

1 UNITED STATES COURT OF APPEALS
2
3 FOR THE SECOND CIRCUIT
4

5 August Term, 2003
6

7 (Argued: June 11, 2004 Decided: October 5, 2004
8 Amended: October 8, 2004)
9 Docket Nos. 03-9080, 03-9109

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13 AUDREY JACQUES,
14
15 Plaintiff-Appellee-
16 Cross-Appellant,
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18 - v. -
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20 DIMARZIO, INC.,
21
22 Defendant-Appellant-
23 Cross-Appellee.
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25 - - - - -x
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28 Before: WALKER, Chief Judge, JACOBS, Circuit Judge,
29 and STANCEU, Judge.^{*}
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31 Defendant DiMarzio, Inc. ("DiMarzio") appeals, on a
32 variety of grounds, from a judgment entered in the United
33 States District Court for the Eastern District of New York
34 (Block, J.) awarding \$190,000 in damages to Plaintiff Audrey
35 Jacques, a former DiMarzio employee who alleged that

* The Honorable Timothy C. Stanceu, Judge, United States Court of International Trade, sitting by designation.

1 DiMarzio fired her in violation of the Americans with
2 Disabilities Act (the "ADA"), 42 U.S.C. § 12102(2)(C),
3 because she was "regarded as" disabled. Jacques cross-
4 appeals from the district court's ruling that she failed to
5 make out a prima facie case of discrimination under 42
6 U.S.C. §§ 12102(2)(A) and (B).

7 We hold that the district court committed reversible
8 error when it instructed the jury that an impairment that
9 allegedly caused a "perceived" demeanor of (inter alia)
10 "hostility" and "social withdrawal" qualified under the ADA
11 as a "perceived" disability substantially limiting Jacques's
12 ability to "interact with others." We further hold that the
13 district court correctly ruled that Jacques failed to make
14 out a prima facie case under 42 U.S.C. §§ 12102(2)(A) and
15 (B). VACATED and REMANDED in part, and AFFIRMED in part.

16 GARY ETTELMAN, Ettelman &
17 Hochheiser, Garden City, NY, for
18 Defendant-Appellant-Cross-
19 Appellee.

21 TATIANA INGMAN and GRACE WON,
22 Legal Interns, (Donna Lee, on
23 the brief), BLS Legal Services
24 Corporation, Brooklyn, NY, for
25 Plaintiff-Appellee-
26 Cross-Appellant.

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2 DENNIS JACOBS, Circuit Judge:

3 Defendant DiMarzio, Inc. ("DiMarzio") appeals from
4 judgment entered after a jury trial in the United States
5 District Court for the Eastern District of New York (Block,
6 J.) awarding \$190,000 in damages to Plaintiff Audrey
7 Jacques, a former DiMarzio employee who alleged that
8 DiMarzio fired her because she was "regarded as" disabled,
9 in violation of the Americans with Disabilities Act (the
10 "ADA"), 42 U.S.C. § 12102(2)(C). Jacques cross-appeals from
11 a ruling that she failed to make out prima facie claims
12 under 42 U.S.C. §§ 12102(2)(A) (discrimination against the
13 disabled) and (B) (discrimination against those with a
14 "record" of a disability).

15 We hold that the district court erred when it
16 instructed the jury that an impairment causing a "perceived"
17 demeanor of (inter alia) "hostility" and "social withdrawal"
18 qualifies under the ADA as a "perceived" disability
19 substantially limiting Jacques's ability to "interact with
20 others." We affirm the district court's ruling that
21 Jacques failed to make out prima facie claims under either
22 42 U.S.C. §§ 12102(2)(A) or (B).

23

1 **Background**

2 **I**

3 DiMarzio is an electric-guitar manufacturer with
4 factory and assembly operations in Staten Island, New York.
5 In 1989, DiMarzio hired Jacques to work in its factory as a
6 packager and assembler of guitar components. Before she was
7 terminated in 1996, DiMarzio received average to above-
8 average employee evaluations. Jacques v. DiMarzio, Inc.,
9 200 F. Supp. 2d 151, 154 (E.D.N.Y. 2002).

10 When an appeal comes to us after a jury verdict, we
11 view the facts of the case in the light most favorable to
12 the prevailing party. Promisel v. First Am. Artificial
13 Flowers, Inc., 943 F.2d 251, 253 (2d Cir. 1991).

14 Jacques has had psychiatric problems since she began to
15 suffer "severe and major depressions" as a teenager and has
16 been continually treated for these problems on an inpatient
17 and outpatient basis for over forty years. Jacques, 200 F.
18 Supp. 2d at 154. In December 1991, while in a period of
19 depression, Jacques refused surgical treatment for uterine
20 hemorrhaging. Id. As a result, Jacques's work attendance
21 was erratic for several months. Id. In 1992, Jacques took
22 a two-week leave of absence to recover from her infection;

1 this was when she first informed the plant manager, Michael
2 Altilio, that she "was suffering from severe depression and
3 a depression disorder" and that she was taking Prozac.
4 Altilio was "very understanding" and indicated that Prozac
5 was "a very good medication." With Jacques's permission,
6 Altilio informed Jacques's immediate supervisor Betty
7 Capotosto, who was considerably less sympathetic; Capotosto
8 told Jacques that, while on leave, she should "get crayons
9 and a coloring book and make pot holders."

10 In 1993, Jacques was diagnosed by her treating
11 psychiatrist as having a "chronic" form of "Bi-polar II
12 Disorder."² Her complaint describes two major depressive

² This diagnosis was based on the assessment of her treating psychiatrist that Jacques has "major depressive episodes accompanied by hypomanic episodes," also described as "a chronic pattern of unpredictable mood episodes and fluctuating unreliable interpersonal and/or occupational functioning." According to Jacques's psychiatrist, "mood swings, irritability, apathy, poor judgment, and denial" that she "cannot regularly control" are symptomatic of this condition. When Jacques "is in a hypomanic episode, her thoughts will be racing and she does not view her behavior as pathological. However, others may easily be troubled by her erratic behavior patterns." Her psychiatrist indicated that her condition "made her vulnerable in social interactions such that she would react in unpredictable ways" and he recommended that she work in a "structured, well-defined environment . . . with her own semi-closed space such as a cubicle would provide." The psychiatrist also attributed her refusal to have surgery in 1991 to her bipolar condition. Jacques, 200 F. Supp. 2d at 154.

1 episodes after 1992: one following a minor car accident in
2 1994 and another when her mother became "seriously ill."
3 Jacques indicated that her relations with her coworkers
4 deteriorated after her two-week leave in 1992, though the
5 majority of the instances she offers to support this
6 deterioration are from 1996.³

7 Beginning in early 1996, Jacques complained that
8 factory safety had worsened because of overcrowding and poor
9 ventilation. That March, she sought emergency room
10 treatment for "severe headaches, blurred vision, nasal
11 congestion, and nausea" which she attributed to factory
12 conditions. When she reported this theory to Altilio, he
13 told her she was "giddy" and walked away. Jacques attempted
14 repeatedly and unsuccessfully to get DiMarzio to pay for the
15 emergency room treatment.

16 From 1990 through 1996, Jacques also repeatedly
17 expressed safety concerns about DiMarzio's practice of
18 allowing factory employees to supplement their income by

³ As to pre-1996 period: Jacques testified that, at some point in the "early '90s," she was questioning Altilio "about some kind of work" and Altilio responded by shaking his head and calling Jacques "nuts." This was the only time, according to Jacques, that Altilio called her "nuts" or any other synonym for mental impairment.

1 taking piecework "home" (a practice known at the company as
2 "homework"). She specifically cited "the dangers of solder
3 and flux, glue, fumes, inadequate ventilation, and the
4 absence of safety glasses" when work was performed at home.
5 Jacques, 200 F. Supp. 2d at 154. Nevertheless, between
6 April and June 1996, Jacques repeatedly asked her superiors
7 for homework to supplement her own income. Capotosto and
8 Altilio always refused, citing Jacques's report of an
9 adverse reaction to solder fumes in March 1996. Capotosto
10 and Altilio also told Jacques that they did not trust her to
11 do the work safely at home without supervision. In August
12 1996, Jacques again confronted Altilio about the dangers of
13 homework and argued that the practice violated New York
14 safety laws. Altilio rebuffed her concerns.

15 By August 1996, Jacques's working relationship with
16 Altilio and Capotosto had become poisonous, as all three
17 attested. According to Altilio, Capotosto "was no longer
18 really able to effectively do her job because" she felt
19 obliged "to tiptoe around [Jacques] and not say something
20 wrong to get [Jacques] upset and cause a whole scene."
21 Altilio, concluding that Jacques's presence at the DiMarzio
22 factory had become counterproductive, nevertheless resolved

1 to "keep" Jacques and "maintain [her] income" by giving her
2 a job as an "outside subcontractor" working off the plant's
3 premises. To this end, on August 30, 1996, Altilio informed
4 Jacques that, because of her "ongoing conflicts with other
5 workers" he wanted her to perform her guitar assembly work
6 exclusively at home. Jacques, 200 F. Supp. 2d at 155.
7 Altilio testified that Jacques expressed interest in this
8 proposal, but Jacques testified that her perception of the
9 offer was that "if I didn't take this proposal, I wouldn't
10 have a job." On September 3, 1996, Altilio asked Jacques if
11 she would accept his proposal, subject to the conditions
12 that there would be "no more conflicts" with coworkers and
13 that she "could not hold [DiMarzio] liable if [she] was
14 injured at home." Jacques indicated that she first wanted
15 to consult with a lawyer.

16 On September 5, 1996, before Altilio or Jacques could
17 agree on the terms of an independent contractor arrangement,
18 Altilio indicated that one of Jacques's coworkers, Leandra
19 Mangin, had lodged a complaint against her for "harassment":
20 Mangin had received a phone call at work from one of her
21 children, and when Jacques answered the phone she allegedly
22 announced that the call was for "that b****"--a comment that

1 the child overheard. According to Altilio, this was the
2 latest in a series of harassing comments that Jacques had
3 made to Mangin. Jacques acknowledged that she frequently
4 teased and ridiculed Mangin but insists that this behavior
5 was "girl-talk and not harassment." Following the
6 harassment complaint, Jacques called in sick for the next
7 two workdays because she was "too upset to leave [her] house
8 and expose [herself] to the anxieties of the workplace."

9 Over the next few days, Jacques and Altilio discussed
10 her situation (in person and by phone) several times; on one
11 occasion Altilio said Jacques "should see a psychiatrist."
12 Finally, on September 11, 1996, Altilio told Jacques that
13 she could return to work, but should "leave if [she] felt
14 upset and [should] avoid . . . Mangin." Altilio also said
15 that he would continue to investigate the possibility of
16 allowing her to work at home. Later that day, he called
17 Jacques back and informed her that he had spoken with Larry
18 DiMarzio, the owner of the company, who had rejected the
19 idea of allowing Jacques to work at home and instead
20 instructed Altilio to terminate Jacques based on her
21 "numerous conflicts with supervisors and . . . coworkers."

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II

On October 23, 1996, Jacques filed a pro se complaint against DiMarzio with the National Labor Relations Board ("NLRB"), alleging that she had been discharged in violation of the National Labor Relations Act ("NLRA"). Jacques, 200 F. Supp. 2d at 155. In response, DiMarzio provided the NLRB with a written statement from Altilio and Capotosto that described Jacques as a "technically competent and productive worker" whose "only technical shortcoming" was a need for "explicit, detailed directions on how to continue her work" whenever anything "unexpected" happened. This statement went on to describe Jacques as a "problem employee": she was prone to "[c]onfrontations with co-workers, . . . intolerance of [ethnic minorities in the] production department,⁴ [and] [e]motional problems in dealing with supervisory staff"; she was the "most confrontational person

⁴ Although DiMarzio stated that Jacques "never made open and overt racial or ethnic slurs directly to her co-workers," it cited several incidents where it claimed Jacques showed signs of ethnic prejudice towards her Hispanic-American coworkers (she once allegedly said of one of her Hispanic coworkers that "you can't understand a word she says") and her African-American coworkers (she once allegedly told Capotosto--in reference to her African-American coworkers--"Why don't you just hire two more Monkeys to replace me?").

1 we have ever employed"; her supervisors and coworkers felt
2 obliged to treat her with "kid gloves." The statement
3 further explained that Mr. DiMarzio, in firing Jacques, "saw
4 no reason why his supervisory staff should be forced to make
5 such an extreme effort to tiptoe around and cater to someone
6 who was emotionally unstable." Summarized supporting
7 statements by eight of Jacques plant coworkers (in addition
8 to Altilio and Capotosto) suggested--at the very least--that
9 her coworkers and supervisors found Jacques to be
10 intimidating and mercurial.

11 The NLRB found no violation of the NLRA and dismissed
12 the complaint. Jacques, 200 F. Supp. 2d at 155. After
13 failing to win relief in a claim before the New York State
14 Division of Human Rights, Jacques sought and received a
15 right-to-sue letter from the Equal Employment Opportunity
16 Commission ("EEOC") and commenced this action under the ADA
17 and state law.

18 In a Memorandum and Order dated February 27, 2002, the
19 district court (Block, J.) granted summary judgment
20 dismissing two of Jacques's claims: [1] her claim under 42
21 U.S.C. § 12102(2)(A) that she was discriminated against
22 because of an impairment (bipolar disorder) that

1 substantially impaired her ability to take care of herself
2 and [2] her claim under 42 U.S.C. § 12102(2)(B) that she was
3 discriminated against because of her "record" of an
4 impairment (bipolar disorder) that substantially impaired
5 her ability to take care of herself or work. Id. at 156-59.
6 The court declined to dismiss Jacques's claim under 42
7 U.S.C. § 12102(2)(C), ruling that there was a "triable issue
8 of fact as to whether DiMarzio regarded Jacques as having
9 'severe problems' 'on a regular basis' in her 'relations
10 with others.'" Id. at 161. The district court also denied
11 summary judgment on Jacques's claim under New York state's
12 whistleblower statute.⁵ Id. at 162.

13 At the end of trial, DiMarzio moved under Fed. R. Civ.
14 P. 50(a) for judgment as a matter of law. The trial judge
15 reserved decision on the motion. Shortly thereafter, the
16 judge stated that "there's enough . . . for the case to go
17 forward." Under the charge given, the jury found that
18 DiMarzio terminated Jacques because it "perceived" her as
19 being disabled in the major life activity of "interacting

⁵ The whistleblower claim under N.Y. Lab. Law § 215 was based on Jacques's claim that she was fired in part as retaliation for her complaints about safety practices at DiMarzio. This claim was rejected by the jury and is not a subject of this appeal.

1 with others" and awarded her \$50,000 in compensatory damages
2 and punitive damages. The court subsequently awarded
3 \$140,000 in post-judgment interest for back pay. The
4 arithmetic of the award is odd, but unchallenged on appeal.
5

6 **Discussion**

7 The prima facie elements of an ADA claim are:

- 8 (1) plaintiff's employer is subject to the ADA;
- 9 (2) plaintiff was disabled within the meaning of
10 the ADA;
- 11 (3) plaintiff was otherwise qualified to perform
12 the essential functions of her job, with or
13 without reasonable accommodation; and
- 14 (4) plaintiff suffered [an] adverse employment
15 action because of her disability.

16
17 Cameron v. Cmty. Aid for Retarded Children, Inc., 335 F.3d
18 60, 63 (2d Cir. 2003). Each element must be established for
19 an ADA plaintiff to prevail at trial.⁶

20 "[I]ndividuals with 'a physical or mental impairment
21 that substantially limits one or more of the major life
22 activities of such individual'" are disabled within the
23 meaning of the ADA. Felix v. N.Y. City Transit Auth., 324
24 F.3d 102, 104 (2d Cir. 2003) (quoting 42 U.S.C.

⁶ DiMarzio conceded in the proceedings below that it is a covered entity under the ADA. Jacques, 200 F. Supp. 2d at 156.

1 § 12102(2)(A)). A plaintiff is also "disabled" within the
2 meaning of the ADA if she has a "record" of such an
3 impairment. 42 U.S.C. § 12102(2)(B). Finally, a plaintiff
4 is "considered 'disabled' under the ADA if she is 'regarded
5 as' suffering from a physical or mental impairment that
6 'substantially limits one or more of the major life
7 activities,' even if she does not actually suffer from such
8 an impairment." Cameron, 335 F.3d at 63 (quoting 42 U.S.C.
9 § 12102(2)(A)&(C)).

10
11 **I**

12 DiMarzio argues on appeal that the district court erred
13 in denying its motion for summary judgment on Jacques's
14 claim that she "was regarded . . . as having a mental
15 disability that substantially limited her ability to
16 interact with others." Jacques, 200 F. Supp. 2d at 159
17 (citations and internal quotation marks omitted). However,
18 the post-trial appeal of a denial of summary judgment "will
19 not ordinarily lie" because "[t]he district court's judgment
20 on the verdict after a full trial on the merits . . .
21 supersedes the earlier summary judgment proceedings."
22 Pahuta v. Massey-Ferguson, Inc., 170 F.3d 125, 130 (2d Cir.

1 1999).

2 Although DiMarzio made a pre-verdict motion for
3 judgment as a matter of law based on insufficiency of the
4 evidence under Fed. R. Civ. P. 50(a), it failed to make a
5 post-verdict motion as required by Fed. R. Civ. P. 50(b).

6 In Pahuta, we made clear that

7 [i]n the absence of a Rule 50(b) renewed motion or
8 extraordinary circumstances, an "appellate court
9 [i]s without power to direct the District Court to
10 enter judgment contrary to the one it had
11 permitted to stand." The purpose of requiring a
12 renewed motion for judgment as a matter of law is
13 to give the opposing party "'an opportunity to
14 cure the defects in proof that might otherwise
15 preclude him [or her] from taking the case to the
16 jury.'" "

17
18 Id. at 129 (citations omitted). The failure to make a
19 motion under Fed. R. Civ. P. 50(b) is one that this Court
20 will excuse only in very narrow circumstances. As we said
21 in Pahuta:

22 Failure to comply with Rule 50(b) may be
23 excused only when the district court has
24 indicated that the motion need not be renewed, and
25 the party opposing the motion could not reasonably
26 have thought "that the movant's 'initial view of
27 the insufficiency of the evidence had been
28 overcome and there was no need to produce anything
29 more in order to avoid the risk of [such]
30 judgment'" "

31
32 We may overlook such a default in order to
33 "'prevent a manifest injustice' in cases '[w]here
34 a jury's verdict is wholly without legal

1 support.'"
2

3 Id. (citations omitted).

4 DiMarzio does not seriously urge us to overlook its
5 failure to move under Rule 50(b) and we are not inclined to
6 do so. We perceive no "manifest injustice" to be prevented
7 nor is the jury verdict "wholly without legal support."
8 True, the trial judge stated that "I reserved on everything.
9 Whether I will allow [the verdict] to stand or not, I will
10 deal with that in the future and give everybody an
11 opportunity to address the issue"; but the trial judge also
12 reminded DiMarzio's counsel to be "mindful" that "as far as
13 any post-verdict motions, you are to comply with the Federal
14 Rules of [P]rocedure." Notwithstanding this caution,
15 DiMarzio concedes that no Rule 50(b) motion was made.
16 Because of this failure and the lack of circumstances
17 excusing it, we decline to address the sufficiency of the
18 evidence to support the jury verdict favoring Jacques on her
19 ADA claim--at least in the form that DiMarzio now raises it.

20
21 **II**

22 Alternatively, DiMarzio argues that the district court
23 committed numerous reversible errors when it instructed the

1 jury on the claim that Jacques was terminated by DiMarzio
2 because it "perceived" her as being disabled in the major
3 life activity of "interacting with others." This Court
4 "review[s] a district court's jury instruction de novo to
5 determine whether the jury was misled about the correct
6 legal standard or was otherwise inadequately informed of
7 controlling law. A new trial is required if, considering
8 the instruction as a whole, the cited errors were not
9 harmless, but in fact prejudiced the objecting party."

10 Girden v. Sandals Int'l, 262 F.3d 195, 203 (2d Cir. 2001)

11 (citations and internal quotation marks omitted).

12 DiMarzio's attacks on the jury instructions are several but
13 at oral argument it focused on the following passage:

14 Relevant to this case, a person is considered
15 "disabled" under the Disabilities Act if she is
16 regarded or perceived as having a mental
17 impairment that substantially limits a major life
18 activity. The ability to interact with others is
19 a major life activity. Jacques must prove that
20 she was perceived as having relations with others
21 that were characterized on a regular basis by
22 severe problems, such as consistently high levels
23 of hostility, social withdrawal, or failure to
24 communicate when necessary, all due to her mental
25 impairment. It is a perception case, in other
26 words. Merely cantankerous persons are not deemed
27 substantially limited in their major life activity
28 of interacting with others. It has to be more
29 than that.

30 (Emphasis added). Although DiMarzio represented to this

1 Court its "belief" that it objected to this portion of the
2 jury instructions, it conceded in a post-argument letter to
3 this Court that it is "unable to locate a specific objection
4 to the charge." Letter from Appellant at 1 (June 11, 2004).
5 We too find no objection preserved in the appellate record.

6 Under the version of Fed. R. Civ. P. 51 in effect at
7 the time of trial in this case, "no party may assign as
8 error the giving or the failure to give an instruction
9 unless that party objects thereto before the jury retires to
10 consider its verdict."⁷ Thus, a failure to make a timely
11 objection to a disputed jury instruction ordinarily
12 constitutes a waiver of appellate review of the instruction.
13 However, it is also well settled that the purpose of Fed. R.
14 Civ. P. 51 is "to allow the trial court an opportunity to
15 cure any defects in the instructions before sending the jury
16 to deliberate," Fogarty v. Near North Ins. Brokerage, Inc.,

⁷ Fed. R. Civ. P. 51 was amended, effective December 1, 2003, to provide, inter alia, that a party's failure to object to a jury instruction does not constitute a forfeiture of the objection if the party previously made its position clear in a "proper request" for jury instructions filed with the court, and the court denied that request "in a definitive ruling on the record." Fed. R. Civ. P. 51(d)(1)(B). This change, had it been in effect at the time of trial, would not have helped DiMarzio because a "proper request" for an instruction was never made.

1 162 F.3d 74, 79 (2d Cir. 1998), not to multiply redundant
2 motions:

3 Rule 51 must be read in conjunction with Fed. R.
4 Civ. P. 46, which states that “[f]ormal exceptions
5 to rulings or orders of the court are
6 unnecessary,” as long as a party makes known its
7 objection and the basis for it at the time the
8 district court rules. As such, a failure to object
9 after a charge is given is excused where . . .
10 a party makes its position clear . . . and the
11 trial judge is not persuaded.

12 Girden, 262 F.3d at 202.

13 Here, the district court was made fully aware of
14 DiMarzio’s position that “interacting with others” was not a
15 major life activity under the ADA. DiMarzio so argued in
16 its summary judgment motion (as well as elsewhere) and the
17 trial judge discussed and explicitly rejected DiMarzio’s
18 position in its written opinion on the motion. See Jacques,
19 200 F. Supp. 2d at 160-61; see also Dresser Indus., Inc. v.
20 The Gradall Co., 965 F.2d 1442, 1450 (7th Cir. 1992)
21 (holding that defendant had not waived objection to the jury
22 charge by failing to make a Rule 51 motion because it had
23 “devot[ed] three pages . . . in its memorandum opposing”
24 plaintiff’s summary judgment motion to the issue and
25 therefore “had reason to believe that it would be pointless
26 to press its theory further”). Because DiMarzio’s position

1 on the validity of this disputed jury instruction was
2 explicitly considered and rejected by the district court in
3 its decision denying summary judgment, we conclude that the
4 issue is not waived on appeal. We are therefore obliged to
5 review the legal soundness of the district court's
6 instructions to the jury on whether Jacques was "regarded
7 as" disabled within the meaning of the ADA.

8
9 **III**

10 _____To prevail under the "regarded as" provision of the
11 ADA, a plaintiff must show more than "that the employer
12 regarded that individual as somehow disabled; rather, the
13 plaintiff must show that the employer regarded the
14 individual as disabled within the meaning of the ADA."
15 Colwell v. Suffolk County Police Dep't, 158 F.3d 635, 646
16 (2d Cir. 1998). This Court follows "a three-step process
17 for determining whether a plaintiff has a disability" that
18 is protected by the ADA. Id. at 641; accord Bragdon v.
19 Abbott, 524 U.S. 624, 631 (1998). We consider: (1) "whether
20 the plaintiff suffered from a physical or mental
21 impairment," (2) whether "'the life activity' upon which the
22 plaintiff relied . . . constitutes a major life activity

1 under the ADA," and (3) whether "the plaintiff's impairment
2 'substantially limited' [the] major life activity
3 identified." Colwell, 158 F.3d at 641 (citations omitted).
4 Since DiMarzio concedes that Jacques's bipolar disorder is a
5 "mental impairment" for purposes of the ADA, Appellant's
6 Brief at 23, our review narrows to the remaining issues
7 under Colwell, i.e. whether "interacting with others" is a
8 major life activity protected under the ADA and, if so, what
9 showing is necessary for a plaintiff to be considered
10 "substantially limited" in "interacting with others."
11 _____In Cameron we expressly declined to address the
12 question of whether "interacting with others" was a major
13 life activity under the ADA and observed that the issue had
14 fractured the circuits. See 335 F.3d at 63-64. In the
15 first case to address the issue, the First Circuit suggested
16 that "the ability to get along with others" is never a major
17 life activity under the ADA, observing that such an ability
18 comes and goes, "triggered by vicissitudes of life which are
19 normally stressful for ordinary people," and that "[t]o
20 impose legally enforceable duties on an employer based on
21 such an amorphous concept would be problematic." Soileau v.
22 Guilford of Maine, Inc., 105 F.3d 12, 16 (1st Cir. 1997).

1 Two years later, the Ninth Circuit concluded otherwise,
2 describing "interacting with others" as "an essential,
3 regular function, like walking and breathing" that "easily
4 falls within the definition of 'major life activity'" under
5 the ADA. McAlindin v. County of San Diego, 192 F.3d 1226,
6 1234 (9th Cir. 1999), cert. denied, 530 U.S. 1243 (2000).
7 But see id. at 1240 (Trott, J., dissenting) ("Not only is
8 this 'disability' vague, but it's bizarre, ominous, and
9 wholly outside of the group of serious disabilities Congress
10 intended to cover with this statute."). All other circuits
11 faced with the issue have (sometimes with exertion) avoided
12 deciding whether "interacting with others" is a major life
13 activity under the ADA.⁸

⁸ See Rohan v. Networks Presentations LLC, 375 F.3d 266, 274 (4th Cir. 2004) ("We decline to resolve this issue here because, assuming that interacting with others is a major life activity, [plaintiff] has not demonstrated that it is an activity in which she is substantially limited."); MX Group, Inc. v. City of Covington, 293 F.3d 326, 337 (6th Cir. 2002) (noting "that it has been held that 'interacting with others,' is a major life activity" but declining to decide the issue); Heisler v. Metro. Council, 339 F.3d 622, 628 (8th Cir. 2003) (declining to hold that "interacting with others [is] a separate major life activity" because plaintiff failed to provide evidence that her mental impairment "substantially limited her ability to interact with others"); Steele v. Thiokol Corp., 241 F.3d 1248, 1254-55 (10th Cir. 2001) (declining to address whether interacting with others is a major life activity because plaintiff was not substantially limited in her ability to interact with others); see also Emerson v. Northern States

1 The parties urge us to align ourselves with either the
2 First Circuit's reasoning in Soileau or the Ninth Circuit's
3 holding in McAlindin. We decline to subscribe to either
4 analysis.

5 There is a difference between "get[ting] along with
6 others" (the life activity considered in Soileau) and
7 "interacting with others" (the life activity considered in
8 McAlindin). We agree with the First Circuit's observation
9 that "get[ting] along with others" is an unworkably
10 subjective definition of a "major life activity" under the
11 ADA--in much the same way that "perceiving" (as distinct
12 from merely "seeing" or "hearing") would be an unworkably
13 subjective "major life activity." See Soileau, 105 F.3d at
14 15. However, it is difficult to contradict the Ninth
15 Circuit's characterization of "interacting with others" as
16 "an essential, regular function" that "easily falls within
17 the definition of 'major life activity.'" McAlindin, 192
18 F.3d at 1234. We also think that "interacting with others,"
19 as overarching as it may be, more objectively describes a
20 life activity than does "getting along with others," which

Power Co., 256 F.3d 506, 511 (7th Cir. 2001) (describing
"interacting with others" in apparent dicta as one of many
"activities that feed into the major life activities of
learning and working").

1 connotes proficiency or success and worsens the problem of
2 subjectivity that concerned the First Circuit. Cf.
3 McAlindin, 192 F.3d at 1235 (“trouble getting along with
4 coworkers is not sufficient to show a substantial
5 limitation” under the ADA). Although “interacting with
6 others” is a more inclusive activity than (say) “seeing” or
7 “standing,” similarly overarching “major life activities”
8 have been endorsed by all of the current members of the
9 Supreme Court in one case or another. See, e.g., Bragdon,
10 524 U.S. at 638-39, 659, 665 (acknowledging “caring for
11 one’s self” as a valid “major life activity” under the ADA).

12 While we accept the Ninth Circuit’s premise that
13 “interacting with others” is a “major life activity” under
14 the ADA, we conclude that the Ninth Circuit’s test for
15 determining when a limitation on this activity is
16 “substantial” for ADA purposes is unworkable, unbounded, and
17 useless as guidance to employers, employees, judges, and
18 juries. According to the Ninth Circuit--whose opinion in
19 McAlindin the district court’s jury instructions in this
20 case tracked--a plaintiff’s impairment in “interacting with
21 others” is “substantial” for purposes of the ADA when it is
22 “characterized on a regular basis by severe problems, for

1 example, consistently high levels of hostility, social
2 withdrawal, or failure to communicate when necessary,"
3 McAlindin, 192 F.3d at 1235, so that a mere
4 "cantankerous[ness]," is not enough. Id.

5 The Ninth Circuit's presumed demarcation--between
6 persons who are "hostile" and those who are "cantankerous"--
7 does not exist. The "cantankerous" are those "marked by ill
8 humor, irritability, and determination to disagree."

9 Webster's New International Dictionary 328 (3d ed. 1986).

10 On the same hand, the most relevant definition of "hostile"
11 is: "marked by antagonism or unfriendliness." Id. at 1094.

12 It does not help much to require that the hostility be of a
13 "consistently high level" or that the disability in

14 interacting with others be otherwise "severe." Common
15 personality traits such as hostility and argumentativeness

16 are useful professional traits in many employment contexts.
17 And traits associated with Jacques's impairment, such as

18 apathy and poor judgment, see infra note 2, are (equally)
19 useless indicia of whether a deficit in human relations is a

20 "substantial" limitation. In a similar vein, the Ninth
21 Circuit's phrase, "consistently high levels of . . . social

1 withdrawal," fails to capture the appropriate standard.⁹

2 The Ninth Circuit approach also frustrates the
3 maintenance of a civil workplace environment. The more
4 troublesome and nasty the employee, the greater the risk of
5 litigation costs for an employer that disciplines or fires
6 him. All things being equal, a "cantankerous" person or a
7 curmudgeon would be more secure by becoming more unpleasant.
8 And an employer faced with an employee who is (for example)
9 an outspoken bigot or boor would have to choose between the
10 risk of litigating that employee's ADA claim, or the risk of
11 litigating the claims of others who experience an unchecked
12 hostile work environment as a result of that employee's
13 behavior.¹⁰

14 We return to the distinction between "getting along
15 with others" (a normative or evaluative concept) and

⁹ "Social withdrawal" (even a high level of it) has an array of meanings, not all of which amount to a substantial limitation on a person's ability to interact with others. The range of personality includes people who are reclusive, or laconic, or acerbic. Some people choose to be alone. Others are isolated for other reasons. See, e.g., United States v. Gementera, 379 F.3d 596, 606 (9th Cir. 2004) (apparently using the term as a synonym for, or a consequence of, "stigmatization" by others).

¹⁰ Evidence in the record suggests that Jacques, on multiple occasions, used language in the workplace that was racist.

1 "interacting with others" (which is essentially mechanical).
2 We hold that a plaintiff is "substantially limited" in
3 "interacting with others" when the mental or physical
4 impairment severely limits the fundamental ability to
5 communicate with others. This standard is satisfied when
6 the impairment severely limits the plaintiff's ability to
7 connect with others, i.e., to initiate contact with other
8 people and respond to them, or to go among other people--at
9 the most basic level of these activities. The standard is
10 not satisfied by a plaintiff whose basic ability to
11 communicate with others is not substantially limited but
12 whose communication is inappropriate, ineffective, or
13 unsuccessful. A plaintiff who otherwise can perform the
14 functions of a job with (or without) reasonable
15 accommodation could satisfy this standard by demonstrating
16 isolation resulting from any of a number of severe
17 conditions, including acute or profound cases of: autism,
18 agoraphobia, depression or other conditions that we need not
19 try to anticipate today.

20 Based on our conclusion regarding the proper standard
21 to be applied, as discussed above, we conclude that the
22 district court erred in the way it instructed the jury on

1 the showing necessary to establish that Jacques was
2 "regarded as" having a disability substantially limiting her
3 in "interacting with others." See Anderson v. Branen, 17
4 F.3d 552, 556 (2d Cir. 1994) ("A jury instruction is
5 erroneous if it misleads the jury as to the correct legal
6 standard or does not adequately inform the jury on the
7 law."). The next question is whether this error was
8 "harmless." See Girden, 262 F.3d at 203 ("A new trial is
9 required if, considering the instruction as a whole, the
10 cited errors were not harmless, but in fact prejudiced the
11 objecting party."). We think there is little doubt that
12 DiMarzio was prejudiced by the erroneous jury instruction
13 and that the error was not harmless. Indeed, the district
14 court, in denying DiMarzio's summary judgment motion on
15 Jacques's "regarded as" claim, stated that "DiMarzio
16 perceived Jacques . . . as an 'extremely emotional' and
17 'irrational' individual." Jacques, 200 F. Supp. 2d at 161.
18 This characterization falls far short of the correct
19 standard for showing that Jacques was "regarded as" being
20 "substantially limited" in "interacting with others." The
21 judgment must be vacated and the case remanded for
22 additional proceedings consistent with this opinion. See

1 Pahuta, 170 F.3d at 129 (“[i]n the absence of a Rule 50(b)
2 renewed motion . . . an ‘appellate court is without power to
3 direct the District Court to enter judgment contrary to the
4 one it had permitted to stand’”) (citations omitted).
5 Nothing in this opinion inhibits the parties from entering a
6 renewed motion in district court for summary judgment
7 premised on the legal principles herein.
8

9 IV

10 The district court ruled that Jacques failed to make
11 out a prima facie claim under 42 U.S.C. § 12102(2)(A) that
12 she was terminated solely on the basis of an impairment
13 (bipolar disorder) that substantially impaired her ability
14 to take care of herself, which is a major life activity
15 within the meaning of the ADA. See Ryan v. Grae & Rybicki,
16 P.C., 135 F.3d 867, 871-72 (2d Cir. 1998); accord Bragdon,
17 524 U.S. at 638-39. Although the district court conceded
18 that Jacques’s bipolar disorder constituted an “impairment”
19 for purposes of the ADA, it ruled that the “severity and
20 duration” of her disorder did not substantially limit
21 Jacques in the “major life activity” of “caring for
22 oneself.” Jacques, 200 F. Supp. 2d at 157-58. The district

1 court observed that

2 This conclusion is reinforced by Jacques's
3 deposition testimony that her mental condition did
4 not affect her ability to take care of her home,
5 to have a normal social life, or to attend to her
6 personal hygiene.

7
8 Id. at 158. The court acknowledged that Jacques had
9 attempted to neutralize this deposition with medical
10 testimony that she "tends to minimize her symptoms," but
11 ruled that Jacques could not "create a material issue of
12 fact by submitting an affidavit disputing [her] own
13 testimony." Id. (internal quotation omitted). On cross-
14 appeal, Jacques challenges the grant of summary judgment in
15 favor of DiMarzio.

16 We review dismissal of a claim on summary judgment de
17 novo. See Young v. County of Fulton, 160 F.3d 899, 902 (2d
18 Cir. 1998). In doing so, we construe the evidence in the
19 light most favorable to Jacques (as the non-moving party)
20 and draw all reasonable inferences in her favor. See
21 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986);
22 Maguire v. Citicorp Retail Servs., Inc., 147 F.3d 232, 235
23 (2d Cir. 1998). Summary judgment is appropriate only where
24 "there is no genuine issue as to any material fact and . . .
25 the moving party is entitled to a judgment as a matter of

1 law." Fed. R. Civ. P. 56(c).

2 Jacques's argument focuses almost exclusively on the
3 district court's (tangential) observation that she
4 "attempt[ed] to create an issue of fact by arguing that her
5 deposition testimony is not credible" as though that were
6 the sole ground for the ruling. Jacques ignores numerous
7 findings that the symptoms associated with her bipolar
8 disorder had not "substantially limited" her ability to
9 "take care of herself." Jacques, 200 F. Supp. 2d at 158.
10 We find no basis to disturb the district court's grant of
11 summary judgment to DiMarzio on this claim.

12 We have considered the parties' remaining arguments on
13 appeal, including DiMarzio's appeal of a variety of
14 evidentiary and procedural rulings by the district court,
15 and Jacques's appeal from the award of summary judgment to
16 DiMarzio on her claim under 42 U.S.C. §§ 12102(2)(B). None
17 of these claims has merit.

18

19

* * *

20 For the foregoing reasons, the judgment of the district
21 court is VACATED and REMANDED in part, and AFFIRMED in part.