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.

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

[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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Trial Attorney
United States Department of Justice, Civil Division

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

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

KATE LYNN BLATT,	:	
	:	
Plaintiff,	:	
	:	
v.	:	No. 5:14-cv-04822
	:	
CABELA'S RETAIL, INC.,	:	
	:	
Defendant.	:	

O P I N I O N

Defendant Cabela's Retail, Inc.'s Partial Motion to Dismiss, ECF No. 13 – Denied

Joseph F. Leeson, Jr. **May 18, 2017**
United States District Judge

This action arises under Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act of 1990 (ADA). Presently before the Court is Defendant Cabela's Retail, Inc.'s Partial Motion to Dismiss. Cabela's seeks dismissal of Count III (ADA – Disability Discrimination, Failure to Accommodate) and Count IV (ADA – Retaliation) of Plaintiff Kate Lynn Blatt's Amended Complaint because Blatt has failed to state a claim upon which relief can be granted. For the reasons set forth below, Cabela's motion is denied.

The defendant bears the burden of demonstrating that a plaintiff has failed to state a claim upon which relief can be granted. *Hedges v. United States*, 404 F.3d 744, 750 (3d Cir. 2005) (citing *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1409 (3d Cir. 1991)). This Court must "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *See Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008) (quoting *Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 374 n.7 (3d Cir. 2002)) (internal quotation marks omitted).

In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), the Supreme Court recognized that "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). In *Ashcroft v.*

Iqbal, 556 U.S. 662 (2009), the Court subsequently laid out a two-part approach to reviewing a motion to dismiss under Rule 12(b)(6).

First, the Court observed, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Id.* at 678. Thus, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" to survive the motion; "instead, 'a complaint must allege facts suggestive of [the proscribed] conduct.'" *Id.*; *Phillips*, 515 F.3d at 233 (quoting *Twombly*, 550 U.S. at 563 n.8). While Rule 8, which requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," was "a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, . . . it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Iqbal*, 556 U.S. at 678-79 ("Rule 8 . . . demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." (citing *Twombly*, 550 U.S. at 555)); *see* Fed. R. Civ. P. 8(a)(2). For "without some factual allegation in the complaint, a claimant cannot satisfy the requirement that he or she provide not only 'fair notice' but also the 'grounds' on which the claim rests." *Phillips*, 515 F.3d at 232 (citing *Twombly*, 550 U.S. at 555 n.3).

Second, the Court emphasized, "only a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief . . . [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 678. Only if "the '[f]actual allegations . . . raise a right to relief above the speculative level'" has the plaintiff stated a plausible claim. *Phillips*, 515 F.3d at 234 (quoting *Twombly*, 550 U.S. at 555). If "the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Iqbal*, 556 U.S. at 679 (quoting Fed. R. Civ. P. 8(a)(2)). "Detailed factual allegations" are not required, *id.* at 678 (quoting *Twombly*, 550 U.S. at 555), but a claim must be "nudged . . . across the line from conceivable to plausible," *id.* at 680 (quoting *Twombly*, 550 U.S. at 570).

"The plausibility standard is not akin to a 'probability requirement,'" but there must be "more than a sheer possibility that a defendant has acted unlawfully." *Id.* at 678 (quoting *Twombly*, 550 U.S. at 556). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of "entitlement to relief."'" *Id.* (quoting *Twombly*, 550 U.S. at 557)).

According to the Amended Complaint, in October 2005, Blatt was diagnosed with "Gender Dysphoria, also known as Gender Identity Disorder," which substantially limits one or more of Blatt's major life activities, including, but not limited to, interacting with others, reproducing, and social and occupational functioning. Am. Compl. ¶ 10, ECF No. 13. Blatt alleges that shortly after she was hired by Cabela's in September 2006, Cabela's began to discriminate against her on the basis of her sex and her disability, in violation of Title VII of the Civil Rights Act and the ADA, and that Cabela's retaliated against her for opposing this

discrimination, also in violation of these statutes. *Id.* ¶¶ 11-32. Blatt further alleges that in February 2007, Cabela's terminated her employment based on her sex and disability. *Id.* ¶¶ 33-34.

The stated purpose of the ADA is to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). In pursuit of this purpose, Congress opted to define the scope of the statute's coverage by means of a flexible and broad definition of "disability," namely, "a physical or mental impairment that substantially limits one or more major life activities of [an] individual." *Id.* § 12102(1)(A). Standing in contrast to this broad definition of disability, there are a few exceptions to the ADA's coverage. The provision at issue in this case, 42 U.S.C. § 12211, excludes from ADA coverage approximately one dozen conditions, including gender identity disorders.

Cabela's contends that § 12211's reference to gender identity disorders applies to Blatt's condition and that the provision therefore excludes her condition from the ADA's scope. Blatt responds that, if that is the case, then § 12211's exclusion of gender identity disorders violates her equal protection rights.

The constitutional-avoidance canon prescribes that "[w]hen the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that [the court] will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *United States v. Witkovich*, 353 U.S. 194, 201 (1957) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)). Thus, if there is a "fairly possible" interpretation of § 12211 that permits the Court to avoid the constitutional question Blatt has raised, the Court must adopt that interpretation. As explained below, there is indeed such an interpretation, namely, one in which the term gender identity disorders is read narrowly to refer to only the condition of identifying with a different gender, not to encompass (and therefore exclude from ADA protection) a condition like Blatt's gender dysphoria, which goes beyond merely identifying with a different gender and is characterized by clinically significant stress and other impairments that may be disabling.[1]

Beginning with the text of the provision, the exceptions listed in § 12211 can be read as falling into two distinct categories: first, non-disabling conditions that concern sexual orientation or identity, and second, disabling conditions that are associated with harmful or illegal conduct.[2]

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[1] By contrast, Cabela's suggested interpretation aligns with the term's definition in the revised third edition of the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (the current edition at the time of the drafting of the ADA), where the term gender identity disorders is defined as broadly encompassing any disorder essentially marked by "an incongruence between assigned sex . . . and gender identity." *See Diagnostic and Statistical Manual of Mental Disorders* 71 (3d ed. revised 1987).

[2] The first category includes homosexuality and bisexuality, *see* 42 U.S.C. § 12211(a), whereas the second category includes pedophilia, exhibitionism, voyeurism, compulsive gambling, kleptomania, pyromania, and "psychoactive substance use disorders resulting from current illegal use of drugs," *see* 42 U.S.C. § 12211(b).

The legislative history shows that Congress discussed the § 12211 exclusions in terms of these two distinct categories. First, there was a concern among some members of Congress that the bill would include "sexual

If the term gender identity disorders were understood, as Cabela's suggests, to encompass disabling conditions such as Blatt's gender dysphoria, then the term would occupy an anomalous place in the statute, as it would exclude from the ADA conditions that are actually disabling but that are not associated with harmful or illegal conduct. But under the alternative, narrower interpretation of the term, this anomaly would be resolved, as the term gender identity disorders would belong to the first category described above.

This narrower interpretation also comports with the mandate of the Court of Appeals for the Third Circuit that the ADA, as "a remedial statute, designed to eliminate discrimination against the disabled in all facets of society, . . . must be broadly construed to effectuate its purposes." *See Disabled in Action of Pa. v. Se. Pa. Transp. Auth.*, 539 F.3d 199, 208-09 (3d Cir. 2008) (quoting *Kinney v. Yerusalim*, 812 F. Supp. 547, 551 (E.D. Pa. 1993)). Thus, any exceptions to the statute, such as those listed in § 12211, should be read narrowly in order to permit the statute to achieve a broad reach. *See Bonkowski v. Oberg Indus.*, 787 F.3d 190, 195 (3d Cir. 2015) ("Following traditional canons of statutory interpretation, remedial statutes should be construed broadly to extend coverage and their exclusions or exceptions should be construed narrowly." (quoting *Cobb v. Contract Transp., Inc.*, 452 F.3d 543, 559 (6th Cir. 2006))). This interpretation is also consistent with the legislative history of § 12211, which reveals that Congress was careful to distinguish between excluding certain sexual identities from the ADA's definition of disability, on one hand, and not excluding disabling conditions that persons of those identities might have, on the other hand.[3]

In view of these considerations, it is fairly possible to interpret the term gender identity disorders narrowly to refer to simply the condition of identifying with a different gender, not to exclude from ADA coverage disabling conditions that persons who identify with a different gender may have —such as Blatt's gender dysphoria, which substantially limits her major life activities of interacting with others, reproducing, and social and occupational functioning. Because this interpretation allows the Court to avoid the constitutional questions raised in this

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preference as a disability or a protected class of individuals." *See The Americans with Disabilities Act of 1989: Hearing on H.R. 2273 Before the Subcomms. on Emp't Opportunities & Select Educ. of the H. Comm. on Educ. & Labor* 101 Cong. 14 (1989) (statement of Rep. Bartlett, Member, H. Comm. on Education and Labor). Second, there was a separate concern that the ADA "could protect individuals from discrimination on the basis of a variety of socially unacceptable, often illegal, behavior if such behavior is considered to be the result of a mental illness," including such conditions as "compulsive gambling, pedophilia, and kleptomania." 135 Cong. Rec. S10765-01, S10796 (daily ed. Sept. 7, 1989) (statement of Sen. Rudman), 1989 WL 183216.

[3] For example, during the Senate debate, in response to inquiries about the proposed bill's coverage of homosexuality, HIV, and AIDS, Senator Thomas Harkin, a sponsor of the bill, clarified that although homosexuality itself would not meet the definition of a disability under the ADA, that would not prevent a person who is gay from receiving coverage under the statute if the person had a disability. *See* 135 Cong. Rec. S10765-01, S10767 (daily ed. Sept. 7, 1989), 1989 WL 183216. Similarly, the House Judiciary Committee commented that "[i]ndividuals who are homosexual or bisexual and are discriminated against because they have a disability, such as infection with the Human Immunodeficiency Virus, are protected under the ADA," and the Committee "specifically rejected amendments to exclude homosexuals with certain disabilities from coverage." H.R. Rep. 101-485, at 76 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 499.

case, it is the Court's duty to adopt it. Accordingly, Blatt's condition is not excluded by § 12211 of the ADA, and Cabela's motion to dismiss Blatt's ADA claims on this basis is denied.

Cabela's acknowledges that its motion to dismiss Blatt's disability discrimination claims rests on the Court's interpretation of § 12211. With respect to Blatt's ADA retaliation claim, however, Cabela's contends that even if Blatt has alleged a disability covered by the ADA, she has nevertheless failed to allege that she engaged in protected activity by opposing disability discrimination in her workplace. Specifically, Cabela's contends that "the Amended Complaint contains allegations that [Blatt] reported conduct that she alleges was discriminatory based on *her sex*, not any disability." Def.'s Mem. Supp. Mot. 10, ECF No. 13-1. Further, Cabela's contends that Blatt has failed to allege that she engaged in protected activity by asking for an accommodation for a disability or that Cabela's took an adverse employment action against her because of her alleged request for an accommodation.

Blatt responds that her Amended Complaint fairly alleges that she continually reported to her superior that she was subject to degrading and discriminatory comments on the basis of her disability, that she requested a female nametag and uniform and use of the female restroom as accommodations for her disability, and that as a result of requesting these accommodations she was subjected to a "pattern of antagonism" prior to her termination. Cabela's replies that Blatt's allegations that she was temporarily forced to wear an inaccurate name tag and was not allowed to use the female restroom do not amount to a "pattern of antagonism."

To state an ADA retaliation claim, Blatt must allege that: (1) she engaged in a protected activity; (2) she experienced an adverse employment action following the protected activity; and (3) there is a causal link between the protected activity and the adverse employment action. *See Krouse v. Am. Sterilizer Co.*, 126 F.3d 494, 500 (3d Cir. 1997). Ordinarily, a causal connection may be shown by "(1) an unusually suggestive temporal proximity between the protected activity and the allegedly retaliatory action, or (2) a pattern of antagonism coupled with timing to establish a causal link." *Lauren W. ex rel. Jean W. v. DeFlaminis*, 480 F.3d 259, 267 (3d Cir. 2007). A "pattern of antagonism" is a "consistent and continuous" pattern of conduct, which can include a "'constant barrage of written and verbal warnings'" as well as "'disciplinary action.'" *See Bartos v. MHM Corr. Servs., Inc.*, 454 F. App'x 74, 79 (3d Cir. 2011) (quoting *Robinson v. Se. Pa. Transp. Auth.*, 982 F.2d 892, 895 (3d Cir. 1993)).

Here, Blatt has plausibly alleged that she engaged in protected activity by reporting discrimination and requesting accommodations for her disability. She has also plausibly alleged that she was subjected to a "pattern of antagonism" as a result of this activity, including Cabela's allegedly intentional and repeated refusal to provide her with a correct name tag.

The Court, accepting the allegations of the Amended Complaint as true, as it is required to do at this stage of the case, denies Cabela's request to dismiss Count III and Count IV of the Amended Complaint for the reasons set forth above. The case will be permitted to proceed to discovery, inter alia, on the facts that may or may not exist to support the claims and defenses set forth in the pleadings. A separate order follows.

BY THE COURT:

/s/ Joseph F. Leeson, Jr.
JOSEPH F. LEESON, JR.
United States District Judge