



Face Equality International (FEI) Research Project

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United States

No.	Question		Answer
1.	<p>a. Do people with facial disfigurements (marks, scars, etc.) have any legal protection against discrimination?</p> <p>b. Which law relates or mentions the legal protections?</p>	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	<p>a. Persons with facial disfigurements can be protected under the Americans with Disabilities Act 1990 (“ADA”) where (i) their facial disfigurement qualifies as a “disability” within the meaning of the ADA and where (ii) they meet the specific conditions for the protection laid down in the relevant ADA Title.</p> <p>b. Americans with Disabilities Act 1990 (as amended) - https://www.ada.gov/law-and-regs/ada/</p> <p>Certain state and local laws may expand protections beyond those provided by the ADA. For example, in California, “cosmetic disfigurements” are specifically included in the definition of physical disability. New York State Human Rights Legislation has also been expanded to include genetic conditions. This means that, in both California and New York, the scope of protections has been expanded beyond those specifically listed in the ADA.</p>
2.	<p>a. What is this country’s legal definition of disability?</p> <p>b. When do people with a facial disfigurement fit within that definition?</p> <p>c. How does being excluded from that definition affect the protection of their rights?</p>		<p>a. The ADA defines an individual with a disability as any one of the following:</p> <p>(a) a person who has a physical or mental impairment that substantially limits one or more major life activity (prong 1).</p> <p>The ADA does not specifically name all of the impairments that are covered. It was however clarified in various communications, such as the Interpretive Guidance on Title 1 of the Americans with Disabilities Act (the “Guidance”) (https://www.hivlawandpolicy.org/sites/default/files/ADA%20Title%201%20EEOC%20Guidance.pdf) that an impairment under the ADA includes a physiological disorder or condition, cosmetic disfigurement or anatomical loss affecting one or more of the body systems (neurological, musculoskeletal, special</p>

		<p>sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine) or any mental or psychological disorder.</p> <p>Major life activities are functions that are crucial to most people's daily lives. These can include breathing, walking, talking, hearing, seeing, sleeping, caring for one's self, performing manual tasks and working.</p> <p>"Major life activities" can also be extended to include major bodily functions such as immune system functions, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions.</p> <p>(b) a person who has a history or record of such an impairment, even if they do not currently have a disability (prong 2).</p> <p>Record of a disability means that the person has a history or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities even though the person does not currently have a disability.</p> <p>(c) a person being regarded as having such an impairment, whether or not the impairment limits or is perceived to limit a major life activity (prong 3).</p> <p>This covers situations where (i) the person has an impairment that does not substantially limit a major life activity, (ii) the person has an impairment that substantially limits a major life activity only as a result of the attitudes of others toward them or (iii) the person does not have any impairment but is treated as having an impairment by others, including individuals and/or organisations. Impairments that are both transitory and minor are however not included.</p> <p>The ADA defines a 'transitory impairment' as an impairment with an actual or expected duration of six (6) months or less. The concept of "minor" impairment is however not defined and is subject to a case-by-case assessment, which can take into account various factors such as the symptoms and severity of the impairment, the type of treatment required, the risk involved, whether any kind of surgical intervention is anticipated or necessary or the nature and scope of any postoperative care. Examples of conditions that were considered to be both transitory and minor include a broken finger, broken bones that healed within two months or injuries from a car accident that were recovered within a week.</p> <p>The 2008 House Judiciary Committee Report (https://www.congress.gov/congressional-report/110th-congress/house-report/730/1) also clarified that the exception relating to "transitory and minor" impairments was introduced to exclude "common ailments like the cold or flu". Since the exclusion only</p>
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		<p>covers impairments that are both transitory and minor, an individual with a permanent face disfigurement (or one that lasts more than 6 months) could benefit from the protection, regardless of whether his/her disfigurement is considered “minor”.</p> <p>The U.S. Equal Employment Opportunity Commission (‘EEOC’) also gives the example of an individual with a severe facial disfigurement who is excluded from staff meetings because the employer does not like to look at the employee or of an experienced assistant manager of a convenience store, with a prominent facial scar, who was passed over for promotion to store manager, because the employer believed that customers or vendors would not want to look at this person.</p> <p>The third prong may be particularly relevant for people with facial disfigurement, who are not substantially limited in major life activities. It is worth noting that the ADA Amendments Act of 2008 (“ADAAA”) broadened the scope of the definition of individuals “regarded as” disabled. It superseded previous US Supreme Court rulings that had made it particularly difficult for plaintiffs to seek protection under the third prong. The US Supreme Court had notably ruled that a claimant was required to prove not only that a given entity believed she/he had an impairment, but also that this entity considered that this impairment substantially limited a major life activity. This very high standard led, for instance, to the dismissal of an action brought by an individual with facial palsy on the ground that he had failed to demonstrate that his employer regarded his palsy as a condition substantially affecting the major life activity of work. Under the revised version of the ADA, individuals now only need to show that they are “regarded as” having an impairment, regardless of whether the impairment is perceived to limit a major life activity or perceived to be substantially limiting. Reports have shown that the ADAAA improved the success rates of claimants in establishing a disability under the ADA. ncd_a-promising-start-executive-summary.docx (live.com)</p> <p>c. Based on the above description of how the ADA captures a person with disability, it is therefore possible for a person with facial disfigurement to be considered a person with disability and to fall within the scope of protection of the ADA. A facial disfigurement may be an actual disability, for instance where it affects an individual’s ability to see, speak or hear (prongs 1 and 2) or be deemed to be a disability based only on the perception of others (prong 3).</p> <p>Medical documentation (doctor records and / or specialist reports) is the strongest evidence under Prong 1 and Prong 2 of the definition, but all available evidence can be used to bolster a claim. For Prong 3, it is significantly more open ended, and evidence would not need to be medical (evidence of disability discounts may be applicable, for example). For visible and non-visible facial disfigurements, the standard of proof can vary.</p>
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3.	<p>Are there aspects of disability and/or disfigurement law that ensure a legal right to healthcare, education or employment?</p>	<p><input checked="" type="checkbox"/> Yes <input type="checkbox"/> No</p>	<p><u>Healthcare/Education:</u></p> <p>As a general rule, the ADA prohibits discrimination on the basis of disability preventing the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any of the entities listed below (including entities related to healthcare and education):</p> <ul style="list-style-type: none"> • Inn, hotel, place of lodging (except establishments within buildings containing five rooms or less that is also the residence of the owner); • Restaurants, bars or other establishments serving food or drink; • Motion picture house, theatre, concert hall, stadium or place of exhibition entertainment; • Auditorium, convention centre, lecture hall, or other place of public gathering; • A bakery, grocery store, clothing store, hardware store, shopping centre or other sales or rental establishment; • Laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlour, gas station, office of accountant or lawyer, pharmacy, insurance office, professional office of health care provider, hospital, or other service establishment; • Terminal, depot or other station used for specified public transportation; • Museum, library, gallery, or other place of public display or collection; • Park, zoo, amusement park, or other place of recreation; • Nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education; • Day care centre, senior citizen centre, homeless shelter, food bank, adoption agency, or other social service centre establishment; and • Gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation. <p>The ADA makes clear that an individual with a disability shall not be denied the chance to participate in the above programmes or activities on equal grounds to those without a disability.</p>

			<p>The above entities and associated third parties must ensure that standards, criteria or administrative methods do not have a discriminatory effect or perpetuate discrimination against those with disabilities. Additionally, those with disabilities must not be denied equal goods, services, facilities, privileges, advantages, accommodation, or other opportunities available to an individual due to a disability.</p> <p>The ADA specifies that discrimination relating to the above list of organisations includes adopting criteria that would have the impact of screening out individuals with disabilities from fully enjoying any goods, services, facilities, privileges, advantages or accommodations unless the criteria is necessary to provide such services. Failure to make reasonable modifications, and take steps to ensure that those with disabilities are not excluded, segregated, denied services or treated differently is also discriminatory, unless an entity can demonstrate that such modifications would fundamentally alter the nature of the good, services, facilities, privileges, advantages or accommodations they supply.</p> <p><u>Employment:</u></p> <p>The ADA provides, as a general rule, that no employers, employment agencies, labour organisations or joint labour-management committees shall discriminate against a qualified individual on the basis of disability. Qualified individuals who receive protections under the ADA include individuals who, with or without reasonable accommodations, can perform the essential functions of a given position. When deciding the essential functions of a role, consideration is given to the employer’s judgement, as well as written job descriptions. This rule covers the process from application, hiring, advancement, discharge, compensation, training and other privileges of employment.</p>
4.	<p>a. How effective are the legal protections? Please describe evidence available of the effect of the legal protections.</p> <p>b. What are deficiencies or areas for improvement in these legal protection measures as they apply and affect people with facial disfigurement?</p>		<p>a. To date, very few cases have been brought under the ADA that relate to facial disfigurement. The focus of most of those cases has been the causative factor of the facial disfigurement (e.g. cellulitis, psoriasis, cleft palate) in order to categorise it as a disability for the purposes of the ADA, rather than being “regarded as” having a disability. A plaintiff’s case has a far greater chance of success under the ADA if they can point to the recognizable disability that they suffer from, and the way in which they are qualified for protection under the ADA. Some relevant cases are as follows:</p> <ul style="list-style-type: none"> • Matter of Tasha Rests., LLC v New York State Div. of Human Rights, 79 A.D.3d 1337; Bey v. City of New York, 437 F. Supp. 3d 222 • Cehrs v. N.E. Ohio Alzheimer Research, 959 F. Supp. 441 (psoriasis constituted a disability under the ADA)

	<p>c. What evidence exists to prove that the information and resources guaranteed by law are actually available to disabled persons?</p>		<p>b. While the ADA offers varying levels of protection for people with facial disfigurements, a protection likely to be helpful to those with facial disfigurements – a reasonable accommodation – requires a high threshold in order to be available. Additionally, because protections for people with facial disfigurements are contained within the ADA, there is a focus in the courts on the causative factor of facial disfigurement i.e. to establish facial disfigurement as a ‘disability’ for the purposes of bringing it within scope of the ADA.</p> <p>One possible reform that would remove the requirement to establish facial disfigurement as a disability and associated threshold requirements is the re-working of the ADA into language more reminiscent of the US Equal Employment Opportunity Commission’s (EEOC) Coverage under Civil Rights Act of 1964.</p> <p>For example:</p> <p><i>“(h) Physical or mental impairment means—</i> <i>(1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or</i> <i>(2) Any mental or psychological disorder, such as an intellectual disability...organic brain syndrome, emotional or mental illness, and specific learning disabilities.”</i></p> <p>Another possible reform would be to allow reasonable accommodation for prong 3 impairments (as discussed above). This would enable plaintiffs to engage in the process of determining necessary reasonable accommodations with their employer, coming to an appropriate resolution. There may be scenarios where this remedy is ineffective, or the relationship between parties has degraded due to discrimination, to the point that engaging in the accommodations process is unproductive. However, this is an avenue offered under other prongs of the ADA, and it would make sense to expand this area.</p> <p>Certain state and local laws may expand protections beyond those provided by the ADA. For example, in California, “cosmetic disfigurements” are specifically included in the definition of physical disability. New York State Human Rights Legislation has also been expanded to include genetic conditions. This means that, in both California and New York, the scope of protections has been expanded beyond those specifically listed in the ADA. Offering a category of discrimination on the basis of cosmetic disfigurements, as in California, would protect individuals with facial disfigurements more comprehensively, making cases more successful when the disability is not one which features a major impairment.</p>
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