

## **Sixth Circuit: A Genetic Mutation That Interferes With Normal Cell Growth May Qualify as a Disability Under the ADA**

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In a case of first impression at the circuit level, the Sixth Circuit Court of Appeals reversed dismissal of a disability discrimination complaint because the plaintiff had plausibly alleged a condition covered by the Americans with Disabilities Act (ADA) based on a genetic mutation causing abnormal cell development.

“Disability” for purposes of the ADA is broadly defined as a physical or mental impairment that substantially limits a major life activity. The ADA instructs that the definition of disability “shall be construed in favor of broad coverage of individuals... to the maximum extent permitted by the terms” of the ADA.

In *Darby v. Childvine, Inc., et al.*, No. 1:18-cv-0669, Plaintiff Sherryl Darby alleged that she underwent a double-mastectomy after genetic testing resulted in a positive match for the BRCA1 gene. Although her employer, Childvine Inc., approved her request to use vacation and sick time to cover her absence for surgery, when Darby returned to work, her supervisor told her she had been terminated. Darby alleged that the stated reasons for her termination — an “unpleasant” attitude, dress code violations and by “being unable to work” — were pretextual. Childvine moved to dismiss the complaint. While the motion was pending, discovery revealed that Darby was never diagnosed with cancer, but had a family history of cancer and the genetic mutation BRCA1. The parties stipulated to certain admissions, including that “[t]he BRCA1 gene is an impairment that substantially limits normal cell growth.” And that, because of her genetic match, Darby’s doctors urged her to have a double mastectomy. In dismissing Darby’s complaint, the district court concluded that Darby had “offered no statutory, regulatory, or caselaw support for her [argument] that the BRCA1 gene, like cancer itself, is a physical impairment that substantially limits normal cell growth.”

The Sixth Circuit reversed and remanded. After reviewing the definition of “disability” in the ADA and the federal regulations, the court posed the following question: “Has Darby plausibly alleged that her impairment substantially limits her normal cell growth as compared to the general population due to both a genetic mutation (BRCA1) that limits her normal cell growth *and* a medical diagnosis of abnormal epithelial cell growth serious enough to warrant a double mastectomy?” The answer is yes.

In reaching this conclusion, the court specifically noted that the 2008 amendments to the ADA included “normal cell growth” in the definition of a “major life activity.” The court also pointed out that the ADA’s implementing regulations cite cancer as a condition that “at a minimum” will qualify as an impairment that substantially limits a major life activity. Because this language suggests a “floor” rather than a “ceiling,” Darby’s gene mutation and abnormal cell growth qualify as a disability under the ADA despite not being cancerous. However, the court did not go so far as to say that a genetic mutation that merely predisposes an individual to other conditions, such as cancer, is *itself* a disability under the ADA. “The terms of the Act do not reach that far.”

The court emphasized the narrowness of both the issue before the court and its holding. Specifically, the court did not decide “whether Darby’s condition *in fact* falls under the ADA’s definition of a disability.”

Alternatively, the court essentially found that the Darby’s condition could be considered a disability under the ADA if certain conditions were met, such as: that her pre-cancerous cells constitute a substantial limitation on her normal cell growth and that her genetic mutation caused those pre-cancerous cells. Those issues require consideration beyond the four corners of Darby’s complaint, and may require an expert to prove. Thus, although Darby’s factual allegations were sufficient to survive a motion to dismiss, more would be required to survive summary judgment. The court reversed and remanded with instructions for the lower court to consider the claim under Ohio law as well as the ADA.

Despite the narrowness of the Sixth Circuit’s holding, it provides important direction as to what may constitute a disability under the ADA in cases of genetic mutation and the attendant medical conditions. And, though the court did not resolve whether Darby had adequately pleaded her failure to accommodate claim in this case, generally employers should engage in an interactive process with employees when presented with a medically-documented request for accommodation and provide a reasonable accommodation when possible.

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National Law Review, Volume X, Number 197

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