirming health care, including transition-related medical care and trans-competent services related to autism; and
- receive full social and legal recognition for their gender, such as the right to make decisions about legal changes to their name and identity documents, decisions about any gender-specific programs and facilities they use, and decisions about their gender-related names and pronouns.

Some people may need support—such as help scheduling medical appointments, completing legal documentation, or dressing—in order to exercise their rights. But we believe that these rights belong to all transgender and gender nonconforming autistic people, regardless of their level of support, needs, or form of communication. And we call on those who support, live with, or work with autistic transgender and gender nonconforming people—including community members, family members, support professionals, and healthcare providers—to follow these principles.

As advocates, we commit to the full inclusion of transgender and gender nonconforming autistic people in both autistic and transgender spaces, services and movements. We believe that transgender and gender nonconforming autistic self-advocates should be at the forefront of all discussions about their rights. We invite everyone in autistic and transgender communities to advocate for dignity, respect and equality for all individuals, regardless of disability, gender identity or gender expression.

Autistic Self Advocacy Network

National Center for Transgender Equality

National LGBTQ Task Force