



People With Disabilities Foundation



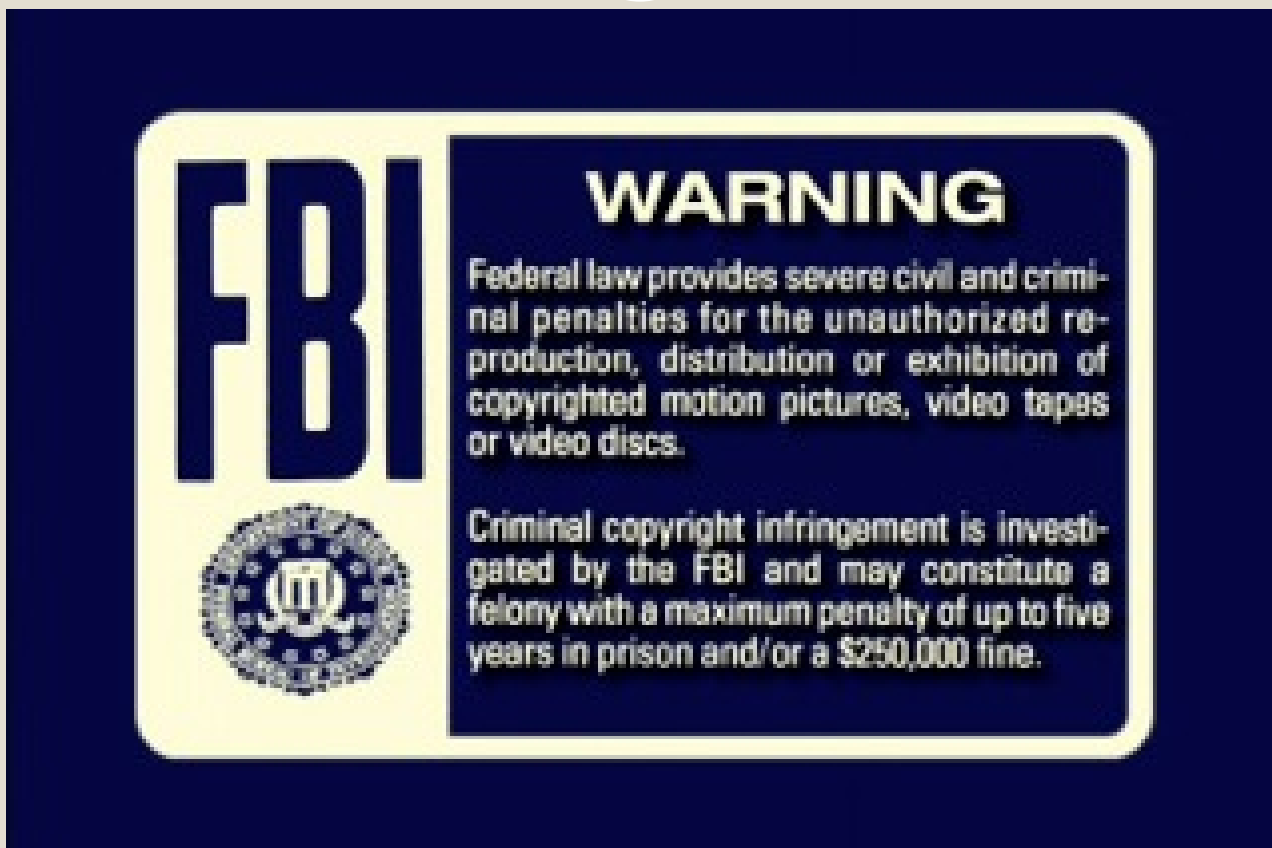
# **DISABILITY DISCRIMINATION LAWSUITS: Ensuring Equal Access to Advocacy for Clients with Mental and/or Developmental Disabilities**

People With Disabilities Foundation  
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# Introduction



- People with mental illness - stigmatized, discriminated against, and marginalized
- In a recent year (2012), nearly 20% of US adults had a mental illness and 4% had a severe mental illness (not including DD)<sup>1</sup>

1. Substance Abuse and Mental Health Services Administration, *Results from the 2012 National Survey on Drug Use and Health: Mental Health Findings*, NSDUH Series H-47, HHS Publication No. (SMA) 13-4805. Rockville, MD: Substance Abuse and Mental Health Services Administration, 2013.



# Impairments



- It is critical to understand the impairments in order to serve client
  - Underlying pathologies
  - What reasonable accommodations do you want as a remedy?
  - Reasonable accommodations both:
    1. during litigation
    2. as remedy
- Diagnostic and Statistical Manual of Mental Disorders, 5th Ed. (DSM 5)



# Most Common Diagnoses



- Psychotic disorders (usually schizophrenia)
- Mood disorders (bipolar and depressive disorders)
- Anxiety disorders, OCD, and trauma-related disorders
- Disruptive, impulse-control and conduct disorders
- Cognitive disorders – reasoning, thinking, processing, etc.
- Personality disorders
- Intellectual disabilities (DD)
- Autism Spectrum Disorder (DD)
- Epilepsy (DD)
- Cerebral palsy (DD)
- Other neurodevelopmental disorders (DD)



# Lack of Advocacy



- Unlike intellectual and many physical disabilities, many mental disorders cannot be quantitatively tested, e.g., an IQ number:
  - There is no easy, objective, quantitative test for psychiatric disorders such as schizophrenia<sup>2</sup> or bipolar disorder<sup>3</sup>

2. DSM 5, p.101 (Am. Psychiatric Ass'n 5<sup>th</sup> ed.) (2013). ("Currently, there are no radiological, laboratory, or psychometric tests for [schizophrenia].")

3. See Jerrold Pollak & John J. Miller, *The Diagnosis of Bipolar Disorder: A Review and Clinical Guide for Psychologists and Other Mental Health Clinicians*. (NAPPP, Garden Grove, C.A.) Mar. 2013, 38, 13-41, available at [http://www.brain-health.co/images/Dx\\_Bipolar\\_Disorder.PDF](http://www.brain-health.co/images/Dx_Bipolar_Disorder.PDF) ("The use of psychological/neuropsychological testing specifically to establish the diagnosis of bipolar disorder has not been well validated. Therefore, formal psychometric testing is not recommended expressly for this purpose.").



# Status of Advocacy



- PWDF commends those advocates who have actively litigated for the rights of this population
  - *Olmstead v. L.C.*, 527 U.S. 581 (1999).
  - The Supreme Court in *Bowen v. City of New York*, 476 U.S. 467 (1986) affirmed the U.S. Court of Appeals (*Bowen, Secretary of Health and Human Services, et al. v. City of New York et al.* (1984)), in upholding the District court overturning SSA's illegal covert procedure to deny those with psychiatric disabilities social security benefits.
- Unfortunately, many disability rights advocates want to let the rights of this population ride on the coattails of people with obvious, “visible” disabilities; e.g., blind or paraplegic
  - *American Council of the Blind v. Astrue*, No. C-05-04696 (WHA) (N.D. Cal.)
  - PWDF's Federal Register comments on SSA's 504 proposed business process<sup>4</sup>

4. Steven Bruce, People With Disabilities Foundation, *Comments on SSA's Proposed Plan Business Process Vision Under the Rehabilitation Act of 1973* (December 17, 2013, Dec. 23, 2013).



# Introduction to Case Studies



- Three PWDF cases in federal court involving work reviews in the context of Social Security disability benefits (SSDI and/or SSI)
  - *Gibler v. Barnhart*, No. 01-0895 MJJ (JL)(N.D. Cal. 2001).
  - *Terrence Davis v. Astrue* (SSA), Case No. 3:06-CV-6108 EMC (NC) (N.D. Cal. 2012).
  - *John Doe v. Astrue* (SSA), Case No. 3:09-CV-980 EMC (NC) (N.D. Cal. 2012).
- Statutes:
  - Americans with Disabilities Act (ADA) (1990)
  - Section 504 of the Rehabilitation Act of 1973





# Symptomatology and Diagnoses



- **Timothy Gibler**
  - High intellectual / cognitive functioning
  - Psychosis, not otherwise specified (NOS)
  - Very severe anxiety and major depressive disorder
  - Multiple episodic suicide attempts
- **Terrence Davis**
  - Paranoid schizophrenia with or without cognitive impairment
  - Anxiety (severe and continuous)
  - Severe depression with suicide ideation/attempts
- **John Doe**
  - Autism
  - Psychotic features
  - Intellectual disability
  - Depression with suicide ideation and attempts



# Accommodating Impairments



- Different impairments do not require the same accommodations
- Schizophrenia does not mean cognitive impairment unless you also have evidence of cognitive impairments



# **Barriers People with Mental and/or Developmental Disabilities May Face in Obtaining Representation**



# Barriers



## Common Stereotypes

## Facts

People with severe mental illness (SMI) necessarily have limited cognitive functioning

While cognitive deficits are present in many mental disorders,<sup>5</sup> a given individual may or may not have them

People with mental illness are violent and/or unpredictable<sup>6</sup>

“Empirical studies of violence uniformly show that only a minority of people with mental illnesses are violent”<sup>7</sup>

People develop mental illness because of their “own bad character”<sup>8</sup>

Many mental health experts believe mental illness is multi-causal<sup>9</sup>

5. Diagnostic and Statistical Manual of Mental Disorders 591 (Am. Psychiatric Ass'n 5<sup>th</sup> ed.) DSM 5 (2013).

6. Bruce G. Link, et al. *Public conceptions of mental illness: labels, causes, dangerousness, and social distance*. American J of Public Health, 89:9; p. 1332.

7. *Id.*

8. *Id.* at 1330.

9. *Id.*



# Strategies in Representation



# Premise



- **Equal Access to Advocacy**
  - Everyone has the right to live independently
  - The right to live independently includes the right to use the judicial system to assert one's civil rights



# Evaluation to Represent



- At initial meeting, ask client for information about:
  - Disorder, medications, functional limitations
  - Name of psychiatrist, therapist
  - Facts of the case and determine how they relate to the disorder
- Explain the litigation process to the client without pressuring them to participate.
- Tell client what will it take to commit to multi-year litigation



# Working with Client



- Effectively communicate with the client to enable the client to participate
- Need to clearly understand the client's symptomatology and resulting functional limitations
- Talk with people in client's support framework before and during litigation
  - May include the treating psychiatrist and/or therapist, employer, independent living skills trainer, family members
  - Support network critical, e.g, depositions
- Attorney will become part of client's support framework





# Know the Pathology



- **Client fragility**
  - All three clients live month-to-month; loss of benefits or overpayments very distressing
  - All three clients have tried to kill themselves
  - Suicide ideation and attempts no more than before the litigation
  - Be aware of it, but do not reject as a plaintiff because of concern or assume that it will be exacerbated by the litigation
  - Know what exacerbates client
  - Explain to client how the system works so they are prepared for the process (here, both SSA and litigation process)



# Facts of Cases



- Very complicated work review rules under SSDI and SSI Programs
- When reviewing these cases, think about:
  - “Effective communication” Key legal term. Law and regulation
  - Remedy sought is reasonable accommodations



# Facts of the Case: Timothy Gibler



- Had work-related earnings, but SSA ceased benefits after conducting a work review without properly taking his disability into account (Employer Subsidy)
- Issue in Case
  - Due process, Section 504. Does SSA consider medical condition during work review? Answer: No
- SSA knew C was in lock-up psych ward for 10 days during work review
  - Did SSA take hospitalization into account in decision to cease based on ability to work? Answer: No



# Overview: Davis & Doe



- SSA applies complex work incentive rules that involved the circumstances of the disability without knowledge of the disability
  - SSA claims representative (CR) did not look at the “codes” that identified the disability
  - SSA representative lacked training about the disabilities
  - SSA contracts the medical to state DDS
  - SSA work incentive rules are very complicated, was confusing and distressing to plaintiffs
  - So complicated, that even government attorney in court said that no one understood the rules



# Facts of the Case: Terrence Davis



- Had work-related earnings, but SSA ceased benefits after conducting a work review without properly taking his disability into account
  - Davis has schizophrenia, but people doing the work reviews did not know anything about it
  - UWA: SSA verification relies on employer, who does not know about the schizophrenia
  - Income Averaging: Contradicts UWA
  - Special Circumstances: Needed breaks, relied on girlfriend's support
- Point: What SSA knew - no medical information



# Facts of the Case: John Doe



- Had work-related earnings, but SSA ceased benefits after conducting a work review without properly taking his disability into account
  - Autism, psychotic features, and intellectual disability, depression with suicide ideation and attempts
  - ILS trainer and lived in ARC residence
  - Bombarded with SSA notices that he did not understand
  - IRWEs: E.g., ILS Trainer
  - Special Circumstances: SSA did not know how to take these into account



# Reasonable Accommodations



- During litigation
- Request reasonable accommodations based on client's functional limitations
- May need to educate the court by requesting reasonable accommodations based on functional limitations<sup>10</sup>

10. Steven Bruce, People With Disabilities Foundation, *Do Disability Rights Advocates Discriminate on the Basis of Mental Disability? (Pt. 2)*, (2014). Available at [https://www.pwdf.org/enews/Updated%20Survey%20Regarding%20Discrimination%20by%20Disability%20Advocates%20Community\\_%20v17.html](https://www.pwdf.org/enews/Updated%20Survey%20Regarding%20Discrimination%20by%20Disability%20Advocates%20Community_%20v17.html)



# Litigation



- Identity protective orders
  - Davis: no protective order
  - Doe: protective order
  - Protective order drafted before the complaint
  - Protects all facts leading to the identity, e.g., place of work, residence, or other addresses





# Depositions



- Reasonable accommodations related to depositions
  - Location of depositions: intimidation vs. fragility
  - Davis/Doe: not US Attorney's Office
  - GSA conference room still looks very official
  - Breaks during depositions: stress, smoking (associated with schizophrenia)
  - Psychological supports to address stress from aggressive opposing counsel, potential for decompensation



# Litigation



- Evidence
  - Davis: Needed psychometric testing – WAIS IV IQ. WRAT IV– reading, spelling, math
  - Doe: Neuro-psych testing – abstraction, etc.
- Other Strategies Employed
  - Counter opposing counsel who says plaintiff is too fragile to be a plaintiff
  - Witnesses: Psychotherapist, independent living skills trainer, psychiatrist (both expert and fact), employers and experts.
  - PWDF requires a minimum of three medical visits for adequate longitudinal perspective in developing evidence or one testing session to determine reading level, etc.
  - Keep good relationship with psychotherapist even if does not want to be involved (subpoena).
  - Do not be hypocritical re. effective communication



# Litigation



- Even though it is more difficult to represent this population than someone with a non-psychiatric disability, it is very important to treat this population the same as everyone else, including **access to court.**



# Remedies



- Request reasonable accommodations based on client's functional limitations
  - Effective communication is important for these disorders
- Examples from Davis / Doe settlement:
  - Assigning named employees with specific program expertise (primary and back-up) to assist the plaintiffs
  - Providing assigned experts with a 3-hour training specific to plaintiff's disabilities on how to further facilitate effective communication with them
  - Making reasonable efforts to accommodate plaintiff's request to meet when a plaintiff visits the field office without an appointment
  - Providing clear, concise summaries of meetings with plaintiffs, at plaintiff's reading level
  - Liberally granting the plaintiff a good cause waiver when he fails to meet a deadline for a reason related to his mental impairment
  - Including alerts in SSA's computer systems to notify employees that plaintiffs are to receive special handling
  - Providing plaintiffs with an audio CD version of notices in addition to written notices<sup>11</sup>

11. Terrence Davis v. Michael Astrue, Case No. 3:06-CV-6108 EMC (NC) and John Doe v. Michael Astrue, Case No. 3:09-CV-980 EMC (NC).



# Enforcement Retained by Court



- Continuing – both sides threaten each other
- Do not be afraid to go back into court
  - CR gave written summary of appointment that Doe could not understand
  - SSA wanted to take plaintiff off SSI, attorney said no because of potential for decompensation (episodic)
- SSA does not want their practices and procedures made public



# **Additional Scenarios Employment and Housing**



# Employment



- **Symptomatology and Diagnoses**
  - Manager's observation of employee's deteriorating job performance based on a new job description
  - Unknown diagnosis, if any
- **Perspective: Manager wanted to support employee, but believed only available option was discipline (suspension without pay)**
- **Issue: Employee confidentiality: right to NOT disclose or have employer inquire about disability**
- **Dilemma: What can employer do if employee does not disclose?**



# Housing



- **Disorder and Medications**
  - Schizophrenia with auditory hallucinations; anti-psychotics
- **Background: Unlawful detainer based on nuisance**
  - Hears voices transmitted through TV late at night
  - Fire Department and psychiatric emergency personnel called often
- **Issues**
  - Client control: QID, but did not want disability made public at trial, so fired her attorney and conducted the trial herself
  - Very smart and educated, but needed a lawyer for affirmative defense- fair housing amendments, expert testimony needed at trial
- **Potential Reasonable Accommodations**
  - T pays for modifications and returns to original condition
  - Move T to a different unit with less impact on neighbors
  - Allow a third-party to move in even if lease only allows one resident
- **State (one or more) law allows emotional support animals, not same as federal ADA regulations**
- **Fair Housing Amendments of 1988 were not changed to eliminate emotional support animals.**