court declined to enjoin those proceedings and denied Flaherty's motion for an injunction. The college dismissed the charges based upon Flaherty's filing of grievances and lawsuits, but held that he was responsible on the remaining charges and suspended him for four years. During the disciplinary proceedings, the college filed a motion for summary judgment.

Flaherty moved to add ADA retaliation claims alleging that the disciplinary proceedings were an unlawful retaliation against him for having exercised his ADA rights. The court granted the college's motion, and denied Flaherty's motion. Flaherty appealed. The Second Circuit dismissed the appeal due to his default. In March 1998, Flaherty filed another complaint, asserting that his suspension violated the ADA's anti-retaliation provisions, which the court dismissed on grounds of *res judicata.*

The Second Circuit reversed. The claims asserted in the 1998 action were not raised in his 1995 action. Flaherty could not have raised the claims in his complaint in the 1995 action because they arose out of the college disciplinary hearings, which were not instituted until after the filing of the complaint. Consequently, the district court's disposition of the claims asserted in the 1995 action had no preclusive effect on the new claims asserted in the 1998 action.

Athletic Association Rule; Title III; Coverage; Reasonable Accommodation; LD

A Washington federal court held the Americans with Disabilities Act (ADA) Title III, 42 U.S.C. §§12181-12189, does not apply to an unincorporated athletic association because it is not a place of public accommodation nor is it associated with such a place. Further, plaintiff's requested accommodation—waiver of the academic requirements—exceeded what was required under the ADA for an athlete with a learning disability. ***Matthews v. National Collegiate Athletic Ass'n, 1999 WL 1256262 (E.D. Wash. Dec. 1, 1999).***

Anthony Matthews is a sophomore member of the Washington State University (WSU) football team. The National Collegiate Athletic Association (NCAA) declared Matthews ineligible to play during the 1999 football season for violating its "75/25" rule. That rule requires that student athletes complete at least 75 percent of the required course load during the academic year and no more than 25 percent during the summer term. Matthews applied for a waiver based on his learning disability, but was denied. In October 1999, the court entered a temporary restraining order enjoining the NCAA from declaring Matthews academically ineligible and prohibiting WSU from allowing him to participate in intercollegiate football. Matthews applied for a preliminary injunction, arguing the NCAA violated Title III.

The district court denied Matthews' motion. Title III does not apply to the NCAA. The NCAA regulates only the eligibility and membership criteria of its member institutions and their student athletes. The list of eligible persons and institutions generated by the NCAA's criteria is not a traditional place of public accommodation, nor is it associated with a particular place of public accommodation. *See Ellit v. USA Hockey*, 922 F. Supp. 217 (E.D. Mo. 1996), 20 MPDLR 385; *Stoutenborough v. National Football League, Inc.*, 59 F.3d 580 (6th Cir. 1995), 19 MPDLR 598. Further, the NCAA does not operate any of its participating school's places of public accommodation.

Also, without showing a likelihood of prevailing on the merits, Matthews was not entitled to a preliminary injunction. The NCAA already had made reasonable accommodations for him. Ordering further accommodation would require the NCAA to dispense with essential eligibility criteria, which is unduly burdensome under the ADA.

Employment: Disability Defined

Title I; Actual; Pretext; CTS

The Sixth Circuit ruled that a former employee with carpal tunnel syndrome (CTS) did not have a disability within the meaning of the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, and that the employer's reason for termination—excessive tardiness—was not a pretext for discrimination. ***Bartkowiak v. The Pillsbury Co., 1999 WL 1253103 (6th Cir. Dec. 17, 1999).***

Stanley Bartkowiak, who worked for The Pillsbury Company, was fired for violating its "no fault" tardiness policy, which provided that employees are subject to discipline regardless of the reason for, or duration of ,tardiness after six times. He sued Pillsbury under Title I, 42 U.S.C. §§12111-12117, for failing to provide reasonable accommodations that would allow him to perform work within his physical limitations. His doctor had restricted him from performing repetitive manual tasks and from lifting more than 20 pounds. Pillsbury contended that it accommodated Bartkowiak's physical restrictions by limiting him to light-duty work. An Ohio federal court granted Pillsbury summary judgment, finding Bartkowiak failed to establish that he had a covered disability under the ADA, or, in the alternative, that Pillsbury's legitimate business reason for terminating him was a pretext for discrimination.

The Sixth Circuit affirmed. First, Bartkowiak was not an individual with a disability under the ADA. His CTS did not significantly restrict his ability to perform a broad range of jobs that did not require heavy lifting and repetitive motions. Bartkowiak had continued to work for Pillsbury for two years after being diagnosed with, and undergoing surgery for, CTS. Second, Bartkowiak failed to establish that Pillsbury's articulated reasons for terminating him were a pretext for discrimination. Bartkowiak attacked what he perceived to be the unfairness of Pillsbury's policy, but admitted that he had violated the policy on numerous occasions.

Title I; Actual; Depression

The Seventh Circuit held that a personality conflict between an employee and a supervisor—even one that triggers the employee's depression—is not enough to establish that the

employee is disabled under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, so long as the employee could still perform the job under a different supervisor. ***Schneiker v. Fortis Ins. Co., 200 F.3d 1055 (7th Cir. 2000).***

Susan Schneiker, a former benefits analyst for Fortis Insurance Company, has depression. When Dana Sanders became her supervisor at Fortis, Schneiker began seeing her psychiatrist more often "in an effort to deal with" Sanders. She was later admitted to a hospital when her depression worsened. Schneiker's doctor recommended that she be removed from Sanders' supervision, and Fortis agreed to a temporary transfer while Schneiker sought a different position at Fortis. When Schneiker failed to obtain a permanent position in the company, she was terminated. Schneiker sued Fortis under Title I, 42 U.S.C. §§12111-12117, alleging she had been discriminated against based on her disability. The district court granted Fortis summary judgment, finding that Schneiker had not demonstrated that her depression substantially limits her ability to work or any other major life activity.

The appeals court affirmed. The record shows that Schneiker's inability to work was due not to her depression, but to her inability to work under Sanders. An employee is not disabled within the meaning of the ADA if she can do the same job for another supervisor. *See Weiler v. Household Fin. Corp.*, 101 F.3d (7th Cir. 1996), 21 MPDLR 57. The court rejected Schneiker's arguments that her depression is triggered by stress, not working under Sanders. She failed to produce any evidence that her inability to work in stressful situations precludes her from a class of jobs or a wide range of jobs. To satisfy her burden of proof, Schneiker needs to point to those job requirements that were problematic in light of her depression. *See Skorup v. Modern Door Corp.*, 153 F.3d 512 (7th Cir. 1998), 22 MPDLR 56.

Title I; Actual; Retaliation; Causal Link; Back; Neck

A Kansas federal court found that a former delivery driver with injuries to his back, neck, shoulders, and knees did not have a covered disability under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* Also, his employer did not terminate him in retaliation for filing an Equal Employment Opportunity Commission (EEOC) complaint because a two-month gap between the employer's receipt of the complaint and his termination was insufficient to establish a causal connection. ***Heiman v. United Parcel Serv., Inc., 1999 WL 1179647 (D. Kan. Dec. 2, 1999).***

United Parcel Service (UPS) fired Paul Heiman, a delivery driver, for arguing with a fellow employee and becoming confrontational with his supervisors. Heiman sued UPS under Title I, 42 U.S.C. §§12111-12117, alleging it terminated him because of his disabilities—injuries to his back, neck, shoulders, and knees—and in retaliation for filing an EEOC complaint and a lawsuit alleging that UPS denied him reasonable accommodation.

The district court granted UPS summary judgment. Regarding the termination claim, Heiman is not disabled under the ADA, because his injuries do not substantially limit the major life activity of working. The only evidence presented was a doctor's report concluding that Heiman had lost the ability to perform about 30 percent of the jobs he might normally have been able to access before his injuries, with 85 percent of this loss falling in the "service, processing, and miscellaneous categories of employment." The report was limited to the Kansas City area, and Heiman failed to introduce evidence showing that no other geographical areas are reasonably available to him. *See Bolton v. Scrivner, Inc.*, 36 F.3d 939 (10th Cir. 1994), 18 MPDLR 659. Further, a 25.5 percent (85 percent of the 30 percent) loss in a specific class of jobs does not constitute a significant restriction in the ability to perform that class of jobs. *See Jackson v. Analyst Int'l Corp.*, 134 F.3d 382 (10th Cir. 1998), 22 MPDLR 197. Similarly, Heiman's 30 percent loss in the ability to perform all jobs is insufficient to constitute a significant restriction in the ability to perform a broad range of jobs in various classes.

Regarding Heiman's retaliation claim, he was unable to show a causal connection between his protected activity and termination. Heiman filed his initial charge of discrimination with the EEOC almost a year and a half before his termination, and filed a complaint about six months before his termination. UPS was served with a copy of the complaint two months before the termination. The two-month gap between the service of process and termination is insufficient to establish a causal connection. *See Richmond v. ONEOK, Inc.*, 120 F.3d 205 (10th Cir. 1997) (holding that a three-month period between protected activity and termination does not establish causal connection).

Title I; Actual; Perceived; Pretext; CTS

An Illinois federal court ruled that an issue of fact exists as to whether a former assembler with carpal tunnel syndrome (CTS) had a disability within the meaning of the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.*, and granted her 21 days to introduce evidence that her employer's reasons for terminating her—tardiness, leaving early, and absences—were pretextual. ***Loven-Swinbank v. Modern Metal Prods. Co., 2000 WL 28255 (N.D. Ill. Jan. 11, 2000).***

Modern Metal Products Company followed a point system where employees were assessed points for tardiness, leaving early, and absences. An accumulation of nine points resulted in termination. Brenda Loven-Swinbank was terminated after she accumulated 19.5 points. She sued under Title I, 42 U.S.C. §§12111-12117. Modern Metal moved for summary judgment.

An issue of fact exists regarding whether Swinbank's CTS is a disability under the ADA. She claims she has numb hands and fingers and is unable to perform repetitive work. Questions of fact exist as to whether, as a result, Swinbank is precluded from performing all assembly line work in the area because of the repetitive nature of the work. Her ability to find a job lacking repetitive motion but earning the same wage rate as her job at Modern Metal may be significantly curtailed, given her tenth-grade education and difficulties with reading and writing.

However, the court rejected Swinbank's claim that Modern

Metal regarded her as disabled. On the one occasion Swinbank asked to transfer to another position because her hand was hurting, her supervisor refused, stating she no longer had any restrictions. The supervisor's reaction indicates he perceived Swinbank as not having a substantially limiting impairment. *See Sanchez v. Henderson*, 188 F.3d 740 (7th Cir. 1999), 23 MPDLR 681.

Even assuming that Swinbank's CTS constitutes a covered disability, she failed to show that Modern Metal's stated reason for her termination was pretextual. Thus, the court gave her 21 days to supplement her response with evidence of non-disabled employees who amassed more points than Swinbank and were not disciplined.

Title I; Actual; Qualified; Reasonable Accommodation

A Texas district court found that a former employee with physical and cognitive impairments raised material issues of fact as to whether she had a covered disability, she was qualified, and her employer reasonably accommodated her disability, as required by the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.* ***Morabito v. General Motors Corp., 1999 WL 1212860 (N.D. Tex. Dec. 17, 1999).***

Sharron Morabito, an assembly line worker in a General Motors (GM) manufacturing plant, sued GM under Title I, 42 U.S.C. §§12111-12117, alleging she was discriminated against on the basis of her disabilities. Morabito claimed that, among other impairments, she (1) has trouble walking due to back pain; (2) cannot turn her neck because of two fused vertebrae; (3) has a cognitive impairment whereby she will forget the most routine things, and (4) has carpal tunnel syndrome in her wrists. Morabito charged that GM required her to work at positions on the assembly line in violation of her medical restrictions and doctor's advice. GM moved for summary judgment.

The district court denied the motion. First, whether Morabito is substantially limited in a major life activity depends on whether she can perform the normal activities of daily living. *See Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723 (5th Cir. 1995), 19 MPDLR 471. Morabito testified to numerous ways in which her daily life is affected by her injuries. For example, she is sometimes relegated to bed; she is unable to hang clothes in a closet or fix her hair; she requires assistance when cooking; and she is unable to lift or groom her dog.

Second, Morabito presented evidence that she was qualified to perform essential functions of her position with reasonable accommodation. The court rejected GM's argument that it cannot reasonably alter its assembly line so as to accommodate Morabito, who is now restricted to only sedentary work. Whatever Morabito's current medical restrictions, the thrust of her claim is that GM—over a period of years and throughout several injuries—discriminated against her by forcing her into a series of inappropriate jobs and denying a host of apparently minor accommodations that would have allowed her to safely perform at least some of those jobs.

Finally, one could find from Morabito's evidence, if credited, that GM failed to make a reasonable effort to accommodate Morabito's medical restrictions. She provided extensive testimony and documentation alleging that GM supervisors and medical personnel regularly ignored her medical restrictions, as well as refused to make reasonable accommodations to honor those restrictions.

Title I; Actual; Skin Condition

The Tenth Circuit affirmed dismissal of a janitor's failure-to-accommodate claim against a school district under the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-12117. He failed to show that his skin condition substantially limited the major activity of working and, thus, he did not have a covered disability under the ADA, *see* 29 C.F.R. §1630.2(j)(3)(i); *Bolton v. Scrivner, Inc.*, 36 F.3d 939 (10th Cir. 1994), 18 MPDLR 659. ***Lewis v. Independent Sch. Dist., 1999 WL 1188818 (10th Cir. Dec. 10, 1999).***

§501; §504; Major Life Activity

An Alabama federal court ruled that individuals cannot be deemed disabled under the Rehabilitation Act §501, 29 U.S.C. §791 *et seq.*, or §504, 29 U.S.C. §794, where working is the only major life activity in which they either are substantially limited, have a record of being substantially limited, or are regarded as having a substantial limitation. ***Mullins v. Crowell, 74 F. Supp. 2d 1067 (N. D. Ala. 1999).***

Plaintiffs, former employees of the Tennessee Valley Authority (TVA), asserted disparate treatment claims under §504 and §501. With regard to §504, plaintiffs alleged TVA intentionally classified and segregated them by competitive area, competitive level, and permanency status for reduction-in-force purposes because of their disabilities. With regard to §501, plaintiffs alleged that TVA failed to implement an affirmative action plan for the hiring, placement, and advancement of employees with disabilities. Under both sections, plaintiffs claimed disparate impact on clerical, secretarial, and aide workers with disabilities, because TVA's policies resulted in statistically significant greater number of non-disabled clerical, secretarial, and aide workers being retained. TVA moved for summary judgment, arguing, in part, that plaintiffs were not individuals with disabilities under the Rehabilitation Act.

The court agreed. In *Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139 (1999), 23 MPDLR 510, the Supreme Court, in the context of an Americans with Disabilities Act case, exhibited a reticence to find that working is a major life activity for purposes of determining whether an individual is disabled. The Court noted that "... it seems to argue in a circle to say that if one is excluded, for instance, by reason of an impairment, from working with others ... then that exclusion constitutes an impairment, when the question you're asking is, whether exclusion itself is by reason of handicap." The court here found the Supreme Court's reticence persuasive. In response to plaintiffs' argument that the Equal

Employment Opportunity Commission included working as a major life activity, the court held:

> While the Supreme Court refused to entirely disregard the EEOC regulations concerning disability in *Sutton* because the parties assumed them to be applicable, from the opinion, it would appear that the Court would, in the proper case, refuse to give any deference to the EEOC regulations interpreting the term disability. Given that, as the Court stated, the EEOC arguably has no authority to issue regulations regarding the meaning of the term "disability" under the ADA, by implication, little deference is due the regulations issued by the EEOC with respect to the Rehabilitation Act.

Accordingly, the court held that working is not a major life activity under the Rehabilitation Act. A limitation on working is contingent on an impairment that limits some area of physical or mental functioning. "It makes sense to say that one is limited in his or her ability to work because he or she is limited in his or her ability to see; it makes no sense to say the contrary." The inability to work is a consequence of a limitation on an area of basic human functioning.

The court cautioned that its holding does not imply that individuals whose impairments prevent them from working cannot demonstrate that they are disabled. Rather, to demonstrate that their inability to work due to an impairment is a disability, they must show that the inability to work stems from a substantial curtailment in their ability to engage in some major life activity or group of major life activity.

Even if working was a major life activity, most of plaintiffs' claims would not be viable. These claims centered on plaintiffs' inability to perform construction-type labor. Plaintiffs failed to demonstrate that the type of jobs from which they were limited constituted a broad, rather than a select or narrow class. They also failed to contrast the number of jobs they could not perform with the number of jobs they could perform given their training, knowledge, and skills.

Title I; Mitigating Measures; Statute of Limitations; Asthma

A Maryland federal court ruled that an employee's asthma, as mitigated by medication, did not constitute a covered disability under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, or the Rehabilitation Act §504, 29 U.S.C. §794. Even if it had, her failure-to-accommodate claims were either time barred or her employer articulated nondiscriminatory reasons for denying her requests. ***Tangires v. John Hopkins Hosp., 79 F. Supp. 2d 587 (D. Md. 2000).***

Dimitra Tangires, a hospital interior design coordinator, complained to her supervisor that the air system in the new office made her sick, but did not say that she needed the air system fixed in order to accommodate her asthma. In April 1992, Tangires took a medical leave of absence. She returned to work six months later. Tangires asked her supervisor about being transferred to a new interior design position. The hospital assigned another employee to the design coordinator position. In January 1993, Tangires unsuccessfully complained to her supervisor that the thermostat setting aggravated her asthma. Tangires was hospitalized with an asthma attack. She requested a medical leave of absence, but the hospital placed her on medical layoff, which allowed the hospital to fill her position while she was absent. After filing a charge with the Equal Employment Opportunity Commission (EEOC) on March 3, 1993, she sued the hospital under Title I, 42 U.S.C. §§12111-12117, and §504.

The court granted the hospital summary judgment, finding Tangires did not have a covered disability under the ADA or §504. Her asthma, if corrected by medication, did not substantially limit any major life activity. *See Sutton v. United Air* Lines, Inc., 119 S. Ct. 2139 (1999), 23 MPDLR 510. Her asthma was treatable, and during her employment she intentionally failed to follow physicians' recommendations that she take steroid medication.

Even if Tangires had a covered disability, her requests for accommodations in December 1991 and January 1992 were time barred. Tangires was precluded from litigating any allegedly discriminatory act that occurred more than 180 days prior to the filing of her EEOC charge. Although Tangires alleged that she was denied reasonable accommodations in September 1992, the evidence did not exist that she had informed the hospital of her need for a specific accommodation. Although Tangires made a reasonable accommodation request in January 1993, the hospital articulated a legitimate, nondiscriminatory reason for failing to alter the air system in her office. In that month, Tangires had a dispute with one of her co-workers over the thermostat that controlled the temperature and flow of air into the office. When Tangires informed her supervisor of her asthmatic condition and need for accommodation, he denied the request. He told her that his concern was that she get along with people and get her work done. The manner in which the supervisor resolved the conflict was a legitimate, nondiscriminatory reason for failing to make changes in the air system.

The hospital also articulated a legitimate, nondiscriminatory reason pursuant to hospital policy for placing Tangires on a medical layoff rather than granting her request for a medical leave of absence. The hospital decided that business necessity required that Tangires not be given a medical leave of absence, and instead placed her on a medical layoff. Her position was filled during her absence. Tangires had the right upon her return from medical layoff to retain her bidding rights on vacant positions at the hospital without losing her seniority. However, Tangires chose not to do so and never returned to work for the hospital.

Finally, the court rejected Tangires' argument that the hospital discriminated against her by failing to promote her to assigned preferred work projects in spite of her qualifications and favorable evaluations. In deciding that Tangires should not be assigned to a work project desired by her, the hospital made an interlocutory or mediate decision rather than an ultimate employment decision actionable under the ADA.

Title I; Mitigating Measures; Actual; Perceived; ADD

An Alabama federal court held that a former employee with attention deficit disorder (ADD) did not have a disability within the meaning of the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* ***Blackston v. Warner-Lambert Co., 2000 WL 122109 (N.D. Ala. Jan. 26, 2000).***

In August 1997, Will Blackston, a territory development representative for Warner-Lambert (WL), told his supervisor that he had ADD-related work difficulties. However, Blackston refused to contact the company doctor and told his supervisor that he did not want WL contacting his physician. In July 1998, WL terminated Blackston because of his poor performance—he had not (1) reported accurately store displays he had placed, (2) removed expired products, or (3) adhered to the company's retail priorities. Blackston sued WL under Title I, 42 U.S.C. §§12111-12117.

The district court held that Blackston did not have a covered disability under the ADA. His ADD, when controlled by medication, did not substantially limit the major life activities of thinking or working. *See* 42 U.S.C. §12102(2); *See also Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139 (1999), 23 MPDLR 510. Blackston admitted, and his physician confirmed, that he was not limited in any major life activities while he was taking his medication. Moreover, the fact that WL found Blackston's work performance to be deficient and had provided him with a timer and a spell checker and changed his work hours was not sufficient to show that he was substantially limited in his ability to work or to think due to his ADD. Finally, neither WL's mere knowledge that Blackston had ADD nor the fact that he informed WL that ADD caused his difficulties at work was sufficient to show that it regarded him as disabled. The employer must view an impairment as generally foreclosing the type of employment involved, not just a narrow range of job tasks. *See Gordon v. E.L. Hamm & Assoc.*, 100 F.3d 907, 913 (11th Cir. 1996).

§501; Mitigating Measures; Qualified; Reasonable Accommodation; Pretext; Depression

The Equal Employment Opportunity Commission reversed its prior decision and determined that the United States Postal Service (USPS) violated the Rehabilitation Act §501, 29 U.S.C. §791 *et seq.*, by terminating a letter carrier with depression and failing to provide reasonable accommodations. ***New v. Henderson, No. 01943836 (EEOC Jan. 18, 2000).***

First, Cheryl New was a person with a disability because her manic depression, even when medicated, substantially limited her cognitive functioning. *See Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139 (1999), 23 MPDLR 510. Second, New was qualified to perform the essential job functions with proper medication, as supported by USPS's physician. Third, New was discriminated against based on her disability when she was denied accommodation. At the time of her request for accommodation, USPS supervisors were aware of her condition, but never responded to her request. Finally, New's act of flailing her arms at others did not rise to the level of violent conduct sufficient to allow termination.

Title I; Actual; Perceived; Attys' Fees; Depression

The Seventh Circuit affirmed that a police officer who took Prozac for depression did not have nor was regarded as having a disability under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* Also, he was not entitled to attorneys' fees because he was not a prevailing party. ***Krocka v. City of Chicago, 203 F.3d 507 (7th Cir. 2000).***

Vincent Krocka sued the City of Chicago Police Department (CPD), alleging violation of Title I, 42 U.S.C. §§12111-12117. The court concluded that Krocka's assignment to the CPD's Personal Concerns Program (PCP) designed for officers with behavioral problems constituted an adverse action under the ADA and granted summary judgment on that issue to Krocka. *See Krocka v. Riegler*, 958 F. Supp. 1333 (N.D. Ill. 1997), 21 MPDLR 337. The court subsequently found a dispute of material fact as to whether Krocka was actually disabled and denied summary judgment to both parties on that issue. *Krocka v. Bransfield*, 969 F. Supp. 1073 (N.D. Ill. 1997), 21 MPDLR 617. A jury returned a verdict in favor of the CPD, finding that Krocka did not have a disability within the meaning of the ADA. The court then denied Krocka's motion for attorneys' fees, finding he was not a prevailing party. *Krocka v. Bransfield*, 1998 WL 214690 (N.D. Ill. Apr. 22, 1998), 22 MPDLR 519.

The appeals court affirmed. The court rejected Krocka's assertion that his depression substantially limits his ability to work in that he is more irritable, less able to concentrate, and more prone to fatigue than the average police officer. Krocka has been a police officer for almost 20 years and has consistently received good performance evaluations. Krocka acknowledged that when taking Prozac he exhibits no symptoms of depression and is able to perform the duties of his job adequately.

The court also rejected Krocka's argument that the CPD regarded his impairment as substantially more limiting than it was because it required him to participate in the PCP as a condition of his employment as a police officer. Placement in the PCP may have been an inappropriate response or an overreaction to Krocka's impairment. However, this is evidence that the CPD took an adverse and unjustified employment action against Krocka because of his impairment. It is not evidence that the CPD regarded that impairment as substantially limiting. Employers do not run afoul of the ADA when they make employment decisions based on physical or mental characteristics that are limiting, but not substantially limiting such that they do not rise to the level of a disability under the ADA definition. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), 23 MPDLR 510.

Krocka further argued that the fact that the CPD required him to undergo a medical evaluation and to continue to be super-

vised by a physician is evidence that the CPD regarded him as disabled. Where inquiries into the psychiatric health of an employee are job related and reflect a concern with the safety of employees, the employer may require specific medical information from the employee and may require that the employee undergo a physical examination designed to determine his or her ability to work. *See Duda v. Board of Educ. of Franklin Park Pub. Sch. Dist. No. 84*, 133 F.3d 1054 (7th Cir. 1998), 22 MPDLR 192. Here, it was entirely reasonable, and even responsible, for the CPD to evaluate Krocka's fitness for duty once it learned that he was experiencing difficulties with his mental health.

Finally, the court rejected Krocka's argument that because the CPD removed him from the PCP pending the outcome of this litigation and has not placed him back in the program, he was a prevailing party entitled to attorneys' fees. Krocka contended that the district court's ruling on summary judgment that placing him in the PCP was an adverse employment action was the cause of the CPD's decision to remove him from the program. However, a plaintiff who ultimately loses because a final judgment is entered against him is not transformed into a prevailing party simply because an interim judgment may have been entered in his favor. *See Hunger v. Leininger*, 15 F.3d 664 (7th Cir. 1994), 18 MPDLR 295. Krocka did not prevail at trial, and the CPD's decision to gratuitously grant him the relief he requested does not change that fact. *See Palmer v. City of Chicago*, 806 F.2d 1316 (7th Cir. 1986).

Title I; Actual; Perceived; Qualified; Attendance; Statute of Limitations; Depression

A Minnesota federal court ruled that a question of fact exists as to whether a former employee with depression had a covered disability under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* Nevertheless, the employee was not a qualified individual, because he could not meet an essential function of his position—regular attendance. ***Johnson v. Loram Maintenance of Way, Inc., 83 F. Supp. 2d 1007 (D. Minn. 2000).***

Jerry Johnson was an assembler for Loram Maintenance of Way. At some point, he was assigned custodial duties, allegedly because of poor attendance and an inability to consistently perform assigned tasks. After Johnson had a severe panic attack at work, he took short-term disability leave. While he was on leave, Loram terminated him as part of a workforce reduction. Johnson sued under Title I, 42 U.S.C. §§12111-12117.

The district court granted Loram summary judgment. The court first rejected Loram's argument that Johnson's claim was time barred. Johnson alleged he was wrongfully terminated on February 27, 1995. He filed a discrimination charge with the Equal Employment Opportunity Commission on December 20, 1995. Because his charge was filed within 300 days of the alleged unlawful termination, Johnson's claim was not precluded by the limitations period. *See* 42 U.S.C. §2000e-5(e)(1).

The court rejected Johnson's argument that Loram regarded him as disabled. The only evidence Johnson offered on this issue was a letter sent to Loram by Johnson's psychologist in which he informed Loram of Johnson's "lingering depression." This letter indicates that Loram was aware of Johnson's condition when it terminated him. To establish that an employer regarded an employee as disabled, however, requires more than a mere awareness of the employee's condition. *See Olson v. Dubuque Community Sch. Dist.*, 137 F.3d 609 (8th Cir. 1998), 22 MPDLR 332.A plaintiff must show that the employer regarded him or her as substantially limited in a major life activity.

As to whether Johnson was actually disabled, the court noted that the psychologist's letter stated that Johnson was "marginally able to return to work full-time, assuming he is returned to his old position or one that is similar." The doctor also stated that Johnson could not handle a different position that would involve a significant change in work tasks. The court found that this created a genuine issue of fact as to whether Johnson was substantially limited in one or more of his major life activities.

Even if Johnson had a covered disability under the ADA, he was not a qualified individual. The court considered the essential job functions of an assembler, rather than a custodian. This is because job qualifications are determined with respect to the employee's long-held, rather than temporary, job duties. *See Browning v. Liberty Mut. Ins. Co.*, 178 F.3d 1043 (8th Cir. 1999), 23 MPDLR 539. Moreover, Johnson conceded that he considered his job to be that of an assembler.

The court found that Johnson was unqualified to perform the essential functions of an assembler because of his poor attendance and lack of dependability. Johnson conceded that regular and reliable attendance is an essential function of the assembler job. Loram had previously rated Johnson's attendance as poor, and had even suspended him for three days because of his poor attendance. When Johnson was terminated, he had been unable to work for over six months. Thus, Johnson failed to cite any evidence that his attendance was adequate to perform the duties of the assembler position.

State Law; Perceived; Pretext; Brain

An Ohio federal court ruled that factual issues exist as to whether an employer regarded a former employee with a brain injury as having a handicap within the meaning of state law, and whether he was terminated because of his handicap. ***McIntosh v. Stanley-Bostitch, Inc., 82 F. Supp. 2d 775 (S.D. Ohio 2000).***

Rodney McIntosh worked for Stanley Bostitch, Inc., as a sales representative and later as a regional sales manager. In 1996, he underwent surgery for a life-threatening brain hematoma. After six weeks of leave, McIntosh was demoted to sales associate. A year later, he was terminated for performance problems. McIntosh sued Stanley Bostitch, claiming disability discrimination under Ohio Rev. Code Ann. §4112.

The district court denied the employer's motion for summary judgment. McIntosh provided direct evidence that his employer regarded him as having a handicap that substantially limited the major life activity of working. McIntosh's demotion and eventual termination demonstrate that Stanley Bostitch regarded him as

not being able to participate in a broad range of jobs within the company, including the positions of sales manager and sales associate. Furthermore, McIntosh could not drive for several months and experienced a reoccurrence of dizziness and forgetfulness, of which the employer was aware, shortly before he was discharged.

Furthermore, the comment by McIntosh's supervisor, Jack Biddick, on McIntosh's demotion as being "due to . . . health problems" constituted direct evidence of handicap discrimination. First, the comment was made by the decision-maker who was behind McIntosh's demotion, Biddick. Even though Biddick did not terminate McIntosh, he reviewed the decision to do so. Second, the comment was directly related to and was about the decision-making process. Biddick said that he was demoting McIntosh because of his health. Finally, the comment was made at the same time that McIntosh was demoted, *see Cooley v. Carmike Cinemas, Inc.*, 25 F.3d 1325, 1330 (6th Cir. 1994), and the employer had not treated other employees with similar work-related performance problems in a similar fashion.

Title I; Perceived; Record; Heart

An Illinois federal court determined that based on what her supervisor may have said a factual issue exists as to whether an employer regarded a former government employee with coronary artery as having a disability within the meaning of the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.* ***Haiman v. Village of Fox Lake, 79 F. Supp. 2d 949 (N.D. Ill. 2000).***

Carolyn Haiman, a bookkeeper for the Treasurer's Department at the Village of Fox Lake, had a heart attack in August 1992 and underwent cardiac catheterization and angioplasty. She returned to work in September, but had recurrent chest pain and was placed on a medical leave of absence by her doctor from November 1992 through February 1993. Two days before she was released to return to work, the Village terminated her. She sued under Title I, 42 U.S.C. §§12111-12117. In an earlier decision, the court held that factual issues existed as to whether the Village regarded her as having a disability and whether she had a record of a disability. *See* 55 F. Supp. 2d 886 (N.D. Ill. 1999), 23 MPDLR 691.

The court denied in part, and granted in part, the Village's motion for summary judgment. Haiman presented sufficient evidence that would allow a reasonable jury to find that the Village regarded her as having an impairment that substantially limited the major life activity of working. Haiman alleged that her supervisor stated that she did not want anybody "dropping dead in my office and me paying for it," and that Haiman was causing everyone's insurance rates to go up. Although the supervisor was not the decision-maker in terminating Haiman, it could reasonably be inferred that the person who actually fired Haiman had relied on the supervisor's recommendation.

Haiman, however, failed to create a genuine issue of material fact in dispute with respect to having a record of a disability that substantially impaired a major life activity. Haiman failed to introduce evidence that a record even existed. A memo referred to Haiman's medical problem and leave, but did not refer to her as having a disability.

Title I; Perceived; Heart

A Massachusetts federal court ruled a project engineer with a cardiac impairment failed to show that he was regarded as having a disability under the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.* ***Hurley v. Modern Continental Constr. Co., 77 F. Supp. 2d 183 (D. Mass. 1999).***

Michael Hurley disqualified himself from his position as a project engineer for Modern Continental Construction due to the level of stress. When no other jobs could be found for Hurley within the company, he was terminated. He sued under Title I, 42 U.S.C. §§12111-12117, alleging that Modern had inaccurately perceived his cardiac impairment as disabling him in the major life activity of working. The district court entered judgment for Modern, and Hurley filed a motion to alter the judgment.

The court denied the motion. At most, the undisputed record reflected that Modern believed that Hurley was unsuited for jobs in the company as an estimator or safety officer because those positions were even more stressful than that of a project engineer. Disqualification from a single job or a narrow range of jobs is not enough to establish a significant restriction from a major life activity. *See Lessard v. Osram Sylvania*, 175 F.3d 193 (1st Cir. 1999). Further, the evidence reflected that Modern offered Hurley positions in the company's restaurant and on its farm, which undercuts any inference that it perceived Hurley to be significantly restricted from a broad range of jobs.

Title I; Actual; Perceived; Vision

A New York federal court held that a police officer with impaired vision in one eye was not substantially limited in the major life activity of seeing or working nor regarded as such and, thus, is not disabled within the meaning of the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* ***Ditullio v. Village of Massena, 81 F. Supp. 2d 397 (N.D.N.Y. 2000).***

Christopher Ditullio, a police officer for the Village of Massena, sustained a severe laceration to his right eye in a car accident. He returned to work on limited desk duty. After the village refused to return him to road patrol, he sued under Title I, 42 U.S.C. §§12111-12117.

The district court granted the village summary judgment. The court rejected Ditullio's contention that he is substantially limited in his ability to see. Because his left eye functions normally, his overall visual system is good. *See Still v. Freeport-McMoran, Inc.*, 120 F.3d 50 (5th Cir. 1997), 21 MPDLR 752. In fact, the medical records of Ditullio's physician indicate that his overall vision is very close to normal. Furthermore, Ditullio testified that, despite his depth perception problems, the injuries to his right eye cause him little difficulty in performing normal daily activities, including driving or working. In fact, he was able to requalify with his ser-

vice pistol after his accident. Therefore, the evidence in its totality demonstrates that Ditullio's impairment is not substantially limiting.

The court also found that Ditullio is not substantially limited in the major life activity of working. His inability to work as a patrolman pertains to a single, particular job that is insufficient to constitute a substantial limitation in the ability to work. *See Miller v. City of Springfield*, 146 F.3d 612 (8th Cir. 1998), 22 MPDLR 605. Ditullio points to no other classes of jobs or broad range of jobs that he would be unable to perform because of his impairment. The fact that Ditullio is still employed as a police officer by the village undermines any claim that he is substantially limited in his ability to work.

Finally, the court rejected Ditullio's contention that the village regarded him as disabled because it considered his eye injury as the basis for not returning him to active road patrol. First, the fact that the village continues to employ Ditullio belies the allegation that the village regarded him as substantially limited in his ability to work.

Second, assigning Ditullio to light duty does not support the inference that the village perceived him as substantially limited in his ability to work. *See Colwell v. Suffolk County Police Dep't*, 158 F.3d 635 (2d Cir. 1998), 22 MPDLR 745, *cert. denied*, 119 S. Ct. 1253 (1999). This is because it is incumbent on Ditullio to present evidence that the village perceived him as unable to perform in a broad range of jobs, not whether the village perceived him as unable to perform in the specific and limited role of a patrolman. *Id.* at 647.

Third, evidence that Ditullio was the only police officer required to submit to physical examinations provides no basis for concluding that he was regarded by the village as limited substantially in working. The fact that the village perceived a need to require the exams suggests no more than that his physical condition was an open question. *See id.* Finally, Ditullio's contention that the village considers him disabled because it looked into disability retirement for him does not support the necessary inference. The definition of the term "disability" under a particular insurance plan may not be equivalent to the definition of disability under the ADA.

Title I; Actual; Perceived; Pretext; Hip

A Wyoming federal court ruled that a former teacher's hip condition did not constitute a covered disability under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, and that the reason for her discharge—inadequate classroom management and instructional skills—was not a pretext for disability-based discrimination. ***Brown v. Holy Name Church, 80 F. Supp. 2d 1261 (D. Wyo. 2000).***

Virginia Brown had four hip replacement surgeries and walked with a limp. She requested accommodations, including limiting her time on stairs and moving her classroom to the first floor. Brown was hired through a series of annual contracts. Her contract was not renewed for the 1997-98 school year allegedly because of poor teaching skills. Brown had been counseled, but had not shown satisfactory improvements and parents had threatened to remove their children if Brown continued to teach. Brown sued under Title I, 42 U.S.C. §§12111-12117.

The court granted the school's motion for summary judgment. Notwithstanding Brown's claim that she was in constant pain, took large amounts of pain medicine, and slept sitting in a chair, she did not demonstrate that she was substantially limited in any major life activity, such as working. Moreover, other than mere awareness of Brown's hip problems and her various surgeries, there was nothing to indicate that the school regarded Brown as having a substantially limiting impairment.

Even if Brown had a covered disability under the ADA, the school offered a legitimate, nondiscriminatory reason for terminating Brown—inadequate classroom management and instructional skills. There was no evidence that Brown's problems with her hip led to the school's decision not to enter into another contract or that her disability played any role in the employment decision.

Hiring; Title I; Perceived; Asbestosis

A Louisiana federal court determined that questions of fact exist as to whether an applicant with asbestosis was denied a marine engineer position because his employer regarded him as disabled in violation of the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.* ***Sakellarides v. Sea-Land Serv., Inc., 2000 WL 37941 (E.D. La. Jan. 14, 2000).***

The record did not preclude the inference that the employer regarded the applicant as disabled and denied him the position on that basis. The court rejected the employer's argument that the applicant had presented no evidence that the employer regarded him as substantially limited in the major life activity of working—precluded from a wide range of jobs, not only from a single position or a narrow range of jobs. The record was devoid of evidence one way or the other. The employer had advised the applicant in correspondence that he would not be accepted for employment and referred broadly to his allegedly claimed asbestosis. However, these letters from the employer to the applicant could reasonably be construed as indicating that the employer perceived the applicant as substantially limited from working either in the particular marine engineer's position, or in a wide range of positions.

Title I; Drug Abuse

An Illinois federal court ruled that a former steel worker who was a current drug user did not have a covered disability under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* ***Quigley v. Austeel Lemont Co., 79 F. Supp. 2d 941 (N.D. Ill. 2000).***

Donnie Quigley, a casting supervisor for Austeel Lemont Company, received a "fair" rating for cooperativeness in a performance evaluation. He attended only six of 10 supervisor training classes. He was hospitalized for two days for severe depression

and chemical dependency, and later for in-patient treatment for drug abuse. Austeel temporarily promoted another employee to Quigley's position allegedly based on his interpersonal problems with other employees. Austeel contended that Quigley's supervisors were unaware of his enrollment in a drug treatment program at the time of the decision. After Quigley returned to work, he was issued a warning for driving on a plant road at a high rate of speed and recklessly passing other cars. Austeel terminated Quigley, and he sued for disability discrimination under Title I, 42 U.S.C. §§12111-12117.

The district court granted Austeel summary judgment. The ADA's "disability" definition does not include an individual who is currently engaging in the illegal use of drugs. *See* 42 U.S.C. §2114(a). The court rejected Quigley's argument that he fits within the ADA's safe harbor provision for individuals who have successfully completed or are participating in a supervised drug rehabilitation program and are no longer using illegal drugs. See 42 U.S.C. §12114(b). This provision applies to a long-term recovery program and to a long-term abstinence from drug use. Quigley's inpatient recovery program lasted 10 days, and he was drug free for a total period of one month before Austeel terminated his employment. This does not qualify as the intended long-term recovery. *See Baustian v. Louisiana*, 910 F. Supp. 274, 276-77 (E.D. La. 1996), 20 MPDLR 71 (finding that a drug-free period of seven weeks before termination was not sufficiently long enough under the ADA). Thus, Quigley's drug involvement within weeks and months before his termination indicates current use.

Even if Quigley's rehabilitation program was long enough under the ADA, he failed to show that his disability substantially limited the major life activity of working, or that Austeel regarded him as disabled.

State Law; Alcoholism

A North Carolina appeals court ruled that a trial court properly instructed a jury that an "active alcoholic" is not considered to be handicapped person within the meaning of the Equal Employment Practices Act of North Carolina (EEPA), N.C. Gen. Stat. §143-422.2 (1999). ***McCullough v. Branch Banking & Trust Co., 524 S.E.2d 569 (N.C. Ct. App. 2000).***

Stephen D. McCullough was fired after his employer, Branch Banking & Trust Company, learned of his arrests and convictions related to drunk driving, including revocation of his driver's license. McCullough sued under the EEPA. The trial court instructed the jury that under the EEPA the term "physical or mental impairment" excludes "active alcoholics"—persons who use alcohol in a periodic fashion during the weeks and months prior to their termination—and that an active alcoholic is not handicapped. The jury found for the employer.

The appeals court upheld the trial court's instructions. Because the EEPA does not define the term "handicap," the court looked to the North Carolina Handicapped Persons Protection Act (HPPA), N.C. Gen. Stat. §168A-2 (1995), which specifically excludes "active alcoholism" from the definition of a handicapped person. Although the EEPA and the HPPA were enacted at different times, they related to the same subject matter and, therefore, must be construed together. Consequently, the EEPA excludes "active alcoholism" from the definition of a handicapped person.

Title I; Actual; Memory Loss

The Tenth Circuit affirmed a jury verdict that a former employee with short-term memory loss, an inability to concentrate, and difficulty in doing simple math did not have a disability under the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.* ***Bowen v. Income Producing Management, 202 F. 3d 1282 (10th Cir. 2000).***

Douglas Bowen, an area director for several fast food restaurants, sustained a gunshot wound to the head. He returned to work two months later, but complained of short-term memory loss, an inability to concentrate, and difficulty in doing simple math. He was voluntarily demoted to the position of store manager with fewer hours. After repeated problems with employee conflicts, Bowen was transferred to a different store. When the new arrangement did not prove satisfactory, he was asked to resign. He sued under Title I, 42 U.S.C. §§12111-12117. A jury returned a special verdict, finding that Bowen was not substantially limited in either his ability to work or to learn.

The appeals court affirmed. Even after his injury, Bowen retained greater skills and abilities than the average person in general, as well as the average person having comparable training, skills, and abilities. When a clinical neuropsychologist performed a series of tests on Bowen to determine the effects of the gunshot injury, he found Bowen's "general intellectual function" and attention and concentration to be in the superior range. He also found Bowen's "speed of information processing" ranged from average to high average. Moreover, Bowen himself testified that, even after his injury, he was able to adequately perform each of the individual tasks required of an area director. Therefore, the court concluded, there was substantial evidence in the record to support the jury verdict.

Title I; Actual; Record; Perceived; PTSD; Cognitive Impairment

The Sixth Circuit ruled that a former hospital aid coordinator with post-traumatic stress disorder and post-traumatic brain syndrome did not have a disability within the meaning of the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.* ***Shepler v. Northwest Ohio Dev. Ctr., 2000 WL 191496 (6th. Cir. Feb. 9, 2000).***

While working for the Northwest Ohio Developmental Center (NODC), a state agency that houses and cares for adults with mental retardation, Linda Shepler was brutally attacked by a resident of Cottage 606. She was diagnosed with post-traumatic brain syndrome and post-traumatic stress disorder. After the attack, Shepler did not work for extensive periods of time. She made

four alternative requests for accommodation so that she could resume working at NODC, all of which were denied. NODC placed Shepler on involuntary disability separation. She sued NODC under Title I, 42 U.S.C. §§12111-12117, alleging failure to accommodate her disabilities. Three months later, she resumed work with NODC at a different cottage. Less than two weeks later, she requested a demotion to a different, part-time position. NODC denied the request, and Shepler never returned to work. A magistrate judge granted NODC summary judgment on the Title I claim.

The Sixth Circuit affirmed. Shepler is not substantially limited in the major life activities of caring for herself, learning, and working. She was able to care not only for herself, but also for her teenage nephew and father. Shepler worked, attended school, and camped while traveling. She exercised regularly and ate adequately. Moreover, although Shepler's ability to learn is hindered by memory and concentration problems, these problems have improved considerably since the attack. She completed her associate's degree and began working towards her bachelor's degree. Thus, her ability to learn is not "substantially" limited. Finally, Shepler is not substantially limited in the major life activity of working, as both she and her doctor repeatedly stated she could return to work as long as she was not assigned to Cottage 606. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), 23 MPDLR 510.

Nor does Shepler have a record of a disability based on NODC's placing her on involuntary disability separation and on various doctors' reports and letters referring to her disabilities. NODC's "disabled" reference and the doctors' reports and letters do not describe any substantially limiting impairment with respect to Shepler's ability to care for herself, learn, or work.

Finally, NODC did not regard Shepler as having an impairment that substantially limited her ability to work. NODC may have believed her health problems precluded her from working in Cottage 606. However, to be substantially limited in the activity of working, a plaintiff must be regarded as precluded from more than one particular job. *See Sutton*, 527 U.S. 516.

Title I; Actual; Qualified; Memory

An Illinois federal court found issues of material fact exist as to whether a former employee with a permanent residual short-term memory defect had a covered disability and was a qualified individual under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* ***Pietrusiak v. Kammerer, 1999 WL 1068468 (N.D. Ill. Jan. 8, 1999).***

Robert Pietrusiak was the Executive Director of the Kane County Health Department. Before his appointment, the Kane County Board of Health and its standing committee had full knowledge that he had a ruptured cerebral aneurysm, which impairs his ability to work with numbers on a short-term basis. His job duties involved fiscal matters including grants, cash-on-hand funds, and budget/cost management. After receiving poor performance evaluations, Pietrusiak was terminated. He sued the county and several of its employees under Title I, 42 U.S.C. §§12111-12117.

The district court denied defendants summary judgment. First, there is evidence that Pietrusiak had a covered ADA disability. His aneurysm could have affected the major life activities of learning and working, including alleged difficulties working with numbers, decreased speed of information processing, and impaired problem solving skills. The nature, severity, and long-term effect of his condition remain a question of fact.

Second, Pietrusiak presented evidence that he is qualified to perform essential job functions with or without reasonable accommodation. He was originally hired as Administrator of the Health Department, but later his title was changed to Executive Director, creating a reasonable inference that the board believed he was qualified for the position. Pietrusiak also adequately described the essential job functions, including making policy recommendations to the committee and budget/cost management.

Title I; Actual; Brain

A Connecticut federal court held that a former sales representative with arterial venous malfunction did not have a covered disability within the meaning of the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* ***Millane v. Becton Dickinson & Co., 1999 WL 1442010 (D. Conn. Sept. 23, 1999).***

John Millane worked for Becton Dickinson & Company as a sales representative. In 1990, he was reevaluated pursuant to the company's plan to revamp its sales approach to focus more on computer programs and presentations. He was evaluated as a bottom performer and placed on probation. His supervisor established a work improvement program for him. After a company reorganization, Millane was fired. He sued the company under Title I, 42 U.S.C. §§12111-12117, claiming he was terminated because of his disability (arterial venous malfunction).

The district court granted Becton Dickinson summary judgment. Millane failed to show that that he had a covered disability under the ADA. Millane was allegedly born with arterial venous malfunction, which became symptomatic at age 30 when he had a petit mal seizure. He claimed that as a result of this condition, he cannot take aspirin, cannot drink alcohol while taking medication, needs a good night's sleep, and sometimes has difficulty remembering dates. However, none of these restrictions amount to a substantial limitation on a major life activity. Major life activities include caring for self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. *See* 29 C.F.R. §1630.2(i).

Title I; Actual; Record; Perceived; Brain

An Alabama federal court ruled that a former employee with a traumatic brain injury who alleged that he was subjected to a hostile work environment and eventually fired did not have a covered disability under the Americans with Disabilities (ADA), 42 U.S.C. §12101 *et seq.* ***Phillips v. Wal-Mart Stores, Inc., 78 F. Supp. 2d 1274 (S.D. Ala. 1999).***

Wal-Mart Stores, Inc., fired Christopher Phillips, a stocker, allegedly for poor performance and attitude. Phillips sued Wal-Mart under Title I, 42 U.S.C. §§12111-12117, claiming a hostile work environment. He claimed that he received negative reviews because one of his supervisors had a personal grudge against him and made fun of his speech, and that his coworkers told him to clean the restrooms when they did not need cleaning and laughed behind his back.

The court granted Wal-Mart's motion for summary judgment. Phillips did not have a covered ADA disability. He alleged that as a result of his traumatic brain injury he had problems with his concentration, memory, and fine motor skills; his speech was slow; he tired easily; and he experienced dizziness, blurred vision, and headaches. However, these impairments impacted, but did not substantially limit, the major life activities of learning, speaking, seeing, performing manual tasks, eating and drinking, and working. First, Phillips' allegations that it took him a very long time to learn the layout of the store and that he would forget what he was doing while he was performing a particular task were insufficient to establish a finding that his impairments substantially impaired his ability to learn. Second, although Phillips had a speech impairment and it took a long time for him to convey what he was trying to say, he failed to demonstrate how this impairment substantially limited his ability to speak. Third, Phillips occasionally experienced blurred vision, but did not show that this impairment substantially impaired his ability to see. Fourth, he did not identify either specifically or by class which manual tasks he was unable to perform. Fifth, Phillips had difficulty in eating and drinking because of his lack of coordination, but that difficulty did not mean that he had a disability under the ADA. Finally, his physical and mental impairments did not substantially affect his ability to work at Wal-Mart. He did not contend that he was unable to perform any of his job duties or that he could not perform a broad range or class of jobs.

Also, Phillips' did not have a record of an ADA disability. While Wal-Mart was aware of Phillips' physical and mental impairments, it had not erroneously classified him as having a substantially limiting impairment. Nor was he regarded as having a disability. He showed that Wal-Mart regarded him as having physical and mental impairments, not that these impairments were substantially limiting any of his major life activities.

Title I; Actual; Qualified; Reasonable Accommodation; Extended Leave; Depression

A New York federal court determined that factual issues exist as to whether a former bank employee with depression had a disability and was qualified individual within the meaning of the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* ***Durrant v. Chemical/Chase Bank/Manhattan Bank, N.A., 81 F. Supp. 2d 518 (S.D.N.Y. 2000).***

Carol Durrant received short-term disability benefits for 26 weeks following a leg injury in an auto accident. After receiving long-term disability benefits for one month, her employer's doctor determined that she was able to work, and those benefits were stopped. Durrant never returned to work. She was fired while hospitalized for depression. Durrant sued under Title I, 42 U.S.C. §§12111-12117.

The district court denied the bank's motion for summary judgment. Although persons with depression are often found not to be disabled under the ADA, the issue must be addressed in light of the specific facts set forth in each case. Here, the bank failed to show that Durrant's depression did not substantially limit the major life activity of working by establishing its severity, anticipated duration, and permanent or long-term impact. *See Schneiker v. Fortis Ins. Co.*, 2000 WL 10251 (7th Cir. Jan. 6, 2000). Therefore, the court assumed that at the time Durrant was terminated, her depression constituted a covered disability under the ADA.

The bank also failed to show that Durrant would have been unable to perform the essential functions of her job even if it had extended her leave rather than fired her. The bank argued that any additional leave would not have enabled Durrant to return to work. She responded that her depression was aggravated by the bank's action in terminating her while she was disabled and that she thereby was rendered unable to work. While Durrant might have been unable to prove that her disability was aggravated by her firing, that was a factual dispute to be decided at trial. The court rejected the bank's argument that it was not obliged to offer reasonable accommodations absent evidence that Durrant had ever requested any accommodation. The bank knew that Durrant was hospitalized for psychiatric reasons when it terminated her. The evidence was consistent with the inference that the bank fired Durrant after a prolonged medical leave precisely because it learned that she had mental health problems. Consequently, Durrant was entitled to the benefit of the inference that the bank knew she was incapable of responding to its inquiry regarding her return to work, but made no serious effort to ascertain her condition before discharging her or to determine whether some brief or reasonable extension of her leave would enable her to return to work.

Title I; Actual; FMLA; Depression

An Illinois federal court ruled that a former employee with depression did not have a disability within the meaning of the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* Also, his employer did not violate the Family and Medical Leave Act (FMLA), 29 U.S.C. §2601 *et seq.*, by failing to reinstate him after he returned from medical leave, since the employer had articulated a legitimate, nondiscriminatory reason for discharging him—he was an at-will employee and had been previously charged with retail theft. ***Sommers v. Household Int'l, Inc., 1999 WL 1285858 (N.D. Ill. Dec. 30, 1999).***

Ronald Sommers had a history of being placed on "corrective action" by Household International, Inc. After a sexual harassment claim against him was made to management, he had an attack of depression, forcing him to take medical leave. When he returned to work, he was fired on charges of retail theft. Although his arrest did not end in a conviction, Household refused to rein-

state him. He sued Household under Title I, 42 U.S.C. §§12111-12117, and the FMLA.

The district court dismissed the claim. Sommers did not have a covered disability under the ADA. Sommers' depression was limited to a single episode only and, therefore, his depression did not "substantially limit" a major life activity. A person who suffers from an isolated instance of depression does not qualify as disabled for purposes of the ADA. *See Palmer v. Circuit Ct.*, 117 F.3d 351 (7th Cir. 1997), 21 MPDLR 622. Moreover, to the degree that Sommers' depression remained, it did not substantially limit his ability to engage in any major life activity. He returned to work.

Further, Household did not violate the FMLA by failing to reinstate Sommers in his position after he returned from medical leave. An employee's right to be restored to the same position he or she occupied prior to leave is not absolute. If Household had terminated Sommers even had he not taken leave, the taking of leave itself would not magically entitle Sommers to reinstatement. This remains true even when the reason for termination is discovered while the employee in question is on leave. *See Holmes v. Pizza Hut of Am., Inc.*, 1998 WL 56433 (E.D. Pa. Aug. 31, 1998). The mere proximity of time between an employee's returning from leave and the decision to terminate does not raise an inference of discrimination.

Here, the person hired to take Sommers' place had herself been on medical leave, rendering null any possibility that Household had discriminated on that basis. If Household had any penchant for that kind of discrimination, why would they have promoted her? Further, Household proffered an acceptable rationale justifying the discharge: it was under the erroneous misconception that Sommers had lied on his employment application. Although Household later found out that its decision was based on a false factual predicate, the mental process it used in determining to discharge Sommers was not prohibited by law.

Title I; Actual; Perceived; Panic; Anxiety

An Illinois federal court ruled that a factual issue exists as to whether a former city computer manager with panic anxiety disorder had a covered disability under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* ***Coniglio v. City of Berwyn, 1999 WL 1212190 (N.D. Ill. Dec. 16, 1999).***

Susan Coniglio experienced anxiety symptoms such as high blood pressure, stress, and depression after her supervisor would call her into his office while he had pornographic images on his computer. Coniglio's doctor diagnosed her with panic anxiety disorder and ordered her to work half days. When her accrued leave expired, the supervisor ordered her to either return to work full time or be terminated. Although her doctor provided a note that Coniglio was unable to return to full-time employment, the city terminated her. She sued under Title I, 42 U.S.C. §§12111-12117.

The district court denied the city's motion to dismiss, finding a question of fact exists as to whether Coniglio's panic anxiety disorder constituted a covered disability under the ADA. Coniglio alleged that she was diagnosed with a physical or mental impairment that substantially limited a major life activity. The relative severity of the condition and the specific major life activity had not been established. There was no allegation in the complaint that Coniglio was able to work full-time in another position. A mental condition that substantially limits a major life activity can qualify as a disability protected by the ADA even if it is triggered by workplace stress or personality conflicts. *See Palmer v. Circuit Ct. of Cook County*, 117 F.3d 351, 352 (7th Cir. 1997). Further, Coniglio alleged that defendants regarded her as someone with a physical or mental condition that significantly limited a major life activity. Defendants ignored this allegation.

Title I; Actual; Depression; Sleep Apnea

A Georgia federal court ruled that a former employee who alleged that her employer failed to reasonably accommodate her depression and sleep apnea by letting her work later hours did not have a disability under the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-12117. ***Hill v. Metropolitan Atlanta Rapid Transit Auth., 77 F. Supp. 2d 1291 (N.D. Ga. 1999).***

Alicia Hill, who has depression and sleep apnea, worked for the Metropolitan Atlanta Rapid Transit Authority (MARTA). She was written up and later suspended because of excessive tardiness. When the tardiness continued, she was terminated. She sued MARTA under Title I, alleging it had failed to reasonably accommodate her condition by changing her working hours to a later time.

The court granted MARTA summary judgment. Hill did not have a covered disability under the ADA. She failed to establish that her depression and sleep apnea substantially limited any of her major life activities. None of Hill's physicians ever advised MARTA that Hill's starting time should be delayed due to her condition or that tardiness was a symptom of her condition. Even Hill testified that no doctor ever told her that it was necessary for her to delay her report to work time in order to perform her job. Further, Hill's assertion that her ability to work was substantially limited was contradicted by her performance evaluations, which indicated that she met or exceeded expectations on performance standards.

State Law; Actual; Pretext; Reasonable Accommodation; Fibromyalgia

A Minnesota appeals court held there were material issues of fact as to whether (1) a former employee's fibromyalgia substantially limited her in the major life activity of working and (2) her employer's legitimate, nondiscriminatory reason for firing her was a pretext for discrimination, in violation of the Minnesota Human Rights Act (MHRA), Minn. Stat. §363.01, subd. 13 (1998). However, her reasonable accommodation claim fails because she did not show that she ever made such a request her employer. ***Hoover v. Norwest Private Mortgage Banking, Inc., 605 N.W. 2d 757 (Minn. Ct. App. 2000).***

Dianne Hoover, a mortgage banker at Norwest Funding, Inc., was diagnosed with fibromyalgia, a chronic-pain illness. Hoover gave her supervisor a copy of a letter noting her need for exercise and stress-reduction practices. Over the next year, Hoover's symptoms worsened, and she required more time to complete her work. When three loan processors complained of compliance problems in Hoover's files, Norwest audited them and discharged her. The district court dismissed Hoover's suit alleging that Norwest had fired her because of her disability in violation of the MHRA.

The appeals court reversed the district court's decision in part. The district court erred in holding as a matter of law that Hoover was not substantially limited in the major life activity of working. Hoover provided the report of a vocational expert who concluded that she was unable to perform a broad range of banking-related jobs. She also provided a letter from her treating physician who opined that she was "materially limited in her ability to perform job tasks, specifically with regard to pace, persistence, and concentration." The court concluded that these documents raise a genuine issue of material fact as to whether Hoover is substantially limited in her ability to work, given that she has only a high school education and her work experience is limited to the banking industry. The district court based its decision on Hoover's failure to provide evidence of any job that she had applied for and been denied because of her disability. *See Sigurdson v. Carl Bolander & Sons, Co.*, 532 N.W.2d 225 (Minn. Sup. Ct. 1995), 19 MPDLR 632. The appeals court found that when the alleged discriminatory action is not refusal to hire, proof of jobs for which a plaintiff applied and was rejected is not necessary to survive a motion for summary judgment. *See Mondzelewski v. Pathmark Stores, Inc.*, 162 F.3d 778 (3d Cir. 1998), 23 MPDLR 196.

Furthermore, although Norwest presented evidence of a legitimate, nondiscriminatory reason for her discharge—her failure to comply with both internal regulations for processing applications and with federal regulations that govern the banking industry—Hoover presented evidence that Norwest's proffered reason for her discharge was pretextual. A group audit conducted after her discharge indicated similar compliance problems in many loan processor's files, and affidavits of co-workers stated that compliance problems are commonplace and that Norwest did not put a high priority on compliance issues. This evidence is sufficient to survive Norwest's motion for summary judgment on the discriminatory discharge claim.

Finally, the district court properly dismissed Hoover's failure-to-accommodate claim, as there is no evidence that she ever requested an accommodation. *See Fjeltestad v. Pizza Hut of Am., Inc.*, 188 F.3d 944 (8th Cir. 1999), 23 MPDLR 512. The record demonstrates that Norwest was aware of Hoover's fibromyalgia, but it does not demonstrate that she requested an accommodation of her disability. Although her deposition responses refer generally to requests for additional clerical support, these requests appear to relate primarily to the general problems arising from the lack of available processors, rather than specifically to Hoover's impairment. Moreover, neither Hoover nor her doctor indicated a need for workplace accommodations at the time of the diagnosis.

Title I; Actual; Reasonable Accommodation; Transfer; Polio

An Illinois federal court found that a city sanitation engineer with post-polio syndrome did not have a disability under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* He was not substantially limited in the major life activities of walking, performing manual tasks, or working. ***Puoci v. Chicago, 81 F. Supp. 2d 893 (N.D. Ill. 2000).***

Pasquale Puoci was assigned to work on the Orange Peel, a piece of equipment that requires the operator to continually climb on and off the machine. After several months, Puoci was diagnosed with post-polio syndrome. He requested that his supervisors reassign him to the Yard High Lift machine, which requires an operator to climb in and out an average of only six times a day. When he received no response, Puoci sued under Title I, 42 U.S.C. §§12111-12117.

The district court granted the city summary judgment. Puoci's difficulties with walking do not constitute a disability. Although he walks with a limp and has pain and discomfort, he does not require a cane or crutch and is not subject to medical restrictions on walking. In addition, there is no evidence that his difficulty walking interferes with his ability to care for himself. Thus, Puoci's limitations constitute only moderate restrictions.

The court also rejected Puoci's claim that he is substantially limited in performing the manual asks of cutting the grass, planting and gardening, and negotiating stairs. Cutting grass, planting, and gardening are not major life activities. Although climbing stairs may qualify as a major life activity, Puoci testified that he can perform his job, which includes climbing in and out of the Orange Peel at least 14 times a day. Even the machine to which he requests a transfer requires getting in and out at least six times a day. Thus, no rational jury could find Puoci substantially limited in climbing stairs.

Finally, Puoci's testimony that he is able to perform all of the duties of his assignment to the Orange Peel undermines his argument that he is substantially limited in the major life activity of working. *See Hilburn v. Murata Elecs. N. Am., Inc.*, 181 F.3d 1220 (11th Cir. 1999), 23 MPDLR 688 (holding that plaintiff's argument that she is substantially impaired in the major life activity of working is belied by her testimony that she is able to work). Even if Puoci were disabled, the ADA only requires reassignment to a vacant position. *See* 42 U.S.C. §12111(9). The record shows that another employee occupied the Yard High Lift position when Puoci requested the transfer. Thus, his request was not a reasonable accommodation.

Title I; Actual; Vision

A Louisiana federal court decided that under the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.*, a part-time teller with corneal dystrophy did not have an impairment that substantially limited the major life activity of seeing or working. ***Lajaunie v. Hibernia Corp., 2000 WL 145362 (E.D. La. Feb. 8, 2000).***

After Brenda Lajaunie's position was eliminated, she was offered a drive-up teller position at another bank branch. She did not accept the offer because she would have problems with glare when sitting at the drive-up teller window. She sued her employer under Title I, 42 U.S.C. §§12111-12117.

The court granted the employer summary judgment. Lajaunie's inability to tolerate glare did not substantially limit the major life activity of seeing. *See Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139 (1999), 23 MPDLR 510. She was able to read, drive, and work. Her doctor's report that working with glare could be extremely uncomfortable and distracting does not constitute a substantial limitation on the major life activity of seeing. Such a finding would dilute the meaning of substantially limited to simply limited.

Nor was Lajaunie substantially limited in the major life activity of working. While she was unable perform a single job—drive-up teller—she failed to allege that she was unable to perform a class of jobs or a broad range of jobs. *See Wooten v. Farmland Foods*, 58 F.3d 382 (8th Cir. 1995), 19 MPDLR 469.

Title I; State Law; Actual; Perceived; FMLA; Serious Health Condition

A Kansas federal court held that a nurse manager with cytomegalovirus (CMV) did not have a disability within the meaning of the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.*, or the Kansas Act Against Discrimination (KAAD), Kan. Stat. Ann. §44-1001 *et seq.* Also, factual issues exist as to whether she had a "serious health condition" under the Family and Medical Leave Act (FMLA), 29 U.S.C. §2601 *et seq.*, and whether her employer interfered with her FMLA rights. ***Goodwin-Haulmark v. Menniger Clinic, Inc., 76 F. Supp. 2d 1235 (D. Kan. 1999).***

Kathleen Goodwin-Haulmark was diagnosed with CMV—a condition caused by stress that is somewhat similar to mononucleosis—and requested a medical leave of absence, which her employer refused. She sued under Title I, 42 U.S.C. §§12111-12117, and the KAAD, alleging wrongful discharge, and under the FMLA, claiming interference with her rights.

The court granted the employer summary judgment on her Title I and KAAD claims, finding she did not have a covered disability. Her CMV did not substantially limit the major life activity of working, because it did not restrict her ability to perform a class of jobs or a broad range of jobs in various classes. Moreover, she did not present evidence that her employer regarded her as substantially limited in the major life activity of working.

However, the court denied the employer summary judgment on the FMLA claim. A doctor's note stating that Goodwin-Haulmark would need treatment for several weeks and, thus, be unable to work created a factual issue as to whether she had a "serious health condition" under the FMLA. Moreover, Goodwin-Haulmark presented evidence from which a trier of fact could conclude that the employer interfered with her FMLA rights. First, when she notified her supervisor and a human resources representative that she wished to take medical leave and delivered a written request for medical leave with a doctor's note, the employer was required by the FMLA to inquire further about her condition, to grant the leave, or to request further certification. *See* 29 C.F.R. §825.302(b). Second, the employer failed to comply with the FMLA and its regulations requiring employers to post a notice summarizing employees' FMLA rights and to include a summary of employees' FMLA rights in its employee handbook. *See* 29 U.S.C. §2619; 29 C.F.R. §825.301(a)(1). Third, by forcing Goodwin-Haulmark to choose between resigning and working without leave, the employer interfered with her rights by "discouraging an employee from using [FMLA] leave." *See* 29 C.F.R. §825.220(b).

Title I; State Law; Actual; FMLA; Serious Health Condition

A New York federal court found that a former employee fired from her job while on disability leave failed to show that she had a covered disability under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, and a state anti-discrimination law, or a serious health condition under the Family and Medical Leave Act (FMLA), 29 U.S.C. §2601 *et seq.* ***Nowak v. EGW Home Care, Inc., 82 F. Supp. 2d 101 (W.D.N.Y. 2000).***

Christine Nowak sued her employer, her supervisor, and the company owner. Plaintiff claimed, in part, that stress induced by her supervisor's sexual harassment resulted in her doctor's placing her on disability leave, for which she was discriminatorily demoted and discharged on the basis of her disability in violation of state law; the ADA Title I, 42 U.S.C. §§12111-12117; 42 U.S.C. §2000e *et seq.*; and the FMLA. Defendants moved for dismissal. Nowak agreed to withdraw her ADA claims against her supervisor and the owner, as well as her claims for punitive damages under state law. Defendants filed a subsequent motion in which they argued, in part, that Nowak failed to state claims for which she was entitled to relief under the ADA, state law, or FMLA.

The district court granted defendants' motion. Nowak did not show she had a covered disability under the ADA, *see Cerrato v. Durham*, 941 F. Supp. 388 (S.D.N.Y. 1996), 20 MPDLR 821. Even if one read her complaint as implying she had hypertension, Nowak presented no facts allowing a reasonable inference that she this condition substantially limited a major life activity, *see Oswalt v. Sara Lee Corp.*, 74 F.3d 91 (5th Cir. 1996), 20 MPDLR 222. Moreover, Nowak failed to state a claim under the broader disability definition of the New York Human Rights Law, which provides that a medically diagnosable impairment qualifies as a disability even if it does not substantially limit one's normal activities, *see Reeves v. Johnson Controls World Servs., Inc.*, 140 F.3d 144 (2d Cir. 1998), 22 MPDLR 359. Nowak alleged only that stress caused her to be placed on disability leave; she provided no additional facts supporting a reasonable inference that she had a medically diagnosable impairment.

Finally, Nowak's accusations were insufficient to raise a reasonable inference that she had a "serious health condition" for which she underwent a continuing course of treatment or other-

wise experienced a period of incapacity within the meaning of the FMLA. She asserted only that her doctor had ordered her to go on disability leave in late January 1998 after she had a nosebleed; that she had returned to her job on March 3 and worked for two weeks; and that she was on disability leave a second time when her position was terminated on March 27.

State Law; Actual; Record; Perceived; Morbid Obesity

A Texas appeals court found that a morbidly obese security guard did not have a covered disability under the Texas Commission on Human Rights Act (TCHRA), Tex. Lab. Code Ann. §§21.001, 21.306. ***Morrison v. Pinkerton, Inc., 7 S.W.3d 851 (Tex. Ct. App. 1999).***

James Morrison, who was 6'4 and weighed 340 pounds, sued his employer, Pinkerton, Inc., under the TCHRA, alleging he was forced to resign because of disability discrimination due to his morbid obesity. He claimed that Pinkerton replaced him at one job and assigned him to another job at 60 cents less an hour wage on a "graveyard" shift. A state district court granted Pinkerton summary judgment because plaintiff did not have a covered disability under the TCHRA.

The appeals court affirmed. While Morrison may have been obese and his obesity may have caused him to be short of breath and tired and affected his respiratory system, he failed to show that he was substantially limited in any major life activity. Unfortunately, being out of breath or tired after walking, running, or climbing stairs does not distinguish Morrison from most of the population. Without exigent circumstances, merely being out of breath cannot be characterized as "incapacitating." Finding Morrison's obesity to be a disability would thus trivialize the impairments of those who are truly disabled.

The court did not agree that Morrison had a record of an impairment simply because he asserted that he had been overweight most of his life. He failed to show that he was classified or misclassified as having a physical impairment that substantially limited at least one major life activity. *See* Tex. Lab. Code Ann. §21.002(6). Nor did the court agree that Pinkerton regarded him as having a substantially limiting impairment. The fact that Morrison was asked not to sit in a chair because he was "too fat" did not establish that Pinkerton believed that he had a disorder that substantially limited him in sitting or any other major life activity. References to Morrison's weight demonstrated that Pinkerton regarded him as overweight, but not substantially impaired in a major life activity.

Title I; Actual; Record; Perceived; Obesity

A Georgia federal court determined that a former employee's obesity did not constitute a disability within the meaning of the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, because it did not result from a physiological condition. ***Coleman v. Georgia Power Co., 81 F. Supp. 2d 1365 (N.D. Ga. 2000).***

Donald R. Coleman worked for Georgia Power (GP) Company as a mechanic operating aerial lift devices. In 1995, GP instituted a 280-pound weight limit for employees using aerial devices. Coleman, who weighed 343 pounds, was placed on a one-time medically supervised weight loss program at company expense. Although he met the 280-pound limit in May 1996, he was over that limit in October 1996 and was fired. He sued GP under Title I, 42 U.S.C. §§12111-12117.

The court granted GP's motion for summary judgment. Coleman's obesity did not constitute a covered disability under the ADA. First, Coleman's condition did not substantially limit a major life activity. The EEOC guidelines indicate that "except in rare circumstances, obesity is not considered a disabling impairment." *See* 29 C.F.R. pt. 1630, App. §1630.2(j). Also, obesity must result from a physiological condition, *see Andrews v. Ohio*, 104 F.3d 803, 808 (6th Cir. 1997), 21 MPDLR 206. Here, Coleman's doctor testified at the deposition that Coleman had diabetes mellitus, which affects the endocrine system, and hyperlipidemia, an elevation of blood fat which may accelerate the rate of peripheral vascular disease and lead to stroke, heart attack, or kidney failure. However, the doctor testified that Coleman did not have a physiological disorder that would cause him to weigh over 300 pounds.

Second, in order have a record of a disability, Coleman had to show that in the past he was classified as having an impairment that substantially limited a major life activity. *See* 29 C.F.R. §1630.2(k). Even though Coleman proffered medical records showing that he had been classified as obese, none of the records reflected any substantial limitation in any major life activity due to his obesity.

Finally, GP did not regard Coleman as having a disability because nothing in the record suggested that GP was aware that Coleman had a history of being substantially limited in any major life activity, or regarded Coleman as being so limited.

Title I; Actual; Perceived; Qualified; Hand

The Tenth Circuit affirmed a federal court ruling that a city maintenance worker with a hand injury did not have a disability nor was a qualified individual within the meaning of the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.* ***Long v. City of Leawood, 2000 WL 14257 (10th Cir. Jan. 7, 2000). [Note: decision not final; subject to revision].***

In October 1995, Richard Long injured his right hand in a work-related accident. He returned to work in January 1996 and resumed driving two months later. In May 1996, Long backed a loader into a storage building. Pursuant to the city's drug policy, Long took a drug test after the accident and tested positive for opiates. The city terminated Long's employment because he had violated the city's drug policy and had been involved in a high number of accidents during his employment. Long sued under Title I, 42 U.S.C. §§12111-12117. The district court granted the city summary judgment.

The appeals court affirmed. Long contended that he was substantially limited in his ability to work because he could no

longer use his right hand for such activities as using a shovel or rake, lifting bags, and operating a floor buffer. In addition, Long noted that his treating physician gave him a 10 percent permanent partial disability rating as part of a workers' compensation proceeding. Long's inability to perform certain tasks that are not essential to his job does not show that his impairment substantially limited the major life activity of working. Moreover, the fact that Long's supervisor referred to him as a "one-armed man" did not establish that the city regarded him as disabled because it did not implicate his ability to perform the tasks his job position required.

Even if Long had a covered disability, he was not qualified to perform the essential functions of his job even with reasonable accommodation. The disability rating in the workers' compensation proceeding is not dispositive evidence of whether Long was a qualified individual with a disability. *See Aldrich v. Boeing Co.*, 146 F.3d 1265 (10th Cir. 1998), 22 MPDLR 610, *cert. denied*, 119 S. Ct. 2018 (1999). Long admitted that his impairment did not prevent him from carrying out his assigned duties for the city. Thus, the district court correctly found that Long had not presented a *prima facie* case of disability.

Title I; Actual; Qualified; Retaliation; Causation; Arm; Shoulder

A Kansas federal court ruled that an employee with arm and shoulder injuries did not have a disability within the meaning of the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, because she was not substantially limited in the major life activity of working. Her retaliation claim also fails because she failed to show a causal connection between the filing of her workers' compensation claim and the employer's decision to terminate her. ***Wright v. Drury Inns, Inc., 1999 WL 1423069 (D. Kan. Dec. 6, 1999).***

Debora K. Wright, a hotel housekeeper for Drury Inns, Inc., injured her right arm and shoulder on-the-job. Her physician limited her to four hours of work per day. Drury Inns allowed Wright to work a four-hour shift, limited the number of rooms she had to clean, and initially assigned another employee to help her with manual tasks. Wright was still unable to work, and took nearly two years off. When she returned, she immediately asked her supervisor to allow another employee to work with her to help her do her job. The supervisor denied her request, but reduced the number of rooms she was required to clean from 17 to 4, and advised her to perform her work using her left arm to the extent possible. Wright quit and sued Drury Inns under Title I, 42 U.S.C. §§12111-12117.

The district court dismissed. Wright failed to show that she was substantially limited in the major life activity of working and, thus, had a covered ADA disability. She presented no evidence that her condition 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 Bolton v. Scrivner*, 36 F.3d 939 (10th Cir. 1994), 18 MPDLR 659. She merely made the conclusory statement that a lifting restriction on a person whose job duties required repetitive and heavy lifting would be a substantial limitation. Moreover, Wright's inability to perform the housekeeping job does not render her disabled within the meaning of the ADA, since the inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working. *See Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139 (1999), 23 MPDLR 510. Finally, Wright failed to introduce evidence regarding the number of housekeeping jobs in the geographical area and her vocational training, skills, or abilities.

Even assuming that Wright had a covered disability, she failed to show she was a qualified individual capable of performing essential job functions with or without reasonable accommodation. Wright conceded that the only accommodation that would enable her to perform the essential functions of her job was having an assistant. Employers are not required to assign existing employees or hire new employees to perform certain functions of an employee's job that the employee cannot perform by virtue of a disability. *See Bratten v. SSI Servs., Inc.*, 185 F.3d 625 (6th Cir. 1999), 23 MPDLR 699.

Finally, the court rejected Wright's retaliation claim, finding she failed to demonstrate the existence of a causal connection between her filing a workers' compensation claim and the defendant's decision to terminate her employment. *See Zinn v. McKune*, 143 F.3d 1353 (10th Cir. 1998). The Tenth Circuit has underscored that unless the employer's adverse action is very closely connected in time to the protected conduct, the plaintiff will need to rely on additional evidence beyond mere temporal proximity to establish causation. *See Conner v. Schnuck Mkts., Inc.*, 121 F.3d 1390 (10th Cir. 1997). The mere fact that Drury Inns terminated Wright three years after she filed a workers' compensation claim, without more, is wholly insufficient to establish the requisite causal connection.

Title I; Actual; Reasonable Accommodation; Pretext

A Kansas federal court found that factual issues exist as to whether (1) a former package car driver with multiple physical impairments had a covered disability under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, (2) his employer provided reasonable accommodation, and (3) the employer's stated reason for termination was a pretext for discrimination. ***Moroney v. United Parcel Serv., 70 F. Supp. 2d 1267 (D. Kan. 1999).***

The district court denied UPS's motion for summary judgment. First, a factual issue exists as to whether plaintiff's physical impairments (injuries to his back; his left arm, shoulder, hand, hip, leg, and foot; and his right elbow, ankle, leg, and hip) substantially limited the major life activity of lifting and, thus, constitute a covered disability under the ADA. Moroney offered evidence that his doctors had restricted him from repetitive lifting more than 30 pounds and from lifting more than 50 pounds. His own testimony demonstrated that he was unable to lift without pain. *See EEOC v. United Airlines*, 185 F.3d 874 (10th Cir. 1999),

23 MPDLR 683 (finding sufficient evidence to withstand summary judgment on the issue of disability where the employee presented evidence that she could not lift more than 20 pounds or perform everyday tasks such as vacuuming, cleaning, or carrying groceries).

A factual issue also exists as to whether UPS offered Moroney reasonable accommodations. Reasonable accommodations may include reassignment to a vacant position. *See* 42 U.S.C. §12111(9)(B). UPS contended that the only accommodation Moroney alleged to have been denied was a temporary transfer to an address clerk position until a driver position became available. UPS also contended that no vacancies existed in either of these positions at the time of Moroney's request, and that in order to assign him to either of these positions, it would have had to reassign other employees in violation of the seniority provisions of its collective bargaining agreement. In support of its argument, UPS offered evidence that Moroney was unaware of any available address clerk positions when he requested a transfer. However, Moroney's knowledge of available positions at the time of his request for a transfer was irrelevant to the inquiry of whether UPS had denied him reasonable accommodations for his disabilities.

Finally, factual issues exist as to whether UPS's stated reason for terminating Moroney—failure to report to work or notify management of his absence for three consecutive days—was a pretext for discrimination. Moroney offered evidence that he advised his supervisors that he was unable to report to work at the time of his termination, and that his supervisors had verbally harassed him about his disability.

Title I; Actual; Reasonable Accommodation; Shoulder

A Michigan federal court ruled that a former employee with a shoulder injury was not substantially limited in the major life activity of working and, thus, did not have a covered disability under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* Also, the employer did not fail to provide reasonable accommodation where the employee was not qualified to perform the essential functions of the alternative positions he sought. ***Barber v. Pepsi-Cola Personnel, 78 F. Supp. 2d 683 (W.D. Mich. 1999).***

Kenneth Barber, a "combo route driver" for Pepsi-Cola Personnel, was required to transport Pepsi products in a large truck to customer locations, unload products from the truck, and place them on the customer shelves. Barber was diagnosed with a right shoulder torn rotator cuff and had surgery. He returned to work at Pepsi under its "transitional duty" program, under which employees could work while recuperating from an injury by gradually easing back to full service. The program was intended for employees who were under temporary medical restrictions of no more than 90 days. Pepsi allowed Barber to remain on transitional duty for several months. When it became clear that his medical restrictions were permanent, Pepsi removed him from transitional duty and refused to allow him to return to work. Barber sued Pepsi under Title I, 42 U.S.C. §§12111-12117.

The court granted Pepsi's motion for summary judgment. Barber's impairment did not substantially limit the major life activity of working and, thus, he did not have a covered disability under the ADA. He argued that his injury precluded him from performing the essential functions of a whole class of jobs—all transport jobs. However, he conceded that he drove a school bus and transported materials for a flooring business. He also failed to indicate why he is not capable of performing sales-related work, as he did for Pepsi, which is consistent with his physical limitation. Moreover, he is capable of laying floors, an arguably physical job, without the need for any modification of the job's usual responsibilities.

Even if Barber had a covered disability, Pepsi did not violate the ADA by refusing to make a reasonable accommodation for him. Pepsi gave Barber an extended period of transitional duty, even though it was probably not required to do so. Reasonable accommodation does not require the employer to wait indefinitely for an employee's medical condition to be corrected. *See Gantt v. Wilson Sporting Goods Co.*, 143 F.3d 1042, 1047 (6th Cir. 1998), 22 MPDLR 480.

Moreover, Pepsi demonstrated that Barber could not perform the essential functions of the two positions he identified as reasonable accommodations—full service vending job and bulk driver. He could only perform the bulk driver position with assistance, and the ADA does not require an employer to eliminate essential functions of the position as a reasonable accommodation. *See Hall v. United States Postal Serv.*, 857 F.2d 1073, 1078 (6th Cir. 1988). And, based on Barber's seniority, Pepsi could not have awarded this position to him without violating its collective bargaining agreement with the union. Regarding the vending job, it required a refrigeration certificate, which Barber did not have. Allowing Barber to bid on other positions for which he might or might not have been qualified for reasons having nothing to do with his shoulder injury—lack of sufficient seniority or certification—did not amount to a reasonable accommodation of his alleged disability.

Title I; Actual; Pain

A Mississippi federal court decided that a former employee with back and buttocks pain did not have a covered disability within the meaning of the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, because he was not substantially limited in the major life activities of working or sitting. ***Rettig v. Boyd Tunica, Inc., 1999 WL 1068604 (N.D. Miss. May 7, 1999).***

Stephen Rettig, a boxman for Boyd Tunica, was required to sit and supervise the activity at the craps table. After several years, Boyd Tunica increased the amount of time sitting at the table from one to three hours, and Rettig suffered a flare-up of his chronic prostatitis, causing great pain in his back and buttocks. Eventually Boyd Tunica granted Rettig's request that he be allowed to sit on a pillow, but reneged due to the risk of theft. Rettig took a leave of absence during which he requested that he

be accommodated. Boyd Tunica did not respond. After Rettig's was released for work, Boyd Tunica offered him non-comparable positions, but he accepted an extended leave of absence instead and was fired when he did not return to work. Rettig sued under Title I, 42 U.S.C. §§12111-12117.

The district court granted the employer's motion for summary judgment. Rettig failed to show that he was substantially limited in the major life activity of working. Although Rettig could no longer perform the job duties of a boxman, he was not restricted from performing a class of jobs or a broad range of jobs. The inability to perform a single, particular job does not constitute a substantial limitation on the major life activity of working. *See* 29 C.F.R. §630.2(j)(3)(1). Rettig is an educated individual, with college and graduate degrees in both engineering and business.

Rettig also failed to show that he is substantially limited in the major life activity of sitting. His condition causes some restriction in his ability to sit, but this is only moderate. *See Horth v. General Dynamics Land Sys., Inc.*, 960 F. Supp. 873, 878 (M.D. Pa. 1997) (ruling that plaintiff, who was unable to sit or stand for more than two hours, was not disabled under the ADA). Further, Rettig asserted that he was limited in the major life activities of concentrating, urinating, and sexual functioning. However, he failed to offer any authority to support the contention that these constitute major life activities under the ADA. He also failed to provide any evidence that he is substantially limited in those activities. While the pain and discomfort may make it difficult for Rettig to concentrate and cause the need to urinate more frequently, both of these complaints are the result of the prolonged sitting required of the job and, thus, relate to the major life activity of working. The court has already determined that Rettig is not substantially limited in working. Moreover, there is no evidence that Rettig is substantially limited in concentration and urination outside of work. Finally, he failed to provide any evidence whatsoever regarding his alleged limitation of sexual functioning.

Title I; Actual; Foot

A Texas federal court found that the fact that a former surgical services nurse's foot deformity was progressive did not make it a "substantially limiting" disability within the meaning of the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.* ***Nicholson v. Paracelsus Mesquite Hosp., Inc., 2000 WL 62940 (N.D. Tex. Jan. 24, 2000).***

The court granted the hospital summary judgment on Barbara Nicholson's Title I, 42 U.S.C. §§12111-12117, claim. Her foot deformity did not substantially limit the major life activities of walking or standing. The restrictions that her doctor ordered—light-duty work, standing for fewer than 60 to 90 minutes, and walking for fewer than 100 feet—were temporary while Nicholson wore her cast. These modest restrictions were not substantial limitations. *See Penny v. United Parcel Serv.*, 128 F.3d 408, 415 (6th Cir. 1997) (noting that cases make clear that moderate difficulty or pain experienced while walking does not rise to level of disability); *Miller v. Airborne Exp.*, 1999 WL 47242 (N.D. Tex. Jan. 22, 1999) (holding that plaintiff's need to rest or sit after standing for more than 30 minutes did not demonstrate that his knee injury left him unable to stand or that he was significantly restricted as compared to the condition, manner, or duration under which the average person could stand). Nicholson introduced no evidence that, at the time she was discharged, she was unable to stand or walk or that she was significantly restricted with respect to either activity when compared to the average person in the population.

Moreover, Nicholson admitted that she was able to do rounds and did not feel that her medical condition limited her ability to do any aspect of her job. In addition, the fact that Nicholson's doctor characterized her foot deformity and pain as progressive was insufficient to prove that she was disabled at the time of her termination. *See Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139 (1999), 23 MPDLR 510. The court rejected Nicholson's argument that at the time she was terminated she was in the early stages of a permanently disabling condition and that her condition was analogous to a person with an HIV infection, which was an impairment even if asymptomatic. *See Bragdon v. Abbott*, 524 U.S. 624 (1998), 22 MPDLR 449. She failed to introduce evidence that the major life activities of walking and standing were substantially impaired during the early stages of her condition.

Title I; State Law; Actual; Reasonable Accommodation; Back; Neck

A Pennsylvania federal court determined that a former customer service technician who claimed that his employer failed to reasonably accommodate his back and neck injuries did not have a covered disability under the Americans with Disability Act (ADA), 42 U.S.C. §12101 *et seq.*, or the Pennsylvania Human Relations Act (PHRA), 43 Pa. Cons. Stat. Ann. §§951-963. ***Morrone v. UGI Utils., Inc., 2000 WL 92341 (E.D. Pa. Jan. 27, 2000).***

After Michael A. Morrone's surgery for back and neck injuries, medical authorities determined that he was fully recovered. When his employer, UGI Utilities, demanded that he return to work, he said he required a different position with accommodations. UGI requested information about Morrone's medical status and need for accommodations, but Morrone never replied. UGI again demanded that Morrone return to work, but Morrone failed to respond. Soon thereafter, he acquired a position with a different company. Morrone sued UGI for violations of the ADA and the PHRA.

The court granted UGI summary judgment, finding that Morrone was not substantially limited in the major life activity of working and, thus, did not have a covered disability. Of the six doctors' letters presented by Morrone, only one discusses Morrones' physical limitations. That letter indicated that although Morrone could not return to his previous position, he could return to a position with fewer physical demands. Moderate restrictions do not constitute a significant limitation on an individual's ability to work. *See Williams v. Channel Master Satellite Sys., Inc.*, 101 F.3d 346, 349 (4th Cir. 1996), 21 MPDLR 65. Moreover, Morrone's ability to find a new job indicated that he

was not substantially limited in his ability to work or perform manual tasks.

Even if Morrone had a covered disability, he failed to participate in an interactive process by discussing possible accommodations with IGI. *See Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 312 (3d Cir. 1999), 23 MPDLR 841. IGI had requested information on accommodations from Morrone, but he failed to respond.

Title I; Retaliation; Adverse Action; Knee

An Ohio federal court ruled that an employee who alleged that his employer failed to accommodate his knee injury did not have a covered disability under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, and failed to show that the employer retaliated against him for filing an Equal Employment Opportunity Commission (EEOC) charge. ***Vass v. Riester & Thesmacher Co., 79 F. Supp. 2d 853 (N.D. Ohio 2000).***

Laszlo Vass, a press brake operator, could not operate the mechanical press brake due to pain, swelling, and instability in his knee. His employer, The Riester & Thesmacher Company, had no light-duty work available, and Vass remained out of work. After Riester purchased a hydraulic brake with an electrical pedal, Vass was able to work as a press operator. After knee surgery, Vass' doctor restricted him to operating a press brake with an electrical, not a mechanical, pedal. Riester again stated that there was no light-duty work available and that placing Vass on the electric brake was not viable because he never became efficient at operating it. Vass filed an EEOC charge.

Riester offered him assignment in the paint and packaging department, but Vass refused on the grounds that he could not climb stairs, he was allergic to chemicals, and the position was punitive and little more than a downgrade from the status of a skilled tradesman to a general laborer. Following another injury, Vass remained out of work. Riester then purchased a new hydraulic press brake with an electrical pedal. Vass' doctor released him to work on the new machine, but Riester refused to allow Vass back until he obtained a release from the company doctor. Vass filed a second EEOC charge. Riester assigned another employee to operate the new machine. Vass returned to work in the metal finishing department. He sued Riester under Title I, 42 U.S.C. §§12111-12117, alleging faiure to reasonably accommodate his disability.

The court granted Riester summary judgment. Vass did not have a covered disability under the ADA. His knee injury did not substantially limit the major life activities of walking or working. Vass walks without a wheelchair or a cane, using only a knee brace while at work; he walks up eight stairs in his home without assistance; works in his garden and performs the family's yard work on his own; lifts objects under 25 pounds; operates a wide variety of machinery while at work; and currently works as a general laborer who does "almost everything." To be substantially limited in the major life activity of working, one has to be precluded from a class of jobs, not just a particular job. Vass' evidence shows that he cannot perform a particular job—operating a mechanical press brake as opposed to an electrical or hydraulic press brake. *See* 42 U.S.C. §12102(2). *See also Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139 (1999), 23 MPDLR 510. The major life activity of working, however, does not mean working in the job of one's choice. *See id.*

The court rejected Vass' argument that Riester retaliated against him for filing his first EEOC charge. Vass refused Riester's offer of a reasonable accommodation working in the paint and packaging department, and he continued working at Riester with the same salary and work hours as before he filed his EEOC charge. His reassignment without salary or work hour changes was not a materially adverse employment action. *See Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876, 886 (6th Cir. 1996), 20 MPDLR 822.

Title I; Actual; Back

The Tenth Circuit affirmed a federal court ruling that a former employee with an injured back that limited his ability to work did not have a disability under the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.* ***Rebarchek v. Farmers Coop. Elevator & Mercantile Ass'n, 2000 WL 14277 (10th Cir. Jan. 7, 2000) [Note: decision not final; subject to revision].***

After back surgery, Larry Rebarchek was released to light-duty work with restrictions of no lifting more than 40 pounds; no bending or twisting of the back more than halfway; no climbing ladders; and no sitting, standing, or walking for more than two hours at a time. After Rebarchek was terminated, he sued under Title I, 42 U.S.C. §§12111-12117. The district court dismissed the claim, concluding that Rebarchek's restrictions did not constitute a substantial limitation on any major life activity. *See* 60 F. Supp. 2d 1145 (D. Kan. 1999), 23 MPDLR 845.

The appeals court affirmed. Rebarchek cited no evidence showing that the restrictions on his lifting, walking, sitting, and standing abilities were significant when compared to the average person's abilities. Moreover, there was no evidence that the restrictions placed on Rebarchek following his back surgery were expected to be of significant duration. *See* 29 C.F.R. §1630.2(j)(2).

Title I; Major Life Activity; Driving; Back

A Puerto Rico federal court ruled that because driving is not a major life activity under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, a police officer with a back injury did not have a covered disability. ***Lopez v. Police Dep't of P.R., 81 F. Supp. 2d 293 (D.P.R. 1999).***

While making an arrest, Lutgardo Lopez injured his back. Upon his return to work, he requested and received a transfer to be closer to his home. Four years later, he was reassigned to an area that was further from his home. He resigned and sued under Title I, 42 U.S.C. §§12111-12117.

The district court granted the police department summary judgment. The only major life activity in which Lopez alleged he was substantially limited was driving. The Second Circuit has

held that driving does not constitute a major life activity. *See Colwell v. Suffolk County Police Dep't*, 158 F.3d 635 (2d Cir. 1998), *cert. denied*, 119 S. Ct. 1253 (1999). The court here agreed, reasoning that the significance of driving is simply not on par with those basic, essential functions that are contemplated by the ADA, such as caring for oneself, walking, seeing, hearing, speaking, breathing, learning, and working. *See* 28 C.F.R. §41.31(b)(2).

Title I; Actual

A D.C. federal court ruled that an accounting clerk failed to show that she had a disability within the meaning of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* She did not refer to a specific disability in her complaint nor proffer any evidence of a disability. ***Johnson v. Jackson & Campbell, P.C., 1999 WL 1301234 (D.D.C. Mar. 1, 1999).***

Tracy Johnson was terminated for below-average job performance. She sued her employer under Title I, 42 U.S.C. §§12111-12117, alleging discrimination based on an unspecified disability. The federal court granted defendant summary judgment. Johnson did not refer to a specific disability in her complaint, nor did she proffer any evidence of a disability. Furthermore, she did not demonstrate that Jackson & Campbell had any knowledge that she had a disability. *See Hadberg v. Indiana Bell Tel. Co.*, 47 F.3d 928 (7th Cir. 1995).

Title I; Actual; Perceived; Pretext; Ear Infections

The First Circuit summarily affirmed a Puerto Rico federal court ruling, *see* 1999 WL 118463, 23 MPDLR 354, that (1) a flight attendant who could fly only in pressurized planes due to ear infections did not have a disability within the meaning of the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.*, and (2) her employer's reason for terminating her—violation of company policy by authorizing travel to a man who was not her husband—was legitimate and nondiscriminatory. ***Santiago v. Executive Airlines, Inc., 1999 WL 1295832 (1st Cir. Dec. 29, 1999).***

Employment: Medical Leave/Exams

FMLA; Eleventh Amendment; Title I; Adverse Action

A Mississippi federal court ruled that a state was immune under the Eleventh Amendment from a suit under the Family and Medical Leave Act (FMLA), 29 U.S.C. §2601 *et seq.*, because Congress exceeded its authority under the Fourteenth Amendment in enacting the act. Also, the state did not violate the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, when it refused to accommodate an employee to allow her to care for her allegedly disabled family members because she failed to show that this constituted an adverse action against her. ***Darby v. Hinds County Dep't of Human Servs., 83 F. Supp. 2d 754 (S.D. Miss. 1999).***

Cynthia Darby is an eligibility worker for the Hinds County Department of Human Services. Due to numerous family medical crises, she took extensive amounts of time off. She sued alleging the department violated her FMLA rights by denying her leave and retaliating against her for exercising her rights under the act. She also sued under the ADA Title I, 42 U.S.C. §§12111-12117, alleging discrimination because of known disabilities of her family members.

The district court dismissed Darby's FMLA action as barred by the Eleventh Amendment. Congress has expressed its unequivocal intent to abrogate states' immunity with respect to suits under the FMLA. *See* 29 U.S.C. §2617(a)(2). However, Congress, in enacting the FMLA, exceeded its enforcement powers under the Fourteenth Amendment. *See Post v. Kansas*, 1998 WL 928677 (D. Kan. Dec. 10, 1998), 23 MPDLR 198; *Driesse v. Florida Bd. of Regents*, 26 F. Supp. 2d 1328 (M.D. Fla. 1998); *McGregor v. Goord*, 18 F. Supp. 2d 204 (N.D.N.Y. 1998); *Thomson v. Ohio State Univ. Hosp.*, 5 F. Supp. 2d 574 (S.D. Ohio 1998), 22 MPDLR 481.

The evil that Congress purported to address in enacting the FMLA was gender discrimination. *See* 29 U.S.C. §2601(b). However, the means adopted by Congress—a 12-week leave period—is not tailored to remedy or prevent gender-based discrimination in the workplace. Thus, the act crosses "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law." *See City of Boerne v. Flores*, 521 U.S. 507 (1997). Accordingly, the states' Eleventh Amendment immunity remains intact, notwithstanding Congress' intention that it be abrogated. *See Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

The court also dismissed Darby's ADA claim. She claimed that as a consequence of her association with her mother, son, and daughter—whom she contends were known by the department to have disabilities—she received reprimands, poor work evaluations, and harassment from co-workers and supervisors. However, none of these actions constitute an "ultimate employment decision" as proscribed by the ADA. *See Dollis v. Rubin*, 77 F.3d 777 (5th Cir. 1995). Accordingly, Darby failed to establish that she had suffered an "adverse action," a requisite element of her *prima facie* case. *See Rizzo v. Children's World Learning Ctrs., Inc.*, 84 F.3d 758 (5th Cir. 1996), 20 MPDLR 515. Even if she had suffered such an action, the regulations interpreting the ADA make clear that the department was not obligated to accommodate Darby to allow her to care for her allegedly disabled family members. *See* C.F.R. §1630.

Termination; FMLA; Eligibility; Absenteeism

The Sixth Circuit ruled that the 1,250 hours that employees are required to have worked for their employer in order to be protected by the Family and Medical Leave Act (FMLA), 29 U.S.C. §2601 *et seq.*, must be computed from the date the leave commenced, rather than the date of the adverse action. ***Butler***