

entitlement. When the RO ruled against him, he further appealed its decision to the Board.

In its May 2011 decision, the Board determined that the RO had in fact committed a CUE when assigning the effective date of Mr. Young's award, reasoning that "the proper effective date" was either the date when the VA received his original claim or the date his entitlement arose, whichever occurred later. The board assigned his entitlement an effective date of March 10, 1989, when the RO had received the letter from his psychiatrist attesting to Mr. Young's diagnosis of PTSD. Mr. Young appealed this decision to the Veterans Court, which ultimately sided with the board in affirming that for his entitlement to be effective, he would have to have an established medical diagnosis of PTSD. He then appealed the Veterans Court decision to the United States Court of Appeals, Federal Circuit.

*Ruling and Reasoning*

The court of appeals first clarified its jurisdiction in the case and asserted that it had the authority to review the case to determine whether the applicable laws had been interpreted correctly, but not to ascertain the veracity of the facts themselves. It then held that "[t]he Veterans Court did not err in approving an effective date that corresponds to the earliest available medical diagnosis indicating that his PTSD existed as of March 10, 1989" (*Young*, p. 1354), thereby affirming the board's assignment of that effective date for Mr. Young's award and the Veterans Court's decision to affirm the board's ruling.

In coming to this conclusion, the Federal Circuit referenced the VA's own legal regulation (38 C.F.R. § 3.304[f] (2014)) that "expressly requires a medical diagnosis of the veteran's condition as PTSD. In light of this requirement, the Veterans Court agreed with the Board that Young's 'entitlement to service connection for PTSD could not arise . . . until a medical examination establishing a clear diagnosis of PTSD was performed'" (*Young*, p. 1352).

*Discussion*

At issue in this case was whether a layperson's diagnosis of PTSD is sufficient to establish a claim of service-connected disability versus a "medical diagnosis" by an appropriate health care professional. In affirming the Veterans Court ruling that a medical diagnosis of PTSD is necessary to establish a corresponding service-connected disability, the Federal Circuit not only deferred to qualified medical experts

in making the diagnosis of PTSD, clarifying the role of the medical expert, but also incorporated a safeguard against potential abuse of the system.

Implicit within its opinion was that medical testimony was imbued with a certain credibility that lay testimony was not. For example, it may be possible for a veteran to easily look up and then report the symptoms of PTSD, thereby claiming eligibility for a service-connected disability. The medical expert in theory establishes a more credible diagnosis of PTSD and can further use the medical records and other corroborating data to determine the earliest date when the diagnosis can be formally applied. This need not necessarily correspond with the date of the initial evaluation or initial contact of the veteran with the medical expert, but rather with the date that was reasonably consistent with applying a formal diagnosis of PTSD, given the available set of records.

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## **Is Attention Deficit Hyperactivity Disorder Covered Under the Americans With Disabilities Act?**

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### **Ninth Circuit Court of Appeals Reversed the Jury Verdict of the District Court of Oregon in Favor of a City's Discharge of Employee, Ruling that Attention Deficit Hyperactivity Disorder-Related Social Deficits Are Not Covered Under the Americans With Disabilities Act**

In *Weaving v. City of Hillsboro*, 763 F.3d 1106 (9th Cir. 2014), the Federal Court of Appeals for the Ninth Circuit was asked by the City of Hillsboro, Oregon, to uphold its discharge of an employee with attention deficit hyperactivity disorder (ADHD). The employee had prevailed against his employer for his discharge, claiming violation of the Americans

With Disabilities Act (ADA), because his difficulties at work were due to ADHD. The employee contended that his ability to interact and work with others was substantially limited by ADHD. The city moved for judgment as a matter of law and also moved for a new trial on the grounds of improper jury instructions. Both motions were denied by the district court and the city appealed. The Ninth Circuit Court of appeals ruled that the district court erred in denying the city's motion for judgment as a matter of law. The city employee did not qualify for ADA protection. He did not have difficulty working, his knowledge and technical competence were on par with his peers, and his interactions with coworkers were the result of his temperament.

#### *Facts of the Case*

Matthew Weaving joined the Beaverton (Oregon) Police Department as an officer in 1995. He had been given a diagnosis of ADHD and treated for it at age 6, but stopped treatment at 12 because his mother believed he no longer had the symptoms. Mr. Weaving did not disclose this history and passed the medical and psychological tests required for the job. In his job evaluations, supervisors noted his difficulty working in a team environment. He was transferred to and later removed from an interagency team as a narcotics detective because of conflicts with another officer. He filed a grievance and was reinstated. He left the narcotics team to join a Federal Bureau of Investigation task force, but difficulties with co-workers continued; they complained of his "overly aggressive style."

In 2006, the Hillsboro Police Department hired Mr. Weaving. He disclosed his ADHD history and the problems with interpersonal communications that he had experienced while at Beaverton, but he affirmed that he no longer had ADHD. His evaluations at Hillsboro were positive, and he was promoted to sergeant in 2007. His supervisor described his conduct as "professional" and empathic toward the public, while his communication style was perceived as arrogant by his colleagues.

Mr. Weaving continued to have difficulties with colleagues. In 2009 he was placed on administrative leave following a grievance filed against him with the city's Human Resources Department for complaints of his "demeaning" and "intimidating" attitude toward subordinates. His conduct was perceived as humiliating and derogatory when he criticized the language skills of a Spanish-speaking officer. Mr. Weaving sought mental health treatment and again

received a diagnosis and treatment for ADHD. Psychological and psychiatric evaluations found him fit for duty. The employer concluded that his interpersonal communication was unacceptable, and he was terminated in December 2009 after a hearing.

Mr. Weaving sued the city in federal district court under the ADA, alleging that he was fired without the employer's providing reasonable accommodation. After instructions on the definition and implications of ADA, the jury found in favor of Mr. Weaving. They awarded him \$562,950 in front and back pay, but his request for reinstatement was declined. The city demanded judgment as a matter of law and for a new trial on the grounds of improper jury instruction. The district court denied them and the city appealed.

#### *Ruling and Reasoning*

In the appeal, the city prevailed. Judge William A. Fletcher reversed the district court, ruling that Mr. Weaving's social impairments did not qualify as "disability" as defined under federal law. Under Title I of the 1990 ADA, 42 U.S.C. § 12112(a) (1990), a disability is "a physical or mental impairment that substantially limits one or more major life activities of the individual who claims the disability," or "a record of such an impairment," or "being regarded as having such impairment" (§ 12102[1]). The ADA provides a list of such activities under § 12102(2)(A), including seeing, hearing, bending, walking, concentrating, breathing, reading, speaking, communicating, interacting with others, and working.

According to the ADA Amendments Act (ADAAA) of 2008, Pub. L. No. 110-325, 122 Stat. 3553, § 2(a)(4-8), "an impairment that substantially limits one major life activity need not limit other major life activities to be considered a disability" and "impairment is a disability . . . if it substantially limits the ability of an individual to perform a major life activity compared with most people in the general population." Determining whether an impairment is substantially limiting "requires an individual assessment." The appellate court commented on Mr. Weaving's ability to work and interaction with others, ruling that he did not satisfy even the lower standard in the ADAAA. He had demonstrated the ability, knowledge, and skill required to perform his duties and was deemed fit for duty as a police officer by a psychiatrist and a psychologist.

In relation to whether Mr. Weaving was substantially limited in his ability to interact with others, the

court cited *McAlindin*, wherein the plaintiff, who had panic attacks and anxiety, had “communicative paralysis” and was “barely functional.” In *Head v. Glacier Northwest, Inc.*, 413 F.3d 1053 (9th Cir. 2005), the plaintiff avoided crowds, stores, and even doctors’ appointments, and was “house bound” for weeks, even after losing the job. Both precedents were pre-ADAAA. The *Weaving* court agreed that interaction with others is a major life activity, but Mr. Weaving was not considered disabled under the ADA because he had difficulty getting along with subordinates and peers only, distinguishing him from the claimants in *McAlindin* and *Head*. Thus, the city’s actions did not violate federal law.

### Dissent

Judge Consuelo M. Callahan dissented, opining that Mr. Weaving had satisfied the *McAlindin* standard, and, in reversing the circuit court’s verdict, the appellate court usurped the jury’s role and failed to follow the controlling circuit’s precedent. She noted that the majority in *Weaving* did not follow *McAlindin*, which had been disparaged in another circuit’s decision, *Jacques v. DiMarzio, Inc.*, 386 F.3d 192 (2nd Cir. 2004).

Judge Callahan remarked that the court did not give weight to the medical and psychological evidence or to the testimony of Mr. Weaving’s superiors. His Lieutenant’s investigation provided the basis for Mr. Weaving’s termination when he concluded that Mr. Weaving was a “bully” and refused to accept responsibility for his behavior. The Lieutenant admitted that he was biased against Mr. Weaving and that his report contained some inaccuracies. At the trial, Deputy Chief Skinner testified that the city’s decision to terminate Weaving was influenced by Lieutenant Goodling’s report. He also reported that Mr. Weaving’s lack of emotional intelligence was the basis of the city’s decision. Judge Callahan referred to the testimony of Mr. Weaving’s psychologist, Dr. Monkarsh, who described him as “one of the clearest examples of adult ADHD” and opined that his difficulties in interpersonal interactions were the result of weak emotional intelligence, a common symptom of ADHD. Nevertheless, he could still be an “excellent police officer.” Another psychologist attributed Mr. Weaving’s interpersonal difficulties to ADHD, explaining that he was unable to read other people’s facial expressions and respond appropriately because of slow visual processing speed.

### Discussion

The *Weaving* case addresses the significance of social impairments in applying for mental disability under the ADA. The Ninth Circuit Court of Appeals ruled that a person who is able to communicate, but whose communications are offensive or “inappropriate, ineffective, or unsuccessful,” does not have substantial limitations on his ability to interact with others within the meaning of the ADA, and to interpret it otherwise would entice frivolous lawsuits against employers by “ill-tempered employees.” Accusing the majority of gutting their own precedent, Judge Callahan dissented on the basis that conduct arising from a disability is part of the disability, and the ADA protects people with mental or physical disability equally. She also opined that the appellate judges had “brush[ed] away” the medical evidence and jury findings in their decision and that the outcome of disability cases should be independent of a litigant’s likeability.

Although we understand that the Ninth Circuit’s controlling standards in *McAlindin* serve a gatekeeping function, it concerns us that the majority in *Weaving* did not fully appreciate the seriousness of the functional impairments in some ADHD cases. Given the ambiguity raised in this case and the cross-fire among federal courts, we eagerly await further developments.

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## Parental Involvement in the Special Education Evaluation Process

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### Violation of the Individuals With Disabilities Education Act by Not Providing Parents With Educational Data

In *M.M. v. Lafayette School District*, 767 F.3d 842 (9th Cir. 2014), the Ninth Circuit U.S. Court of Appeals held that the school district’s failure to