MPDLR 511. By using his contact lenses, Pacella was "able to function like a normal person [except it was] a little bit harder for him [to read] really fine print." He had obtained occupational bifocals, which by his own admission addressed his need to be able to discern detail. The only significant visual problem Pacella had been unable to correct with any physical optical aide was his lack of depth perception caused by his monocular vision. However, he admitted to using visual cues, namely association, shading, and touching, to help him compensate for his deficit in depth perception. Although Pacella's lack of depth perception slowed down "significantly" the amount of time he took to perform assignments where depth perception was required, his classmates performed the same tasks only "somewhat faster." While Pacella's corrected vision may vary from that of the general population, such differences do not constitute a substantially limiting disability.

However, the court denied the school summary judgment on the retaliation claim. Pacella did not have to show that he had a covered disability in order to state such a claim. *See Soileau v. Guilford of Maine, Inc.*, 105 F.3d 12, 16 (1st Cir. 1997).

Employment: Disability Defined

Title I; Mitigating Measures

Bipolar Disorder

The Third Circuit held that a former secretary with bipolar disorder created a genuine factual dispute under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, as to whether her condition, as medicated, substantially limited a major life activity. *Taylor v. Phoenixville Sch. Dist., 184 F.3d 296 (3d Cir. 1998).*

Katherine Taylor, an elementary school secretary for 20 years, experienced a sudden change of behavior that culminated in an episode after a new principal took over. She was hospitalized and missed three months of work. When Taylor returned, the principal updated her job description to include an increased number of tasks. The principal was dissatisfied with her performance. Although communications and relations between the principal and Taylor deteriorated, Taylor's doctor advised the school district that Taylor was able to work and was not disabled. Taylor did not report to the school district that she was having difficulty performing her functions due to stress. After she was dismissed for unsatisfactory performance, Taylor sued under Title I, 42 U.S.C. §§12111-12117.

A Pennsylvania federal court granted the school district summary judgment, holding Taylor's bipolar disorder was not a disability and that she was not qualified. *See* No. Civ. A. 96-8470 (E.D. Pa. Mar. 20, 1998), 22 MPDLR 329. The Third Circuit reversed, finding Taylor's unmedicated condition demonstrated that she has a disability, and that she raised genuine factual disputes as to whether the school district participated in good faith in the interactive process required by the ADA. *See* 174 F.3d 142 (3d Cir. 1999); 23 MPDLR 345. When the school district sought rehearing, the Third Circuit held its petition until the Supreme Court announced its decisions in two then-pending cases addressing whether disabilities under the ADA are to be judged with or without regard to mitigating measures. In *Sutton v. United Airlines, Inc.*, 119 S. Ct. 2139 (1999), and *Murphy v. United Parcel Serv.*, 119 S. Ct. 2133 (1999), the Supreme Court held that mitigating measures must be taken into account when determining whether a plaintiff is disabled under the ADA.

Based on these decisions, the Third Circuit granted panel rehearing and vacated its prior opinion. The court found genuine factual disputes as to whether Taylor's bipolar disorder, when she is taking lithium, substantially limits a major life activity. Taylor claimed that even though lithium has improved her condition and reduced the risk of full-blown psychotic episodes, the drug does not perfectly control her symptoms, leaving her still substantially limited in her ability to think. Lithium has a very narrow therapeutic range, and blood levels of the drug can fluctuate for a variety of reasons. The evidence shows that throughout the 1993-94 school year, Taylor experienced enough difficulty that she saw her psychiatrist 25 times even though she earned a secretary's salary, had to care for a disabled child, and had to pay half the $120 fee herself. One can infer that she would not have undertaken such expense without experiencing serious difficulty. Furthermore, lithium can cause a number of side effects, including nausea, impaired concentration, and memory problems. Taylor's problems at work may have been related to these side effects, and the Supreme Court has noted that drug side effects can be important in evaluating whether someone is disabled. *See Sutton,* 119 S. Ct. at 2147.

By contrast, the school district presented the report of its expert, Dr. Rieger. His report, which was based on only one office visit, indicates that Taylor's "misconduct was solely due to her basic personality," and "[w]hatever subjective difficulties she experienced during her last year of employment were not due to her mental illness but due to her peculiar personality traits. ..." A reasonable jury could question Dr. Rieger's conclusion that all of Taylor's problems at work were due solely to her peculiar personality traits, not her mental illness. Taylor had performed very well at work before the onset of her illness, and a jury could finding it surprising that the peculiar personality traits manifested itself only after she became ill.

The court rejected the school district's claim that Taylor is not disabled based on her doctor's note, which stated that she was "able to return to work and is not disabled." The doctor's remark appears simply to be another way of saying that Taylor was capable of working. It is hardly conclusive proof that Taylor was not substantially limited. While the doctor's use of the term "disabled" is not unusual, it is not an accurate definition for purposes of the ADA. The Supreme Court recently rejected glib estoppel arguments that turn on the different meanings carried by the term "disability." *See Cleveland v. Policy Mgmt. Sys. Corp.*, 119 S. Ct. 1597 (1999). Having concluded there are genuine factual

disputes about whether Taylor has a disability under the ADA, the court remanded for consideration of whether the school district was responsible for the breakdown in the interactive process involving reasonable accommodation.

Finally, because *Sutton* and *Murphy* concerned only the issue of when a plaintiff has a disability under the ADA, the previous discussion of the interactive process is unaffected and incorporated, unchanged, in this opinion.

Depression

An Illinois federal court ruled that a former employee with depression did not have a disability under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, because she was not substantially limited in a major life activity when she was taking her medication, nor did her employer regard her as having a disability. *Robb v. Horizon Credit Union, 1999 WL 731050 (C.D. Ill. Sept. 14, 1999).*

Mary Robb, an employee at Horizon Credit Union, was hospitalized with depression for three weeks. When she returned, she was able to perform all of her job tasks, but was still taking medication to treat her depression. She was fired two months later due to a "personality conflict." Robb sued under Title I, 42 U.S.C. §§12111-12117, alleging she had been terminated because of her disability.

The district court granted the Credit Union summary judgment. Robb's depression, when medicated, does not substantially limit a major life activity. When determining whether an individual is "substantially limited" in a major life activity and, thus, "disabled" under the ADA, the court must consider the effects of any corrective measures that the person is taking, including medications. *See Sutton v. United Airlines, Inc.*, 119 S. Ct. 2139 (1999), and *Murphy v. United Parcel Serv., Inc.*, 119 S. Ct. 2133 (1999).

Nor does Credit Union regard Robb as having a disability. She asserts that the rumor around the office was that she had had a nervous breakdown, that the office atmosphere was cold, and that her supervisor was unsympathetic during her hospitalization and admitted that he had not coped well with his father's mental illness. This was insufficient to support an inference that Credit Union regarded Robb as having a disability. It might have regarded her as impaired, but a perceived impairment alone does not rise to the level of a protected disability under the ADA. *See Duff v. Lobdell-Emery Mfg., Co.*, 926 F. Supp. 799 (N.D. Ind. 1996), 20 MPDLR 501. A plaintiff must show not only that the defendant knew about her impairment, but also that the defendant believed that it substantially limited a major life activity. *See Skorup v. Modern Door Corp.*, 153 F.3d 512 (7th Cir. 1998), 22 MPDLR 751.

Qualified; Direct Threat; Reasonable Accommodations; Seizures

A Kansas federal court ruled that a former employee who alleged that he was terminated due to a seizure disorder in violation of the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-12117, did not have a covered disability because his seizures were controlled by medication, nor was he a qualified individual. Also, his employer did not fail to reasonably accommodate his disability. *Spradley v. Custom Campers, Inc., 1999 WL 760659 (D. Kan. Aug. 19, 1999).*

In 1994, Brian Spradley applied for work with Customer Campers. He did not list on a new employment sheet that he had seizures or epilepsy because at that time he did not believe that he had these conditions. Spradley injured his elbows and right shoulder at work, and was assigned maintenance work. In the fall of 1995, he had two seizures at work, but his doctor reported no seizure disorder at that time. In February 1996, Spradley was diagnosed with a general seizure disorder, and he was prescribed Dilantin to reduce the likelihood of seizures. Spradley's doctor told him that he should not drive a vehicle or be around hazardous machinery, even if he was taking Dilantin. Custom Campers terminated Spradley on the ground that he posed a safety risk to himself and other employees. Spradley sued Custom Campers for violating Title I.

The court dismissed Spradley's ADA claim. First, he did not have a covered disability because he failed to show his seizures substantially limited a major life activity. The U.S. Supreme Court has held that if a disorder can be controlled by medication or other corrective measures, it is not substantially limiting. *See Murphy v. United Parcel Serv., Inc.*, 1999 WL 407472 (June 22, 1999). Spradley conceded that on both occasions when he had seizures at work, he was not taking Dilantin. Although the facts indicate that taking Dilantin will not necessarily eliminate seizures, it would make it far less likely that he would have seizures.

Second, even if Spradley had a covered disability, he was not a qualified individual because he could not perform the essential functions of his job even with reasonable accommodations without endangering the health and safety of himself or others. *See Chiari v. City of League*, 920 F.2d 311, 317 (5th Cir. 1991). When Spradley had a seizure, he was near an industrial trash compactor. Had he fallen into the compactor, he would have been injured or killed. Moreover, the employer could not modify the job to eliminate the risk. *See Chandler v. City of Dallas*, 2 F.3d 1385, 1393 (5th Cir. 1993). He was employed in the safest position he was qualified to occupy in the plant.

Third, the court rejected Spradley's argument that Custom Campers failed to reasonably accommodate him. Spradley had not requested restructuring of his job requirements or job transfer. Although he could have performed some maintenance and janitorial jobs, this work would only take 25 percent of the time. Spradley could not have performed other jobs in the metal department, including running a screw gun or doing wiring.

FEHA; LD

A California appeals court held the definition of "mental disability" under the Fair Employment and Housing Act (FEHA), Cal. Gov't Code §12900 *et seq.*, is different from the

definition in the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, in that it does not require that the disability "substantially limit" or even "limit" a major life activity. *Swenson v. County of Los Angeles, 89 Cal. Rptr. 2d 572 (Cal. Ct. App. 1999).*

Stanley Swenson, a physician employed by Los Angeles County Medical Center, has attention deficit disorder, dyslexia, and a disability involving writing and written expression. Although his duties included preparing written patient records, he was able to discharge that duty by using residents he supervised. After 15 years, Swenson was assigned to a non-teaching ward. Because there were no residents, Swenson had sole responsibility for preparing written patient charts. He had difficulty completing this task due to his mental disabilities. He requested several accommodations, but none were granted. Eventually, Swenson was terminated. He sued the medical center under FEHA.

At trial, the court instructed the jury that "[a]n employee has a mental disability when he has or is regarded by his employer as having any mental disorder or condition which affects one or more major life activities." The trial court refused the medical center's proposed jury instruction, based on the ADA, that the mental condition must substantially limit a major life activity. The jury found for Swenson.

The appeals court affirmed. Under the ADA, an individual is entitled to protection only if a physical or mental impairment is so serious that it "substantially limits" a major life activity. The FEHA definition contains no express requirement as to the degree of disability that must result from a condition in order to trigger the statutory protection it provides. The existence of a disabling mental condition—unless otherwise excluded—qualifies an individual for protection from employment discrimination based on the condition.

The court rejected the medical center's argument that the legislature intended FEHA to include the same requirements as the ADA for both physical and mental disability. The legislature provided definitions of mental and physical disability with an express provision that the ADA standard be used only if it would result in "broader protection of the civil rights of individuals with a mental disability or physical disability" or include any disabling conditions not included in FEHA definitions. The fact that the FEHA standard for mental disability is less exacting than the ADA provision is consistent with this express legislative intent.

Title I; Actual; Reasonable Accommodation; Retaliation; Stress

A divided Ninth Circuit reinstated the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-12117, claim brought by an employee diagnosed with anxiety disorders, panic disorders, and somatoform disorders, finding factual issues existed as to whether he had a covered disability and was reasonably accommodated under the ADA. However, the employee's ADA retaliation claim denial was affirmed. *McAlindin v. County of San Diego, 192 F.3d 1226 (9th Cir. 1999).*

Richard McAlindin, a county systems analyst, sought leave due to work stress. He requested a transfer as a reasonable accommodation under the ADA. The county preferred to accommodate McAlindin in his present job, because county policy required employees to arrange their own transfers. After returning from leave, McAlindin believed that his supervisors treated him in a discriminatory manner by not providing him with proper training and issuing him warnings after he fell asleep on the job. McAlindin sued under Title I, alleging denial of reasonable accommodation and retaliation. A California federal court dismissed his claims.

The Ninth Circuit found a genuine issue of material fact as to whether he had a covered disability. He asserted that he was substantially limited in the major life activities of sleeping, engaging in sexual relations, and interacting with others. In denying his claim, the district court summarily dismissed most of McAlindin's asserted major life activities and focused on working only. Whether McAlindin faced substantial limitations in his ability to work is irrelevant to whether his limitations in other major life activities qualify him as disabled for ADA purposes. Relying on *Bragdon v. Abbott*, 118 S. Ct. 2196 (1998), 22 MPDLR 449, the appeals court held that engaging in sexual relations, like procreation, was a major life activity. In addition, the appeals court found that "common sense suggests that sleeping is also a major life activity in the lives of most people," because a person generally spends one-third of each 24-hour day asleep, and sleeping is indispensable to the maintenance of personal health. Finally, the appeals court determined that interacting with others, like walking and breathing, was a major life activity. "Recognizing interacting with others as a major life activity of course does not mean that any cantankerous person will be deemed substantially limited in a major life activity."

Here, McAlindin stated that he was impotent as a result of medications he took, and that his medications disrupted his normal sleep patterns and caused him to be drowsy at work. Several doctors who evaluated McAlindin reported his difficulty interacting with others. These evaluations suggested that McAlindin had a total inability to communicate at times, in addition to a more subtle impairment in engaging in meaningful discussion. In *Sutton v. United Airlines*, 119 S. Ct. 2139 (1999), 23 MPDLR 510, the U.S. Supreme Court recognized that the use of medication may not eradicate the effects of illness, and that a disability may remain due to symptoms of the condition itself, which persist despite the effects of medication, or as a result of the medication's side effects. The facts as alleged by McAlindin, if true, bring this case within the category described in *Sutton*.

The appeals court also concluded that a genuine issue of material fact existed as to whether the county denied McAlindin reasonable accommodations. The issue was not whether McAlindin received the same treatment as everyone else did, but whether the county took reasonable steps to accommodate his limitations in ways that did not impose undue hardship on it.

However, the appeals court affirmed the dismissal of McAlindin's ADA retaliation claim. McAlindin alleged that his co-workers ignored him; that he was reprimanded for sleeping on the job; and that the county failed to (1) provide necessary training, (2) extend his employment status to leave without pay with the right to return while he was on disability leave, and (3) transfer him. Mere ostracism in the workplace is not enough to show an adverse employment decision. *See Strother v. Southern Cal. Permanente Med. Group*, 79 F.3d 859, 869 (9th Cir. 1996). Also, the county's refusal to extend his right to return beyond a year, which was dictated by its leave policy was not an adverse action. The county permitted him to return to his job and informally assured him that it would respect his right under the ADA.

However, the remaining incidents qualify as adverse employment actions. Adverse actions need not be severe. *See Bouman v. Block*, 940 F.2d 1211, 1229 (9th Cir. 1991). Nonetheless, the retaliation claim ultimately fails because McAlindin failed to show that the adverse actions occurred because of his protected activities. Rather, they occurred because the county followed universally-applied policies.

A dissent commented that McAlindin did not identify his inability to interact with others as a mental or physical impairment. "At best, the suggestion that he cannot get along with others may be a symptom or a consequence of a disability, but not a disability *per se*." There was no causal connection demonstrated with McAlindin's alleged sexual dysfunction and his job. Is the employer "supposed to accommodate his impotence?" Finally, there was no evidence that McAlindin suffered any adverse employment action. The county had not denied him a transfer, had only warned him about sleeping on the job, and had provided McAlindin the same training as other employees.

Title I; Major Life Activities; Panic Disorder

A New York federal court ruled that because "thinking normally" and "socializing" are not major life activities under the American with Disabilities Act (ADA) Title I, 42 U.S.C. §12111, an employee with a panic disorder did not have a covered disability. *Francis v. Chemical Banking Corp., 62 F. Supp. 2d 948 (E.D.N.Y. 1999).*

Donahue Francis, a printer operator for Chemical Bank, was diagnosed in 1994 as having anxiety disorder with agoraphobia. In 1995, Chemical Bank terminated Francis after he had been on leave for more than 27 weeks, had used all allotted sick days, and had not elected long-term disability coverage. Francis sued under Title I.

The U.S. Supreme Court has articulated a three-step process for evaluating a disability claim under the ADA. *See Bragdon v. Abbott*, 524 U.S. 624 (1998), 22 MPDLR 449. First, the court determines whether the plaintiff has a physical or a mental impairment. Second, the court considers whether the life activity indicated by the plaintiff qualifies as a major life activity under the ADA. Finally, the court determines whether the claimed impairment substantially limits the major life activity.

Assuming that Francis's panic disorder constituted a mental impairment, he failed to show that it substantially limited a major life activity. EEOC regulations define major life activities as functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. *See* 29 C.F.R. §1630.2(i). Francis made only conclusory claims that his ability to "think as a normal person" was impaired and that some of his social activities, including his sexual activity, were impaired. "Thinking normally" and "socializing" did not constitute major life activities as contemplated under the ADA.

Title I; Actual; Obsessive Compulsive Disorder

The Seventh Circuit determined that an employer did not violate the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-12117, when it terminated a computer programmer with obsessive compulsive disorder (OCD), because she failed to show she had a covered disability. *Evans v. Magna Group, 1999 WL 402401 (7th Cir. June 11, 1999).*

To qualify as a disability under the ADA, an impairment must substantially limit a major life activity. *See Patterson v. Chicago Ass'n for Retarded Citizens*, 150 F.3d 719, 725 (7th Cir. 1998), 22 MPDLR 606. Here, Joyce Evans failed to show her OCD substantially limits the major life activity of working. To the contrary, she described her OCD as a "fairly harmless disorder" and said that "her condition did not in anyway prevent her from performing her job."

Title I; Actual; Pretext; CTS; Depression

The Tenth Circuit affirmed that a former retail store employee with carpal tunnel syndrome (CTS) and depression failed to show she had a disability under the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.* Moreover, her employer's reason for terminating her—her supervisor thought she had voluntarily resigned from her position—was legitimate and nondiscriminatory. *Gearhart v. Sears, Roebuck and Co., 1999 WL 781056 (10th Cir. Oct. 1, 1999).*

The Tenth Circuit upheld the lower court's finding, *see* 27 F. Supp. 2d 1263 (D. Kan. 1998), 23 MPDLR 61, that plaintiff's alleged CTS and depression did not substantially limit her ability to perform a major life activity and, thus, did not constitute covered disabilities under the ADA. Thus, the lower court was not required to address the issue of pretext under the burden shifting analysis of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Even if plaintiff had a covered disability, she failed to refute the employer's nondiscriminatory reason for her termination. She provided no evidence that she had not voluntarily resigned.

Title I; Actual; Record; Perceived; PTSD

A Louisiana federal court ruled that an employee with post-traumatic stress disorder (PTSD) did not have a disability or a

record of one under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, nor did his employer regard him as having a disability. *Adams v. Autozoners, Inc., 1999 WL 744039 (E.D. La. Sept. 23, 1999).*

Floyd Adams has undergone treatment for PTSD "on and off" since his discharge from the military in 1972. During his employment as a salesperson at Autozoners, his superiors repeatedly reprimanded him for violations of company policies including absences, insubordination, and misuse of the company vehicle. He was terminated for insubordination after he refused to help unload inventory. He sued under Title I, 42 U.S.C. §§12111-12117.

The district court dismissed. The Fifth Circuit has recognized that PTSD, while not a *per se* ADA disability, may constitute a protected disability when a plaintiff can also show that the disorder impaired one of his major life activities. Adams failed to produce evidence that his PTSD limits any major life activity. On the contrary, he swore in his Equal Employment Opportunity Commission (EEOC) affidavit that he has never requested any employment accommodation because of his PTSD and that he has never needed any accommodation. Adams likewise stated in his complaint that he "capably performed each and every condition of his employment agreement."

Moreover, Adams failed to show he has a record of impairment, meaning that he "has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities." *See* 29 C.F.R. §1630.29(k). Adams presented no evidence documenting any conception or misconception held by Autozoners that his PTSD rendered him substantially impaired. Indeed, he submitted a medical history record to Autozoners when he was hired indicating he had no medical restrictions, was not under a doctor's care, and was generally in excellent health.

Finally, Autozoners did not regard Adams as having a disability. He offered no evidence that Autozoners mistakenly believed that he had PTSD, or that Autozoners believed that he was substantially limited in his ability to work or in any of his other major life activities. Adams' affidavit submitted in support of his EEOC charge stated that he never told anyone at Autozoners that he had PTSD, nor requested any accommodation from them as a result of his PTSD. In fact, Adams swore that "the company had no way of knowing that I had this disability." Furthermore, Autozoners submitted affidavits from its managers for the area and district in which Adams worked, stating it was not aware that he had PTSD when it fired him.

Title I; Actual; Back

An Illinois federal court decided that a former employee with a back injury and 30-pound weight-lifting restriction did not have a disability under the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq. Kause v. Alberto-Culver Co., 1999 WL 756131 (N.D. Ill. Sept. 10, 1999).*

Pamela Kause, a warehouse worker for Alberto-Culver Co., sustained a non-work related back injury and was put on a 30-pound weight-lifting restriction for several weeks. Kause later quit her job and sued under Title I, 42 U.S.C. §§12111-12117.

The court granted Alberto-Culver summary judgment. Kause's back injury was not a covered disability because it did not substantially limit the major life activity of lifting, *see* 29 C.F.R. §1630.2(j). In her deposition Kause admitted that she was able to do her job without difficulty after about three months, when the 30-pound weight restriction was removed. Moreover, Kause's statement in a later affidavit that she experiences pain when she engages in "too much lifting or bending" is too vague to create an issue of fact, because it does not explain the frequency or magnitude of her difficulty. In evaluating limitations on lifting and bending, the nature, severity, duration, and permanence of the impairment are highly relevant in assessing whether a disability claim has been made. *See Hamm v. Runyon*, 51 F.3d 721 (7th Cir. 1995).

Even if Kause were still subject to the 30-pound weight restriction, her claim could not survive. Considering the average person's ability, a lifting difficulty of the severity she describes is insufficient to constitute a disability. Several courts have found restrictions more limiting than Kause's insufficient to constitute a disability. *See McKay v. Toyota Motor Mfg.*, 110 F.3d 369 (6th Cir. 1997) (10-pound lifting restriction not a disability); *Williams v. Channel Master Satellite Sys. Inc.*, 101 F.3d 346 (4th Cir.), *cert. denied, Williams v. Avnet, Inc.*, 520 U.S. 1240 (1996) (25-pound lifting restriction not a disability).

A Kansas federal court ruled that a former grain storage facility manager with an injured back did not have a disability under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq. Rebarchek v. Farmers Coop. Elevator & Mercantile Ass'n, 60 F. Supp. 2d 1145 (D. Kan. 1999).*

Larry Rebarchek suffered two on-the-job back injuries. After surgery, he was released to light-duty work with restrictions of no lifting more than 40 pounds; no bending or twisting of the back more than half-way; no climbing ladders; and no sitting, standing, or walking for more than two hours at a time without breaks. After Rebarchek was terminated, he sued under Title I, 42 U.S.C. §§12111-12117.

The court dismissed the claim. Rebarchek's restrictions do not constitute a substantial limitation on the major life activities of lifting or working. *See Aucutt v. Six Flags Over Mid-Am., Inc.*, 85 F.3d 1311 (8th Cir. 1996). Rebarchek cited no evidence to show that his restrictions were significant when compared to the average person in the general population. Moreover, the restrictions imposed by Rebarchek's doctor were given in connection with Rebarchek's recovery from back surgery. A temporary disability while recuperating from surgery is generally not considered a disability under the ADA. *See Gutridge v. Clure*, 153 F.3d 898 (8th Cir. 1998).

The Sixth Circuit decided that the Ohio Department of Transportation did not violate the Americans with Disabilities Act Title I, 42 U.S.C. §§12111-12117, by terminating an

employee with back injuries because she did not have a covered disability. *Lorubbio v. Ohio Dep't of Transp., 1999 WL 357758 (6th Cir. May 21, 1999).*

The court found that Phyllis Lorubbio's inability to work at a computer or ride in a car for extended time periods does not substantially limit her major activity of working because she is not significantly restricted in the ability to perform either a class or broad range of jobs. She also failed to propose a specific accommodation for her limitations, and her requested accommodation to work closer to home was unrelated to her back condition.

Title I; Actual; Qualified; Back

A Pennsylvania federal court found that a former employee with a back 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. Bachert v. Home Depot, Inc., 1999 WL 782562 (E.D. Pa. Sept. 23, 1999).*

James Bachert worked for Home Depot as a part-time lot person, which required moving items to customer vehicles; climbing ladders; carrying merchandise; and lifting and moving items weighing up to 95 pounds without assistance. After injuring his back while working at his full-time job with a city government, he did not provide Home Depot with an estimate of when he would be released to return to work. After eight weeks, Home Depot terminated him for "health reasons." A month later, Bachert appeared at Home Depot seeking to return to work. His doctor had not given him full medical clearance and had placed a 20-pound lifting restriction on him. Since Bachert could not perform lot work, he sought to return to another job. Home Depot had no other available jobs for which Bachert was qualified and, thus, refused to rehire him. He sued under Title I.

The court dismissed his claim. Bachert did not have a disability because his back problem did not substantially restrict his ability to perform a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities. *See* 29 C.F.R. §1630.2(j)(3)(i). Despite some weight lifting restriction, he returned to his full-time job for the city government. At best, he is excluded from performing the singular, particular job of a lot person.

Even assuming that Bachert had a covered disability, he was not qualified to perform the essential functions of the lot position even with reasonable accommodation. Bachert claimed that Home Depot should have reassigned him to another position—a phone center sales associate job—as a reasonable accommodation. However, he failed to show the job was vacant and he was qualified to perform it. Home Depot presented evidence that no such position was available. Moreover, Bachert had been working at Home Depot for less than three months and did not have the knowledge and familiarity of Home Depot's store and products necessary to perform the essential functions of a phone center sales associate.

State Law; Actual; Reasonable Accommodation; Back

A Michigan federal court ruled that a former employee with a back injury failed to show she had a covered disability under the Michigan Handicappers Civil Rights Act (MHCRA), Mich. Comp. Laws §37.1101 *et seq.*, and that her employer had offered a reasonable accommodation for her condition. *Plumb v. Abbott Lab., 60 F. Supp. 2d 642 (E.D. Mich. 1999).*

Michelle Plumb worked as a dietician for Abbott Laboratories. She injured her back in 1992 and again in 1995, and was restricted from lifting more than 10 pounds and sitting and driving for prolonged periods. Although a subsequent independent medical exam indicated that Plumb could work without restriction, she stayed home due to back pain. Abbott notified Plumb that if she did not report to work, she would be terminated based on the independent medical exam. She did not return and was fired. Plumb sued Abbott for disability discrimination under the MHCRA.

The court dismissed her claim. Plumb failed to show that she was substantially impaired in a major life activity. She presented no evidence that she had an incurable back injury or that her lifting restriction was permanent. "Many individuals lead relatively normal lives, even with a herniated disk, and plaintiff has failed to show that her injury significantly limited her daily activities." Even if Plumb had a covered disability, Abbott proposed a reasonable accommodation. When notified of Plumb's lifting restriction, Abbott suggested she use a cart to move boxes of sample products in order to accommodate her 10-pound lifting restriction. Plumb contended that this was not feasible because she would have bend over to pick up the boxes, which caused too much pain to complete the task. Her opinion about her limitations was not supported by her treating physician, who concluded that Plumb could perform her job without restriction.

Title I; Actual; Pretext; Back

A New York federal court ruled that a former cosmetic saleswoman who alleged that her employer failed to reasonably accommodate her back problem and terminated her in retaliation for requesting an accommodation did not have a disability under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* Also, her employer's reason for firing her—an altercation with her supervisor—was legitimate and nondiscriminatory. *Muszak v. Sears, Roebuck & Co., 63 F. Supp. 292 (W.D.N.Y. 1999).*

Iwona Muszak, a beauty consultant in the cosmetics department at Sears, injured her back while working and aggravated her back injury in an auto accident. To alleviate strain on her back, she requested that the cash register be moved so that it would be level with her waist and permit her to face customers as she used it. Muszak's supervisor advised her to use another register in close proximity to the cosmetics department. After Muszak was terminated for allegedly assaulting

her supervisor, she sued Sears under Title I, 42 U.S.C. §§12111-12117.

The court granted summary judgment for Sears. Muszak's "vague back injury" did not constitute an ADA disability. The medical evidence relating to Muszak's condition while at Sears was simply that of a lumbar strain, which may have presented some difficulties for her in working, but did not mean that she was substantially restricted from working. Even if Muszak had a covered disability, she failed to adequately rebut Sears' stated reason for terminating her employment.

Title I; State Law; Perceived; Pretext; Back

A New York federal court dismissed an Americans with Disabilities Act Title I, 42 U.S.C. §§12111-12117, claim brought by a former engineer with a back injury, because he failed to show he was selected for layoff because his employer regarded him as having a disability. However, questions of fact existed as to whether plaintiff had a disability—a physical impairment that is demonstrable by medically accepted clinical or laboratory diagnostic techniques—under the New York Human Rights Law (HRL), N.Y. Exec. Law. §296 *et seq.*, and whether the employer's reason for terminating him was a pretext for discrimination. *Mora v. Danka Office Imaging Co., 1999 WL 777888 (S.D.N.Y. Sept. 29, 1999).*

Julio Mora worked as a field engineer for Danka. His primary duties were maintaining and repairing photocopy machines. Mora injured his back while pushing a heavy photocopy machine. Following his return to light duty work, Danka laid off field engineers as part of a nationwide reduction in force. Mora was rated in the bottom 20 percent of the field engineers in his region, and he was laid off. He sued Danka, alleging he was selected for layoff because his employer regarded him as having a disability, in violation of Title I and §296 *et seq.*

The court dismissed the Title I claim. That Danka asked Mora at the time of his rating whether his disability was permanent did not demonstrate that Danka regarded Mora as substantially impaired in a major life activity. Danka had a valid business reason for doing so—the need to know the severity of Mora's injury in order to plan work coverage and fill out required insurance forms. In fact, Danka's allowing Mora to return to light duty indicated that it did not regard Mora as substantially limited in his ability to work. *See Colwell v. Suffolk County Police Dep't*, 158 F.3d 635, 647 (2d Cir. 1998), *cert. denied*, 119 S. Ct. 1253 (1999). Furthermore, Mora failed to assert the particular major life activity that Danka viewed him as being substantially limited in performing. His inability to perform a single, particular job did not constitute a substantial limitation on the major life activity of working. *See* 29 C.F.R. §1630.2(j)(3)(ii). Plaintiffs must show they are substantially restricted in their ability to perform a class of jobs or a broad range of jobs as compared to an average person of comparable skills and training.

However, the court refused to dismiss Mora's HRL claim. Under that statute, an employee does not have to demonstrate that his or her impairment substantially limited normal life activities in order to qualify as disabled. Rather, an employee has a covered disability if he or she suffers from "a physical, mental or medical impairment" that "is demonstrable by medically accepted clinical or laboratory diagnostic techniques." *See* §292(21). Here, a question of fact existed as to whether Mora's medically diagnosed lumbar facet syndrome constituted a disability and whether Danka's reason for termination was pretextual.

§501; Perceived; Qualified; Heart

The Eleventh Circuit found that a federal agency did not violate the Rehabilitation Act §501, 29 U.S.C. §791 *et seq.*, when it refused to allow an employee to return to work after he had two heart attacks, because he did not have a covered disability and was not otherwise qualified to do his job even with reasonable accommodations. *Sutton v. Lader, 185 F.3d 1203 (11th Cir. 1999).*

On February 2, 1994, the Small Business Administration (SBA) hired Robert Sutton to work as a disaster relief construction analyst on a 30-day appointment. Two days later, he had a heart attack and underwent an angioplasty. On February 16, he had a second heart attack and underwent bypass surgery. Sutton's doctor reported that he was totally disabled through March 10, and partially disabled until April 1. On March 29, a second doctor reported that Sutton could return to work, but Sutton had failed to inform the doctor of the nature of his professional duties as a construction analyst. On May 4, Sutton submitted a letter from a third doctor, who released him to perform his duties as a construction analyst. On that date, SBA was no longer hiring construction analysts. When, in July, another disaster prompted SBA to begin hiring construction analysts again, Sutton refused. He sued SBA for violating §501. A Georgia federal court held that SBA discriminated against Sutton by not allowing him to return to work because it perceived him to be disabled between March and July 1994.

The Eleventh Circuit reversed. SBA knew that Sutton had heart surgery and regarded him as only temporarily unable to work during his recovery. The mere fact that an employer is aware of an employee's impairment is insufficient to demonstrate that the employer regarded the employee as disabled. An employee who is perceived by his employer as having only a temporary incapacity to perform the essential functions of his job is not perceived as "disabled" as defined by §501. Temporary, non-chronic impairments of short duration, with little or no long-term or permanent impact, are usually not disabilities. *See* 29 C.F.R. pt. 1630, App. §1630.2(j); *Huff v. UARCO, Inc.*, 122 F.3d 374 (7th Cir. 1997).

Further, Sutton was not qualified to perform the essential functions of his construction analyst position until May 4. By then, SBA was no longer hiring analysts. Under §501, employers have no duty to employ people who are not capable of performing the duties of the employment to which they aspire. SBA was under no obligation to accommodate Sutton by placing him in a

supervisory position until he was able to work as a construction analyst. He had never completed the training for the analyst position, had never worked as an analyst, had never assessed any earthquake damage, and did not have any experience or background in disaster relief work. Moreover, there were no light-duty analyst positions, and the SBA had no duty to create such a position for Sutton. *See Shiring v. Runyon*, 90 F.3d 827, 831 (3d Cir. 1996).

Title I; Actual; Qualified; Reasonable Accommodation; Heart

A Pennsylvania district court found that a former employee with heart disease raised material issues of fact as to whether he had a covered disability and was qualified within the meaning of the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, and whether his employer reasonably accommodated his disability. *Herbst v. General Accident Ins. Co., 1999 WL 820194 (E.D. Pa. Sept. 30, 1999).*

Ralph Herbst was a managing attorney of house counsel at General Accident Insurance Co. He had two heart attacks and has permanent recurrent chest and shoulder pain. After heart surgery in 1995, he returned to work and requested a more flexible work schedule and the assistant managing attorney position to reduce his workload. General Accident denied Herbst's requests, and threatened to fire him when he told them he needed to take two days off for diagnostic tests. General Accident filled the assistant managing attorney position with Herbst's least favorite candidate, leading to problems in the office. In 1997, Herbst's supervisor terminated him. Herbst sued under Title I, 42 U.S.C. §§12111-12117, alleging he was discriminated against on the basis of his disability.

The district court denied General Accident's motion for summary judgment. First, there is evidence that Herbst had a covered disability under the ADA. His heart problems substantially impair the major life activities of working, ambulation, stamina, endurance, and concentration. His cardiologist stated that Herbst has a history of coronary artery disease dating back to 1987, which is expected to continue indefinitely.

Second, Herbst presented evidence that he is qualified to perform the essential functions of his position with or without reasonable accommodation. He is a licensed attorney and has substantial experience in insurance law and as an administrator and manager in the legal field. His poor performance evaluation may have been infected by discriminatory and retaliatory animus stemming from an incident in which he reported his supervisor to the Equal Employment Opportunity Commission for refusing to hire the most qualified candidate on the basis of his race.

Finally, one could find from Herbst's evidence, if credited, that General Accident failed to make a good faith attempt to respond to Herbst's requests for accommodation as the hiring of the new assistant manager was part of an intentional effort to induce Herbst's resignation or "set him up" to be discharged. Once an employer knows of an employee's disability and the employee's desire for accommodation, the employer must make a good faith effort to obtain any additional information necessary to evaluate and institute the necessary accommodations. *See Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296 (3d Cir. 1999).

Title I; State Law; Perceived; Heart Transplant

A Pennsylvania federal court found issues of material fact existed as to whether an employee who had a heart transplant was regarded by his employer as having a disability within the meaning of the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, and the Pennsylvania Human Relations Act (PHRA), 43 Pa. Cons. Stat. Ann. §951. *Kolodij v. Consolidated Rail Co., 1999 WL 744447 (E.D. Pa. Sept. 23, 1999).*

There was evidence that Thomas Kolodij's employer regarded his heart transplant as a substantially limiting disability. His affidavit stated that his employer treated him differently, that his performance evaluations consistently declined after his transplant, and that he was terminated after returning from a stress test. Courts analyze PHRA claims in the same manner as they analyze ADA claims.

State Law; Actual; Perceived; Mitigating Measures; Diabetes

Kansas

A Kansas state appeals court found that a school district that terminated an employee with diabetes did not violate the Kansas Act Against Discrimination (KAAD), Kans. Stat. Ann. §44-1001 *et seq.*, because he did not have a disability nor was regarded as having one. *Seaman Unified Sch. Dist. No. 345 v. Kansas Comm'n on Human Rights, 1999 WL 777505 (Kan. Ct. App. Oct. 1, 1999.*

Donald Reed, a school custodian, had a history of insulin-dependent diabetes. After undergoing a surgical procedure to treat his diabetic retinopathy—a disorder which causes the blood vessels in one's retinas to hemorrhage—his doctor restricted him from stooping, straining, and lifting. After a second surgery, Reed's doctor placed no limitations on his activity. However, concerned that lifting would affect his eyes, Reed consulted another physician who set a 25-pound lifting restriction on Reed's activities. Reed was terminated because of the restriction. He filed a complaint with the Kansas Human Rights Commission, which found that the school district discriminated against him on the basis of his disability. A state district court reversed.

The state appeals court affirmed, holding that Reed did not have a covered disability under the KAAD, which is modeled after the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.* His diabetes, when medicated, did not substantially impair a major life activity. *See Sutton v. United Airlines, Inc.*, 119 S. Ct. 2139 (1999), 23 MPDLR 510; *Murphy v. United Parcel Serv., Inc.*, 119

S. Ct. 2133 (1999), 23 MPDLR 511; *Albertsons, Inc. v. Kirkingburg*, 119 S. Ct. 2162 (1999). Reed testified that he could control his diabetes with proper diet and monitoring, and his physical activities were not limited. Moreover, he only showed that he was unable to the perform the particular job of custodian when it requires heavy lifting, rather than a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities. *See* 29 C.F.R. §1630.2(j)(3)(i). Such evidence is insufficient as a matter of law to prove that Reed is substantially limited, or regarded as so, in the major life activity of working. An employer is free to decide that some limiting, but not substantially limiting impairments make individuals less than ideally suited for a job.

Tennessee

A Tennessee appeals court ruled that a former computer purchasing agent's insulin-dependent diabetes, when corrected with medication, did not substantially limit the major life activity of working and, thus, did not constitute a covered disability under the Tennessee Handicap Act (THA), Tenn. Code Ann. §8-50-103. *Davis v. Computer Maintenance Serv., 1999 WL 767597 (Tenn. Ct. App. Sept. 29, 1999).*

Previously, a Tennessee trial court dismissed John Davis' THA complaint, finding that although he had a covered handicap under the statute, he failed to show his employer fired him because of his handicap.

The appeals court affirmed, but on different grounds. Because the THA does not define "handicap," the court looked to the definition in the Tennessee Human Rights Act, Tenn. Code Ann. §4-21-102(9); the Americans with Disabilities Act, 42 U.S.C. §12102(2); the Rehabilitation Act, 29 U.S.C. §706(8); and federal and state case law. The definition of "handicap" is virtually the same in all three statutes: a physical or mental impairment that substantially limits a major life activity. The court noted that the trial court's decision that Davis had a covered disability came before the U.S. Supreme Court's decision in *Sutton v. United Airlines*, 119 S. Ct. 2129, 2147 (1999), 23 MPDLR 510. That case held that corrective measures, such as glasses or contact lenses, must be taken into consideration when determining whether an individual has a covered disability. Here, Davis used corrective measures, such as insulin shots and oral medication, but failed to identify any major life activity that was substantially limited by his diabetes. "A diabetic whose illness does not impair his . . . daily activities" should not be considered disabled "simply because he . . . has diabetes." *See Sutton*, 119 S. Ct. at 2147.

The court rejected Davis' argument that his employer regarded him as having a disability. To be substantially limited in the major life activity of working, plaintiffs must allege they are unable to work in a class of jobs or a broad range of jobs in various classes. The inability to perform a single, particular job does not constitute a substantial limitation. *See* C.F.R. §1630.2(j)(3)(i). Here, Davis identified no broad class of jobs that he was perceived as being unable to perform. He failed to show that his employer regarded his diabetes as an impairment that limited him in more than one type of job, a specialized job, or a particular job choice. His employer did not feel that Davis could perform his particular job, which required talking on the telephone, because of his persistent dry cough. Under *Sutton*, the employer could legitimately consider the negative side effects resulting from an individual's medication. *See Sutton*, 119 S. Ct. at 2147.

Title I; Actual; CTS

The Ninth Circuit affirmed that a former laboratory technician 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.*, because she was not substantially limited in the major life activity of working. *Broussard v. Univ. of Cal. at Berkeley, 192 F.3d 1252 (9th Cir. 1999).*

Jocelyn Broussard, an animal technician in the Office of Laboratory Animal Care (OLAC) at the University of California, took care of mice that had to be given water manually so they would remain germ-free. Due to the constant stoppering and unstoppering of water bottles, Broussard developed CTS in her right wrist. After surgery, her treating physician, Dr. Massem, released her to return to work with a variety of restrictions, including that she spend no more than 50 percent of her day working with the cages and the water bottles. OLAC had to assign half of her workload to another technician. Broussard requested that she be transferred out of the transgenic mice unit. The university said there were no vacancies available for which she was qualified and terminated her. Broussard sued under Title I, 42 U.S.C. §§12111-12117. The district court granted the university's second motion for summary judgment.

The Ninth Circuit affirmed. In support of her argument that she was substantially limited from performing a number of jobs in the area, Broussard relied solely on the report of a vocational rehabilitation specialist, Thomas Church. He opined that Broussard was limited to working in the sedentary to light category of jobs, and that she faced restrictions even within this category. However, Church's analysis was flawed. First, his calculations were based on lifting restrictions, even though the rehabilitation counselor and her treating physician did not test or even address lifting restrictions. Second, he stated that Broussard was limited to 15-minute intervals on a keyboard even though the rehabilitation counselor found that she could type for 50 minutes at a time on the keyboard. Finally, Church's declaration is the type of conclusory allegation which this court found insufficient to withstand a motion for summary judgment in *Thompson v. Holy Family Hosp.*, 121 F.3d 537 (9th Cir. 1997), 21 MPDLR 609 (holding a hospital worker with a cervical injury which prevented her from lifting over 25 pounds on a continuous basis was not disabled under the ADA because she could not provide evidence which showed that her restriction precluded her from engaging in an entire class of jobs.)

Broussard needed to "identify what requirements posed by the class of [animal care] jobs . . . were problematic in light of the limitations that [CTS] imposed on her. This is not an onerous requirement, but it does require some evidence from which one might infer that [plaintiff] faced 'significant restrictions' in her ability to meet the requirements of other jobs" which she failed to do. *See Davidson v. Midelfort Clinic, Ltd.*, 133 F.3d 499 (7th Cir. 1998), 22 MPDLR 193.

Title I; Actual; Qualified; CTS

The Ninth Circuit reversed summary judgment in favor of an employer under the Americans with Disabilities Act Title I, 42 U.S.C. §12111, because an employee with carpal tunnel syndrome (CTS) had raised genuine issues of material fact as to whether he had a disability and whether he was qualified. *Wellington v. Lyon County Sch. Dist., 187 F.3d 1150 (9th Cir. 1999).*

After Michael Wellington, a maintenance worker for a school district, developed CTS, he was temporarily assigned to assist in setting up a school district safety program. When Wellington's doctor determined he would not be able to return to his prior job unless it was modified, the school district fired Wellington. He sued under Title I, and the trial court granted the school district summary judgment.

Reversing, the Ninth Circuit found Wellington raised genuine issues of material fact as to whether he had a disability. To establish a substantial limitation on his ability to work, an employee must show that he is "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities." 29 C.F.R. §1630.2(j)(3)(i). The evidence indicated Wellington's education was limited to a high school degree and his work experience was limited to manufacturing, construction, heavy maintenance, and plumbing. Wellington's doctor said that Wellington is permanently unable to perform work involving metal fabrication, welding, and carpentry; use a variety of tools to do maintenance and repair; and engage in heavy lifting. Thus, there exists a question of fact as to whether he is significantly restricted in the ability to perform work in a class of jobs—construction, maintenance, plumbing—and thus whether he has a disability under the ADA.

If Wellington is able to demonstrate that he has a covered disability, there also exists a genuine issue of material fact as to whether he is qualified. Although Wellington did not contend that he was qualified to perform the essential functions of the maintenance position, he contended that placing him in a permanent position in the safety program would have been a reasonable accommodation. However, the ADA does not impose on employers a duty to create a new position to accommodate a disabled employee. *See Willis v. Pacific Maritime Ass'n*, 162 F.3d 561 (9th Cir. 1998). Here, the evidence raised an issue of fact as to whether the safety position may have already been created before Wellington's termination. If so, issues of fact exist as to whether Wellington was qualified for that position. If not, Wellington might establish at trial that the school district did not follow through on its initial decision to create such a position because of Wellington's disabled status and the fear of adverse reaction of his fellow employees. If proven, this could provide a basis for a reasonable jury to conclude that the school district failed to make a reasonable accommodation.

Title I; Actual; Pretext; Back; Vision; Hearing

A Kansas federal court ruled that an employee who alleged discrimination due to his hearing, vision, and back disabilities with regard to compensation and job assignments in violation of the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-12117, did not have a covered disability nor was there an adverse employment action that raised an inference of discrimination. *Amro v. Boeing Co., 65 F. Supp. 2d 1170 (D. Kan. 1999).*

Joseph Amro, a design engineer, was severely injured while working for Boeing Co., and had surgery on his hands, nose, ears, and eyes. The court assumed that Amro had one or more physical impairments due to hearing, vision, and back problems that prevented him from sitting for long periods of time or walking long distances. However, he failed to show that his physical impairments substantially limited the major life activity of working. The job of design engineer was a narrow job category, rather than a broad class of jobs. *See Sutton v. United Airlines*, 119 S. Ct. 2139 (1999).

Even if Amro had a covered disability, he failed to show that he endured an adverse employment action that raises an inference of disability discrimination. Amro claimed Boeing unlawfully discriminated against him by failing to transfer him to jobs that required him to use a computer more than 50 percent of time. However, his medical restrictions prohibited him from using a computer more than 50 percent of the workday. Further, with regard to raises and salary increases, Amro failed to establish that his performance was equal to others who received higher raises.

§501; Monocular Vision

A New York federal court ruled that an employee with monocular vision who claimed he was demoted and denied reasonable accommodation when he took a postal exam did not have a disability under the Rehabilitation Act §501, 29 U.S.C. §791 *et seq. Tone v. United States Postal Serv., 1999 WL 781625 (N.D.N.Y. Sept. 27, 1999).*

Martin Tone worked for the postal service as a motor vehicle operator (MVO) and tractor trailer operator (TTO). In July 1997, his left eye was removed because of a malignant tumor. Following surgery, he could not work as a TTO because he failed to meet postal standards and U.S. Department of Transportation regulations for commercial vehicles weighing over 26,000 pounds. Tone requested light duty assignment to MVO, but the postal

service denied the request because his medical condition was permanent and there was not enough light duty work. Tone took a postal exam for entry-level positions, but failed. The postal service denied his request to retake the test with the accommodation of more time to complete it on the ground that the test involved a speed component and to allow additional time would render the test score meaningless. After Tone passed a postal exam for a laborer and/or custodian, he transferred with a loss of seniority and pay. Tone sued the postal service for violating §501.

The court dismissed the claim. There was no dispute that Tone's monocular vision was a physical impairment under the Rehabilitation Act., *see* 29 C.F.R. §1630.2(h)(1), or that working was one of Tone's major life activities, *see* 29 C.F.R. §1603.2(i). However, Tone failed to show his monocular vision substantially limited his ability to work. Although he was prevented from returning to work as a TTO, his monocular vision did not substantially restrict his ability to work in a class of jobs or a broad range of jobs in various classes. *See* 29 C.F.R. §1630.2(3)(ii); *Sutton v. United Airlines, Inc.*, 119 S. Ct. 2139 (1999), 23 MPDLR 510. He received a disability certificate that authorized his return to work without any restrictions. Moreover, a doctor determined that he was "medically qualified to perform any functions that do not require two eyes." Also, Tone passed the Laborer and Custodial Examination, which qualified him to work in at least six different positions. He accepted one.

Title I; Qualified; Pretext; Retaliation; Foot

A New York federal court dismissed an Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-12117, claim, finding a former employee with foot bunions failed to show she had a disability, was a qualified individual, or was fired because of her disability or in retaliation for requesting a reasonable accommodation. *Brower v. Continental Airlines, Inc., 62 F. Supp. 2d 896 (E.D.N.Y. 1999).*

Margaret Brower, who has had foot bunions since birth, worked as an airport sales agent for Continental Airlines. Brower's doctor wrote Continental a letter, suggesting Brower be allowed to work sitting to take pressure off her feet. She requested a stool, which Continental provided. After Brower was terminated, she sued under Title I.

The court dismissed the claim. Brower did not have a covered disability under the ADA. Her assertion that her ability to stand and walk was substantially limited by her degenerative foot condition was contradicted by her participation in a two-mile march after she sued Continental. Moreover, Brower's contention that, due to her request for a stool, her foot problem became common knowledge at Continental could not compel a rational jury to find that Continental regarded Brower as being substantially limited in any major life activity. Finally, Continental's grant of Brower's request for accommodation did not establish a record of her disability. An employer that accedes to minor and potentially debatable accommodations does not thereby stipulate to the employee's record of a disability. *See Colwell v. Suffolk County Police Dep't*, 158 F.3d 635 (2d Cir. 1998).

Even if Brower had a covered disability, she was not qualified for the airport sales associate position. Because the job required constant contact with customers, being polite and helpful were essential functions. Brower was not consistently polite or helpful, as demonstrated by at least five written customer complaints about her interpersonal skills. Common sense dictates that an employee with poor interpersonal skills and behavior problems is not qualified for a job that requires constant contact with an employer's customers. *See Beyousi v. Bloomingdale's Inc.*, 1999 WL 689939 (S.D.N.Y. 1998).

Even if Brower could state a *prima facie* case under the ADA, she would not be able to establish that Continental's reason for terminating her employment was a pretext for disability discrimination. Continental terminated Brower's employment because of numerous customer complaints. Although there may have been factual disputes as to whether the customer complaints directed against Brower were justified, there was no evidence that Continental fired Brower because of her disability. To defeat a motion for summary judgment, a plaintiff must do more than simply assert that the defendant's stated reason for firing her was false, she must also demonstrate that the termination was motivated by a discriminatory animus. *See Norton v. Sam's Club*, 145 F.3d 114 (2d Cir. 1998). Brower was unable to do this.

Finally, Brower was unable to demonstrate any evidence of retaliatory animus for her request for a stool so that she could sit down while she worked. Brower conceded that no one suggested or hinted that her termination was related to her request for a stool. Further, she could not establish a temporal connection between her request and the decision to terminate her four months later. *See Hollander v. American Cyanamid Co.*, 895 F.2d 80 (2d Cir. 1990).

Title I; Actual; Record; Leg; Ankle

The Sixth Circuit affirmed that a former maintenance foreman with a leg injury did not have a disability or a record of a disability within the meaning of the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq. Lamb v. Bell County Coal Corp., 1999 WL 717976 (6th Cir. Sept. 9, 1999).*

Harold Lamb, a maintenance foreman, sustained a severe injury to his lower leg and ankle on-the-job. He spent six weeks recovering from his injuries and then returned to his job. A year later, he was terminated when he failed to repair a chute causing the plant to temporarily close down. He sued under Title I, 42 U.S.C. §§12111-12117, alleging he was discriminated against on the basis of a disability. The district court dismissed, finding he did not have a covered disability.

The Sixth Circuit found Lamb failed to show that his impairments substantially limit a major life activity. He failed to provide evidence that his ability to walk is significantly restricted compared to the average person in the general population. *See Penny v. United Parcel Serv.*, 128 F.3d 408 (6th Cir. 1997), 21 MPDLR 748, (holding a plaintiff with a noticeable limp who experienced some discomfort when he walked was not disabled

under the ADA.) Rather, the evidence shows that Lamb experiences only moderate discomfort when he walks. He admits that he lives an active lifestyle and is able to hunt, fish, and play 18 holes of golf. Furthermore, he was able to march double time and complete a one-and-a-half mile run when he was training at the police academy.

Lamb also failed to provide evidence that his ability to work is significantly restricted as compared to the average person in the general population. In fact, he can perform work that requires physical exertion, and his physician cleared him to return to his position as maintenance foreman. Moreover, Lamb's injury did not prevent him from purchasing and using a bulldozer for landscaping work, and he subsequently enrolled at the police academy and has been working as a deputy sheriff.

In addition, Lamb failed to show he has a record of impairments that substantially limit a major life activity. He relies exclusively on the workers' compensation settlement agreement to show that he has a record of impairments, even though the settlement agreement simply states that "Lamb shall receive 20 percent occupational disability in weekly payments of $54.30 for 425 weeks." This statement suggests that Lamb has impairments, but does not indicate whether they substantially limit a major life activity.

Title I; Actual; Tendinitis

The Sixth Circuit affirmed that a nurse with tendinitis did not have a disability under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, because she did not provide factual support that her impairment substantially limited a major life function. *Doren v. Battle Creek Health Sys., 187 F.3d 595 (6th Cir. 1999).*

Linda Doren, a pediatrics nurse, has tendinitis in multiple joints, chondromalacia of both knees, and low back radiculopathy. In 1995, Battle Creek eliminated all eight-hour shifts in the pediatrics department in favor of 12-hour shifts. When Doren claimed she could only work eight-hour shifts, Battle Creek replaced her with a 12-hour shift nurse. Doren sued under Title I, 42 U.S.C. §§12111-12117, alleging she was discriminated against because of her disability. Battle Creek moved for summary judgment. The trial court granted the motion, finding Doren did not have a disability within the meaning of the ADA. *See* 1998 WL 689956 (W.D. Mich. June 5, 1998).

The appeals court affirmed. Doren has a number of physical limitations, but she has not presented sufficient evidence of a disability under the ADA. In support of her allegation that she is substantially impaired in the major life activity of working, Doren produced an affidavit from Robert Ancell, Ph.D., who had examined her, stating that she would not be able to perform the duties on an adult floor in light of her medical conditions. However, Doren has never worked with adult patients, only children, and testimony regarding her inability to work with adult patients cannot establish that she is unable to perform many positions in the field of nursing. Additionally, Doren failed to produce evidence regarding the number of pediatrics nursing jobs from which she is excluded, or the availability of pediatric nursing positions for which she is qualified.

Dr. Ancell further stated in his affidavit that Doren "has a physical impairment that substantially limits one of her major life activities . . . and preclude[s] her from engaging in most of [sic] jobs in the local and national economy as a registered nurse." However, Fed. R. Civ. P. 56(e) states that a party must offer "specific facts showing that there is a genuine issue for trial." Neither Dr. Ancell's report nor his affidavit provide "specific facts." Both are merely conclusory, restating the requirements of the law and, thus, cannot create a genuine issue of material fact sufficient to defeat summary judgment.

Title I; Actual; Retaliation; Pretext; Spine

The Sixth Circuit affirmed that a former delivery driver with spinal injuries did not have a covered disability under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, and that his employer had a legitimate, nondiscriminatory reason for firing him. *Cain v. Airborne Express, 1999 WL 717948 (6th Cir. Sept. 10, 1999).*

Airborne Express fired Thaddius Cain, a delivery driver, for submitting a forged medical excuse and for a poor overall work record. Cain sued Airborne under Title I, 42 U.S.C. §§12111-12117, alleging it (1) subjected him to a pattern and practice of harassment on the job because of his disabilities—arthritis of the spine and arachnoiditis (inflammation of the membrane covering the spinal cord)—by treating him differently from non-disabled employees and (2) retaliated against him for filing an EEOC complaint and this lawsuit. The district court granted Airborne summary judgment, finding Cain failed to present evidence of harassment or disparate treatment based on any alleged disability, and to produce sufficient evidence of pretext to rebut Airborne's legitimate reasons for terminating him.

The appeals court affirmed on different grounds. Cain is not disabled under the ADA, because his arachnoiditis and arthritis of the spine do not substantially limit the major life activity of working. In his deposition, Cain stated that he was able to perform his job without a problem and that he neither needed nor requested special considerations in order to do his job. Furthermore, he passed all his Department of Transportation physicals and made repeated requests for overtime. Aside from his isolated statement that he had difficulty walking, there is no evidence that he was substantially limited in any major life activity and, thus, had a covered disability. *See Penny v. United Parcel Serv.*, 128 F.3d 408 (6th Cir. 1997), 21 MPDLR 748 (holding moderate difficulty with walking does not constitute a disability).

Further, the district court correctly determined that Airborne was entitled to judgment as a matter of law on Cain's retaliation claims. First, Cain did not deny the factual basis behind Airborne's reasons for the disciplinary actions, except as to one incident in which he was accused of referring to a co-worker as a "dyke." Second, he was consistently disciplined and continuously filed

grievances regarding those disciplinary actions, both before and after he engaged in a protected activity—filing the EEOC complaint. Last, he failed to show that others "similarly situated" received less severe discipline. *See Manzer v. Diamond Shamrock Chems. Co.*, 29 F.3d 1078 (6th Cir. 1994).

Title I; Actual; Keratoconus

A North Carolina federal court determined that Wal-Mart did not violate the Americans with Disabilities Act Title I, 42 U.S.C. §§12111-12117, when it terminated a part-time sales associate with keratoconus, because she did not have a covered disability. *Person v. Wal-Mart Stores, Inc., 1999 WL 700479 (E.D.N.C. Aug. 19, 1999).*

Ann Person's keratoconus—which causes eye pain, redness, dryness, and blurred or double vision—does not substantially limit her ability to see as compared to an average person. *See* 29 C.F.R. §1630.2(j). These symptoms only begin to limit her ability to see at around 10:00 p.m. Even persons without keratoconus may experience compromised vision to some degree after working from 7:30 a.m. to 10:00 p.m. Moreover, her eye infections, which occur once every four or five months, usually do not cause her to be absent from work.

Title I; Actual; ADD

The Seventh Circuit ruled that the Wisconsin Department of Workforce Development (DWD) did not violate the Americans with Disabilities Act Title I, 42 U.S.C. §§12111-12117, by terminating an unemployment benefits specialist with attention deficit disorder (ADD), because she did not have a covered disability. *Paul v. Wisconsin Dep't of Indus., Labor and Human Relations, 1999 WL 685912 (7th Cir. Aug. 24, 1999).*

The Seventh Circuit affirmed summary judgment for DWD. Susan Paul failed to show that her condition substantially limited her ability to perform either a class of jobs or a broad range of jobs. *See Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139, 2150-51 (1999); *Murphy v. United Parcel Serv., Inc.*, 119 S. Ct. 2133, 2138 (1999). A psychologist stated that her ADD may have limited her ability to perform the job she was in, not a broad class of positions.

Title I; Actual; Lifting Restriction

A D.C. federal court ruled that a research assistant whose elbow, neck, shoulder, and knee injuries limited his ability to lift more than seven pounds failed to show that he had a disability under the American with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq. Siragy v. Georgetown Univ., 1999 WL 767831 (D.D.C. Aug. 20, 1999).*

Hamid Siragy, a research assistant at Georgetown University, injured his elbow, neck, shoulder, and knee while moving boxes in a laboratory. He was on sick leave for about six months. Shortly after he returned to work, he was laid off as part of a reduction in force. He sued Georgetown University under Title I.

The court granted Georgetown's summary judgment motion. Siragy's permanent inability to straighten his left arm and permanent walking limitations did not interfere with any major life activities. In his evaluation report to Georgetown, Siragy's physician stated that Siragy was capable of walking, sitting, standing, bending, and climbing for eight hours a day. The only limitations placed on Siragy were a seven-pound lifting restriction and a 10-pound restriction for pushing and pulling. Several courts have found such restrictions do not rise to the level of a disability under the ADA. *See Williams v. Channel Master Satellite Sys., Inc.*, 101 F.3d 346 (4th Cir. 1996), 21 MPDLR 65 (holding 25-pound lifting restriction insufficient to constitute disability under ADA); *Horth v. General Dynamics Land Sys., Inc.*, 960 F. Supp. 873 (M.D. Pa. 1997) (finding 20-pound lifting restriction insufficient to constitute disability under ADA).

Title I; Actual; Perceived; Lupus; Post-concussion Syndrome

The Ninth Circuit found that a former computer systems specialist who claimed to have lupus and post-concussion syndrome did not have a disability nor was regarded as having one within the meaning of the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq. West v. Central Valley Regional Ctr., Inc., 1999 WL 397705 (9th Cir. May 27, 1999).*

Pamela West worked for six hours per day as a computer systems specialist for Central Valley Regional Center (CVRC), a state social services agency, between 1989 and 1994. In 1994, CVRC restructured West's position into a full-time (8 hour-per-day) position due to increased computer demand. West did not accept the full-time job, claiming that she could only work six-hour days due to limitations associated with lupus and head injuries. CVRC terminated West. She sued under Title I, 42 U.S.C. §§12111-12117. The district court granted CVRC summary judgment, finding West failed to show she had a covered disability.

The Ninth Circuit affirmed. As a threshold matter, it was not clear that West had physical impairments. Medical testimony from several physicians who had treated West during the pertinent period did not establish a diagnosis of active lupus. Similarly, medical testimony did not definitively substantiate West's claim of post-concussion syndrome.

Even if West had such impairments, she failed to show that they substantially limited her ability to perform a class of jobs or a broad range of jobs. *See* 29 C.F.R. §1630.2(j)(3)(I). Medical testimony from several of West's physicians did not indicate that she was restricted to working a six-hour day. Moreover, West admitted that she was willing to fill the eight-hour position at CVRC if her physician approved. However, she never informed CVRC of her intent nor contacted her doctor. In addition, after she left CVRC she accepted a delivery job where she worked 40 hours per week for half the year. She admitted that she would

have worked 40 hours per week for the full year if the employer had a need for that many hours.

Further, CVRC's suggestion that West be medically evaluated for the restructured position did not indicate that it perceived her as substantially limited in the major life activity of working. CVRC offered West the job, as well as training for it.

Title I; Actual; Perceived; Hepatitis C

A Texas federal court determined that an employer did not violate the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-12117, when it terminated a sales associate with Hepatitis C because he did not have a covered disability. *Qualls v. Lack's Stores, Inc., 1999 WL 731758 (N.D. Tex. Mar. 31, 1999).*

The court rejected Jerry Quall's argument that Hepatitis C substantially limits the major life activity of reproduction. Reproduction is not a major life activity under the ADA. *See Zatarain v. WDSU-Television, Inc.*, 79 F.3d 1143 (5th Cir. 1996). *But see Bragdon v. Abbott*, 524 U.S. 624 (1998), 22 MPDLR 449. Even if it were, Quall's Hepatitis C status does not substantially limit his reproductive activity. After the birth of his fourth child, Qualls and his wife decided that they did not wish to have more children, and he had a vasectomy shortly thereafter.

The court also rejected Quall's assertion that his condition substantially limited his ability to work because Interferon, the medication used to treat Hepatitis C, causes fatigue. Quall was not taking the drug when he was terminated, and courts must examine whether an employee is substantially limited in a major life activity at the time of termination. *See Burch v. Coca-Cola Co.*, 119 F.3d 305 (5th Cir. 1996), 21 MPDLR 620.

Moreover, the court denied Quall's claim that his managers regarded him as having a disability. Evidence that his co-workers expressed fear of infection through casual social contact is insufficient to show that a managerial decision-maker regarded Quall as disabled and terminated him because of that perception.

Title I; Perceived Drug Use

An Illinois federal court ruled that an issue of fact existed as to whether a former employee was discharged due to a perceived disability, in violation of the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-12117, or for refusing to take a drug test. *Kelm v. Arlington Heights Park Dist., 1999 WL 753930 (N.D. Ill. Sept. 15, 1999).*

David Kelm, an employee of the Arlington Heights Park District, took a mandatory drug and alcohol test. The results revealed minimal traces of illegal drugs. Kelm denied illegal drug use. He was evaluated by a substance abuse professional (SAP), who reported that Kelm had no conscious recollection of using cocaine and that abuse or addiction was not apparent by patient history. The SAP prescribed future drug testing. Kelm signed a last chance agreement, rather than be terminated. He refused to undergo a random test when he learned that a female employee of the sample collection site was to observe him providing a urine sample. Arlington Heights terminated Kelm, and he sued under Title I, alleging he was discriminated on the basis of a perceived disability—erroneous perception of illegal drug use.

The court denied the Park District's motion to dismiss the ADA claim. The ADA protects an individual who is erroneously regarded as engaging in drug use, but is not engaging in such use. *See* 42 U.S.C. §12114(b)(3). Kelm had sufficiently alleged that he had been discriminated against because of Park District's erroneous belief that he was using drugs. An issue of fact existed as to whether Park District discharged Kelm because he refused to submit to a drug test or as a result of a perceived disability.

Title I; Record; Perceived; MS

The Tenth Circuit ruled a nurse with multiple sclerosis (MS) failed to show that she had a record of disability or was regarded as having a disability under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq. Sorensen v. University of Utah Hosp., 1999 WL 820213 (10th Cir. Oct. 14, 1999).*

Laura Sorensen, a flight nurse for the University of Utah Hospital, was hospitalized with MS. When she returned to work, she was scheduled as a regular nurse. Before the hospital made a final determination as to whether to return her to the flight nurse position, Sorensen resigned. She sued under Title I. The trial court granted the hospital summary judgment, finding that Sorensen did not have a covered disability.

The Tenth Circuit affirmed. The court rejected Sorensen's claim that she had a record of disability that substantially limited the major life activity of working during her five-day hospitalization and subsequent recovery time. For an impairment to be substantially limiting, it must have a permanent or long-term impact. The Equal Employment Opportunity Commission Interpretive Guidance describes a broken leg that takes eight weeks to heal as an impairment of fairly brief duration. *See* 29 C.F.R. §1630, App. §1630.2(j). Here, Sorensen's hospitalization and MS symptoms affected her for only a brief period. She was ready to return to work only eight days after she was released from the hospital, and she is not presently substantially restricted in her ability to work.

The court also rejected Sorensen's argument that the hospital regarded her as having a disability because it did not return her to her position as flight nurse. 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 Airlines, Inc.*, 119 S. Ct. 2139 (1999); 29 C.F.R. §1630.2(j)(3)(i). The flight nurse position is a single job, and the hospital provided Sorensen with numerous other opportunities to work as a nurse. She worked for the hospital as a nurse in the burn unit, the surgical intensive care unit, and the emergency room following her MS diagnosis and hospitalization. Because Sorensen has not distinguished the flight nurse position from the class of regular nurse jobs the hospital

permitted her to perform, she has not established that she was regarded as having a disability.

Title I; Actual; Perceived; Pretext; Migraines

A Delaware federal court ruled that a former fork lift operator with migraine headaches had not shown that he had a disability or was regarded by his employer as having a disability under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* Even if he had a covered disability, his employer's reason for terminating him—violation of safety rules—was not a pretext for discrimination. *Sears v. E.I. Du Pont De Nemours & Co., 1999 WL 825602 (D. Del. Sept. 30, 1999).*

John Sears was fired from Du Pont's plant after he accidentally struck a 440-volt electrical junction box while driving a forklift in a restricted area of the plant. Du Pont later reinstated Sears under the condition that he stop taking medications for his migraines. Sears sued Du Pont under Title I, alleging he had been discriminated against based on his disability.

The court granted Du Pont summary judgment. Sears presented no evidence that he was substantially limited in the major life activity of working. The only medical evidence indicated that Sears had been performing his regular job since reinstatement despite his migraine headache pain. Similarly, Sears did not present sufficient evidence that Du Pont regarded him as disabled. Although Du Pont knew that Sears had migraine headaches, there was nothing in the record indicating that it treated him as if he had a disability. The record only revealed that Du Pont was concerned about the impairing side effects of Sears' medication, not about his physical condition. The fact that Du Pont ultimately reinstated Sears after he agreed not to take judgment-impairing medications confirmed this.

Even if Sears could show that he had a disability and otherwise state a *prima facie* case under the ADA, he would not be able to establish that Du Pont's reason for terminating his employment was a pretext for disability discrimination. Du Pont terminated Sears because he violated several safety rules by driving his forklift into a restricted area of the plant and using the lift in a manner for which it was not designed. Other than Sears' own conclusory testimony, there was no evidence to case doubt on the genuineness of Du Pont's valid safety concerns.

Employment: Medical Leave/Exams

Termination; FMLA; Sovereign Immunity; Preemption

The Ninth Circuit held that a federal employee's claims under Title II of the Family and Medical Leave Act (FMLA), 29 U.S.C. §2601 *et seq.*, were barred by sovereign immunity and preempted by the Civil Service Reform Act. *Russell v. United States Dep't of Army, 191 F.3d 1016 (9th Cir. 1999).*

Theresa Russell worked for the Department of the Army (DA) as a civil service employee. From September to November 1993, her son suffered from asthma due to severe upper respiratory infections, and Russell was repeatedly absent from work. She sought information from her supervisor regarding her rights to leave time under the FMLA, but allegedly was not provided the information. Her requests for retroactive leave for her absences and a reduced work schedule were denied. In November 1993, the DA terminated Russell for excessive absenteeism and tardiness. She sued, alleging discrimination claims under the FMLA. A Washington federal court held that the FMLA did not provide a private right of action for federal employees to enforce its provisions.

The Ninth Circuit affirmed. The FMLA grants private and federal employees an entitlement to periods of leave. *See* 29 U.S.C. §2612(a)(1); 5 U.S.C. §6382(a)(1). Title II of the FMLA governs leave for federal civil service employees with more than 12 months of service. *See* 5 U.S.C. §6381 *et seq.* Title I of the FMLA governs leave for private employees. *See* 29 U.S.C. §2601 *et seq.* While Title I and Title II employees under the FMLA are afforded equivalent rights to leave time, Title I expressly provides a private right of action to remedy employer action for violating FMLA rights. *See* 29 U.S.C. §2617(a)()2). Title II contains no analogous provision. *See* 5 U.S.C. §6381-6387. The absence of an express statutory authorization for such suits barred Russell's FMLA claims, because suits against the federal government are barred by sovereign immunity absent an expressed waiver. The court rejected Russell's argument that review of FMLA violations was available under the Administrative Procedure Act (APA), 5 U.S.C. §702. The Civil Service Reform Act preempted APA review of FMLA claims.

FMLA; Employer Defined; Jurisdiction

The Fourth Circuit dismissed a former employee's claim under the Family and Medical Leave Act (FMLA), 29 U.S.C. §2601 *et seq.*, because defendants employed less than 50 employees and did not constitute an "integrated employer" with several other corporations. *Hukill v. Auto Care, Inc., 192 F.3d 437 (4th Cir. 1999).*

Monte Hukill worked as an auto inspector at McGillicuddy Associates, Inc.'s (MAI). He left work for six weeks to undergo surgery for a chronic health condition and was terminated upon his return. He sued MAI—which is 100 percent owned by William McGillicuddy—and Auto Care, Inc. (ACI)—which is 50 percent owned by him—alleging violations of the FMLA. Before trial, the district court held it had subject matter jurisdiction because defendants constituted an "integrated employer" under 29 C.F.R. §825.104(c)(2). A jury found in favor of Hukill and awarded damages, costs, and attorneys' fees.

The Fourth Circuit reversed. The FMLA defines an employer as any person engaged in commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year. *See* 29 U.S.C.