animosity towards her.

The district court granted the school district's summary judgment motion. Plaintiffs must exhaust the IDEA's due process hearing procedures in order to bring a civil action under the IDEA. *See Weber v. Cranston Sch. Comm.*, 212 F.3d 41 (1st Cir. 2000), 24 MPDLR 593. Because the Eads did not pursue any administrative procedures under the IDEA, the court lacked jurisdiction, unless they established an exception to the exhaustion requirement.

The Eads argued that exhaustion is unnecessary when the remedies sought by the plaintiffs—here, monetary relief—could not be awarded administratively. However, most courts addressing this issue have held that a plaintiff seeking monetary damages still must exhaust administrative remedies, even though money damages may be unavailable through the administrative process. *See Covington v. Knox County Sch. Sys.*, 205 F.3d 912 (6th Cir. 2000), 24 MPDLR 415; *Falzett v. Pocono Mountain Sch. Dist.*, 150 F. Supp. 2d 699 (M.D. Pa. 2001), 25 MPDLR 789. The question is whether the plaintiff has alleged any "injuries that could be redressed to any degree by the IDEA's administrative procedures and remedies." *See Padilla v. School Dist. No. 1*, 233 F.3d 1268, 1274-75 (10th Cir. 2000), 25 MPDLR 59.

Here, the Eads' allegations that the school district failed to accommodate Rachel, failed to provide a free appropriate public education, and then created a hostile environment because of her disability almost exclusively deal with Rachel's educational needs and the school district's continuing failure to meet them. The alleged injuries are "educational in nature and therefore presumptively redressable through IDEA's administrative procedures." *Id.* at 1275.

Grad School; §504; Title III; Disability Defined; Temporary; Depression

The Ninth Circuit affirmed the district court's dismissal (*see* 2000 WL 1639514 (N.D. Cal. Oct. 27, 2000), 25 MPDLR 64) of a former graduate student's claim that he was improperly terminated from a Ph.D. program, finding that his depression was only temporary and, thus, did not constitute a disability under the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.*, or the Rehabilitation Act §504, 29 U.S.C. §794. ***Green v. Graduate Theological Union, 2002 WL 460254 (9th Cir. Feb. 11, 2002).***

IDEA; Stay-Put Provision; Atty's Fees

The Eighth Circuit held that a school district that unilaterally placed a student with mild cerebral palsy in school while due process hearings were ongoing, instead of continuing the home schooling he received while recuperating from surgery, effected a change in the student's then-current educational placement, in violation of the stay-put provision of the Individuals with Disabilities Education Act, 20 U.S.C. §1415(j). Also, the district court did not abuse its discretion by ordering the school district to provide extended school year services for one summer as a remedy for this violation. However, the district court properly denied attorneys' fees, because the parents prevailed on only a small and technical part of their claim and had unreasonably failed to cooperate with the school district. ***Hale v. Poplar Bluff R-1 Sch. Dist., 280 F.3d 831 (8th Cir. 2002).***

Employment: Disability Defined

Title I; Substantial Limitation; Jury Question

The Tenth Circuit held that, in a case tried by a jury, the court decides whether the plaintiff has identified impairments and major life activities recognized under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, but the jury decides whether the identified impairment "substantially limits" one or more of the identified major life activities such that the plaintiff should be considered disabled under the act. ***Bristol v. Board of County Comm'rs of Clear Creek County, 281 F.3d 1148 (10th Cir. 2002).***

Gary Bristol worked as a jailer for the Sheriff of Clear Creek County, Colorado. After experiencing chest pains at work, Bristol's doctor placed him on light duty indefinitely. A month later, Bristol was discharged because he could no longer perform the essential functions of a jailer. He sued under Title I, 42 U.S.C. §§12111-12117. The district court decided that whether Briston was "disabled" for purposes of the ADA was for the court, not the jury, to decide, and that Bristol was disabled. The court then submitted the case to the jury, which returned a verdict in favor of Bristol.

The Tenth Circuit reversed and remanded. The district court correctly identified Bristol's alleged impairment as a heart condition, and "working" as the major life activity on which his claim was predicated. *See Poindexter v. Atchison, Topeka & Santa Fe Ry. Co.*, 168 F.3d 1228 (10th Cir. 1999), 23 MPDLR 346. However, the district court erred when it concluded that the third "substantially limits" step of the ADA's disability analysis was a question of law for the court to decide. *See Bragdon v. Abbott*, 524 U.S. 624 (1998), 22 MPDLR 449. It was a factual question for the jury. Determining both how well "the average person in the general

population" performs any given major life activity and whether the plaintiff has proven he or she is "unable to perform" or is "significantly restricted" in performing a major life activity involves weighing evidence and assessing credibility of witnesses—tasks historically given to the jury. *See Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991). Most federal circuit courts agree that this question is factual. *See Kiphart v. Saturn Corp.*, 251 F.3d 573 (6th Cir. 2001), 25 MPDLR 587; *Maziarka v. Mills Fleet Farm, Inc.*, 245 F.3d 675 (8th Cir. 2001), 25 MPDLR 436; *Santiago Clemente v. Executive Airlines, Inc.*, 213 F.3d 25 (1st Cir. 2000), 24 MPDLR 780; *Colwell v. Suffolk County Police Dep't*, 158 F.3d 635 (2d Cir. 1998), 22 MDPLR 745; *Leison v. City of Shelbyville*, 153 F.3d 805 (7th Cir. 1998), 22 MPDLR 750.

Title I; Actual; FMLA; Retaliation

An Illinois federal court upheld a jury's $300,000 award under the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-12117, and a $50,000 award under the Family and Medical Leave Act (FMLA), 29 U.S.C. §2601 *et seq.*, to a former employee with diabetes mellitus. Plaintiff presented sufficient evidence that (1) despite various mitigating measures, he was substantially limited in the major life activity of working and, thus, was disabled under the ADA, and (2) his employer retaliated against him for exercising his right to take leave under the FMLA. ***Carruth v. Continental Gen. Tire, Inc., 2001 WL 1775992 (S.D. Ill. June 21 2001).***

A jury awarded Adrian Carruth $175,000 in compensatory damages and $250,000 in punitive damages on his Title I claim, and $75,000 in damages on his FMLA claim. The district court capped Carruth's total recovery on his Title I claim to $300,000 pursuant to 42 U.S.C. §1981a, and reduced the FMLA award to $50,000. Continental General Tire moved for judgment notwithstanding the verdict on both claims.

The district court denied the motion. First, there was sufficient evidence for the jury to find that Carruth was disabled under the ADA. Carruth experienced blood sugar flare-ups, despite taking the prescribed mitigating measures (monitoring diet and exercising). *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), 23 MPDLR 510; *Lawson v. CSX Transp., Inc.*, 245 F.3d 916 (7th Cir. 2001), 25 MPDLR 395. Carruth presented sufficient evidence that his diabetes substantially limited his ability to work generally. In addition to his blood sugar flare-ups, he was unable to work 21 days every six months. "Being unable to show up for work prevents an employee from not only working one job, but any job . . . Indeed, Carruth's inability to work dwarfs that of the average person's inability to work due to occasional, brief bouts of random illness." *See Vande Zande v. State of Wis. Dept' of Admin.*, 44 F.3d 538 (7th Cir. 1995), 19 MPDLR 189; *E.E.O.C. v. Sears, Roebuck & Co.*, 233 F.3d 432 (7th Cir. 2000), 25 MPDLR 65; *Moore v. J.B. Hunt Transport, Inc.*, 221 F.3d 944 (7th Cir. 2000), 24 MPDLR 783.

Second, sufficient evidence existed for a jury to find that Continental retaliated against Carruth for exercising his FMLA rights and that its proffered reasons for terminating Carruth—insubordination and leaving work early without permission—were a pretext of intentional FMLA retaliation.

Hiring; Title I; Actual; Qualified; Genetic Amputee

The First Circuit found that genuine issues of material fact existed as to whether a job applicant with only one completely functioning arm was disabled under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, and whether she was qualified for a position as an emergency medical technician (EMT). ***Gillen v. Fallon Ambulance Serv., Inc., 283 F.3d 11 (1st Cir. 2002).***

Kelly Gillen sued Fallon Ambulance Service (FAS) under Title I, 42 U.S.C. §§12111-12117, for refusing to hire her as an EMT. The district court granted FAS summary judgment.

The First Circuit vacated and remanded for further proceedings. The district court erred in relying on Gillen's optimistic self-assessment of her capabilities to support its conclusion that she was not substantially limited in the major life activity of lifting. Gillen's upbeat view of her capabilities was more a testament to her determination, than to her condition. The key issue is not whether persons with disabilities accomplish their goals, but whether they encounter significant disability-related obstacles in doing so. The district court also erred in relying on Gillen's demonstrated ability to lift 40 to 50 pounds, for the manner in which she lifts and the conditions under which she can lift will be significantly restricted because she only has one functioning limb.

Further, a rational fact-finder could conclude that Gillen was qualified for the EMT position. *See Holiday v. City of Chattanooga*, 206 F.3d 637 (6th Cir. 2000), 24 MPDLR 798. Several months before she applied, Gillen demonstrated her ability, with a partner, to lift and carry adults on weighted stretchers during her state certification classes. Several months after she applied, she was hired by another ambulance company, where she demonstrated her ability to perform the full range of an EMT's duties, lifting included.

State Law; Actual; Pretext; Reasonable Accommodation; Retaliation; Heart Condition

A Massachusetts federal court found that a former accounts controller with a heart condition presented sufficient evidence that she had a disability under the Massachusetts Antidiscrimination Law (MAL), Mass. Gen. Laws ch. 151B; that she was discriminated against because of her disability; and that her employer failed to accommodate her disability. However, she failed to establish that the employer retaliated against her for filing a discrimination complaint with the state administrative agency. ***Flanagan-Uusitalo-Uusitalo v. D.T. Indus., Inc., 2001 WL 1805333 (D. Mass. Dec. 20, 2001).***

After a heart attack in February 1997, Donna Flanagan-Uusitalo returned to work in April 1997. D.T. Industries reorganized Flanagan-Uusitalo's department, allegedly because the management structure was no longer feasible, and eliminated some of Flanagan-Uusitalo's job duties. She received a bonus for 1997, which was lower than the bonuses received by other employees performing similar duties. Flanagan-Uusitalo's supervisor advised her that her bonus reflected her illness and her failure to do her job. Flanagan-Uusitalo filed a complaint with the Massachusetts Commission Against Discrimination (MCAD), claiming handicap discrimination.

In July 1998, D.T. canceled Flanagan-Uusitalo's short-term disability benefits and informed her that she would receive no further payments until she provided satisfactory documentation. Due to Flanagan-Uusitalo's work-related stress, her doctor restricted her to part-time work. D.T. refused to allow Flanagan-Uusitalo to work part-time, and she resumed full-time work. Flanagan-Uusitalo filed a second MCAD complaint. In December, she filed a complaint in state court alleging handicap discrimination and retaliation in violation of the MAL. In March 1999, Flanagan-Uusitalo was fired when she failed to return from work after becoming temporarily disabled due to work-related stress. D.T. had the case removed to federal court based on diversity grounds.

The district court denied summary judgment for D.T. on Flanagan-Uusitalo's discrimination claim. She established that she was a handicapped person under the MAL, *see* Mass. Gen. Laws ch. 151B, §1(17). "In the case of a person who suffers heart disease, a presumption may be created that the condition substantially limits one or more of her major life activities." *See Talbert Trading Co. v. MCAD*, 636 N.E.2d 1351 (Mass. Ct. App. 1994). She produced evidence that her heart condition limited her major life activities by causing her anxiety, depression, and chronic physical pain. She also produced evidence that D.T. believed Flanagan-Uusitalo's condition adversely affected her employment capabilities. When D.T.'s President learned of Flanagan-Uusitalo's temporary inability to travel, he allegedly stated that he wanted her fired.

Flanagan-Uusitalo also demonstrated that D.T. terminated her because of her impairment. Flanagan-Uusitalo's supervisors asked her if she was "up to" taking on the duties of her job, notwithstanding the fact that she had already been performing these duties. A factual issue existed as to whether D.T. made reasonable efforts to accommodate Flanagan-Uusitalo by allowing her to work part time. *See Petsch-Schmid v. Boston Edison Co.*, 914 F. Supp. 697 (D. Mass. 1996), 20 MPDLR 232.

However, the court granted D.T. summary judgment on Flanagan-Uusitalo's retaliation claim, for she failed to establish a causal connection between D.T.'s alleged adverse actions and the filing of her MCAD complaint. *See Lewis v. Gillette, Co.*, 22 F.3d 22, 25 (1st Cir. 1994). The only evidence of excessive scrutiny of Flanagan-Uusitalo's employment and her request for short-term disability leave in 1998 was her own assertions. She was not disadvantaged with respect to salary, grade, or other objective terms and conditions of employment. *See MacCormack v. Boston Edison Co.*, 672 N.E.2d 1 (Mass. Sup. Jud. Ct. 1996). In fact, D.T. allowed her to take a longer leave of absence in 1998—after she filed her MCAD claim—than in 1997. Finally, although D.T.'s denial of Flanagan-Uusitalo's request for part-time work followed her filing of the MCAD complaint, that one event followed another is not sufficient to make a causal link. *Id.*

State Law; Title I; Actual; Record; Perceived; FMLA; Punitive Damages; Graves' Disease

A New York federal court held that a former transit authority employee with Graves' disease who failed to show she was substantially limited in the major life activity of working, was regarded as such, or had a record of a substantially limiting impairment was not disabled under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* However, factual issues existed as to (1) whether she was disabled under the New York State Human Rights Law (NYSHRL) and the New York City Human Rights Law (NYCHRL), which define the term "disability" broader than the ADA does, and (2) whether her absences were covered by the Family and Medical Leave Act (FMLA), 29 U.S.C. §2601 *et seq.* Also, she could not recover punitive

damages under these statutes. ***Barr v. New York City Transit Auth., 2002 WL 257823 (E.D.N.Y. Feb. 20, 2002).***

Janice Barr was suspended on numerous occasions for attendance problems. In March 1998, Barr missed five days of work and submitted a doctor's note documenting the swelling in her legs and her rapid heartbeat. In June 1998, Barr was absent from work for 20 days and was diagnosed with Graves' disease. She requested FMLA leave. A July 1998 FMLA form submitted to the transit authority made no reference to this condition. When Barr returned to work, a transit authority doctor found her fully capable of working. The transit authority terminated Barr for attendance violations in March 1998, and she sued for disability discrimination under Title I, 42 U.S.C. §§12111-12117, as well as the FMLA, the NYSHRL and the NYCHRL.

The district court granted summary judgment for the transit authority on Barr's Title I claim. She failed to show that her Graves' disease substantially limited the major life activity of working—significantly restricted her ability to perform a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities. *See Toyota Motor Mfg., Ky., Inc. v. Williams*, 122 S. Ct. 681 (2002), 26 MPDLR 73; *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), 23 MPDLR 510. Her inability to perform a single, particular job did not constitute a substantial limitation on working. *See Giordano v. City of N.Y.*, 274 F.3d 740 (2d Cir. 2001), 25 MPDLR 411. After her termination, Barr worked five days a week as a Workfare Employment Program worker.

The court rejected Barr's argument that she had a record of a disability. *See* 42 U.S.C. §12102(2)(B). Her request for FMLA in June 1998, her doctor's March 1998 sick form, and the transit authority doctor's evaluation established only that Barr had a physical impairment, not a substantially limiting one. *See Sanders v. Arneson Prods.*, 91 F.3d 1351 (9th Cir. 1996), 20 MPDLR 685; *Halperin v. Abacus Tech. Corp.*, 128 F.3d 191 (4th Cir. 1997), 21 MPDLR 756. The court also rejected Barr's argument that the transit authority regarded her as substantially limited in the major life activity of working. *See* 42 U.S.C. §12102(2)(C); *Giordano*; *Sutton*.

However, Barr could pursue her claim under the NYSHRL, which defines the term "disability" broader than the ADA does. *See Reeves v. Johnson Controls World Servs., Inc.*, 140 F.3d 144 (2d Cir. 1998), 22 MPDLR 359. Under that statute, any "medically diagnosable impairment" is considered a disability. Because the standard for disability under the NYCHRL is at least as expansive as the standard under the NYSHRL, Barr could bring her claim under that statute. *See Sacay v. The Research Found. of City of N.Y.*, 44 F. Supp. 2d 496, 503 (E.D.N.Y. 1999), 23 MPDLR 521.

Barr could also pursue her FMLA claim. She presented sufficient evidence in her sick forms, certification from her doctor, and medical exam reports to establish that her condition qualified as a "serious medical condition" under the FMLA. *See* 29 U.S.C. §2612(a)(1)(D).

A factual issue existed as to whether Barr's absences in March 1998, which the transit authority cited as a reason for her termination, qualified as FMLA leave. If Barr's termination was based in part on FMLA covered absences, even in combination with other absences, her termination might violate the FMLA. *See Barnett v. Revere Smelting & Refining Corp.*, 67 F. Supp. 378 (S.D.N.Y. 1999), 24 MPDLR 76.

A factual issue also existed as to whether the information Barr provided to the transit authority was sufficient to reasonably apprise it of her need to take FMLA leave in March 1998. She called in sick with swelling and tightness in her legs and submitted a sick form certified by her doctor. On Barr's July FMLA form, her doctor reported that Barr had been suffering from a serious health condition since March 1998. *See McClain v. Southwest Steel Co., Inc.*, 940 F. Supp. 295 (N.D. Ok. 1996), 20 MPDLR 842; *Hendry v. GTE N., Inc.*, 896 F. Supp. 816 (N.D. Ind. 1995), 19 MPDLR 751; *Mann v. Mass Correa Elec., J.V.*, 2002 WL 88915 (S.D.N.Y. Jan. 23, 2002). It was undisputed that Barr suffered an adverse employment decision and availed herself of a protected right in taking leave in June and July 1998.

Finally, punitive damages are not available under the FMLA. *See* 29 U.S.C. §2617; *see also Cavin v. Honda of Am. Mfg., Inc.*, 138 F. Supp. 2d 987 (S.D. Ohio 2001), 25 MPDLR 419; *Keene v. Rinaldi*, 127 F. Supp. 2d 770 (M.D.N.C. 2000), 25 MPDLR 420. Punitive damages are also not available under the NYSHRL. *See Greenway v. Buffalo Hilton Hotel*, 143 F.3d 47 (2d Cir. 1998), 22 MPDLR 476. Although punitive damages are available under the NYCHRL, they could not be recovered against the transit authority. *See Fowler v. Transit Supporters Org.*, 2000 WL 303283 (S.D.N.Y. Mar. 23, 2000).

State Law; Perceived; Paranoia

The state supreme court held that the Arkansas Civil Rights Act of 1993 (ACRA), Ark. Code Ann. §§16-123-1-1 *et seq.*, unlike the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, does not contemplate a cause of action for discrimination against those that are merely "regarded" as disabled. ***Faulkner v. Arkansas Children's Hosp., 2002 WL 392781 (Ark. Sup. Ct. Mar. 14, 2002).***

Sherry Faulkner worked as a technical and educational coordinator for a specialized unit at Arkansas Children's Hospital (ACH). On February 12, 1999, she was placed on involuntary leave pending an investigation of allegations that she had mishandled the treatment of three patients. A psychological evaluation on February 18 revealed that Faulkner had a paranoid reaction to being placed on leave. On March 17, ACH accused Faulkner of several other improper acts and errors in her handling of patients and placed her on leave for five weeks. When she returned to work, she was assigned to a new position that ACH claimed was less stressful.

Faulkner later sued under the Arkansas Civil Rights Act, claiming that ACH had discriminated against her on the basis of a perceived disability. ACH moved to dismiss. The trial court granted the motion, finding that although the ACRA allows for a cause of action for those "regarded" as being disabled, Faulkner had failed to make a sufficient showing.

The state high court affirmed on different grounds. The plain language of the ACRA clearly contemplated coverage only for persons presently with a disability, not those merely "regarded" as being disabled. *See Raley v. Wagner*, 57 S.W.3d 683 (Ark. Sup. Ct. 2001). The ACRA is silent as to whether one has a cause of action for simply being "regarded as" having a disability. By contrast, the ADA specifically includes within its definition of "disability" anyone who was "regarded as having such an impairment." *See* 42 U.S.C. §12102(2).

Expanding the plain language of the ACRA's definition of "disability" to include coverage for persons *regarded* as having a disability would be akin to legislating. *See Shoemaker v. State*, 38 S.W.3d 350 (Ark. Sup. Ct. 2001); *Four County (NW) Reg'l Solid Waste Mgmt. Dist. Bd. v. Sunray Serv. Inc.*, 971 S.W.2d 255 (Ark. Sup. Ct. 1998).

"Although the ACRA provides that our state courts may look to state and federal decisions that interpret federal civil rights laws as persuasive authority for interpretive their reading of ACRA," *see* Ark. Code Ann. §16-123-105(c), the statute does not similarly point to decisions reached interpreting the ADA. Further, the Eighth Circuit recently offered its view that this court would interpret the ACRA's definition of "disability" in identical fashion to its federal corollary. *See Land v. Baptist Med. Ctr.*, 164 F.3d 423 (8th Cir. 1999), 23 MPDLR 153. However, the Eighth Circuit is not binding authority for this court. In addition, the definition of a *presently occurring* disability, which was at issue in *Land*, is virtually the same in both acts—substantial limitation in a major life activity. "Hence, the situation is dramatically different from what confronts us in the case at hand."

Title I; Actual; Mitigating Measures; Direct Threat; PTSD

A New York federal court determined that a former forklift operator with post-traumatic stress disorder (PTSD) did not have a disability under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, because his condition could be controlled with medication. In addition, because his conduct posed a threat to himself and his co-workers, his termination was proper. ***Hewitt v. Alcan Aluminum Corp., 2001 WL 1638650 (N.D.N.Y. Nov. 8, 2001).***

Leonard Hewitt was involved in a series of accidents at work, due to the unsafe and reckless operation of forklift trucks and other equipment. He also displayed disruptive and inappropriate conduct. After several warnings, he was terminated. He filed a discrimination charge with the Equal Employment Opportunity Commission, which found no evidence that Hewitt had been discharged because of his disability. Hewitt sued Alcan Aluminum Corp. under Title I, 42 U.S.C. §§12111-12117.

The district court granted Alcan summary judgment. Hewitt did not have an ADA disability. *See Bragdon v. Abbott*, 524 U.S. 624, 632-639 (1998), 22 MPDLR 449. The U.S. Supreme Court has held that a person whose physical or mental impairment is corrected by medication or other measures does not have a substantially limiting impairment. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 480-82 (1999), 23 MPDLR 510. However, an individual has a disability if, notwithstanding the use of medication or a corrective device, he or she is substantially limited in a major life activity. *Id.*

Hewitt stated in various interrogatories that, when controlled with medication, his PTSD did not substantially limit the major life activity of working. He also disclosed that he had not been taking medication or getting treatment for his disability for at least a year prior to his termination. Plaintiffs who do not avail themselves of corrective medication are not qualified individuals under the ADA. *See Tangires v. The Johns Hopkins Hosp.*, 79 F. Supp. 2d 587, 596 (D. Md. 2000), 24 MPDLR 241, *aff'd*, 230 F.3d 1354 (4th Cir. 2000). Because he was not disabled, the court summarily rejected his allegation that Alcan failed to make reasonable accommodations.

Furthermore, Hewitt's termination had been warranted, because his conduct posed a threat to himself and other employees. An employer is not required to wait until an employee badly injures someone or extensively damages equipment or structures to terminate an employee who exhibits unsafe conduct. *See Jackson v. Bosie Cascade Corp.*, 941 F. Supp. 1122,

1126 (S.D. Ala. 1996), 20 MPDLR 835.

State Law; Immune Deficiency; Depression

An Illinois appeals court held that a former account system engineer with immune deficiency and depression was not handicapped within the meaning of the Illinois Human Rights Act (IHRA), Ill. Rev. Stat. 1989, ch. 68, par. §1-101 *et seq.*, because his conditions were related to his ability to perform his job duties. ***Van Campen v. International Bus. Machs. Corp. (IBM), 762 N.E.2d 545 (Ill. Ct. App. 2001).***

IBM fired Peter Van Campen for repeatedly reporting to work late and excessive absenteeism. He sued for violations of the IHRA. The Illinois Human Rights Commission found that Van Campen was not handicapped under the IHRA.

The state appeals court affirmed. The IHRA defines "handicap" as "a determinable physical or mental characteristic of a person . . . which may result from disease, injury, congenital condition of birth or functional disorder and which . . . is unrelated to the person's ability to perform the duties of a particular job or position." *See* 775 Ill. Comp. Stat. 5/1-103(I)(1). Van Campen's condition was related to his ability to perform his job. As a result of his excessive absenteeism and late arrival time, Van Campen missed client meetings and emergency calls and failed to complete assignments. Regular attendance (a workday of 8:30 a.m. to 5:00 p.m. Monday through Friday) was essential to his position. His job was not amenable to a flexible schedule.

Van Campen's request that he be allowed to work when his medical condition allowed with no fixed schedule was unreasonable. IBM did not permit such erratic and unpredictable schedules, and Van Campen's department never permitted flex-time. IBM had no independent duty under the IHRA to investigate any reasonable accommodation for Van Campen, because he could not adhere to the job requirements.

Title I; Actual; Perceived; Retaliation; FMLA; Arthritis; PTSD; Back

An Illinois federal court held that a former machine operator who alleged that he had arthritis, post-traumatic stress disorder (PTSD), and degenerative disk disease was not disabled or regarded as such under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* Also, he failed to establish a causal connection between his termination and his protected activities to support retaliation claims under the ADA and the Family and Medical Leave Act (FMLA), 29 U.S.C. §2601 *et seq.* ***Gibbs v. A. Finkl & Sons Co., 2002 WL 318291 (N.D. Ill. Feb. 26, 2002).***

A. Finkl & Sons Company fired John Gibbs for insubordination after he refused his supervisor's order to operate a drill machine that he had never been trained to operate. Gibbs sued Finkl for violations of Title I, 42 U.S.C. §§12111-12117, and the FMLA.

The district court granted summary judgment for Finkl. First, Gibbs was not disabled under the ADA. *See* 42 U.S.C. §12102(2); *Mattice v. Memorial Hosp. of S. Bend, Inc.*, 249 F.3d 682 (7th Cir. 2001), 25 MPDLR 601. Gibbs failed to present any medical or other evidence showing that his physical and mental impairments substantially limited the major life activities of sleeping and learning. *See Kolecyck-Yap v. MCI Worldcom*, 2001 WL 245531 (N.D. Ill. Mar.12, 2001), 25 MPDLR 409. The only reference to any objective medical evaluation was a determination by a Veterans Hospital physician that Gibbs had PTSD, which Gibbs did not ask the court to admit into evidence.

Even if Finkl knew about Gibbs' PTSD, this is not sufficient to show that the company regarded this condition as substantially limiting. *See Johnson v. American Chamber of Commerce Publishers*, 108 F.3d 818 (7th Cir. 1997), 21 MPDLR 485. Gibbs gave his supervisor a pamphlet about PTSD and told him that the pamphlet might explain why he was "flying off the handle." Gibbs' supervisor told him that it was "propaganda," indicating that the supervisor did not believe that Gibbs had PTSD, or that it explained his behavior.

The court also rejected Gibbs' ADA retaliation claim that he was terminated for submitting an affidavit in support of a former co-worker's discrimination case. Gibbs failed to present any evidence to show a causal nexus between his termination and the affidavit. There is nothing about the timing of the termination to suggest such a nexus. Gibbs' actions on behalf of the co-worker occurred in 1994, and he was terminated in 1999. *See Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446 (7th Cir. 1994). He also failed to demonstrate a causal connection between his termination and his FMLA leave. *See King v. Preferred Technical Group*, 166 F.3d 887 (7th Cir. 1999), 23 MPDLR 226.

§501; Actual; Reasonable Accommodation; Medical Leave; CFS

A D.C. federal court found that a government worker with chronic fatigue syndrome (CFS) failed to show that he was substantially limited in the major life activity of working and, thus, was not disabled under the Rehabilitation Act §501, 29 U.S.C. §791 *et seq.* Also, his request for indefinite medical leave was unreasonable. ***Scarborough v. Natsios, 2002 WL 441117 (D.D.C. Mar. 29, 2002).***

Wilbur Scarborough worked as a program officer for the U.S. Agency for International Development (USAID). In the three years before his retirement, he became unable to steadily work full-time allegedly because of CFS. When Scarborough was notified that he had been selected out for mandatory retirement, he sued under §501. The district court granted USAID's motion for summary judgment, finding that Scarborough was not disabled under §501. He failed to show that his CFS substantially limited the major life activity of working—significantly restricted his ability to work in a broad class of jobs. *See* 29 U.S.C. §705(9)(B); *Toyota Motor Mfg., Ky., Inc. v. Williams*, 122 S. Ct. 681 (2002), 26 MPDLR 73. His physicians' reports address only generally whether he was able to fulfill the requirements of his specific job. Moreover, Scarborough's claim that USAID should have accommodated him by assigning him to a different position undercuts his argument that his ability to work was substantially limited.

Even assuming that Scarborough were disabled, he failed to show that he requested an objectively reasonable accommodation. Scarborough asserted that he requested two different accommodations—to be reassigned to another position and to be granted leave without pay (LWOP). However, there is no evidence that Scarborough had informed USAID that he was seeking reassignment as an accommodation, rather than because he preferred to be transferred to "a position in his area of expertise and training." *See Flemmings v. Howard Univ.*, 198 F.3d 857 (D.C. Cir. 1999), 24 MPDLR 115.

Further, his request to be placed on LWOP "at any time that I am unable to report to work" was unreasonable in two respects. *See Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638 (1st Cir. 2000), 24 MPDLR 631. First, his request was that USAID grant him LWOP in an erratic, unpredictable manner—whenever he felt he needed to miss work. *See Carr v. Reno*, 23 F.3d 525 (D.C. Cir. 1994), 18 MPDLR 396. Second, he requested that the LWOP be granted indefinitely and offered no indication that he would be able to resume his normal duties. Such requests for indefinite medical leave are unreasonable as a matter of law. *Sampson v. Citibank*, 53 F. Supp. 2d 13 (D.D.C. 1999), 23 MPDLR 719.

Title I; Actual; Alcohol Abuse

A Connecticut federal court decided that a former teacher who abused alcohol failed to show that she was substantially limited in a major life activity and, thus, was not disabled under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* ***Nucifora v. Bridgeport Bd. of Educ., 2001 WL 179529 (D. Conn. Sept. 24, 2001).***

During the fall of 1994, Susan Nucifora began drinking on a daily basis. She received unsatisfactory evaluations due to her lack of punctuality, missing lesson plans, not teaching the curriculum, ineffective classroom management, and inadequate teacher feedback. When asked if any problems were affecting her performance at work, Nucifora resonded that she was getting a divorce, but never mentioned any alcohol addiction. After it was recommended that she be terminated, Nucifora advised the school board that she abused alcohol. She rejected the school board's offer of a one-year unpaid leave of absence with medical benefits, and was subsequently terminated. She then sued the school board for disability-based discrimination, in violation of the ADA Title I, 42 U.S.C. §§12111-12117.

The district court granted summary judgment for the school board on the ground that Nucifora was not disabled under the ADA. She failed to show that her alcoholism substantially limited a major life activity. *See* 42 U.S.C. §12102(2). Nucifora claimed that she was substantially limited in the major life activities of eating, sleeping, seeing, driving, and focusing, but admitted that these incidences occurred when she was intoxicated, and that some of these conditions occurred only infrequently. The ADA does not cover temporary disabilities. *See Burch v. Coca-Cola Co.*, 199 F.3d 305 (5th Cir. 1997), 21 MPDLR 620.

Although Nucifora claimed that her alcoholism substantially limited the major life activity of working, she asserted that she believed that her teaching skills reached the required levels of both the school board and the State of Connecticut. She failed to show that she was "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and ability." *See* 29 C.F.R. §1630.2(j)(3)(I). The inability to perform a single job does not constitute a substantial limitation on the major life activity of working. *See Heilweil v. Mt. Sinai Hosp.*, 32 F.3d 718 (2d Cir. 1994), *cert. denied*, 513 U.S. 1147 (1995). After her termination, Nucifora worked as a substitute teacher.

Under Title I, an employer "may hold an employee who . . . is an alcoholic to the same qualification standards for employment or job performance and behavior that such [employer] holds other employees, even if unsatisfactory performance or behavior is related to . . . alcoholism of such employee." *See* 42 U.S.C. §12114(c)(4). Consequently, Nucifora could not escape responsibility for her unsatisfactory job performance merely because she is an alleged alcoholic, or because the conduct in question may be related in some part to her drinking.

Title I; Actual; Mitigating Measures; Constructive Discharge; Seizure Disorder

An Illinois federal court ruled that a former telephone operator supervisor did not have a disability under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, because her seizure disorder, when medicated, did not substantially limit any major life activities. Also, her working conditions were not so intolerable that a reasonable person would have resigned, and her employer did not force her to retire. ***Nelson v. Ameritech, 2002 WL 226845 (N.D. Ill. Feb. 14, 2002).***

Ameritech employee, Betty Nelson, was promoted to the position of supervisor's aide in 1988. On December 6, 1993, she was diagnosed with a seizure disorder after falling at work. Her doctor released her to return to work on January 5, 1994, with certain restrictions. She returned to work on January 14, but her manager denied her request for a three- to six-month medical leave of absence. In May, Nelson applied for voluntary early retirement. After receiving a right-to-sue letter from the Equal Employment Opportunity Commission (EEOC), Nelson sued Ameritech under Title I, 42 U.S.C. §§12111-12117.

The district court granted Ameritech summary judgment. Nelson was not disabled under the ADA. She was only medically restricted from driving, using heavy machinery, or swimming. None of these activities, alone or in combination, equates to a major life activity. Nelson testified that her seizure disorder only affected her ability to drive long distances, and admitted that nothing else in her life was affected. She returned to work shortly after her diagnosis, and continued working without incident for nearly six months until her retirement. There were no indications that her disorder affected her ability to perform her job duties.

Her doctor testified that if Nelson had taken her medications as prescribed, her seizure disorder would have been reasonably well controlled and would not have disrupted her ability to work or care for herself and her family. Impairments that can be corrected by medication do not substantially limit a major life activity. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), 23 MPDLR 510. Even when Nelson failed to take her medication consistently, she had only five or six seizures during the entire year.

Nelson's claim that she was forced to resign because her working conditions had become unbearable, when viewed from the reasonable employee's standpoint, failed. *See Grube v. Lau Indus., Inc.*, 257 F.3d 723, 728 (7th Cir. 2002). The meeting with her manager, which resulted in Nelson being put on "final warning status," was a counseling session. Such sessions do not create intolerable work environments. *See Ribando v. United Airlines*, 200 F.3d 507 (7th Cir. 1999). Nothing that Nelson did even hinted that she believed her working conditions were intolerable. She did not request that a union representative attend the meeting, or file any grievance as to the manger's actions. Instead, four months after she returned to work, she applied for early retirement and continued to work at Ameritech.

Furthermore, it was not reasonable for Nelson to treat her manger's failure to grant her a leave of absence as a final decision. Per company policy, managers lacked such authority, and Nelson failed to follow the proper procedure for obtaining leave.

Finally, Nelson was not coerced into retirement, but rather voluntarily left her job to take advantage of the enhanced benefits Ameritech offered her under its early retirement program.

Title I; State Law; Actual; Mitigating Measures; Diabetes

A New York federal court ruled that a former employee with diabetes was not disabled under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, because his diabetes, when controlled by medication, did not substantially limit a major life activity. Nor was he disabled under the New York State Human Rights Law (NYHRL), N.Y. Exec. Law §296 *et seq.*, for he was terminated for failing to meet production standards, not because of his diabetes. ***Anyan v. New York Life Ins. Co., 2002 WL 511554 (S.D.N.Y. Apr. 4, 2002).***

Joseph Anyan, an insurance agent for New York Life Insurance Company, failed to meet production standards for both 1997 and 1998. In 1999, the company declared an "amnesty" for agents who had failed to meet 1998 and first quarter of 1999 goals. When Anyan ultimately failed to meet his Contract Maintenance Standard, he was terminated. He sued New York Life for violations of the NYHRL and the ADA Title I, 42 U.S.C. §§12111-12117.

The district court granted New York Life summary judgment. Anyan was not disabled under the ADA. *See* 42 U.S.C. §12102(2); *Toyota Motor Mfg., Ky., Inc. v. Williams*, 122 S. Ct. 681, 691 (2002), 26 MPDLR 73. His diabetes, as controlled by medication, did not substantially limit a major life activity. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 483 (1999), 23 MPDLR 510. Anyan claimed that, due to his diabetes, he was unable to "operate on full speed." However, his symptoms were only temporary, not permanent as required by the ADA, because they were eventually controlled by medication. *See Huskins v. Pepsi Cola of Odgensburg Bottlers, Inc.*, 180 F. Supp. 2d 347, 352

(N.D.N.Y. 2001); *Adams v. Citizens Advice Bureau*, 187 F.3d 315, 316-17 (2d Cir. 1999).

Nor was Anyan disabled under the NYHRL. Under this statute, "disabilities are not limited to physical or mental impairments, but may also include medical impairments. . . . " *See* N.Y. Exec. Law §292(21). To qualify as a disability, the condition must (1) prevent the exercise of normal bodily function, or (2) be "demonstrable by medically accepted clinical or laboratory diagnostic techniques." *See McDermott v. Xerox*, 491 N.Y.S.2d 106, 109 (N.Y. Ct. App. 1985), 9 MPDLR 347. For a *prima facie* case under the NYHRL, a plaintiff must show (1) that he has a disability, and (2) that the disability caused the behavior for which he was terminated. *See Guzman v. ARC XVI Inwood, Inc.*, 1999 WL 178786 (S.D.N.Y. Mar. 30, 1999); *Posner v. Marcus & Millichap Corp. Real Estate Servs.*, 180 F. Supp. 2d 529 (S.D.N.Y. 2002).

Anyan's diabetes constituted a medical impairment, because it was demonstrable by medically accepted techniques. However, Anyan provided no evidence that New York Life terminated him because of his diabetes. He had not shown concrete evidence that his employer knew of his disability aside from a medical note that had been placed in his file several years earlier. To the contrary, his immediate managing partner stated under oath that she was unaware of Anyan's diabetes and that any request for an accommodation would have been forwarded to her.

Also, New York Life asserted that he was discharged for a legitimate business reason—repeatedly failing to meet production standards. Assuming that Anyan had not met these standards because of his diabetes, he had not requested an accommodation for his diabetes. *See Mazza v. Bratton*, 108 F. Supp. 2d 167, 176 (E.D.N.Y. 2000), 24 MPDLR 795. Moreover, even without such a request, New York Life had accommodated Anyan by granting him extensions on his production standards under the "amnesty," or by not enforcing them. It was only after Anyan failed to meet his third quarter quota that the company terminated him.

State Law; Title I; Actual; Diabetes; Stress; Confidentiality

A Maine federal court decided that a former police chief with diabetes and stress-related symptoms failed to show that he was substantially limited in a major life activity and, thus, was not disabled under the Maine Human Rights Act (MHRA), 5 Me. Rev. Stat. Ann. §4551 *et seq.*, or the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* However, he raised a genuine issue of material fact as to whether the town had violated the ADA by disclosing confidential medical information about his condition to newspaper reporters. ***Pouliot v. Town of Fairfield, 184 F. Supp. 2d 38 (D. Me. 2002).***

In 1994, Jean Pouliot, police chief of the Town of Fairfield, Maine, was diagnosed with Type II non-insulin-dependent diabetes. In 1998, he began to experience increased personal and professional stress, depression, and chronic fatigue. On August 24, 1999, the Town Council held a meeting to discuss the police department's overspending, at which time Pouliot apologized for an overdraft, citing medical health and personal issues. The council suspended him for two weeks without pay and required restitution. On September 1, at a Town Council executive meeting, Pouliot was asked to discuss his health problems. He requested that the information be kept confidential. That same month, Pouliot resigned under pressure from the council. During an investigation by the state attorney general's office into financial irregularities in the police department, two newspapers quoted members of the council as saying that Pouliot's medical difficulties and the effects of his diabetes medication had "clouded his mind."

On January 21, 2000, Pouliot filed a discrimination charge with the Equal Employment Opportunity Commission and the Maine Human Rights Commission against the town, claiming that it had discriminated against him on the basis of his disability. He sued the town and individual members of the council under the MHRA and the ADA Title I, 42 U.S.C. §§12111-12117. The district court granted defendants motion to dismiss in part. First, Pouliot failed to show that he was disabled under the MHRA or the ADA. The court construed the MHRA as being consistent with the ADA. *See Caldwell v. Federal Express Corp.*, 908 F. Supp. 29, 36 (D. Me. 1995). Pouliot failed to specify which health problem he claimed was his disability or any major life activity that was substantially limited by this disability. In addition, he had admitted that his limitations were temporary, and that he could have returned to work within a reasonable time. *See Toyota Motor Mfg., Ky., Inc. v. Williams*, 122 S. Ct. 681, 691 (2002), 26 MPDLR 73 (*citing* 29 C.F.R. §1630.2(j)(2)(ii)-(iii): An impairment's impact must be permanent or long-term). Because Pouliot had inadequately alleged that he had a disability, his failure-to-accommodate claim also was dismissed.

However, Pouliot stated a claim under the ADA and MHRA for disclosure of confidential information. *See Pollard v. City of Northwood*, 161 F. Supp. 2d 782, 793 (N.D. Ohio 2001), 25 MPDLR 439 (recognizing an ADA claim where a city administrator revealed a police officer's mental health problems to the press). The ADA prohibits employers from disseminating medical

information about their employees under certain circumstances. *See generally* 42 U.S.C. §12112(d)(3), (4); *see Downs v. Massachusetts Bay Transp. Auth.*, 13 F. Supp. 2d 130 (D. Mass. 1998), 22 MPDLR 628 (recognizing an ADA claim against an employer who gave a worker's compensation claims investigator access to plaintiff's medical file). The ADA provides that information obtained from current employees in conjunction with a voluntary medical exam or inquiry into their ability to perform job-related functions must be treated as a "confidential medical record" and may only be disclosed to certain specified individuals. *See* 42 U.S.C. §12112(d)(3), (4). Pouliot alleged that he revealed mental and physical health information as part of the town's investigation, and the town revealed the information to the press.

Title I; Actual; Pretext; Diabetes

An Illinois federal court held that a part-time city bus driver with diabetes failed to show that he was substantially limited in the major life activity of working or regarded as such and, thus, was not disabled under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* Also, his employer terminated him for violating its policy against substance abuse, not because of his disability. ***Young v. Chicago Transit Auth., 2002 WL 206967 (N.D. Ill. Feb. 11, 2002).***

When Christopher Young injured his ankle while boarding his bus, he was ordered to take a drug and alcohol test pursuant to the Chicago Transit Authority (CTA) Drug and Alcohol policy. Young tested positive for cocaine and was terminated. He sued the CTA for violating Title I, 42 U.S.C. §12111-12117.

The district court granted CTA's summary judgment motion. Young failed to show that he had a disability under the ADA. *See Toyota Motor Mfg., Ky., Inc. v. Williams* 122 S. Ct. 681, 691 (2002), 26 MPDLR 73; *Bekker v. Humana Health Plan, Inc.*, 229 F.3d 662, 669-70 (7th Cir. 2000). The record showed that while employed by the CTA for over two years, Young had never submitted medical documentation that he needed any type of accommodation, or that he was restricted from working in any way. Young's own doctor had provided the CTA with written assurances that he was fit to work his job without any medical restrictions. Even if Young were disabled, he failed to show that the CTA's reason for terminating him was a pretext for discrimination.

Titles I, II, V; Actual; Vision; Eleventh Amendment; Injunction

A Pennsylvania federal court dismissed a security guard's claims under Titles I, II, and V of the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, finding that his impaired vision, when corrected, did not constitute a disability under the ADA. Also, he failed to assert an employment relationship with the state police to support his Title I and Title V claims, his Title I money damages claim was barred by the Eleventh Amendment, and he was precluded from seeking injunctive relief against a state agency. ***Davis v. Pennsylvania, 2002 WL 334391 (E.D. Pa. Feb. 22, 2002).***

James Davis sought compensatory damages and injunctive relief against the state under Title I (Employment), Title II (Public Entity), and Title V (Retaliation) of the ADA. He claimed that the Pennsylvania State Police (PCP) denied him certification to carry a firearm based on his uncorrected 20/200 vision.

The district court dismissed all of Davis' ADA claims. He was not disabled under the ADA. *See* 42 U.S.C. §12102(2); *Toyota Motor Mfg., Ky., Inc. v. Williams*, 122 S. Ct. 681 (2002), 26 MPDLR 73. With corrective lenses, Davis has a 20/20 visual acuity level and, thus, is not substantially limited in the major life activity of seeing. *See Marinelli v. City of Erie, Pa.*, 216 F.3d 354 (3d Cir. 2000), 24 MPDLR 772; *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), 23 MPDLR 510.

In a footnote, the court refused to decide PCP's argument that it was immune from suit for money damages under Title II. The U.S. Supreme Court expressly declined to decide whether Congress had abrogated Eleventh Amendment immunity in the context of suits brought by private individuals seeking money damages against the state under Title II. *See Board of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001), 25 MPDLR 236; *see also Lavia v. Pennsylvania Dep't of Corrs.*, 224 F.3d 190 (3d Cir. 2000), 24 MPDLR 799. Because the court had already concluded that Davis failed to allege a disability under Title II, there was no need to decide the immunity issue. However, *Garrett* served as an alternative ground for dismissing Davis' Title I money damages claim. Moreover, Davis' failure to assert an employment relationship with the PCP served as an alternative ground for dismissing his claims under Title I and Title V. *See* 42 U.S.C. §12112(a); *see also Garrett* and *Krouse v. American Sterilizer Co.*, 126 F.3d 494 (3d Cir. 1997), 21 MPDLR 758.

In another footnote, the court concluded that Davis was not entitled to injunctive relief. In *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy*, 506 U.S. 139 (1993), the U.S. Supreme Court held that prospective, injunctive relief was not available against state agencies, but only state officials. The only defendant Davis had named was the PCP.

Hiring; Title I; Actual; Perceived; Qualified; Pretext; Medical Inquiry; Monocular Vision

A Florida federal court held that a job applicant with monocular vision was not disabled or regarded as such under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*; that he was unable to perform an essential job function, even with reasonable accommodation; and that his employer rescinded its conditional employment offer because of his failure to present additional medical information. ***Flores v. American Airlines, Inc., 2002 WL 206302 (S.D. Fla. Jan. 29, 2002).***

American Airlines (AA) offered Pablo Flores a job as a cabin cleaner, contingent on his passing a medical exam. Flores wrote on AA's medical questionnaire that he was legally blind in his left eye. After Flores failed to provide AA with additional medical information from an ophthalmologist, AA rescinded its offer. Flores sued AA for violating Title I, 42 U.S.C. §§12111-12117.

The district court granted summary judgment for AA. Flores was not disabled under the ADA. Although Flores' vision loss was permanent and he lacked depth perception, he presented no probative evidence that he was substantially limited in any major life activity. *See Toyota Motor Mfg, Ky., Inc. v. Williams*, 122 S. Ct. 681 (2002), 26 MPDLR 73. Monocular vision is not a *per se* disability. *See Albertson's, Inc., v. Kirkingburg*, 527 U.S. 555 (1999), 23 MPDLR 511. He could drive, cook, use a computer, and work. While he has to be careful when engaging in certain activities, he uses measures to compensate for his monocular vision. Flores' work history demonstrated that he was not limited with respect to a broad range of jobs. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), 23 MPDLR 510. He had worked as an airport agent, substitute teacher, social worker, assembly person, field representative, and salesperson. Finally, AA's requirement that cabin cleaners have depth perception in order to drive trucks loaded with supplies and position the trucks to the aircraft's door did not show that the airline regarded Flores as substantially limited in working. *See Sutton.*

Also, Flores was not a qualified individual under the ADA. *See* 42 U.S.C. §12111(8); *see also Holbrook v. City of Alpharetta, Ga.*, 112 F.3d 1522 (11th Cir. 1997), 21 MPDLR 488; *Lucas v. W.W. Grainger, Inc.*, 257 F.3d 1249 (11th Cir. 2001), 25 MPDLR 840. He admitted that he was unable to drive and align trucks up to aircrafts, but asserted that this function was not essential, because it was performed infrequently. However, "[t]he percentage of time spent on this function is not dispositive of whether the function is an essential function." In AA's judgment, this function was essential to the cabin cleaner position, and the job description identified this function as essential. The court rejected Flores' argument that another cabin cleaner could perform this function, because each crew included eight workers. "Reallocation or redistribution of an essential function, however, amounts to an elimination of an essential function. Elimination of an essential job function is not a reasonable accommodation under the ADA." *See Holbrook.*

Finally, Flores failed to show that AA did not hire him because of his disability. Flores did not comply with AA's request for additional medical information. AA began the interactive process with Flores, and the breakdown in this process was attributable to him. *See Willis v. Conopco*, 108 F.3d 282 (11th Cir. 1997), 21 MPDLR 351. Under the ADA, employers can ask disability-related questions and conduct a medical exam after tendering a conditional offer of employment. *See* 42 U.S.C. §12112(d)(3). "Nothing in the ADA prohibits an employer from seeking additional medical information. Indeed, it is the EEOC's position that an employer may ask individuals for additional medical information if the additional information is medically related to the previously obtained medical information." *See ADA Enforcement Guidance on Preemployment Disability-Related Inquires and Medical Examinations* (Oct. 10, 1995). Further, other cabin cleaners who were given conditional job offers went through the same process.

State Law; Title I; Perceived; Qualified; Pretext; Color Blind

A New York federal court held that the city transit authority did not violate the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. § §12111-12117, or the New York State Human Rights Law (NYSHRL), NYC Admin. Code §8-107(15)(a), when it prohibited a former bus driver who could not recognize colors of traffic signals from driving. He was not regarded as disabled, he could not perform an essential job function even with reasonable accommodation, and the transit authority had a legitimate reason for not allowing him to drive. ***Shannon v. New York City Transit Auth., 2002 WL 300818 (S.D.N.Y. Feb. 25, 2002).***

Curtis Shannon, a bus driver for the Manhattan and Bronx Surface Transit Operating Authority (MABSTOA), was diagnosed with red/green deficiency and a progressive retinal disease. As a result, MABSTOA permanently restricted him from driving, in accordance with the New York Vehicle and Traffic Law and regulation 15 NYCRR §6.10(b), which state that persons are qualified to drive a bus if they are able to ". . . recognize the colors of traffic signals and devices

showing the standard red, green, and amber," and New York State article 19A, which prohibits certification of bus drivers for red, green, and amber color blindness. After he resigned rather than be fired, he sued MABSTOA under the ADA and the NYSHRL.

The district court granted MABSTOA's motion for summary judgment, finding that Shannon was not disabled under the ADA or the NYSHRL. The fact that MABSTOA had a vision requirement, standing alone, did not establish that it regarded Shannon as substantially limited in the major activity of working. The ADA allows employers to prefer some physical attributes over others. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 490-91 (1999), 23 MPDLR 510. Employers are "free to decide that some limiting, but not *substantially* limiting, impairments make individuals less than ideally suited for the job." *Id.* at 490-91.

Moreover, the fact that MABSTOA required Shannon to undergo eye examinations by specialists did not show that he regarded his color blindness as substantially limiting his ability to work. *See Colwell v. Suffolk County Police Dep't*, 158 F.3d 635, 647 (2d Cir. 1998), 22 MPDLR 745, *cert. denied*, 526 U.S. 1018 (1999); *Tice v. Centre Area Transp. Auth.*, 247 F.3d 506, 515 (3d Cir. 2001), 25 MPDLR 589. Such a request only establishes that the employer had doubts as to the employee's ability to perform a particular job. In addition, the bus driver position was the only position that Shannon was precluded from taking. To be substantially limited in working, a person must be precluded from a broad range or class of jobs, not one particular job. *See Murphy v. United Parcel Serv.*, 527 U.S. 516, 523 (1999), 23 MPDLR 511.

Even if Shannon were regarded as disabled, he was not a qualified individual, because he could not perform an essential job function—distinguishing traffic light colors—and no accommodation would enable him to do so. *See* 42 U.S.C. §12111(8). MABSTOA's vision standard was job-related and consistent with business necessity. *See* 42 U.S.C. §12112(b)(6), §12113(a). Moreover, MABSTOA had a legitimate, nondiscriminatory reason for terminating Shannon: ensuring the safety of the public. *See New York City Transit Auth. v. Transport Workers Union, Local 100*, 663 N.Y.S.2d 114 (N.Y. Sup. Ct. App. Div. 1995).

Title I; Actual; Temporary; Back Injury

The Fourth Circuit held that a former convenience store supervisor was not disabled under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, because her back injury was temporary, and her restrictions did not substantially limit any major life activity. ***Pollard v. High's of Baltimore, Inc., 2002 WL 261556 (4th Cir. Feb. 25, 2002).***

Mary Pollard's job with High's of Baltimore required her to spend considerable time driving from store to store within an assigned area, as well as to be on-call 24 hours a day in case of emergencies. She typically worked more than a 40-hour week. In August 1997, Pollard injured her back while working. She returned to work in April 1998 and was restricted from working more than eight hours per day, repetitive bending, lifting more than five pounds, and driving for extended periods. High's told Pollard that there were no light-duty jobs available. In September, Pollard's driving restriction was lifted, and she was allowed to lift up to 25 pounds. She returned to work as a store clerk. After Pollard's eight-hour work restriction was lifted, she asked to be reinstated as a supervisor. High's told Pollard that it would reinstate her only if she demonstrated that she could work an eight-hour day as a store clerk. In October, Pollard quit. She then sued High's for Title I, 42 U.S.C. §§12111-12117, violations. A Maryland federal court granted summary judgment for High's.

The Fourth Circuit affirmed, holding that Pollard was not disabled under the ADA. *See* 42 U.S.C. §12102(2); *see also Toyota Motor Mfg., Ky., Inc. v. Williams*, 122 S. Ct. 681 (2002), 26 MPDLR 73; *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), 23 MPDLR 510. Pollard's back injury was temporary. An impairment simply cannot be a substantial limitation on a major life activity if it is expected to improve in a relatively short period of time. *See, e.g., Halperin v. Abacus Tech. Corp.*, 128 F.3d 191 (4th Cir. 1997), 21 MPDLR 756; *Gutridge v. Clure*, 153 F.3d 898 (8th Cir. 1998), 22 MPDLR 748; *Rogers v. International Marine Terminals, Inc.*, 87 F.3d 755 (5th Cir. 1996), 20 MPDLR 692; *McDonald v. Pennsylvania*, 62 F.3d 92 (3d Cir. 1995), 19 MPDLR 613. Pollard's nine-month leave period was insufficient to demonstrate that she had a permanent or long-term impairment that significantly restricted a major life activity. Pollard's doctor reported that her condition was only temporary, and that she would be able to resume her full duties as an area supervisor. Pollard repeatedly communicated this fact to High's. The only permanent restriction—that Pollard not lift more than 25 pounds or bend repetitively—were "mild limitations and not significantly restricting." *See Halperin*; *Williams v. Channel Master Satellite Sys.*, 101 F.3d 346 (4th Cir. 1996), 21 MPDLR 65. After Pollard quit, she immediately took another job.

Title I; Actual; Reassignment; Lifting Restriction

A Kansas federal court held that a former employee who was restricted from lifting more than 35 pounds

was not disabled under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, because she was not substantially limited in the major life activities of lifting and working. Additionally, she failed to identify appropriate positions that she could be reassigned to as a reasonable accommodation under the ADA. ***Thompson v. KN Energy, Inc., 177 F. Supp. 2d 1238 (D. Kan. 2001).***

Ann Thompson, a plant operator for a gas processing plant, was terminated for not reporting a gas leak that she caused, in violation of KN Energy's policy. Thompson sued KN under Title I, 42 U.S.C. §§12111-12117, alleging she was fired because of her disability (elbow injury).

The district court granted summary judgment for KN, finding that Thompson's elbow injury did not constitute a protected disability within the meaning of the ADA. This injury did not substantially limit her in the major life activity of lifting. *See* 29 C.F.R. Pt. 1630, App. 1630.2(i). Several circuits, including the Tenth Circuit, have held more severe lifting restrictions than 35 pounds fail the "substantially limiting" standard under the ADA. *See, e.g., Huckans v. United States Postal Serv.*, 201 F.3d 448 (10th Cir. 1999); *Thompson v. Holy Family Hosp.*, 121 F.3d 537, 539-40 (9th Cir. 1997), 21 MPDLR 311; *Williams v. Channel Master Satellite Sys.*, 101 F.3d 346, 349 (4th Cir. 1996), 21 MPDLR 65; *Aucutt v. Six Flags Over Mid-Am., Inc.*, 85 F.3d 1311, 1319 (8th Cir. 1996), 20 MPDLR 502; *Lowe v. Angelo's Italian Foods, Inc.*, 87 F.3d 1170, 1174 (10th Cir. 1996), 20 MPDLR 687.

Nor did Thompson's injury substantially limit the major life activity of working—significantly restrict her from performing either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training skills and abilities, *see* 29 C.F.R. §1630.2(j)(3)(i); *Bolton v. Scrivner, Inc.*, 36 F.3d 939 (10th Cir. 1994), 18 MPDLR 659, *cert. denied*, 513 U.S. 1152 (1995). Thompson was only precluded from doing a narrow range of jobs that required the ability to lift more than 35 pounds. *See, e.g., Schneider v. Chas Seligman Distrib. Co.*, 995 F. Supp. 756, 760 (E.D. Ky. 1998), 22 MPDLR 607. She worked for over a year after her injury without missing a day for illness. In addition, she successfully secured a position as an administrative assistant after her termination.

In addition, Thompson failed to identify any positions within the company that would be an appropriate accommodation to her "office work" restriction. *See Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1174-75 (10th Cir. 1999), 23 MPDLR 533. Moreover, she did not engage in an interactive process to aid in identifying an appropriate position.

§501; Actual; Perceived; Speech Impediment; LD; Back Injury

A Pennsylvania federal court held that a former postal employee who had a speech impediment, learning disabilities, and a back condition was not disabled within the meaning of the Rehabilitation Act §501, 29 U.S.C. §791 *et seq.*, for he was not substantially limited in any major life activity nor regarded as such. ***Dorn v. Potter, 2002 WL 316901 (W.D. Pa. Feb. 28, 2002).***

On August 13, 1998, the postal service terminated Paul Dorn allegedly for excessive absenteeism. He sued the postal service for subjecting him to a hostile work environment and discharging him due to his disabilities, in violation of §501.

The district court granted the postal service summary judgment, finding Dorn was not disabled under §501. *See* 29 U.S.C. §705(20)(B). The court relied on *Toyota Motor Mfg., Ky., Inc., v. Williams*, 122 S. Ct. 681 (2002), 26 MPDLR 73, concluding that the Court's interpretation of who is an individual with a disability under the Americans with Disabilities Act Title I, 42 U.S.C. §§12111-12117, applies to §501. *See Donahue v. Consolidated Rail Corp.*, 224 F.3d 226 (3d Cir. 2000), 24 MPDLR 940; *see also* 42 U.S.C. §§12102(A), 12201–04, and §12210; 29 U.S.C. §794(d). Dorn failed to show that his impairments substantially limited a major life activity. *See* 45 C.F.R. §84.3(j)(2)(ii). The Court in *Toyota* interpreted the phrase "major life activity" as referring only "to those activities that are of central importance to daily life." *Toyota*, 122 S. Ct. at 691.

First, Dorn's speech impediment—he had trouble pronouncing the letters "S" and "R"—did not substantially limit any major life activity, including speaking. Both before and after his employment with the postal service, he had successfully held positions—telephone solicitor and customer service representative—that involved the extensive use of speech over the telephone. Moreover, Dorn was able to speak intelligibly throughout his deposition by the postal service. *See Reeder v. Frank*, 813 F. Supp. 773 (D. Utah 1992), 17 MPDLR 387, *aff'd*, 986 F.2d 1428 (10th Cir. 1993). Additionally, his speech impediment did not affect any of his hobbies (reading and small appliance repair) or his ability to run and maintain a household. He also had no plans of seeking treatment for his impediment, and could not recall visiting a doctor for treatment within the last eight years. Finally, Dorn's speech impediment did not affect his performance during his employment with the postal service.

Second, Dorn's learning disability did not substantially limit any major life activity, including learning. The breadth and depth of his hobbies and the

nature and success of his employment both before and after the postal service demonstrated that he did not have a substantially limiting learning impairment. Dorn had received a G.E.D., passing on the first try without any special assistance. He took classes at a community college and received high grades without any accommodations. *See Davidson v. Midelfort Clinic, Ltd.*, 133 F.3d (7th Cir. 1998), 22 MPDLR 193. Even if, as Dorn contended, his learning disability substantially impaired his ability to perform activities such as balancing a checkbook, doing weekly grocery shopping, and remembering to perform various unspecified tasks, these activities were not centrally important to daily life within the meaning of *Toyota*.

Finally, Dorn's back injury was temporary and, thus, did not qualify as a disability. He suffered significant residual problems for eight months, but then returned to his normal activities. Dorn could shower, walk a mile, lift 50-75 pounds, bench press 100 pounds, sit in a chair for two hours, and stand for two hours without pain. He returned to work full time, working two jobs at once and overtime.

The court rejected Dorn's argument that the postal service regarded him as having a substantially limiting impairment. *See Deane v. Pocono Med. Ctr.*, 142 F.3d 138 (3d Cir. 1998), 22 MPDLR 340; *Tice v. Centre Area Trans. Auth.*, 247 F.3d 506 (3d Cir. 2001), 25 MPDLR 589. Dorn's supervisor testified that, although he noticed a slight speech impediment, he did not experience any noticeable difficulty in understanding Dorn's speech. Moreover, the postal service had no problems with Dorn's work performance. Similarly, Dorn's allegation that co-workers made comments about him being slow showed at most that they regarded him as having an impairment, not one that substantially limited the major life activity of learning. Finally, after Dorn sustained the back injury, he told his supervisor that he was not badly hurt.

Title I; Actual; Back Injury; CTS

A Minnesota federal court upon reconsideration ruled that a former employee with carpal tunnel syndrome and a lower back injury was not substantially limited in his ability to perform tasks central to people's lives and, thus, did not have a disability under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* ***Philip v. Ford Motor Co., 2002 WL 391348 (D. Minn. Mar. 8 2002).***

The Ford Motor Company requested reconsideration of the district court's prior decision (*see* 2001 WL 670834 (D. Minn. June 13, 2001), 25 MPDLR 796) that George Philip had raised a genuine issue of material fact as to whether he was disabled in light of the U.S. Supreme Court's recent decision in *Toyota Motor Mfg., Ky., Inc. v. Williams*, 122 S. Ct. 681 (2002), 26 MPDLR 73.

The district court reversed, finding that Philip was not disabled under the ADA as a matter of law. In *Toyota*, the Court held that when addressing the major life activity of performing manual tasks, the central inquiry is whether the claimant is unable to perform the variety of tasks central to most people's daily lives, not the tasks associated with his or her specific job. *Id.* at 693. George Philip failed to meet this burden. He indicated that he mows his own yard with a self-propelled lawnmower; uses a weed whacker; dresses, grooms, and feeds himself; washes his car by hand; barbecues, walks up and down stairs without difficulty; ties his own shoe laces and neckties; and works out by bit-lifting a small dumbell occasionally, walking on a treadmill, riding a stationary bike, and doing crunches, keg-lifts, and squats. The only substantial limitation created by Philip's restrictions (*e.g.*, restricted from performing repetitive tasks, using vibrating tools, engaging in moderate repeated lifting, and remaining in a fixed position for an extended time period) are substantial limitations in his ability to perform certain tasks at work.

Title I; Actual; Qualified; Lifting, Bending Restrictions

A Minnesota federal court ruled that a former housekeeper supervisor with neck and back pain was not disabled under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, because her lifting and bending restrictions did not substantially limit her ability to perform any major life activities. Also, she was not qualified under the ADA, because she could not perform her essential job function of vacuuming, and requiring other employees to assist her was not a reasonable accommodation. ***Alexander v. The Northland Inn, 2002 WL 236703 (D. Minn. Feb. 15, 2002).***

Ansaf Alexander, who worked on the night shift at the Northland Inn hotel (Inn), was responsible for cleaning when her department was shorthanded. After a car accident, she was restricted from repetitive lifting, carrying, pushing, pulling, and bending. The Inn terminated Alexander because of her permanent inability to vacuum. She sued under Title I, 42 U.S.C. §§12111-12117.

The district court granted the Inn summary judgment. Alexander failed to show that she had a protected disability under the ADA. Her inability to perform a single job, such as vacuuming, is not a substantial limitation of the major life activities of lifting, bending,

pushing, or pulling. The word "substantial" precludes impairments that interfere in only a small way with performing manual tasks. *See Toyota Motor Mfg., Ky., Inc. v. Williams*, 122 S. Ct. 681 (2002), 26 MPDLR 73. Also, the Eighth Circuit has consistently held that general lifting restrictions are insufficient to constitute a disability under the ADA. *See Gutridge v. Clure*, 153 F.3d 898 (8th Cir. 1998), 22 MPDLR 748. Alexander was not substantially limited in the major life activity of working—significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes—because she was only prevented from performing the single job of vacuuming. *See Wooten v. Farmland Foods*, 58 F.3d 382 (8th Cir. 1995), 19 MPDLR 469.

Even if Alexander was disabled, she failed to show that she was qualified to perform her essential job functions. The Inn considered vacuuming to be an essential function. It deemed all housekeeping supervisors to be "working" supervisors, and Alexander's job description specified that her duties included maintaining the cleanliness of the facilities. *See* 42 U.S.C. §12111(8). Finally, her requested accommodation—delegating this task to other persons—was unreasonable because it would fundamentally alter the nature of the job. Employers may require employees to perform certain functions, even though they only take a small amount of their time. *See Summerville v. Trans World Airlines*, 219 F.3d 855 (8th Cir. 2000), 25 MPDLR 247.

Title I; Perceived; Back, Neck Injuries

A Connecticut federal court decided that a shop expeditor with back and neck injuries failed to show that his employer regarded him as substantially limited in the major life activity of walking, standing, lifting, carrying, or working and, thus, was not disabled under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* ***Beason v. United Techs. Corp., 2002 WL 519459 (D. Conn. Mar. 15, 2002).***

After a mirror fell on Donald Beason at work, he took medical leave. His doctor restricted him to sedentary work that allowed him to stand, sit, or stretch when necessary, and did not involve lifting more than 25-30 pounds or using vibrating machinery. Later, Beason's doctor released him to work without restrictions, but Hamilton Standard (HS) refused to recall him. Beason sued for violations of Title I, 42 U.S.C. §§12111-12117.

The district court granted summary judgment for HS. Beason failed to show that the company regarded him as having a physical impairment that substantially limited one or more major life activities, *see* 42 U.S.C. §12102(2)(C). The Equal Employment Opportunity Commission's regulations define "substantially limited" in relation to "the average person in the general population." *See* 29 C.F.R. §1630.2(j)(1).

First, HS's perception that Beason's ability to walk as limited to the extent that he gets numbness in his toes and has significant pain when he turns right was not sufficient to show that the company regarded him as substantially limited in walking as compared to the average person. *See Piascyk v. New Haven*, 64 F. Supp. 2d 19, 28 (D. Conn. 1999), 24 MPDLR 81, *aff'd*, 216 F.3d 1072 (2d Cir. 2000) (plaintiff's 20 percent impairment of right ankle, 10 percent impairment of back, difficulty climbing stairs, marked limp, constant moderate pain in right ankle, periodic need to wear air cast, and inability to walk more than half a mile did not indicate a substantial limitation in walking).

Second, UTC's perception that Beason could not stand for longer than two hours did not amount to a perception that he was substantially limited in standing as compared to the average person. *See Hopkins v. Digital Equip. Corp.*, 1998 WL 702339 (S.D.N.Y. Oct. 7, 1998) (plaintiff's inability to stand for prolonged period not substantially limiting a major life activity).

Third, UTC's belief that Beason could lift no more than 25 pounds was not a belief that his limitations were perceived as substantial as compared to the average person. *See Thompson v. Holy Family Hosp.*, 121 F.3d 537, 539-40 (9th Cir. 1997), 21 MPDLR 609 (plaintiff's inability to lift more than 25 pounds frequently, more than 50 pounds twice a day, and more than 100 pounds once a week not substantial limitation on lifting); *Sherrod v. American Airlines*, 132 F.3d 1112, 1120 (5th Cir. 1998), 22 MPDLR 214 (plaintiff's 45-pound occasional and 20-pound frequent lifting restrictions not substantial limitations on lifting).

Finally, Beason failed to show that UTC regarded him as unable to work in a broad class of jobs. *See* 29 C.F.R. §1630.2(j)(3)(i); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 491 (1999), 23 MPDLR 510. UTC's perception that Beason could not perform any position with a physical demand rating of "3," requiring the ability to lift up to 40 pounds and the use of vibrating or heavy machinery, did not meet the definition of a "broad range of jobs." Courts have construed a "broad range of jobs" to mean a wide range of employment opportunities within the employee's field. *See Heilweil v. Mount Sinai Hosp.*, 32 F.3d 718, 724 (2d Cir. 1994), 18 MPDLR 658; *Deane v. Pocono Med. Ctr.*, 142 F.3d 138 (3d Cir. 1998), 22 MPDLR 340; *Milner v. Henderson*, 2000 WL 964768, at *1 (2d Cir. July 11, 2000); *EEOC v. Blue Cross Blue Shield*, 30 F. Supp. 2d 296, 305 (D. Conn. 1998), 23 MPDLR 208. Beason failed to show that he was regarded as unable to perform technical or mechanical work that may have also been

within his abilities or qualifications, but that did not require a high physical demand. He also presented no evidence of the specific job market in the geographical area to which he had reasonable access by which a reasonable juror could conclude that he was perceived as limited in performing a broad class of jobs.

Title I; Perceived; Muscle Injuries

A New York federal court ruled that an employer did not regard a meter reader serviceman with muscle injuries as substantially limited in the major life activity of working and, thus, he was not disabled under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* ***Covelli v. National Fuel Gas Distrib. Corp., 2001 WL 1823584 (W.D.N.Y. Dec. 6, 2001).***

After Richard Covelli injured the muscles in his chest, back, left arm, and neck in November 1987, his doctors medically restricted him from bending, lifting, stooping, pushing, pulling, twisting his back, stair or ladder climbing, walking farther than one city block, and repetitive gripping or strenuous activity with his hands. The National Fuel Gas Distribution Corp. (NFG) placed him on light duty. In early 1995, Covelli objected to NFG's assigning him to a security guard position, because he would lose union representation and his pay would be frozen at his current level. In August 1995, NFG rejected a medical release returning Covelli to his serviceman position on the ground that the release did not indicate that his physical condition had changed. Between August 1995 and April 1997, Covelli's union and NFG worked to resolve his grievance, and NFG agreed to restore him to his serviceman position effective September 1997. Covelli still sued NFG under Title I, 42 U.S.C. §§12111-12117.

The district court granted summary judgment for NFG, finding that Covelli failed to establish that NFG perceived him as disabled. That NFG believed that his impairments resulting from his 1987 injury restricted his ability to work as a serviceman and assigned him to light-duty work did not show that NFG regarded him as unable to work in a broad range of jobs based on his age, training, and experience. *See Ryan v. Grae & Rybicki*, 135 F.3d 867 (2d Cir. 1998), 22 MPDLR 195; *Colwell v. Suffolk County Police Dep't*, 158 F.3d 635 (2d Cir. 1998), 22 MPDLR 745. Moreover, NFG's request for medical documentation to substantiate Covelli's recovery—which occurred immediately after his transfer to a non-union position—was insufficient evidence that NFG perceived him as disabled. For more than seven years, Covelli insisted that he was unable to perform the full duties of the serviceman position. NFG's dissatisfaction with Covelli's 1995 medical release was reasonable, given that he did not indicate a change in his physical condition to justify lifting the restrictions. Employers may require medical proof that an employee is capable of performing the position's essential functions. *See* 42 U.S.C. §12112(d)(4).

Title I; Actual; Perceived; Lifting Restrictions

An Illinois federal court granted summary judgment to an employer-school district, finding that a former janitor with various lifting restrictions (10-, 20-, and 25-pounds) was no substantially limited in the major life activity of working nor regarded as such and, thus, was not disabled under the Americans with Disabilities Act, 42 U.S.C §12101 *et seq. See Contreras v. Suncast Corp.*, 237 F.3d 756, 763 (7th Cir. 2001), 25 MPDLR 231; *Davidson v. Midelfort Clinic, Ltd.*, 133 F.3d 499, 511 (7th Cir. 1998), 22 MPDLR 193. ***Williams v. Rockford Pub. Sch. Dist., 2002 WL 221545 (N.D. Ill. Feb. 12, 2002).***

Title I; Actual; Pretext; Back, Neck, Shoulder Injuries

An Arkansas federal court found that a former state employee with back, neck, and shoulder injuries was not disabled under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, and failed to show that her employer's reason for firing her was a pretext for disability discrimination. ***Carter v. Arkansas Dep't of Human Servs., 2002 WL 229894 (W.D. Ark. Feb. 6, 2002).***

The Arkansas Department of Human Services hired Oleta Carter to work as a foster parent liaison, social services aide. During her probationary period, Carter disclosed to her supervisor that she had back, neck, and shoulder injuries. Later, she was fired for failing to complete two assignments. The department denied Carter's request for more time to prove herself or for a transfer to an independent living instructor position. Carter sued the department for violating Title I, 42 U.S.C. §§12111-12117.

The district court granted summary judgment for the department. Carter was not disabled under the ADA. *See Toyota Motor Mfg., Ky., Inc., v. Williams*, 122 S. Ct. 681 (2002), 26 MPDLR 73. She failed to present evidence that she had a permanent or long-term impairment that substantially limited any major life activities, defined in *Toyota* as activities that are of central importance to most people's daily lives. The only evidence Carter submitted was a doctor's note from 1993 diagnosing her impairments and setting out a few work restrictions.

Carter also failed to show that her employer's reason

for firing her was pretextual. Carter contended that she could tell from the "look" on her supervisor's face that she did not like the idea of Carter's physical condition. However, a different supervisor fired Carter, and there was no evidence that supervisor was even aware of Carter's impairments. In addition, any evidence showing that Carter had no problems at work until after she made known her physical impairments to her initial supervisor was insufficient to establish disability discrimination. Carter worked for the department only three months and was an employee in training when she was fired.

Title I; Actual; Temporary; Shoulder

A New York federal court found that a truck driver was not disabled under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, because his shoulder injury only prevented him from working for five months. ***Huskins v. Pepsi Cola of Odgensburg Bottlers, Inc., 180 F. Supp. 2d 347 (N.D.N.Y. 2001).***

In February 1999, Philip Huskins was cleared to return to his delivery duties for Pepsi Cola after sustaining a shoulder injury in September 1998. Pepsi terminated him for being argumentative in a February 16th meeting with his supervisors to discuss his new route. Huskins sued Pepsi under Title I, 42 U.S.C. §§12111-12117.

The district court granted Pepsi summary judgment, finding Huskins was not disabled under the ADA. The ADA's disability definition does not include temporary medical conditions, even those requiring extended leaves of absence from work, because they are not substantially limiting. *See Halperin v. Abacus Tech. Corp.*, 128 F.3d 191 (4th Cir. 1997), 21 MPDLR 756. Moreover, courts have held as a matter of law that Huskins' weight restriction—no lifting above 25 pounds—when compared to an average person's abilities is not a significant restriction on the ability to lift, work, or perform any other major life activity. *See, e.g., Williams v. Channel Master Satellite Sys., Inc.* 101 F.3d 346 (4th Cir. 1996), 21 MPDLR 65. Finally, his inability to participate in leisure activities and sports does not equate with an inability to engage in normal daily activities or job-related duties. *See Kirkendall v. United Parcel Serv.*, 964 F. Supp. 106 (W.D.N.Y. 1997).

Title I; Perceived; CTS

The Sixth Circuit affirmed a district court's grant of judgment to an employer, finding that a former employee with carpal tunnel syndrome (CTS) was not regarded by her employer as substantially limited in the major life activity of working and, thus, was not disabled under the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.* The employer only regarded plaintiff as being unable to perform her particular job (sewing machine operator) due to her CTS, not a broad class of jobs such as factory work. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), 23 MPDLR 510. The court rejected plaintiff's assertion that she was disabled because she was regarded as being unable to perform jobs involving repetitive motion, which constitutes a broad class. The U.S. Supreme Court recently held that "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives" in order to be considered substantially limited in the major life activity of performing manual tasks. *See Toyota Motor Mfg., Ky., Inc. v. Williams*, 122 S. Ct. 681 (2002), 26 MPDLR 73. ***Cannon v. Levi Strauss & Co., 2002 WL 193891 (6th Cir. Feb. 6, 2002).***

State Law; Arm Injury; Worker's Comp.; Retaliation

A Michigan appeals court affirmed summary disposition for an employer, finding that a former employee was not disabled under Michigan's Persons with Disabilities Civil Rights Act, Mich. Comp. Laws §37.1103(d)(ii), because his arm injury was related to his ability to perform his specified job duties. It prevented him from doing essential manufacturing duties. Also, he failed to show a causal connection between the filing of his worker's compensation claim and his termination, as required under the Worker's Disability Compensation Act, Mich. Comp. Laws §418.301(11). *See Chiles v. Machine Shop, Inc.*, 238 Mich. App. 462, 470 (Mich. Ct. App. 1999). He had applied for and received worker's compensation benefits for as many as 10 years before he was laid off, and he had no worker's compensation claims pending at that time. ***Rayman v. Progressive Tool & Indus. Co., 2002 WL 266956 (Mich. Ct. App. Feb. 19, 2002).***

Title I; State Law; Perceived; Foot Surgery; Jurisdiction

A New York federal court decided that a former product analyst with foot problems failed to show that her employer regarded her as disabled under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* The court refused to exercise jurisdiction over the employee's state law claim. ***Greicus v. Liz Claiborne, Inc., 2002 WL 244598 (S.D.N.Y. Feb. 20, 2002).***

When Joy Greicus returned to work after foot surgery, she walked with a cane, could not stand or sit in one position for an extended period of time, and had to keep

her foot elevated. Her employer, Liz Claiborne, Inc. (LC), terminated her for poor job performance. Greicus sued for violations of Title I, 42 U.S.C. §§12111-12117, and the New York State Human Rights Law (NYHRL), N.Y. Exec. Law §296 *et seq.*

The district court granted LC summary judgment. Greicus was not disabled under the ADA. *See* 42 U.S.C. §12102(2). She failed to show that LC regarded her impairment as substantially limiting the major life activity of working—precluded her from a broad class of jobs as compared to the average person having comparable training, skills, and experience. *See* 42 U.S.C. §12102(2)(C); 29 C.F.R. §1630.2(j)(3)(i); *Francis v. City of Meriden*, 129 F.3d 281 (2d Cir. 1997), 22 MPDLR 54; *Reeves v. Johnson Controls World Servs. Inc.*, 140 F.3d 144 (2d Cir. 1998), 22 MPDLR 359; *Giordano v. City of N.Y.*, 274 F.3d 740 (2d Cir. 2001), 25 MPDLR 411; *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), 23 MPDLR 510. After informing Greicus that she would be terminated, her supervisors assisted her in preparing a resume and even searched for jobs for her.

The court declined to exercise jurisdiction over the state law claim. The NYHRL's definition of disability is broader than that of the ADA in that it includes medically diagnosable impairments that do not substantially limit an individual's major life activity. Thus, the court's determination that Greicus was not disabled under the ADA was not dispositive of her state law claim. Absent any remaining claims, the appropriate analytical framework to be applied to discrimination claims based on disability as defined by state law is best left to the state courts. *See Giordano*, 274 F.3d at 754.

Title I; Actual; Qualified; Foot Injury

A Mississippi federal court decided that a former truck driver was not disabled under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, because his foot injury did not substantially limit the major life activities of walking or working. Also, he was not a qualified individual under the ADA, because he could not pass the U.S. Department of Transportation (DOT) physical exam—an essential job requirement—until after his termination. ***Mink v. Wal-Mart Stores, Inc., 2002 WL 221074 (N.D. Miss. Jan. 24, 2002).***

Tommy Mink experienced a left foot drop, a condition that causes the leg not to lift properly. His doctor restricted him from driving more than two minutes per day, and from repetitive movements such as operating a foot control. Mink had to wear a foot brace. Wal-Mart Stores, Inc., refused to allow Mink to return to work unless he obtained a full release without restrictions from his doctor. Wal-Mart terminated him for failing to return to work within one year after his leave of absence and for medical disabilities. More than a year after his termination, Mink stopped wearing his foot brace and passed a DOT physical exam. He sued Wal-Mart for violating Title I, 42 U.S.C. §§12111-12117.

The district court granted summary judgment for Wal-Mart. Mink was not disabled under the ADA. *See* 42 U.S.C. §12102(2)(A); *see also Toyota Motor Mfg., Ky., Inc. v. Williams*, 122 S. Ct. 681 (2002), 26 MPDLR 73; *Albertson's, Inc., v. Kirkingburg*, 527 U.S. 555 (1999), 23 MPDLR 511; *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), 23 MPDLR 510. At the time of termination, Mink's foot impairment did not substantially limit a major life activity. *See* 29 C.F.R. §1630.2(j). Pursuant to *Toyota*, major life activities refer to those activities that are of central importance to daily life. He could walk and perform manual tasks with only a minor variation or interference. Although Mink's ability to drive a truck was limited, he was not precluded from working in a broad class of jobs.

Even if Mink were disabled, he was not a qualified individual under the ADA. *See Albertson's*. Wal-Mart was bound to comply with DOT regulations, which prohibit persons who have an arm, foot, or leg impairment that interferes with their ability to operate commercial motor vehicles from driving. *See* 49 C.F.R. §391.41(b)(2)(ii). At the time of his termination, Mink's doctor would not release him to drive a truck for more than two minutes per day, and stated that Mink would not be able to use his foot to operate the foot control. The DOT regulations are implemented in response to public safety concerns, which are a legitimate defense to Mink's claim of ADA violations.

Title I; Actual; Heart Condition, CBA

A New York federal court ruled that a production machine mechanic failed to show that his heart condition substantially limited the major life activities of sleeping and working, so that he was not disabled under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* ***Serow v. Redco Foods, Inc., 2002 WL 257378 (N.D.N.Y. Feb. 19, 2002).***

When Stephen Serow returned to work after a heart attack, he asked Redco Foods, Inc. to switch him from the night to the day shift at the same wage rate. Serow's doctor reported that this accommodation would limit stress, improve sleep, and assist in blood pressure control. Redco denied Serow's request based on seniority provisions in the collective bargaining agreement between Redco and Serow's union. After Serow accepted a lower paying job with Redco, he sued Redco for violating Title I, 42 U.S.C. §§12111-12117, and the union for breaching its duty of fair

representation under the Labor Management Relations Act (LMRA).

The district court granted summary judgment for Redco, finding that Serow was not disabled under the ADA. *See* 42 U.S.C. §12102; *see also Toyota Motor Mfg., Ky., Inc. v. Williams*, 122 S. Ct. 681 (2002), 26 MPDLR 73; *Colwell v. Suffolk County Police Dep't*, 158 F.3d 635 (2d Cir. 1998), 22 MPDLR 745. He failed to show that his cardiovascular disease substantially limited him in the major life activities of sleeping and working. *See Colwell*; *Muller v. Costello*, 187 F.3d 298 (2d Cir. 1999), 23 MPDLR 703; *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), 23 MPDLR 510. Serow claimed that his job affected his sleep, because working the night shift required him to sleep during the day. "This is inadequate because plaintiff has to show that he has an impairment which affects his sleep, not merely a job that affects his sleep." With regard to working, Serow claimed that when working the night shift, he was required to sleep during with the day, which he had difficulty doing. He did not show that he was unable to work a broad range of jobs, as required by the ADA. *See Sutton*. Serow continued to work after his heart attack, and his impairment affected, if at all, his ability to work a certain schedule.

Hiring; Title I; Perceived; Hypertension

The Fourth Circuit affirmed the district court's grant of summary judgment for an employer (*see* 2001 WL 95715 (W.D. Va. Jan. 29, 2001), 25 MPDLR 232), finding that a job applicant with hypertension was not disabled under the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.*, because he only showed that his employer regarded his hypertension as precluding him from one particular job, rather than a broad range of jobs. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), 23 MPDLR 510; *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999), 23 MPDLR 511. ***Stumbo v. Dyncorp Procurement Sys., Inc., 2001 WL 1010427 (4th Cir. Sept. 5, 2001).***

Title I; Actual; Record; Perceived; Reasonable Accommodation; MS

A Wisconsin federal court held that a former employee with Multiple Sclerosis (MS) who failed to show that she was substantially limited in the major life activity of working or regarded as such or had a record of a substantially limiting impairment was not disabled under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* Also, she failed to request a reasonable accommodation. ***Vandeveer v. Fort James Corp., 2002 WL 507069 (E.D. Wis. Mar. 28, 2002).***

In the summer of 1998, Fort James Corp. hired Tracey Vandeveer as a senior customer service representative. Although she did not mention that she had MS on her application, she told her supervisor in October. In February 1999, Fort James terminated Vandeveer for poor work performance. She sued for violations of Title I, 42 U.S.C. §§12111-12117.

The district court granted summary judgment for Fort James. Vandeveer was not disabled under the ADA. *See* 42 U.S.C. §12102(2). *See also Toyota Motor Mfg., Ky., Inc., v. Williams*, 122 S. Ct. 689 (2002), 26 MPDLR 73. She failed to show that she was substantially limited in the major life activity of working—significantly restricted from performing a broad range of jobs. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471(1999), 23 MPDLR 510. She contended that her impairment did not limit her ability to do her work at Fort James, and that she did a good job. Vandeveer also failed to show that she was substantially limited in performing manual tasks and walking. "The primary problem with this argument is that it was raised far too late. It was nowhere suggested in her complaint and—presumably for that reason—discovery on it was never taken." Further, even if Vandeveer could proceed, performing household chores does not constitute a major life activity. As to her alleged difficulties walking more than 15 minutes, "although walking is a major life activity, people are not often called on to walk for lengthy periods of time and the inability to do so for more than fifteen minutes is not likely a 'substantial limitation.'" *See Penny v. United Parcel Serv.*, 128 F.3d 408 (6th Cir. 1997), 21 MPDLR 748.

The court rejected Vandeveer's argument that she had a record of a substantially limiting disability because she took three months of disability leave before working for Fort James. *See* 42 U.S.C. §12102(2)(B). "The ADA is not intended to protect people who may have hospital records . . . but rather to protect individuals who "are subject to discrimination because of their history of a substantial limiting impairment." *See EEOC Compliance Manual*, 902.7, 6887; *see also Sorenson v. University of Utah Hosp.*, 194 F.3d 1084 (10th Cir. 1999), 23 MPDLR 854. Vandeveer failed to show that she had a substantial impairment of a major life activity in the past, or that Fort James relied on the record of that impairment in making decisions that affected her employment. *See Davidson v. Midelfort Clinic, Ltd.*, 133 F.3d 499 (7th Cir. 1998), 22 MPDLR 193.

The court also rejected Vandeveer's argument that Fort James regarded her as disabled. *See* 42 U.S.C. §12102(C). The fact that several co-workers knew that she had MS did not establish that Fort James wrongly believed her to be unable to work in a broad class of jobs. *See Davidson.*

In addition, Vandeveer never told her supervisor or anyone else at Fort James that her MS had advanced to the stage where she could no longer perform her essential job without accommodation. Although she told her supervisor that she was experiencing stress, Vandeveer failed to put Fort James on notice that it needed to engage in the interactive process to determine what accommodations were appropriate and reasonable. *See Taylor v. The Principal Fin. Group, Inc.*, 93 F.3d 155 (5th Cir. 1996), 20 MPDLR 698; *Hunt-Golliday v. Metropolitan Water Reclamation Dist. of Greater Chicago*, 104 F.3d 1004 (7th Cir. 1997), 21 MPDLR 214. "Asking an employer to reduce 'stress' of the workplace is an ambiguous, perhaps unattainable goal, and is not a reasonable accommodation." *See Gaul v. Lucent Techs., Inc.*, 134 F.3d 576 (3d Cir. 1998), 22 MPDLR 207.

Title I; Actual; Marfan's Disorder

An Illinois federal court that a former grocery stock clerk failed to show that his connective tissue disorder substantially limited the major life activities of working and reproduction and, thus, was not disabled under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* ***O'Loughlin v. Dominick's Finer Foods, 2001 WL 1753500 (N.D. Ill. Apr. 19, 2001).***

Kevin O'Loughlin's job at Dominick's Finer Foods required him to unload grocery goods weighing 60 to 80 pounds from trucks and move them about the store. After being diagnosed with Marfan's Syndrome—a disorder affecting all the connective tissues in the body that may result in a catastrophic event if persons engage in activities that cause them to strain or overexert themselves—O'Loughlin was no longer able to perform his job. His supervisor told O'Loughlin that there were no positions available with his medical restrictions, and he sued Dominick's under Title I, 42 U.S.C. §§12111-12117, alleging he was constructively discharged because of his disability.

The district court granted summary judgment for Dominick's, finding that O'Loughlin was not disabled under the ADA. *See* 42 U.S.C. §12102(2). He failed to show that his condition rendered him substantially limited in the major life activities of working and reproduction. *See* 29 C.F.R. §1630.2(j); *see also Webb v. Clyde L. Choate Mental Health & Dev. Ctr.*, 230 F.3d 991 (7th Cir. 2000), 25 MPDLR 73. Although the Equal Employment Opportunity Commission's *Interpretative Guidance to the ADA* indicates that a weight lifting restriction substantially limits a major life activity, *see* 29 C.F.R. §1630.2(j) App., this " . . . conflicts with case law in this circuit and others holding that a lifting restriction alone is insufficient to constitute a substantial limitation on the life activity of working as a matter of law." *See Contreras v. Suncast Corp.*, 237 F.3d 756 (7th Cir. 2001), 25 MPDLR 231; *Williams v. Channel Master Satellite Sys., Inc.*, 101 F.3d 346 (4th Cir. 1996), 21 MPDLR 65; *Aucutt v. Six Flags Over Mid-Am.*, 85 F.3d 1311 (8th Cir. 1996), 20 MPDLR 502; *Ray v. Glidden Co.*, 85 F.3d 227 (5th Cir. 1996), 20 MPDLR 507. O'Loughlin admitted that the only restriction on his activities was the 40-pound lifting restriction. Furthermore, he merely asserted that his impairment excluded him from working as a stock clerk, not from a broad class of jobs.

O'Loughlin also failed to present evidence that his condition affected his reproductive choices. Although an individual with Marfan's Syndrome has a 50 percent chance of passing the disease to any offspring, O'Loughlin did not indicate whether this fact had affected his decision to have children. *See Bragdon v. Abbott*, 524 U.S 624 (1998), 22 MPDLR 449; *Gutwaks v. American Airlines*, 1999 WL 1611328 (N.D. Tex. Sept. 2, 1999); *Reese v. American Food Serv.*, 2000 WL 1470212 (E.D. Pa. Sept. 29, 2000), 24 MPDLR 935; *Hiller v. Runyon*, 95 F. Supp. 2d 1016 (S.D. Iowa 2000), 24 MPDLR 472.

Title I; Actual; Temporary; Reasonable Accommodation; Jaw

A Louisiana federal court ruled that a former employee with a temporary jaw condition was was not substantially limited in a major life activity and, thus, did not have a disability under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* Also, she never gave her employer the opportunity to accommodate her. ***Combe v. La Madeline, 2002 WL 253352 (E.D. La. Feb. 20, 2002).***

Leigh Ann Combe, a general manager for La Madeline, took a leave of absence in December 1999 for corrective jaw surgery. She returned to work in early January 2000 with restrictions to perform only light duties, and was accommodated. Later that month, Combe took another leave of absence for another surgery, applied for and received long-term disability benefits, and was placed on medical leave by La Madeline. While out on medical leave, Combe repeatedly inquired about open management positions with La Madeline, but was told that she could only make these inquiries once she was released for work by her doctor. She never contacted La Madeline again, and took another job. Combe filed a discrimination charge with the Equal Employment Opportunity Commission (EEOC), which was dismissed, and then filed suit in federal court against La Madeline under Title I, 42 U.S.C. §§12111-12117, alleging failure to accommodate her after her second

leave of absence.

The district court granted La Madeline summary judgment. Plaintiff was not disabled under the ADA. She was not substantially limited in the major life activity of eating, for her disorder was only temporary. *See McDonald v. Pennsylvania*, 62 F.3d 92 (3d Cir. 1995), 19 MPDLR 613. Moreover, there was no evidence that plaintiff's jaw problem had any long-term effect on any other major life activities, as she indicated that she was able to care for herself and perform daily activities such as washing, bathing, and cooking. The U.S. Supreme Court recently held in *Toyota Motor Mfg., Ky., Inc. v. Williams*, 122 S. Ct. 681 (2002), 26 MPDLR 73, that the key issue in determining disability under the ADA is whether the plaintiff is substantially limited in performing tasks that are centrally important to most people's daily lives. Plaintiff returned to work with defendant after her first surgery and was able to perform administrative duties. After her second surgery, plaintiff regained her full strength and by August 2001 was able to carry a full workload. Finally, plaintiff never afforded La Madeline the opportunity to accommodate her following her second surgery. She failed to inquire about job openings at the appropriate time and instead sought employment elsewhere.

Title I; Actual; Hepatitis C; Reasonable Accommodation; Transfer

A New York federal court ruled that a city worker failed to show that her interferon treatment for Hepatitis C substantially limited the major life activity of working under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* Also, her request for a transfer as an accommodation was not reasonable. ***Pimentel v. City of N.Y., 2001 WL 1579663 (S.D.N.Y. Dec. 11, 2001).***

After the city denied Sylvia Pimentel's three separate requests for a medical transfer due to Hepatitis C, she filed an administrative charge against the city for disability discrimination, including failure to accommodate and to pay her the same rate as non-disabled co-workers. She then brought suit for Title I, 42 U.S.C. §§12111-12117, violations.

The district court granted the city summary judgment. First, Pimentel was not disabled under the ADA. The work-related effects of her treatment (*e.g.*, depression, crying spells, anxiety, insomnia, and fatigue) lasted for only two months and, thus, were not substantial compared to the average person in the general population. *See* 29 C.F.R. §1630.2(j)(1); *Colwell v. Suffolk County Police Dep't*, 158 F.3d 635, 644 (2d Cir. 1998), 22 MPDLR 745. Moreover, her inability to perform a single, specific job did not qualify as a substantial limitation. *See Heilweil v. Mount Sinai Hosp.*, 32 F.3d 718, 723 (2d Cir. 1994), 18 MPDLR 658. Pimentel stated in various depositions that she could have worked for a variety of other city agencies, even though many had the same job duties and responsibilities as her prior position.

Even if she were disabled, her request for a transfer was not reasonable. She failed to show that the transfer would accommodate her alleged disability, so that her request expressed no more than a personal preference, which the ADA does not require employers to accommodate. *See Hussein v. Hotel Employees & Rest. Union, Local 6*, 108 F. Supp. 2d 360, 370 (S.D.N.Y. 2000). Pimentel requested the transfer to avoid working with her supervisor, which is not reasonable under the ADA. *See Gaul v. Lucent Techs., Inc.*, 134 F.3d 576, 581 (3d Cir. 1998), 22 MPDLR 207.

Title I; Actual; Perceived; Hypertension

A Massachusetts federal court ruled that a city police lieutenant with hypertension failed to show that he was disabled or perceived as such within the meaning of the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* ***Sheehan v. City of Gloucester, 2002 WL 389297 (D. Mass. Mar. 11, 2002).***

Arthur Sheehan sued the city under Title I, 42 U.S.C. §§12111-12117, alleging it failed to accommodate his disability.

The district court granted the city summary judgment, finding that Sheehan was not disabled under the ADA. He failed to show that his hypertension substantially limited the major life activity of working—unable to work in a broad class of jobs, not just one type of job, a specialized job, or a particular job of choice. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 491-92 (1999), 23 MPDLR 510. After his retirement from the police force, Sheehan worked as a security guard for 24-32 hour per week. He also failed to show that he was regarded as disabled. The police department regarded him as unable to perform the job of a police officer, which as previously mentioned is not sufficient under the ADA.

State Law; Actual; Pretext; Viral Infection

An Ohio appeals court found that a former field engineer with heightened sensitivity to cold air failed to show that he was substantially limited in the major life activities of breathing or working and, therefore, was not handicapped under the state's disability discrimination law. Further, he failed to show that he was terminated because of his impairment. ***DeBolt v. Eastman Kodak Co., 2001 WL 1511979 (Ohio Ct. App.***

Nov. 29, 2001).

When William DeBolt returned to work after a serious viral infection, he informed his manager at Eastman Kodak Company that he had developed heightened sensitivity to cold air. He was given a modified work assignment where he did not service any KOM equipment, which is usually housed in highly air-conditioned environments. About two years later, DeBolt was informed by Kodak management that, due to company downsizing, he probably would not have a job if his restrictions were not lifted. He began servicing the KOM equipment again. However, DeBolt informed his supervisor that he felt unprepared to service the equipment. His supervisor scheduled him for a seven-week KOM equipment class. When DeBolt refused to attend the training, he was terminated. He sued under Ohio Rev. Code §4112.02 and §4112.99, alleging handicap discrimination. The trial court granted Kodak summary judgment.

The appeals court affirmed. There is no indication that DeBolt's pulmonary problems substantially limited his major life activities of breathing or working. DeBolt's testimony establishes nothing more than that his sensitivity to cold air drafts may cause sinus infections, which may require antibiotics. No evidence established that DeBolt has difficulty breathing when not in air-conditioned environments, or that being in such cold air environments always results in breathing difficulties. With regard to the major life activity of working, DeBolt's testimony established only that he is unable to service computer equipment housed in highly air-conditioned environments, not in other types of environments. The inability to perform a single, particular job does not constitute a substantial limitation in working. *See Columbus Civ. Serv. Comm. v. McGlone*, 697 N.E.2d 204 (Ohio Sup. Ct. 1998).

DeBolt also failed to show that his employer's reason for terminating him—insubordination—was a pretext for discrimination. *See Beauchamp v. Compuserve, Inc.*, 709 N.E.2d 863 (Ohio Ct. App. 1998), 22 MPDLR 363; *Hood v. Diamond Prods.*, 658 N.E.2d 738 (Ohio Sup. Ct. 1996), 20 MPDLR 231.

State Law; Medical Condition Defined; Temporary; Reasonable Accommodation; Notice

The New Mexico supreme court reversed a jury verdict for a former billing clerk, finding that he failed to show that his temporary fatigue, dizziness, and disorientation amounted to a medical condition under the state Human Rights Act, and that his employer terminated him because of that condition. Also, the terse language of his return-to-work certificate was insufficient to put his employer on notice that he was requesting an accommodation. ***Trujillo v. Northern Rio Arriba Elec. Coop., 41 P.3d 333 (N.M. Sup. Ct. 2001).***

Frank Trujillo, a billing clerk for Northern Rio Arriba Electric Cooperative (NORA), went on sick leave to recuperate from his temporary condition. While he was gone, problems were discovered with his work, including delays in billing and inaccurate records. When he attempted to return to work, NORA sent Trujillo a letter terminating his employment. Trujillo sued NORA under the New Mexico Human Rights Act, N.M. Stat. Ann. §28-1-1–15, alleging he was terminated because of his medical condition. A jury returned a verdict in favor of Trujillo.

The state high court reversed. Under the Human Rights Act, an employer is prohibited from discharging "any person otherwise qualified because of a medical condition." *See* §28-1-7(A). The symptoms reported by Trujillo were insufficient to establish that he had a medical condition. Although he testified to feeling exhausted, dizzy, and disoriented, as well as experiencing some numbness in his arm, the nature of Trujillo's condition was never identified or diagnosed. Further, his problems existed for a short period; within a month his doctor had cleared him to return to work. The New Mexico legislature did not intend the phrase "medical condition" to include temporary illness with minimal residual effects. *See Hilburn v. Murata Elecs. N. Am. Inc.*, 181 F.3d 1220 (11th Cir. 1999), 23 MPDLR 688 (a temporary injury with minimal residual effect cannot be the basis for a sustainable claim under the Americans with Disabilities Act). Thus, the question of a violation of the Human Rights Act should not have been submitted to the jury.

The court rejected Trujillo's failure-to-accommodate claim based on his doctor having issued a certificate to return to work for "half time for one month." The certificate was inadequate to put NORA on notice that Trujillo was requesting an accommodation under the Human Rights Act. Although the certificate did ask for a reduction in Trujillo's hours, it did not offer a diagnosis of his illness and how it limited his ability to work, or suggest any accommodation that his illness might require. *See Smith v. Midland Brake, Inc.*, 180 F.3d 1154 (10th Cir. 1999), 23 MPDLR 533.

Even if Trujillo had a medical condition on the day of his discharge, no evidence was presented at trial that NORA discriminated against him because of his health. The fact that NORA was aware of Trujillo's health problems was not sufficient to show that the company regarded him as having a medical condition, or that he was fired for that reason. *See Webb v. Mercy Hosp.*, 102 F.3d 958 (8th Cir. 1996), 21 MPDLR 62. The termination letter discussed a number of reasons NORA

was dissatisfied with Trujillo's job performance, which predated Trujillo's illness.

§501; Actual; Perceived; Reasonable Accommodation; Stress; Fatigue

A California federal court found that an employee who took medical leave due to stress and fatigue was not substantially limited in the major life activity of traveling nor was perceived by his employer as substantially limited in the major life activity of working and, therefore, was not disabled under the Rehabilitation Act §501, 29 U.S.C. §791. Also, his employer accommodated his request for limited travel. ***Coons v. Secretary of U.S. Dep't of Treasury, 2002 WL 243596 (N.D. Cal. Feb. 5, 2002).***

Peter Coons, an employee of the Internal Revenue Service (IRS), took three months sick leave, claiming excessive stress, extreme fatigue, and work pressure. Upon his return, he was reassigned to another position in order to accommodate his requests for no unplanned extended absences from home and no excessive air travel. One year later, Coons was demoted from a GS-15 to a GS-14 for using his government computer to visit Internet sex sites. He sued under §501, alleging discrimination, and retaliation for requesting a reasonable accommodation.

The district court granted the government summary judgment. Coons is not a person with a disability. He identified "travel" as the only major life activity that was substantially limited because of his impairment. However, he was not precluded from travel, only restricted from "extensive travel." Thus, assuming travel is a major life activity, no reasonable trier of fact could find that Coons was significantly limited in his ability to travel.

The government's knowledge of Coons' three-month medical leave of absence a year before the demotion is insufficient to establish that the IRS regarded Coons as disabled. First, there is no evidence that the IRS regarded Coons as being unable to work. Second, the severity of Coons' impairment was too short-lived to constitute a substantial limitation on his ability to work. *See Sanders v. Arneson Prods. Inc.*, 91 F.3d 1351 (9th Cir. 1996), 20 MPDLR 685. Third, Coons did not present any specific evidence about relevant labor markets. *See Thornton v. McClatchy Newspapers, Inc.*, 261 F.3d 789 (9th Cir. 2001), 25 MPDLR 980.

Even if Coons were disabled, his reasonable accommodation claim would still fail. Coons first claimed that when he requested an accommodation, the IRS failed to engage in the "interactive process." However, Coons conceded that his request for an accommodation was honored. An employer faces liability for a failure to engage in the interactive process in good faith only if a reasonable accommodation would have been possible but was not given. *See Barnett v. U.S. Air Inc.*, 228 F.3d 1105 (9th Cir. 2000), 24 MPDLR 956, *US Airways, Inc. v. Barnett*, 2002 WL 737494 (U.S. Sup. Ct. Apr. 29, 2002).

Coons also claimed that when he was demoted, the IRS took away his reasonable accommodation. The problem with this claim is that "reasonable accommodation" has no relevance here, because it is undisputed that Coons was qualified to perform both the position from which he was demoted and the position to which he was demoted. *See Cripe v. City of San Jose*, 261 F.3d 877 (9th Cir. 2001), 25 MPDLR 1007. Moreover, there is no evidence in the record that he requested an accommodation at this time.

Title I; Actual; Temporary; Hostile Workplace; Retaliation; Body Odor

A New York federal court ruled that a U.S. Customs Service employee did not have a disability under the Americans with Disabilities (ADA), 42 U.S.C. §12101 *et seq.*, because his body odor problem was not permanent and did not substantially limit a major life activity. Also, he failed to show that he was subjected to a hostile workplace, unequal terms and conditions of employment, and retaliation based on his disability. ***Georgy v. O'Neill, 2002 WL 449723 (E.D.N.Y. Mar. 25, 2002).***

Loren Georgy had a skin impairment that prevents him from wearing deodorant, resulting in a body odor problem. When he was later transferred to a position that did not require any manual labor, his problem disappeared. Georgy was later terminated for poor work performance (i.e., sleeping on the job, arguing with co-workers regarding office procedures and work assignments, taking unscheduled breaks, and performing filing tasks contrary to instructions). Georgy sued the Secretary of the Treasury (SOT) for violating Title I, 42 U.S.C. §§12111-12117.

The district court granted the SOT summary judgment. Georgy was not disabled under the ADA. He failed to show that his skin impairment substantially limited him in the major life activities of working, caring for himself, or interacting with others. Georgy testified at his deposition that his body odor problem did not "affect [his ability] to do [the] job of Customs aide" or affect his ability to care for himself, "because he took care of [his] hygiene." His allegation that he worked in a disharmonious office where people were rude to him was not sufficient to show a substantial limitation on interacting with others. There was no evidence of consistent high levels of hostility, social withdrawal,

or failure to communicate when necessary. *See McAlindin v. County of San Diego*, 192 F.3d 1226, 1235 (9th Cir. 1999). Moreover, his body odor problem was not long-term, because it disappeared when he was transferred. *See Santiago Clemente v. Executive Air Lines, Inc.*, 213 F.3d 25, 31 (1st Cir. 2000).

The court dismissed Georgy's hostile workplace claim, finding that his general allegations that his supervisors waged a campaign against him by disciplining him, yelling at him, and not being sympathetic to his disability did not show that his workplace was "permeated with discriminatory intimidation, ridicule and insult, that [was] sufficiently severe or pervasive to alter the conditions of the victim's employment." *See Torres v. Pisano*, 116 F.3d 625, 630-31 (2d Cir. 1997). He did not establish the type of continuous, pervasive conduct necessary to create a hostile work environment. *See Curtis v. Airborne Freight Corp.*, 87 F. Supp. 2d 234, 250 (S.D.N.Y. 2000). Nor did Georgy establish how any of the alleged discriminatory conduct unreasonably interfered with his work performance.

The court also dismissed Georgy's claim that he was subjected to unequal terms and conditions of employment because of his disability. Even if true, his allegations that he was not given a desk right way, had to travel in a van without a place to sit, was not allowed to eat at his desk, and was given voluminous filing assignments was not sufficient to show that he experienced a materially adverse change in the terms and conditions of his employment. *See Medwid v. Baker*, 752 F. Supp. 125, 136-7 (S.D.N.Y. 1999). He was not demoted or docked in pay, his title was not diminished, and his responsibilities were not significantly reduced. There was no evidence that Georgy was treated differently than other similarly situated employees. Finally, with respect to Georgy's retaliation claim, the process to terminate him was in place prior to the time that he met with the EEO counselor. *See Johnson v. Palma*, 931 F.2d 203, 207 (2d Cir. 1991).

State Law; Actual; Perceived; Breast Cancer

An Ohio federal court ruled than a barge attendant with breast cancer, who had no medical restrictions when she returned to work, failed to show that she was handicapped or regarded as such by her employer for purposes of her state law disability discrimination claim. ***Johnson v. Ohio Valley Elec. Corp., 2002 WL 484418 (S.D. Ohio Mar. 26, 2002).***

When Jane Johnson returned to work after taking a leave of absence due to breast cancer, she asked to be considered for an equipment operator position. Her supervisor, Spencer, initially rejected her interest, then stated that the company had decided against filling the position. Johnson sued Ohio Valley Ohio Valley Electric Corporation for denying her the position because of her breast cancer, in violation of Ohio Rev. Code §4112.

The district court granted summary judgment for Ohio Valley. Johnson failed to show her cancer substantially limits one or more major life activities, *see* §4112.01(A)(13); *see also Hood v. Diamond Prods., Inc.*, 74 Ohio St.3d 298, 301 (Ohio Sup. Ct. 1996), 20 MPDLR 231; *Hazlett v. Martin Chevrolet, Inc.*, 25 Ohio St.3d 279, 281 (Ohio Sup. Ct. 1986), 11 MPDLR 36. She claimed that her chemotherapy affected her strength and stamina, and that she tended to be more tired than before her surgery. However, Johnson was currently being treated with the medication tamoxifen, and had been under no medical restriction since she returned to work. She testified that she could perform her duties as a barge attendant and had worked 15 to 20 hours per week overtime since returning to work. Johnson also failed to show that her supervisors regarded her as being handicapped, *see* §4112.01(A)(13). Conclusory speculation by Johnson and her husband was insufficient.

Title I; Actual; Substantial Limitation; Dyslexia

A New York federal court held that a former account executive needed more than her own assertion that she was dsylexic to support her claim of impairment under the American with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-12117. She also failed to show that her condition substantially limited the major life activity of working. ***Frank v. Plaza Constr. Corp., 2002 WL 253948 (S.D.N.Y. Feb. 21, 2002).***

Wendy Frank, an account executive with Plaza Construction Corporation (Plaza), claimed she was terminated from her job, in part, because of her disability. She sued Plaza for violation of Title I.

The district court granted Plaza summary judgment. First, the only evidence that Frank had presented was her own assertion and her mother's statement that she had been diagnosed with dyslexia. The court rejected the mother's statement as hearsay and noted that Frank's statement was of dubious admissibility. To the extent that it simply repeated an expert's opinion, it was hearsay. To the extent that it was her own opinion, Frank failed to show that she was qualified to make the diagnosis or that it was rationally based on her own perception. Moroever, even if she was impaired, she had not shown that she was disabled under the ADA.

Merely having an impairment is not sufficient to establish an ADA disability. A claimant must show that

the impairment limits a major life activity in a substantial way. *See Toyota Motor Mfg., Ky., Inc. v. Williams*, 122 S. Ct. 681, 690 (2002), 26 MPDLR 73. The use of the word "substantial" clearly "precludes impairments that interfere in only a minor way with the performance of major tasks from qualifying as disabilities." *Id.* at 691. Here, Frank had not shown that her dyslexia impaired any life activity. In fact, Frank's affidavit that attested to her difficulty in reading and writing were contradicted by other testimony that she could perform her duties at Plaza. She had also left blank the space on Plaza's employment application that had asked if there was "any reason why you could not perform the essential duties of the position for which you are applying." Additionally, her physician had testified that Frank did not exhibit any symptoms of dyslexia.

Title I; Actual; Mitigating Measures; Qualified; Chemical Sensitivity

A Minnesota federal court held that a former chemical engineer who was allergic to acrylates stored at his workplace was not disabled under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, because he could mitigate his condition by working in an allergen-free environment. Also, he could not perform his essential job functions without accommodation, and his request to work at home was unreasonable. ***Gits v. Minnesota Mining & Mfg. Co., 2001 WL 1409961 (D. Minn. June 15, 2001).***

Minnesota Mining and Manufacturing Company (3M) allowed Peter Gits to be away from his lab while it searched for an alternative position in a workspace free from acrylates. Ultimately, no vacant position was found, and 3M terminated him. He sued 3M for violations of Title I, 42 U.S.C. §§12111-12117.

The district court granted summary judgment for 3M, finding that Gits was not disabled for purposes of the ADA, *see* 42 U.S.C. §12102(2)(A)-(C). He was not substantially limited in the major life activity of working—significantly restricted in his ability to perform either a class or jobs or a broad range of jobs in various classes as compared to the average person having comparable training skills and abilities, *see* 29 C.F.R. §1630.2(j)(3)(i); *see also Coffey v. County of Hennepin*, 23 F. Supp. 2d 1081, 1088 (D. Minn. 1998), 22 MPDLR 746; *Heilweil v. Mount Sinai Hosp.*, 32 F.3d 718, 723 (2d Cir. 1994), 18 MPDLR 658—because his sinus and respiratory difficulties were ameliorated or eliminated by avoiding the 3M environment. *See Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 522 (1999), 23 MPDLR 511; *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482 (1999), 23 MPDLR 510. Gits failed to show that he suffered a significant reduction in meaningful employment opportunities. *See Webb v. Garelick Mfg. Co.*, 94 F.3d 484, 488 (8th Cir. 1996), 20 MPDLR 827. Since his termination, Gits has been either in school full-time or employed. He testified that he could perform a job that did not involve exposure to industrial chemicals, and that there had never been a time when he believed he could not work at all.

Nor was Gits limited in the major life activity of breathing, because his difficulties occurred only when he was exposed to acrylate products. *See Land v. Baptist Med. Ctr.*, 164 F.3d 423, 425 (8th Cir. 1999), 23 MPDLR 151 (plaintiff's severe but temporary allergic reaction to peanuts did not substantially limit major life activity of breathing.).

Also, Gits was not qualified to perform his essential job function—being present at work—even with reasonable accommodation, *see* 42 U.S.C. §12111(8); *see also Moritz v. Frontier Airlines, Inc.*, 147 F.3d 784, 787 (8th Cir. 1998), 22 MPDLR 617. An employee who is unable to come to work on a regular basis has been held to be unable to satisfy any of the functions of the job in question, much less the essential ones. *See Moore v. Payless Shoe Source, Inc.*, 187 F.3d 845, 848 (8th Cir. 1999), 24 MPDLR 92; *Lalla v. Consolidated Edison Co.*, 2001 WL 456248, at *3-4 (S.D.N.Y. Apr. 30, 2001), 25 MPDLR 635. Although Git's request for a reassignment was reasonable, there were no vacant positions available. Further, his request to work at home was unreasonable, because his management of the product line required contact with the laboratories and facilities that contained acrylate products. *See DeBord v. Board of Educ.*, 126 F.3d 1102, 1106 (8th Cir. 1997), 21 MPDLR 788. The ADA does not require an employer to change its overall manner of conducting business to accommodate a disabled employee. *See Heaser v. Toro Co.*, 247 F.3d 826, 828-30 (8th Cir. 2001), 25 MPDLR 625. 3M was not obligated to delegate essential functions of Gits' position to other individuals in order to accommodate him. *See Moritz*, 147 F.3d at 788.

Title I; Actual; FMLA; Pregnancy

A New York federal court dismissed a former employee's American with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-12117, claim, finding that pregnancy itself is not a disability under the statute, and that her pregnancy-related complications were short-term. Also, her employer did not violate the Family and Medical Leave Act (FMLA), 29 U.S.C. §2601 *et seq.*, because it had already decided to terminate her before denying her request for leave. ***Kennebrew v. New York City Hous. Auth., 2002 WL 265120 (S.D.N.Y. Feb. 26, 2002).***

Between June 1999 and February 2000, Themetris Kennebrew, a secretary for the New York City Housing Authority (NYCHA), submitted 25 leave of absence requests for doctors' appointments due to gestational diabetes. On August 9, 1999, she received a counseling memo that detailed the reasons for her unsatisfactory job performance rating, which included tardiness, failure to file work tickets and update employee folders, repeating the same mistakes on employee overtime reports, and maintaining her office in disarray. On February 9, before Kennebrew was told she was terminated, she requested a six-month leave of absence under the FMLA for stress on the advice of her doctor. The NYCHA terminated her effective February 16. She sued under Title I and the FMLA.

The district court granted summary judgment for the NYCHA. Kennebrew claimed that her pregnancy was a protected disability. However, the "EEOC regulations, which are entitled to substantial deference in construing the ADA, explicitly exclude 'conditions' such as pregnancy, that are not the result of a physiological disorder." *See Martinez v. N.B.C., Inc.*, 49 F. Supp. 2d 305, 308-09 (S.D.N.Y. 1999), 23 MPDLR 519 (*quoting* 29 C.F.R. Pt. 1630, App. 1630.2(h) at 347). Additionally, every court that has considered this issue has held that pregnancy is not in and of itself a disability. *See, e.g., Martinez v. N.B.C. Inc.*, 49 F. Supp. 2d at 308-09 (S.D.N.Y. 1999); *Minott v. The Port Auth. of N.Y. & N.J.*, 116 F. Supp. 2d 513, 525 (S.D.N.Y. 2000), 25 MPDLR 79; *Lehmuler v. Incorporated Village of Sag Harbor*, 944 F. Supp. 1087, 1093-94 (E.D.N.Y. 1996), 21 MPDLR 61. Because Title VII forbids discrimination on the basis of pregnancy, it would be redundant to interpret the ADA as covering mere pregnancy as well. *See, e.g., LaCoparra v. Pergament Home Ctrs., Inc.*, 982 F. Supp. 213, 228 n.17 (pregnancy-based discrimination, "while beyond the purview of the ADA, may nevertheless violate Title VII of the Pregnancy Discrimination Act.")

Moreover, pregnancy-related complications will generally not qualify women for protection under the ADA, except in "extremely rare cases." The complications must be "substantial enough to qualify as a disability," regardless of the fact that the woman is pregnant. *See LaCoppara*, 982 F. Supp. at 227. Here, however, Kennebrew presented no evidence that her gestational diabetes was other than a short-term condition.

Finally, Kennebrew's FMLA claim failed because NYCHA had decided to terminate her before she requested FMLA leave. *See, e.g., Carrillo v. National Council of the Churches of Christ*, 976 F. Supp. 254, 256 (S.D.N.Y. 1997); *Beno v. United Tel. Co. of Fla.*, 969 F. Supp. 723, 726 (M.D. Fla. 1997).

Title I; Actual; Reasonable Accommodation; Retaliation; Fibromyalgia

An Indiana federal court ruled that an account executive who failed to show that his fibromyalgia limited his ability to perform any major life activity was not disabled under the American with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, and therefore was not entitled to a reasonable accommodation. However, a jury could infer from indirect evidence that he had been fired for engaging in statutorily protected activities. ***Kaley v. Icon Int'l Inc., 2001 WL 1781898 (S.D. Ind. Dec. 4, 2001).***

In 1998, James Kaley, an account executive for Icon International Inc., informed Icon's president, Michael Parrot, of his condition and asked that he be allowed to communicate with his Fort Wayne office by telephone, rather than by driving there. In 1999, co-workers complained that Kaley had engaged in inappropriate conduct, used threatening language, created tension in the workplace, used company facilities for personal use, and spread false rumors. On April 8, 1999, Kaley filed a discrimination charge with the Equal Employment Opportunity Commission (EEOC). Icon issued Kaley a final, written warning in August 1999, informing him that any further inappropriate conduct would result in his termination. In November, Kaley brought suit against Icon for violations of Title I, 42 U.S.C. §§12111-12117. In December, Parrott yelled at him in public for filing the lawsuit. Kaley was terminated one week later for allegedly violating the company's code of conduct.

The district court granted Icon's motion to dismiss in part, finding that Kaley did not have a disability under the ADA. He failed to produce evidence that his fibromyalgia symptoms substantially limited any major life activity, as required by the ADA. *See* 42 U.S.C. §12102(2). He alleged that he could not sit, drive, or stand for prolonged periods, that he sometimes could not drive, and that he tired easily, but these effects were not of a nature or level of severity that imposed significant restrictions on Kaley compared to the average person in the general population. *See Emerson v. Northern States Power Co.*, 256 F.3d 506, 511-12 (7th Cir. 2001), 25 MPDLR 832 (*citing* 29 C.F.R. §1630.2(j)(ii)); *see also Roth v. Lutheran Gen'l Hosp.*, 57 F.3d 1446, 1454 (7th Cir. 1995), 19 MPDLR 517. Because Kaley was not disabled as a matter of law, Icon had no duty to reasonably accommodate him or engage in an "interactive process" to find a reasonable accommodation under the ADA. *See* 29 C.F.R. §1630, Appendix, *Interpretive Guidance on Title I of the ADA.*

However, Kaley raised a genuine issue of material fact as to retaliation. His EEOC claim and lawsuit were

statutorily protected activities, and Kaley had suffered an adverse employment action when he was terminated. Moreover, Kaley presented evidence establishing a causal connection between his termination and his EEOC charge and/or the lawsuit. *See Silk v. City of Chicago*, 194 F.3d 788, 799 (7th Cir. 1999), 23 MPDLR 871. Not only was he terminated within two months of filing his lawsuit, but the company president publicly rebuked him citing the lawsuit and then fired him one week later. *See Hunt-Golliday v. Metropolitan Water Reclamation Dist.*, 104 F.3d 1004, 1014 (7th Cir. 1997), 21 MPDLR 214 (causal link may be established by circumstantial evidence of suspicious timing); *Alexander v. Gerhardt Enters., Inc.*, 40 F.3d 187, 196 (7th Cir. 1994) (plaintiffs may rely on "telling temporal sequence"); *Dey v. Colt Const. & Dev. Co.*, 28 F.3d 1446, 1458 (7th Cir. 1994) (plaintiff may establish a causal link with evidence that discharge took place on the heels of protected activity).

§501; Actual; Chronic Pain

The Seventh Circuit held that a former Immigration and Naturalization Services (INS) employee failed to show that her chronic pain and tender and sore muscles substantially limited any major life activities and, thus, was not disabled under the Rehabilitation Act §501, 29 U.S.C. §791 *et seq.* ***Stein v. Ashcroft, 2002 WL 435357 (7th Cir. Mar. 21, 2002).***

Doree Stein was diagnosed with chronic upper left extremity pain and myofacial pain syndrome (tender and sore muscles resulting from repetitive use) and restricted to sedentary employment and from repetitive motion of her left hand. As a result, INS no longer assigned her outreach duties outside the office, but her salary, title, and other job duties remained the same. Stein filed a discrimination charge with the Equal Employment Opportunity Commission (EEOC), alleging that the removal of her outreach duties amounted to discrimination, and that the INS refused to accommodate her. After the EEOC found no discrimination, Stein sued the INS for violating §501. An Illinois federal court granted summary judgment for the INS.

The Seventh Circuit affirmed that Stein was not disabled under the Rehabilitation Act. *See* 29 U.S.C. §706(8)(B); 29 C.F.R. §1613.702(c); *see also Hamm v. Runyon*, 51 F.3d 721 (7th Cir. 1995), 19 MPDLR 466; *Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446 (7th Cir. 1995), 19 MPDLR 517. She failed to show that she was substantially limited in the major life activity of working. *See Davidson v. Midelfort Clinic, Ltd.*, 133 F.3d 499 (7th Cir. 1998), 22 MPDLR 193; *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), 23 MPDLR 510; *Contreras v. Suncast Corp.*, 237 F.3d 756 (7th Cir. 2001), 25 MPDLR 231. Her inability to lift and carry heavy boxes outside of the office to the extent necessary to perform outreach duties did not rise to the level of a restriction on her ability to work in a broad class or range of jobs as compared to the average person having comparable training, skills, and abilities. *See* 29 C.F.R. §1630.(j)(3)(i); *Contreras*. This was but one single aspect of Stein's job duties and therefore did not overcome her demonstrated ability to successfully perform the numerous other tasks required of her job.

Stein also failed to show that she was substantially limited in sleeping, engaging in sexual relations, participating in sports, and caring for herself. The most recent medical evaluation indicated that Stein could work an eight-hour a day, five days a week without restriction. The only support for her claim was her own affidavit. Stein did not present any evidence, medical or otherwise, that her alleged specific limitations were permanent or long-term, or even currently existing. *See Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002), 26 MPDLR 73.

Title 1; Actual; Frostbite

A New York federal court granted an airline's motion to dismiss, finding that a former employee failed to show that her frostbite significantly restricted her ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities, *see* 29 C.F.R. §1630.2(j)(3)(i) and, thus, was not disabled under the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.* ***Chille v. United Airlines, 2001 WL 1826281 (W.D.N.Y. Sept. 17, 2001).***

Employment: Medical Leave/ Exams/Retaliation

Title I; Medical Screening; Diabetics

A Tennessee federal court denied summary judgment for an employer, finding it failed to establish that all insulin-dependent diabetes pose such a substantial risk of attention lapses so that it is justified under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, in barring them from operating forklifts. ***EEOC v. Murray, Inc., 175 F. Supp. 2d 1053 (M.D. Tenn. Nov. 13, 2001).***

Murray, Inc. required all active forklift operators to submit to a medical screening every three years. Raymond Waits was removed from his forklift operator position and eventually was terminated, pursuant to Murray's policy prohibiting all individuals with a