In the always challenging world of disabilities, where the disabled come in groups of one, perhaps the most challenging area involves invisible disabilities – challenging to those who have the ailments, challenging to employers, challenging even to the judges that must adjudicate the cases that come before them. This paper will review a number of such cases with the hope of discerning some decisional principles that can help us successfully understand how to approach them.

I. Invisible Illness

The terms invisible illness, non-manifest impairments, or hidden disabilities all refer to ailments that are not immediately apparent. Invisible disabilities include a large and varied number of illnesses, ranging from renal failure and diabetes to migraines and fibromyalgia to a very broad spectrum of psychological disorders, themselves ranging from ADHD to depression to PTSD.

In the employment context, invisible disabilities present an unusual moment where many of the fundamental issues of the Americans with Disabilities Act (“ADA”) meet: Is it a disability? Is it a substantial impairment? Did anyone know? Can the employee/applicant be accommodated? As will be examined here, judges are often no more able to address these issues than anyone else. But they must. This paper will review a number of those judicial decisions with an aim to distilling some common conclusions.

II. ADA Coverage: Making (and Refuting) a Prima Facie Case for Invisible Illnesses

To make out a *prima facie* case of employment discrimination under the ADA a plaintiff must show that she or he: (1) is disabled within the meaning of ADA; (2) is qualified, with or without reasonable accommodation, to perform the essential functions of the position held or desired; and (3) has suffered an adverse action because of his/her disability. Despite the 2008 changes in the

* Shareholder. I wish to thank my colleagues at Fortney & Scott, LLC, and in particular Burton Fishman, for assisting in preparation of this paper. Any errors are solely my responsibility.
Americans with Disabilities Act Amendments Act ("ADAAA") which expanded coverage and included a broad Statement of Purpose\(^1\) and the amended EEOC regulations,\(^2\) courts continue to struggle when making determinations as to whether individuals with invisible illnesses are entitled to the protections of the ADA.

Employers have three principal "lines of defense" against an allegation of discrimination: (1) show that the employee is not disabled within the Act; (2) show that the employee is not a qualified individual; or (3) demonstrate that discrimination was not based on disability because the illness had not been disclosed by the employee or known by the employer.

III. **Prong One: Disabled Within the Meaning of the ADA**

The first case examined here addresses the first response and demonstrates the differences in perception and interpretation that invisible illnesses continue to present. In *Weaving v. City of Hillsboro,*\(^3\) the court was asked to determine if an employee’s attention deficit hyperactivity disorder ("ADHD") was substantially limiting in the major life activity of working and interacting with others in light of the employee’s coping skills.

The plaintiff, a police sergeant, was terminated after an internal investigation revealed that he had severe interpersonal problems with others on the police force. After the termination, Weaving brought an ADA claim alleging that his interpersonal problems resulted from ADHD which substantially limited his ability to engage in the major life activities of working and interacting with others. A jury decided in the plaintiff’s favor, finding both that the plaintiff was disabled under the ADA and that the City had terminated him due to his disability.\(^4\) The City appealed.

The court of appeals disagreed. The appeals court saw it as an evidentiary matter and concluded that the evidence at trial was insufficient to demonstrate that the plaintiff "was limited in his ability to work compared to 'most people in the general population,'"\(^5\) relying on 29 C.F.R. § 1639.2(j)(1)(ii).\(^5\) The court noted the fact that plaintiff, despite his alleged impairment, was "a skilled police officer" whose supervisors had recognized his "knowledge and technical

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1 See ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(5), 122 Stat. 3553 (2008) (declaring that “the primary objective of attention in cases brought under the ADAAA should be whether entities covered under the ADA have complied with their obligations . . . . [T]he question of whether an individual’s impairment is a disability under the ADA should not demand extensive analysis.”).
2 29 C.F.R. § 1630 et seq. (2016); 29 C.F.R. § 1630.2(j)(1)(i) ("The term ‘substantially limits’ shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA."); id. at (j)(1)(iii) ("The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether an individual's impairment substantially limits a major life activity. Accordingly, the threshold issue of whether an impairment ‘substantially limits’ a major life activity should not demand extensive analysis.”).
3 763 F.3d 1106 (9th Cir. 2014), cert. denied, 135 S.Ct. 1500 (2015).
4 Id. at 1111.
5 Id. at 1112.
competence” and had selected him for “high-level assignments” to support its conclusion. The court rejected the plaintiff’s claims that his ADHD also impaired his ability to interact with others, finding that the plaintiff’s limitation was not sufficiently debilitating. To reach this conclusion, the court contrasted the police sergeant to plaintiffs in prior cases who were so severely impaired that they were essentially housebound.6

It is important to note that the court of appeals reached this conclusion even though the regulations it relied upon state that an impairment need not have a prohibitive or restrictive effect on one’s ability to work or communicate with others in order to be considered “substantially limiting.”7 Plaintiff’s “ADHD may well have limited his ability to get along with others. But that is not the same as a substantial limitation on the ability to interact with others.”8 The court concluded that the plaintiff’s ability to perform his job well and “engage in normal social interactions” conclusively demonstrated his lack of a disability under the ADA. Although in other cases the Ninth Circuit has specifically recognized “interacting with others” as a major life activity, it determined that the plaintiff failed to present sufficient evidence that his impairment was substantially limited.

A different conclusion was reached in a similar – perhaps more extreme – situation in Jacobs v. N.C. Admin Office of the Courts.9 There, the employer argued that an employee with severe anxiety disorder, who had been assigned to a public-facing clerk position, did not have a disability under the ADA because interacting with others is not a major life activity.10 The court of appeals concluded that the EEOC regulations identifying interacting with others as a major life activity were entitled to Chevron deference.11 As to the employer’s contention that the clerk’s anxiety disorder was not substantially limiting, the court found that the employer “misapprehends both the meaning of ‘substantially limits and the nature of social anxiety disorder.’” The court relied upon the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorder (DSMV-IV) explanation that a person with social anxiety disorder may either avoid social situations all together, or endure them with intense anxiety.12 The court noted that “[a] person need not live like a hermit in order to be substantially limited in interacting with others.”13 Accordingly, the court concluded that the clerk was substantially limited in her ability to interact with others and disabled under the ADA.

A decisional principle can be distilled: the degree of social impairment matters in a case involving interpersonal relations; thus, it is best to focus a challenge on that aspect of the claim and not dispute the existence of a category of disability.

6 Id. at 1113 (discussing McAlindin v. County of San Diego, 192 F.3d 1226 (9th Cir. 1999), and Head v. Glacier Northwest, Inc., 413 F.3d 1053 (9th Cir. 2005)).
8 Weaving, 763 F.3d at 1113 (emphasis in original).
9 780 F.3d 562 (4th Cir. 2015).
10 Id. at 572.
11 Id. at 572–73.
12 Id. at 573.
13 Id.
IV. Prong Two: Qualified Individual Within the Meaning of the ADA

Courts apply a two-part test to determine whether an individual is qualified within the meaning of the ADA. First, a court will determine whether the employee possess the requisite skills, education, or certification for his or her position. Second, it will rule whether the employee, despite impairments, can perform the essential functions of the position with or without reasonable accommodation. As with other disabilities, the analysis of whether an employee with an invisible illness is qualified often hinges on the second factor, the employee’s ability to perform the job.

In many instances, in deciding on “qualifications,” courts are required to judge employees’ conduct even more than their abilities. When Congress expanded the definition of disability in the ADAAA, it did not make any significant changes to the definition of “qualified individual.” As with so much else in the ADA, courts have had to fill the gaps.

(A) Failing to Disclose a Disability or Request an Accommodation

We can see the “gap-filling” judicial process at work in Walz v. Ameriprise Financial.14 There, a process analyst’s undisclosed bipolar affective disorder caused her to interrupt meetings, disturb co-workers and disrespect her supervisor. Although the supervisor approached the plaintiff to discuss her behavioral problems and to offer assistance, the plaintiff rejected assistance and blamed the supervisor for issues in the workplace.15 After being issued a formal behavioral warning, the plaintiff requested FMLA leave, but never disclosed the reason for leave. The plaintiff was terminated when she returned to work and resumed her disruptive behavior. She sued, lost, and appealed.

The appellate court found that the plaintiff’s disruptions prevented her from working effectively with others, an essential function of her position as a Process Analyst.16 Although plaintiff may have been qualified for a position with a reasonable accommodation, the court found that the plaintiff’s failure to disclose her disability and request an accommodation prevented her from being able to make a showing that she could perform the essential functions of her job with or without reasonable accommodation.17 Relying upon Rask v. Fresenius Medical Care North America,18 the court held that where a disability and the need for an accommodation is not obvious nor apparent to the employer, “a plaintiff who fails to disclose her disability and request an accommodation from her employer cannot show that she is qualified with accommodation.”19

14 779 F.3d 842 (8th Cir. 2015).
15 Id. at 843.
16 Id. at 846.
17 Id.
18 509 F.3d 466, 470 (8th Cir. 2007).
19 Walz, 779 F.3d at 846 (citing Rask, 509 F.3d at 470) (internal citation omitted).
(B) Threatening the Safety of Others

This same focus on the employee’s conduct is found in a case where the court held that an employee who was terminated for making threats is not qualified at the time of discharge. Both the EEOC and the courts have concluded that once an employee makes violent threats, the employee is no longer a qualified individual, entitled to protection under the ADA.

In a recent case, Mayo v. PCC Structural, Inc., an employee with a major depressive disorder was terminated after he made threatening statements to co-workers, e.g., that he would bring a gun to work and start shooting people. After the employee repeated the threats in a subsequent call with his company’s HR department and when the police paid a visit to his home, he was suspended and eventually terminated. The employee challenged his termination, arguing that his comments were the symptoms of and caused by a disability.

The district court concluded that the employee was not a qualified individual entitled to protection under the ADA. The Ninth Circuit affirmed, stating “We agree with our sister circuits. An employee whose stress leads to serious and credible threats . . . is not qualified.”

The court of appeals also rejected the employee’s argument that his employer must meet the “direct threat” defense. The court explained: “[W]e do not conclude that Mayo’s


21 See EEOC ENFORCEMENT GUIDANCE ON THE AMERICANS WITH DISABILITIES ACT AND PSYCHIATRIC DISABILITIES, supra note 20.

22 795 F.3d 941 (9th Cir. 2015).

23 Id. at 943.

24 Id.

25 Id. at 944–45.

26 To prevail on a direct threat defense, employer must conduct an individualized threat assessment. The EEOC regulations are specific “regarding the kind of assessment an employer must make and against which the reasonableness of the threat determination will be measured.” Peeler v. Boeing Company, No. C14–0552RSL, 2015 WL 6626537 (W.D. Wash. Oct. 30, 2015) (citing Chevron Inc. v. Echazabal, 336 F.3d 1023, 1028, aff’d, 536 U.S. 73 (2002)). In Peeler, an aviation maintenance technician claimed that her employer failed to accommodate post-traumatic stress disorder and depression. Boeing asserted the direct threat defense. The employer relied on a clinical psychologist’s evaluation of the employee’s ability to perform the essential functions of a job. The court found that while the evaluation could support a plausible argument that plaintiff’s health would be in jeopardy if she returned to the factory floor prior to acquiring coping skills, it was not enough to establish a direct threat defense because the

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termination was permissible because his threats demonstrated that he posed a ‘potential of future violence.’ Instead . . . we conclude that his termination was permissible because his stress led to death threats. Mayo was unable to appropriately handle stress and interact with others—an ‘essential function’ of his job.”

(C) Attendance Issues

Invisible disabilities can also result in excessive, unpredictable, and apparently inexplicable absenteeism. Although the EEOC has increasingly taken the position that regular attendance is not an essential function, many courts have vehemently disagreed.

A 2016 district court decision involving the termination of a truck driver with a known history of heart issues and diabetes helps illustrate the difficulties facing courts in this area. In Knutson v. Air-Land Transport Services, Inc., the court found that an employee who had missed 23 days of work over a nine-month period was unable to perform the essential functions of his job due to absenteeism. Citing a prior decision in which the Eighth Circuit had held that “an employee who is unable to come to work on a regular basis is unable to satisfy any of the functions of the job in question, much less the essential functions,” the court concluded that the truck driver was not a “qualified individual”

A decisional principle is more difficult to distill. Nonetheless, it is clear that the conduct of the employee and the relation between the ailment and the conduct strongly influences the outcome. It also appears that as the number of ADA cases increases, the authority of the EEOC’s Regulations and guidance may be diminishing. Courts are more inclined to rely on the decisional law in their Circuits than on the interpretations of the agency.

V. Prong Three: Subjected to Adverse Action Because of Disability

In addition to being disabled and qualified, to establish a prima facie case of discrimination under the ADA, a plaintiff must also be able to show that she or he suffered an adverse action because of a disability. In recent cases involving employees with hidden disabilities, causation

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27 Mayo, 795 F.3d at 945.
28 The EEOC has argued that attendance is not an essential job function, but rather a qualification standard.
29 See Williams v. AT&T Mobility Services LLC, 847 F.3d 384 (6th Cir. 2017) (finding that regular attendance was an essential function of the employee’s job); EEOC v. Ford Motor Co., 782 F.3d 753, 762–63 (6th Cir. 2015) (en banc) (holding that regular and predictable job attendance was an essential function of the employee’s job, as “an employee who does not come to work cannot perform any of his job functions, essential or otherwise.”); see also Samper v. Providence St. Vincent Med. Ctr., 675 F.3d 1233, 1237–38 (9th Cir. 2012); Mason v. Avaya Commc’ns, Inc., 357 F.3d 1114, 1122–24 (10th Cir. 2004); EEOC v. Yellow Freight Sys., Inc., 253 F.3d 943, 948 (7th Cir. 2001) (en banc) (quoting Tyndall v. Nat’l Educ. Ctrs., 31 F.3d 209 (4th Cir. 1994)).
31 2016 WL 4649816 at *5 (citing Spangler v. Federal Home Loan Bank of Des Moines, 278 F.3d 847, 850 (8th Cir. 2002)).
frequently turns on whether the decision-maker was aware of the disability prior to taking the adverse action. Without that requisite knowledge, employees cannot show that their employers took action “because of” their disability. In discriminatory discharge cases, many courts have found that when a decision-maker had no knowledge of an employee’s condition, the employee cannot establish that he was terminated based on a disability.

(A) Decision-Maker Knew or Should Have Known

The Fourth Circuit’s decision in Jacobs v. N.C. Admin Office of the Courts helps underscore the impact of a decision-maker’s knowledge in hidden disability cases and the burden placed on the individual employee. That case involved a deputy courthouse clerk who suffered from a severe social anxiety disorder. After the clerk was assigned to a customer service role at the front counter, she began having panic attacks. She told an immediate supervisor about her anxiety and requested a transfer to another clerk position with less personal interaction. When her employer failed to take action, the clerk sent a follow-up email to three supervisors disclosing her disability and repeating her request for an accommodation. The clerk was told that the sole decision-maker was out on an extended vacation. When the decision-maker returned, she promptly terminated the clerk, citing performance issues.

The clerk charged her former employer with disability discrimination. The employer challenged the clerk’s prima facie ADA claim on numerous grounds, including arguing that the clerk could not prove causation because no reasonable jury could find that the decision-maker knew of the clerk’s disability at the time of her termination.

The district court, limiting its purview to a narrow ambit, found no evidence on the record that the decision-maker knew of the clerk’s accommodation request at the time of her termination; however, the court of appeals took a broader view. The Fourth Circuit held that there was substantial evidence that the clerk made every effort to inform her employer that she suffered from anxiety and nerve issues, including a discussion with a supervisor months earlier and the clerk’s email disclosing her disability and requesting an accommodation. The court of appeals had no difficulty finding that the decision-maker knew or should have known about and acted because of the employee’s disability.

Jacobs is unusual. Most employers would be reluctant to challenge an ADA claim on causation grounds where there is evidence that an employee disclosed a disability to a supervisor and requested an accommodation. Where the supervisor is aware of the disability and the need for

32 Jacobs, 780 F.3d at 562.
33 Id. at 567.
34 Id. at 568.
35 Id. at 575.
36 Id.
accommodation, the employer’s knowledge of the disability is often presumed or imputed to the
decision-maker.\textsuperscript{37}

\textbf{(B) Ignorance is Bliss: The Impact of Swift Termination Action}

Employees who are terminated for misconduct will have a much greater challenge proving
causation if they have not previously disclosed a hidden disability — or tried to. In those
instances, a finding of employer discrimination depends upon whether and when the decision-
maker was made aware of the disability. The irony is that an employer who takes swift
disciplinary action in response to employee misconduct is less likely to be found culpable of
disability discrimination because the employee has had little to no opportunity to raise a hidden
disability to help explain the questionable actions. On the other hand, an employer that follows a
formal process, which provides employees with an opportunity to contest a disciplinary action, is
far more likely to learn of a hidden disability during that process, and be forced to reconsider its
decision. Once the employer is made aware that a disability may have played a role in the
conduct, it can no longer prevail on causation grounds based on the company’s lack of
knowledge about the disability.

Two recent cases involving employees who were terminated for sleeping at work help illustrate
this point. The first case, \textit{Spurling v. C&M Fine Pack, Inc.}, \textsuperscript{38} involved a nightshift factory
worker who received a final warning and suspension, pending possible termination, after she was
found asleep on the job. Pursuant to her employer’s disciplinary policies, the plaintiff was given
a period of time to produce information relevant to management’s decision to terminate her.
During this time, she informed the employer that her performance issues may be related to a
medical condition and submitted paperwork from her physician indicating that the plaintiff had a
disability and that she had a “medical work up in progress.”\textsuperscript{39} Despite this information, the
employer terminated the plaintiff. Shortly thereafter, the aforementioned medical work up
resulted in a diagnosis of narcolepsy, which was manageable with medication.\textsuperscript{40}

The plaintiff sued for disability discrimination. The district court granted summary judgment for
the employer, holding that the “employer could not be held accountable for discrimination under
the ADA when both the employer and employee are unaware that a condition exists.”\textsuperscript{41} The
court said the central issue was causation; whether the employee was terminated as a result of her
condition. The Seventh Circuit reversed. Although the employer was unaware of the plaintiff’s
condition when she was suspended pending termination, by the time the plaintiff was actually
terminated, her employer knew that she had a medical condition covered under the ADA.\textsuperscript{42}
Having concluded that the employer had knowledge of the disability, the Seventh Circuit

\textsuperscript{37} \textit{See}, e.g., \textit{Kimbro v. Atlantic Richfield Co.}, 889 F.2d 869 (9th Cir. 1989) (finding employer responsible for failure
to accommodate an employee where the employee’s supervisors had knowledge of employee’s disability).
\textsuperscript{38} 739 F.3d 1055 (7th Cir. 2014).
\textsuperscript{39} \textit{Id.} at 1059.
\textsuperscript{40} \textit{Id.}
\textsuperscript{41} \textit{Id.} at 1059–60.
\textsuperscript{42} \textit{Id.} at 1061.
remanded for the district court to determine whether the plaintiff was a qualified individual within the meaning of the ADA.\textsuperscript{43}

In a second case, \textit{Paolino v. U.S. Airways}, the employer took nearly immediate action to terminate an airline worker who was caught sleeping in the break room.\textsuperscript{44} The plaintiff alleged that he was not sleeping, but rather experiencing a dissociative state as a result of an undisclosed anxiety disorder, and had been fired based on his disability in violation of the ADA. Although colleagues and some supervisors knew about the employee’s anxiety disorder, there was no evidence that the employee had requested an accommodation or that the actual decision-maker was aware of the condition when he terminated the employee. The court concluded that without knowledge of the disability, the decision-maker could not have acted with discriminatory intent.\textsuperscript{45} The court also rejected the employee’s argument that the decision-maker must have known about his anxiety disorder because he saw the employee take medication and knew that paramedics were called at some point in the past. The court was unconvinced. Perhaps supporting the core notion that the ADA devalues mere assumptions, the court found “[t]hese instances show only that the decision-maker knew the plaintiff had a health issue, not that the decision-maker knew the plaintiff had a disability.”\textsuperscript{46}

Once again, distilling a decisional principle involves weighing the employees’ conduct even more than assessing the nature of the ailment. Employees with an invisible disability bear a special burden. Courts will not impute knowledge and culpability to an uninformed employer. Further, judges will permit -- for the most part -- employers to act on what they know when they know it. The reality is that acting quickly in response to a terminable offense is more defensible than acting otherwise, thus increasing the incentive on a disabled employee to disclose his/her ailment.

\textbf{VI. Conclusion}

Congress included language in the ADAAA, which the EEOC has expanded, directing the focus of legal practitioners and the courts away from threshold coverage issues and towards the employers’ action, namely whether an employer has complied with its legal obligations, assuming the employee merits ADA protections. However, invisible illnesses magnify the challenge of applying this simplistic approach to what is an often complex and nuanced set of circumstances.

Invisible illnesses, by their very nature, regularly require courts to look beyond the employer’s actions and the disabling condition to the employee’s conduct. Although courts are ready to conclude that an invisible illness is covered under the ADA, they may reject coverage where an

\textsuperscript{43} Id.
\textsuperscript{45} 2016 WL 304640 at *5.
\textsuperscript{46} Id.
employee’s conduct suggests a mere social difficulty and not a substantially disabling ailment. Courts have also shown a willingness to examine employee conduct when determining whether the employee is a “qualified individual” within the meaning of the Act. Courts routinely conclude that an employee who engages in severe threatening behavior or who has a record replete with excessive and unpredictable absences is not a qualified individual entitled to protections of the ADA. Lastly, and perhaps most significantly, an employee’s inaction in disclosing an invisible illness matters. Although employees with invisible illnesses may believe they have persuasive reasons for keeping their condition under wraps at work, courts will not extend the ADA’s protections to an employee who has failed to disclose the existence of a hidden disability or the basis of a requested accommodation -- even where the employee’s condition turns out to be the root cause of the workplace issue.

Invisible disability cases make visible the inherent problems with focusing on the employer’s obligations to the exclusion of all else and remind us why there is continuing need for courts to make determinations with respect to coverage.