

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

9 Docket Nos. 03-9080, 03-9109
10

11 - - - - -x
12

13 AUDREY JACQUES,
14

15 Plaintiff-Appellee-
16 Cross-Appellant,
17

18 - v. -
19

20 DIMARZIO, INC.,
21

22 Defendant-Appellant-
23 Cross-Appellee.
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25 - - - - -x
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27
28 Before: WALKER, JACOBS, Circuit Judges, STANCEU,
29 Judge.*
30

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.

1
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. [A
4 408] Altilio was "very understanding" and indicated that
5 Prozac was "a very good medication." With Jacques's
6 permission, Altilio informed Jacques's immediate supervisor
7 Betty Capotosto, who was considerably less sympathetic;
8 Capotosto told Jacques that, while on leave, she should "get
9 crayons and a coloring book and make pot holders." [A 408-
10 09]

11 In 1993, Jacques was diagnosed by her treating
12 psychiatrist as having a "chronic" form of "Bi-polar II
13 Disorder."² [A 359] Her complaint describes two major

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." [A 360] The

1 depressive episodes after 1992: one following a minor car
2 accident in 1994 and another when her mother became
3 "seriously ill." [A 297] Jacques indicated that her
4 relations with her coworkers deteriorated after her two-week
5 leave in 1992 [A 408-09], though the majority of the
6 instances she offers to support this deterioration are from
7 1996.³

8 Beginning in early 1996, Jacques complained that
9 factory safety had worsened because of overcrowding and poor
10 ventilation. That March, she sought emergency room
11 treatment for "severe headaches, blurred vision, nasal
12 congestion, and nausea" which she attributed to factory
13 conditions. When she reported this theory to Altilio, he
14 told her she was "giddy" and walked away. Jacques attempted
15 repeatedly and unsuccessfully to get DiMarzio to pay for the
16 emergency room treatment. [A 300-01]

psychiatrist also attributed her refusal to have surgery in
1991 to her bipolar condition. Jacques, 200 F. Supp. 2d at
154.

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. [A 405-06]

1 From 1990 through 1996, Jacques also repeatedly
2 expressed safety concerns about DiMarzio's practice of
3 allowing factory employees to supplement their income by
4 taking piecework "home" (a practice known at the company as
5 "homework"). She specifically cited "the dangers of solder
6 and flux, glue, fumes, inadequate ventilation, and the
7 absence of safety glasses" when work was performed at home.
8 Jacques, 200 F. Supp. 2d at 154. Nevertheless, between
9 April and June 1996, Jacques repeatedly asked her superiors
10 for homework to supplement her own income. Capotosto and
11 Altilio always refused, citing Jacques's report of an
12 adverse reaction to solder fumes in March 1996. **[A 301-02,**
13 **408-18]** Capotosto and Altilio also told Jacques that they
14 did not trust her to do the work safely at home without
15 supervision. **[A 412-13]** In August 1996, Jacques again
16 confronted Altilio about the dangers of homework and argued
17 that the practice violated New York safety laws. Altilio
18 rebuffed her concerns. **[A 303, 415]**

19 By August 1996, Jacques's working relationship with
20 Altilio and Capotosto had become poisonous, as all three
21 attested. According to Altilio, Capotosto "was no longer
22 really able to effectively do her job because" she felt

1 obliged "to tiptoe around [Jacques] and not say something
2 wrong to get [Jacques] upset and cause a whole scene." [A
3 588] Altilio, concluding that Jacques's presence at the
4 DiMarzio factory had become counterproductive, nevertheless
5 resolved to "keep" Jacques and "maintain [her] income" by
6 giving her a job as an "outside subcontractor" working off
7 the plant's premises. [A 588] To this end, on August 30,
8 1996, Altilio informed Jacques that, because of her "ongoing
9 conflicts with other workers" he wanted her to perform her
10 guitar assembly work exclusively at home. Jacques, 200 F.
11 Supp. 2d at 155. Altilio testified that Jacques expressed
12 interest in this proposal, [A 588] but Jacques testified
13 that her perception of the offer was that "if I didn't take
14 this proposal, I wouldn't have a job." [A 418] On
15 September 3, 1996, Altilio asked Jacques if she would accept
16 his proposal, subject to the conditions that there would be
17 "no more conflicts" with coworkers and that she "could not
18 hold [DiMarzio] liable if [she] was injured at home." [A
19 304] Jacques indicated that she first wanted to consult
20 with a lawyer.

21 On September 5, 1996, before Altilio or Jacques could
22 agree on the terms of an independent contractor arrangement,

1 Altilio indicated that one of Jacques's coworkers, Leandra
2 Mangin, had lodged a complaint against her for "harassment":
3 Mangin had received a phone call at work from one of her
4 children, and when Jacques answered the phone she allegedly
5 announced that the call was for "that b****"--a comment that
6 the child overheard. **[A 281, 515-16]** According to Altilio,
7 this was the latest in a series of harassing comments that
8 Jacques had made to Mangin. **[A 590-91]** Jacques
9 acknowledged that she frequently teased and ridiculed Mangin
10 but insists that this behavior was "girl-talk and not
11 harassment." **[A 304]** Following the harassment complaint,
12 Jacques called in sick for the next two workdays because she
13 was "too upset to leave [her] house and expose [herself] to
14 the anxieties of the workplace." **[A 305]**

15 Over the next few days, Jacques and Altilio discussed
16 her situation (in person and by phone) several times; on one
17 occasion Altilio said Jacques "should see a psychiatrist."
18 **[A 305]** Finally, on September 11, 1996, Altilio told
19 Jacques that she could return to work, but should "leave if
20 [she] felt upset and [should] avoid . . . Mangin." Altilio
21 also said that he would continue to investigate the
22 possibility of allowing her to work at home. **[A 306]** Later

1 that day, he called Jacques back and informed her that he
2 had spoken with Larry DiMarzio, the owner of the company,
3 who had rejected the idea of allowing Jacques to work at
4 home and instead instructed Altilio to terminate Jacques
5 based on her "numerous conflicts with supervisors and . . .
6 coworkers." [A 306, 417; Blue 6]

7

8

II

9 On October 23, 1996, Jacques filed a pro se complaint
10 against DiMarzio with the National Labor Relations Board
11 ("NLRB"), alleging that she had been discharged in violation
12 of the National Labor Relations Act ("NLRA"). Jacques, 200
13 F. Supp. 2d at 155. In response, DiMarzio provided the NLRB
14 with a written statement from Altilio and Capotosto [A 333-
15 44] that described Jacques as a "technically competent and
16 productive worker" whose "only technical shortcoming" was a
17 need for "explicit, detailed directions on how to continue
18 her work" whenever anything "unexpected" happened. [A 334]

19 This statement went on to describe Jacques as a
20 "problem employee": she was prone to "[c]onfrontations with
21 co-workers, . . . intolerance of [ethnic minorities in the]

1 production department,⁴ [and] [e]motional problems in
2 dealing with supervisory staff"; [A 334] she was the "most
3 confrontational person we have ever employed"; her
4 supervisors and coworkers felt obliged to treat her with
5 "kid gloves." [A 339] The statement further explained that
6 Mr. DiMarzio, in firing Jacques, "saw no reason why his
7 supervisory staff should be forced to make such an extreme
8 effort to tiptoe around and cater to someone who was
9 emotionally unstable." [A 344] Summarized supporting
10 statements by eight of Jacques plant coworkers (in addition
11 to Altilio and Capotosto) suggested--at the very least--that
12 her coworkers and supervisors found Jacques to be
13 intimidating and mercurial. [A 334-335]

14 The NLRB found no violation of the NLRA and dismissed
15 the complaint. Jacques, 200 F. Supp. 2d at 155. After
16 failing to win relief in a claim before the New York State

⁴ Although DiMarzio stated that Jacques "never made open and overt racial or ethnic slurs directly to her coworkers," 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?"). [A 336]

1 Division of Human Rights, Jacques sought and received a
2 right-to-sue letter from the Equal Employment Opportunity
3 Commission ("EEOC") and commenced this action under the ADA
4 and state law.

5 In a Memorandum and Order dated February 27, 2002, the
6 district court (Block, J.) granted summary judgment
7 dismissing two of Jacques's claims: [1] her claim under 42
8 U.S.C. § 12102(2)(A) that she was discriminated against
9 because of an impairment (bipolar disorder) that
10 substantially impaired her ability to take care of herself
11 and [2] her claim under 42 U.S.C. § 12102(2)(B) that she was
12 discriminated against because of her "record" of an
13 impairment (bipolar disorder) that substantially impaired
14 her ability to take care of herself or work. Id. at 156-59.
15 The court declined to dismiss Jacques's claim under 42
16 U.S.C. § 12102(2)(C), ruling that there was a "triable issue
17 of fact as to whether DiMarzio regarded Jacques as having
18 'severe problems' 'on a regular basis' in her 'relations
19 with others.'" Id. at 161. The district court also denied
20 summary judgment on Jacques's claim under New York state's
21 whistleblower statute.⁵ Id. at 162.

⁵ The whistleblower claim under N.Y. Lab. Law § 215 was based on Jacques's claim that she was fired in part as

1 At the end of trial, DiMarzio moved under Fed. R. Civ.
2 P. 50(a) for judgment as a matter of law. The trial judge
3 reserved decision on the motion. **[A 669]** Shortly
4 thereafter, the judge stated that "there's enough . . . for
5 the case to go forward." **[A 670]** Under the charge given,
6 the jury found that DiMarzio terminated Jacques because it
7 "perceived" her as being disabled in the major life activity
8 of "interacting with others" and awarded her \$50,000 in
9 compensatory damages and punitive damages. The court
10 subsequently awarded \$140,000 in post-judgment interest for
11 back pay. **[SPA 1]** The arithmetic of the award is odd, but
12 unchallenged on appeal.

13

14

Discussion

15

The prima facie elements of an ADA claim are:

16

(1) plaintiff's employer is subject to the ADA;

17

(2) plaintiff was disabled within the meaning of
the ADA;

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(3) plaintiff was otherwise qualified to perform
the essential functions of her job, with or
without reasonable accommodation; and

20

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(4) plaintiff suffered [an] adverse employment
action because of her disability.

23

24

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

4 "[I]ndividuals with 'a physical or mental impairment
5 that substantially limits one or more of the major life
6 activities of such individual'" are disabled within the
7 meaning of the ADA. Felix v. N.Y. City Transit Auth., 324
8 F.3d 102, 104 (2d Cir. 2003) (quoting 42 U.S.C.
9 § 12102(2)(A)). A plaintiff is also "disabled" within the
10 meaning of the ADA if she has a "record" of such an
11 impairment. 42 U.S.C. § 12102(2)(B). Finally, a plaintiff
12 is "considered 'disabled' under the ADA if she is 'regarded
13 as' suffering from a physical or mental impairment that
14 'substantially limits one or more of the major life
15 activities,' even if she does not actually suffer from such
16 an impairment." Cameron, 335 F.3d at 63 (quoting 42 U.S.C.
17 § 12102(2)(A) & (C)).

18
19 **I**

20 DiMarzio argues on appeal that the district court erred

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

1 in denying its motion for summary judgment on Jacques's
2 claim that she "was regarded . . . as having a mental
3 disability that substantially limited her ability to
4 interact with others." Jacques, 200 F. Supp. 2d at 159
5 (citations and internal quotation marks omitted). However,
6 the post-trial appeal of a denial of summary judgment "will
7 not ordinarily lie" because "[t]he district court's judgment
8 on the verdict after a full trial on the merits . . .
9 supersedes the earlier summary judgment proceedings."
10 Pahuta v. Massey-Ferguson, Inc., 170 F.3d 125, 130 (2d Cir.
11 1999).

12 Although DiMarzio made a pre-verdict motion for
13 judgment as a matter of law based on insufficiency of the
14 evidence under Fed. R. Civ. P. 50(a), it failed to make a
15 post-verdict motion as required by Fed. R. Civ. P. 50(b).
16 In Pahuta, we made clear that

17 [i]n the absence of a Rule 50(b) renewed motion or
18 extraordinary circumstances, an "appellate court
19 [i]s without power to direct the District Court to
20 enter judgment contrary to the one it had
21 permitted to stand." The purpose of requiring a
22 renewed motion for judgment as a matter of law is
23 to give the opposing party "an opportunity to
24 cure the defects in proof that might otherwise
25 preclude him [or her] from taking the case to the
26 jury.'" "

27
28 Id. at 129 (citations omitted). The failure to make a

1 motion under Fed. R. Civ. P. 50(b) is one that this Court
2 will excuse only in very narrow circumstances. As we said
3 in Pahuta:

4 Failure to comply with Rule 50(b) may be
5 excused only when the district court has
6 indicated that the motion need not be renewed, and
7 the party opposing the motion could not reasonably
8 have thought "that the movant's 'initial view of
9 the insufficiency of the evidence had been
10 overcome and there was no need to produce anything
11 more in order to avoid the risk of [such]
12 judgment'"

13
14 We may overlook such a default in order to
15 "'prevent a manifest injustice' in cases '[w]here
16 a jury's verdict is wholly without legal
17 support.'"

18
19 Id. (citations omitted).

20 DiMarzio does not seriously urge us to overlook its
21 failure to move under Rule 50(b) and we are not inclined to
22 do so. We perceive no "manifest injustice" to be prevented
23 nor is the jury verdict "wholly without legal support."
24 True, the trial judge stated that "I reserved on everything.
25 Whether I will allow [the verdict] to stand or not, I will
26 deal with that in the future and give everybody an
27 opportunity to address the issue"; **[A 794]** but the trial
28 judge also reminded DiMarzio's counsel to be "mindful" that
29 "as far as any post-verdict motions, you are to comply with

1 the Federal Rules of [P]rocedure.” [A 798] Notwithstanding
2 this caution, DiMarzio concedes that no Rule 50(b) motion
3 was made. [Reply 6-11] Because of this failure and the
4 lack of circumstances excusing it, we decline to address the
5 sufficiency of the evidence to support the jury verdict
6 favoring Jacques on her ADA claim--at least in the form that
7 DiMarzio now raises it.

8
9 **II**

10 Alternatively, DiMarzio argues that the district court
11 committed numerous reversible errors when it instructed the
12 jury on the claim that Jacques was terminated by DiMarzio
13 because it “perceived” her as being disabled in the major
14 life activity of “interacting with others.” This Court
15 “review[s] a district court’s jury instruction de novo to
16 determine whether the jury was misled about the correct
17 legal standard or was otherwise inadequately informed of
18 controlling law. A new trial is required if, considering
19 the instruction as a whole, the cited errors were not
20 harmless, but in fact prejudiced the objecting party.”
21 Girden v. Sandals Int’l, 262 F.3d 195, 203 (2d Cir. 2001)
22 (citations and internal quotation marks omitted).

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

3 Relevant to this case, a person is considered
4 "disabled" under the Disabilities Act if she is
5 regarded or perceived as having a mental
6 impairment that substantially limits a major life
7 activity. The ability to interact with others is
8 a major life activity. Jacques must prove that
9 she was perceived as having relations with others
10 that were characterized on a regular basis by
11 severe problems, such as consistently high levels
12 of hostility, social withdrawal, or failure to
13 communicate when necessary, all due to her mental
14 impairment. It is a perception case, in other
15 words. Merely cantankerous persons are not deemed
16 substantially limited in their major life activity
17 of interacting with others. It has to be more
18 than that.

19 (Emphasis added). Although DiMarzio represented to this
20 Court its "belief" that it objected to this portion of the
21 jury instructions, it conceded in a post-argument letter to
22 this Court that it is "unable to locate a specific objection
23 to the charge." Letter from Appellant at 1 (June 11, 2004).
24 We too find no objection preserved in the appellate record.

25 Under the version of Fed. R. Civ. P. 51 in effect at
26 the time of trial in this case, "no party may assign as
27 error the giving or the failure to give an instruction
28 unless that party objects thereto before the jury retires to

1 consider its verdict.”⁷ Thus, a failure to make a timely
2 objection to a disputed jury instruction ordinarily
3 constitutes a waiver of appellate review of the instruction.
4 However, it is also well settled that the purpose of Fed. R.
5 Civ. P. 51 is “to allow the trial court an opportunity to
6 cure any defects in the instructions before sending the jury
7 to deliberate,” Fogarty v. Near North Ins. Brokerage, Inc.,
8 162 F.3d 74, 79 (2d Cir. 1998), not to multiply redundant
9 motions:

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

19 Girden, 262 F.3d at 202.

20 Here, the district court was made fully aware of

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 DiMarzio's position that "interacting with others" was not a
2 major life activity under the ADA. DiMarzio so argued in
3 its summary judgment motion (as well as elsewhere) and the
4 trial judge discussed and explicitly rejected DiMarzio's
5 position in its written opinion on the motion. See Jacques,
6 200 F. Supp. 2d at 160-61; see also Dresser Indus., Inc. v.
7 The Gradall Co., 965 F.2d 1442, 1450 (7th Cir. 1992)
8 (holding that defendant had not waived objection to the jury
9 charge by failing to make a Rule 51 motion because it had
10 "devot[ed] three pages . . . in its memorandum opposing"
11 plaintiff's summary judgment motion to the issue and
12 therefore "had reason to believe that it would be pointless
13 to press its theory further"). Because DiMarzio's position
14 on the validity of this disputed jury instruction was
15 explicitly considered and rejected by the district court in
16 its decision denying summary judgment, we conclude that the
17 issue is not waived on appeal. We are therefore obliged to
18 review the legal soundness of the district court's
19 instructions to the jury on whether Jacques was "regarded
20 as" disabled within the meaning of the ADA.

21

22

1 showing is necessary for a plaintiff to be considered
2 "substantially limited" in "interacting with others."
3 _____In Cameron we expressly declined to address the
4 question of whether "interacting with others" was a major
5 life activity under the ADA and observed that the issue had
6 fractured the circuits. See 335 F.3d at 63-64. In the
7 first case to address the issue, the First Circuit suggested
8 that "the ability to get along with others" is never a major
9 life activity under the ADA, observing that such an ability
10 comes and goes, "triggered by vicissitudes of life which are
11 normally stressful for ordinary people," and that "[t]o
12 impose legally enforceable duties on an employer based on
13 such an amorphous concept would be problematic." Soileau v.
14 Guilford of Maine, Inc., 105 F.3d 12, 16 (1st Cir. 1997).
15 Two years later, the Ninth Circuit concluded otherwise,
16 describing "interacting with others" as "an essential,
17 regular function, like walking and breathing" that "easily
18 falls within the definition of 'major life activity'" under
19 the ADA. McAlindin v. County of San Diego, 192 F.3d 1226,
20 1234 (9th Cir. 1999), cert. denied, 530 U.S. 1243 (2000).
21 But see id. at 1240 (Trott, J., dissenting) ("Not only is
22 this 'disability' vague, but it's bizarre, ominous, and

1 wholly outside of the group of serious disabilities Congress
2 intended to cover with this statute."). All other circuits
3 faced with the issue have (sometimes with exertion) avoided
4 deciding whether "interacting with others" is a major life
5 activity under the ADA.⁸

6 The parties urge us to align ourselves with either the
7 First Circuit's reasoning in Soileau or the Ninth Circuit's
8 holding in McAlindin. We decline to subscribe to either
9 analysis.

10 There is a difference between "get[ting] along with
11 others" (the life activity considered in Soileau) and

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 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 "interacting with others" (the life activity considered in
2 McAlindin). We agree with the First Circuit's observation
3 that "get[ting] along with others" is an unworkably
4 subjective definition of a "major life activity" under the
5 ADA--in much the same way that "perceiving" (as distinct
6 from merely "seeing" or "hearing") would be an unworkably
7 subjective "major life activity." See Soileau, 105 F.3d at
8 15. However, it is difficult to contradict the Ninth
9 Circuit's characterization of "interacting with others" as
10 "an essential, regular function" that "easily falls within
11 the definition of 'major life activity.'" McAlindin, 192
12 F.3d at 1234. We also think that "interacting with others,"
13 as overarching as it may be, more objectively describes a
14 life activity than does "getting along with others," which
15 connotes proficiency or success and worsens the problem of
16 subjectivity that concerned the First Circuit. Cf.
17 McAlindin, 192 F.3d at 1235 ("trouble getting along with
18 coworkers is not sufficient to show a substantial
19 limitation" under the ADA). Although "interacting with
20 others" is a more inclusive activity than (say) "seeing" or
21 "standing," similarly overarching "major life activities"
22 have been endorsed by all of the current members of the

1 Supreme Court in one case or another. See, e.g., Bragdon,
2 524 U.S. at 638-39, 659, 665 (acknowledging "caring for
3 one's self" as a valid "major life activity" under the ADA).

4 While we accept the Ninth Circuit's premise that
5 "interacting with others" is a "major life activity" under
6 the ADA, we conclude that the Ninth Circuit's test for
7 determining when a limitation on this activity is
8 "substantial" for ADA purposes is unworkable, unbounded, and
9 useless as guidance to employers, employees, judges, and
10 juries. According to the Ninth Circuit--whose opinion in
11 McAlindin the district court's jury instructions in this
12 case tracked--a plaintiff's impairment in "interacting with
13 others" is "substantial" for purposes of the ADA when it is
14 "characterized on a regular basis by severe problems, for
15 example, consistently high levels of hostility, social
16 withdrawal, or failure to communicate when necessary,"
17 McAlindin, 192 F.3d at 1235, so that a mere
18 "cantankerous[ness]," is not enough. Id.

19 The Ninth Circuit's presumed demarcation--between
20 persons who are "hostile" and those who are "cantankerous"--
21 does not exist. The "cantankerous" are those "marked by ill
22 humor, irritability, and determination to disagree."

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

2 On the same hand, the most relevant definition of "hostile"

3 is: "marked by antagonism or unfriendliness." Id. at 1094.

4 It does not help much to require that the hostility be of a

5 "consistently high level" or that the disability in

6 interacting with others be otherwise "severe." Common

7 personality traits such as hostility and argumentativeness

8 are useful professional traits in many employment contexts.

9 And traits associated with Jacques's impairment, such as

10 apathy and poor judgment, see infra note 2, are (equally)

11 useless indicia of whether a deficit in human relations is a

12 "substantial" limitation. In a similar vein, the Ninth

13 Circuit's phrase, "consistently high levels of . . . social

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

15 The Ninth Circuit approach also frustrates the

16 maintenance of a civil workplace environment. The more

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).

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

11 We return to the distinction between "getting along
12 with others" (a normative or evaluative concept) and
13 "interacting with others" (which is essentially mechanical).
14 We hold that a plaintiff is "substantially limited" in
15 "interacting with others" when the mental or physical
16 impairment severely limits the fundamental ability to
17 communicate with others. This standard is satisfied when
18 the impairment severely limits the plaintiff's ability to
19 connect with others, i.e., to initiate contact with other
20 people and respond to them, or to go among other people--at

¹⁰ Evidence in the record suggests that Jacques, on multiple occasions, used language in the workplace that was racist. **[A 336]**

1 the most basic level of these activities. The standard is
2 not satisfied by a plaintiff whose basic ability to
3 communicate with others is not substantially limited but
4 whose communication is inappropriate, ineffective, or
5 unsuccessful. A plaintiff who otherwise can perform the
6 functions of a job with (or without) reasonable
7 accommodation could satisfy this standard by demonstrating
8 isolation resulting from any of a number of severe
9 conditions, including acute or profound cases of: autism,
10 agoraphobia, depression or other conditions that we need not
11 try to anticipate today.

12 Based on our conclusion regarding the proper standard
13 to be applied, as discussed above, we conclude that the
14 district court erred in the way it instructed the jury on
15 the showing necessary to establish that Jacques was
16 "regarded as" having a disability substantially limiting her
17 in "interacting with others." See Anderson v. Branen, 17
18 F.3d 552, 556 (2d Cir. 1994) ("A jury instruction is
19 erroneous if it misleads the jury as to the correct legal
20 standard or does not adequately inform the jury on the
21 law."). The next question is whether this error was
22 "harmless." See Girden, 262 F.3d at 203 ("A new trial is

1 required if, considering the instruction as a whole, the
2 cited errors were not harmless, but in fact prejudiced the
3 objecting party.”). We think there is little doubt that
4 DiMarzio was prejudiced by the erroneous jury instruction
5 and that the error was not harmless. Indeed, the district
6 court, in denying DiMarzio’s summary judgment motion on
7 Jacques’s “regarded as” claim, stated that “DiMarzio
8 perceived Jacques . . . as an ‘extremely emotional’ and
9 ‘irrational’ individual.” Jacques, 200 F. Supp. 2d at 161.
10 This characterization falls far short of the correct
11 standard for showing that Jacques was “regarded as” being
12 “substantially limited” in “interacting with others.” The
13 judgment must be vacated and the case remanded for
14 additional proceedings consistent with this opinion. See
15 Pahuta, 170 F.3d at 129 (“[i]n the absence of a Rule 50(b)
16 renewed motion . . . an ‘appellate court is without power to
17 direct the District Court to enter judgment contrary to the
18 one it had permitted to stand’”) (citations omitted).
19 Nothing in this opinion inhibits the parties from entering a
20 renewed motion in district court for summary judgment
21 premised on the legal principles herein.

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IV

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

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

Id. at 158. The court acknowledged that Jacques had attempted to neutralize this deposition with medical testimony that she "tends to minimize her symptoms," but ruled that Jacques could not "create a material issue of

1 fact by submitting an affidavit disputing [her] own
2 testimony." Id. (internal quotation omitted). On cross-
3 appeal, Jacques challenges the grant of summary judgment in
4 favor of DiMarzio.

5 We review dismissal of a claim on summary judgment de
6 nov. See Young v. County of Fulton, 160 F.3d 899, 902 (2d
7 Cir. 1998). In doing so, we construe the evidence in the
8 light most favorable to Jacques (as the non-moving party)
9 and draw all reasonable inferences in her favor. See
10 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986);
11 Maguire v. Citicorp Retail Servs., Inc., 147 F.3d 232, 235
12 (2d Cir. 1998). Summary judgment is appropriate only where
13 "there is no genuine issue as to any material fact and . . .
14 the moving party is entitled to a judgment as a matter of
15 law." Fed. R. Civ. P. 56(c).

16 Jacques's argument focuses almost exclusively on the
17 district court's (tangential) observation that she
18 "attempt[ed] to create an issue of fact by arguing that her
19 deposition testimony is not credible" as though that were
20 the sole ground for the ruling. Jacques ignores numerous
21 findings that the symptoms associated with her bipolar
22 disorder had not "substantially limited" her ability to

1 "take care of herself." Jacques, 200 F. Supp. 2d at 158.
2 We find no basis to disturb the district court's grant of
3 summary judgment to DiMarzio on this claim.

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

10
11 * * *

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