education program or placement decision, the court applied the two-year state statute of limitations contained in the Missouri Human Rights Act (MHRA), Mo. Ann. Stat. §213.111. A civil rights claim under the MHRA was most closely analogous to a cause of action under the IDEA. The court rejected Lauren's parents' argument that Missouri's five-year "catch-all" statute of limitations for personal actions applied, *see* Mo. Ann. Stat. §516.120(4), because a five-year period would frustrate the IDEA's policy to ensure quick resolution of disputes because of lost education. The two-year limitations period was not so brief as to undermine the IDEA policy of providing parents the opportunity to protect their children's rights. The court also rejected the parents' argument that the limitations period should be tolled because Lauren was a minor, *see* Mo. Ann. Stat. §516.170. Tolling the statute of limitations for an entire childhood would frustrate federal policy even more than the five-year statute of limitations would.

Applying the two-year limitations period, the court found that because Lauren's parents first challenged her placement in January 1995, any claims that she had been denied a FAPE before January 1993 are time barred. Thus, the court considered whether Lauren was denied a FAPE between January 1993 and January 1994—the date she was admitted to the Missouri School for the deaf.

The appeals court also held that the district court erred in determining that Lauren had received a FAPE. The due process panel concluded that the education Lauren received at the MSSSH with respect to sign language instruction was "wholly deficient." All of her evaluations showed an intensive need for a language-based program that adequately considered her deafness. The district court failed to give due weight to the due process panel decision. Consequently, the appeals court remanded to the due process panel for a determination of the appropriate remedy.

H.S. Athletics; §504; Title II; Direct Threat; Hemophilia; Hepatitis B

The Sixth Circuit held that a school district that placed a student with hemophilia and hepatitis B on "hold" status for a three-week period while it determined whether he posed a direct threat to the health and safety of other players did not violate the Rehabilitation Act §504, 29 U.S.C. §794, or the Americans with Disabilities Act Title II, 42 U.S.C. §§12131-12165. ***Doe v. Woodford County Bd. of Educ., 213 F.3d 921 (6th Cir. 2000).***

John, who has hemophilia and hepatitis B, participated in athletics without incident. In 1996, he became a member of the high school junior varsity basketball team. John's school medical records stated that he had hemophilia and hepatitis B and that he should not engage in activities that would put him at increased risk for physical injury. The school placed John's status as a player on "hold," and he could not practice with the team until the school received a doctor's clearance. John's doctor sent the school a letter stating that he had some reservations about John's health, that he was capable of playing basketball, and that his hemophilia put him at some risk. The school coach was dissatisfied with the vagueness and generality of the letter and continued John's "hold" status. Although the school principal instructed the coach to treat John like all other players, despite his medical condition, and to allow him to practice with the team, John did not receive notice of the principal's decision. John chose not to remain on the team and sued the school for violations of §504 and Title II. A Kentucky federal court granted the school summary judgment.

The Sixth Circuit affirmed. John argued that he was qualified to play on the basketball team without accommodation. The school admitted that its junior varsity basketball program operated under a "no cut" policy, meaning that any ninth grade student wishing to play was selected. Nonetheless, as an exception, persons with disabilities may not be "otherwise qualified" under both §504 and Title II if their participation in a program poses a direct threat to the health and safety of others. Here, the school was attempting to make such a determination when it placed John on "hold" status. For purposes of liability, it does not matter that the school eventually determined to allow John to fully participate on the basketball team. Rather, during the "hold" status period, the school was simply trying to balance the need of protecting the public health with John's rights not to be treated differently due to his disability. Consequently, the school may not be found liable for discrimination during this interim period. *See* 42 U.S.C. §12182(b)(3); *Montalvo v. Radcliffe*, 167 F.3d 873 (4th Cir. 1999), 23 MPDLR 150 (ruling student with HIV barred from martial arts school because he posed threat to health and safety of others). The school was in a "catch-22" situation. It had to be aware of possibly infringing upon John's rights if he was excluded from participation on the basketball team, and faced potential liability if John played on the team and another student accidentally became exposed to John's contagious condition.

Employment: Disability Defined

Title I; Workers' Comp.; Estoppel; Reasonable Accommodation; No Request; Back

The Third Circuit held that the doctrine of collateral estoppel barred a former employee's claim that his back injury constituted a disability under the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-12117, as a workers' compensation judge had previously found that he had fully recovered from his injury. ***Jones v. United Parcel Serv., 214 F.3d 402 (3d Cir. 2000).***

Neil Jones worked as a driver for United Parcel Service (UPS). After an on-the-job back injury on December 16, 1988, Jones began receiving workers' compensation. On October 19, 1995, a judge granted UPS's petition to terminate benefits on the ground that Jones had fully recovered from his injury. The Pennsylvania Workers' Compensation Appeal Board and Pennsylvania Commonwealth Court affirmed. While Jones' case was pending before the Board, he filed a Title I complaint claiming that UPS

failed to provide him with a reasonable accommodation for his return to work. Jones admitted that he was incapable of performing package car driver duties and that he had failed to make any request for an accommodation, an alternative equivalent position, or a promotion. He contended that he was excused from providing such evidence because UPS failed to engage in the interactive process. A Pennsylvania federal court granted UPS summary judgment on the ground that Jones was not a qualified individual with a disability.

The Third Circuit affirmed. Jones' ADA claim was barred by the doctrine of collateral estoppel, as the issue decided in the workers' compensation proceeding is identical to that presented in the ADA claim, *see Rue v. K-Mart Corp.*, 713 A.2d 82, 84 (Pa. Sup. Ct. 1998). The core of his ADA claim is the allegation that he remained disabled as a result of his work-related injury and UPS failed to provide a reasonable accommodation for that disability. The workers' compensation judge found that Jones had completely recovered from his back injuries and could return to work as a package car driver, and this finding had been sustained on appeal. Because Jones was precluded from re-litigating his recovery from the 1988 work-related injury, his ADA claim failed as a matter of law.

Even if the doctrine of collateral estoppel were not applicable, Jones' ADA claim failed because he admitted that no reasonable accommodations on the part of UPS would have allowed him to perform as a driver. The appeals court rejected Jones' argument that the parties could have identified transfer positions as a reasonable accommodation, but that UPS failed to engage in the interactive process. *See* 29 C.F.R. §1630.2(o)(3); *see also Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296 (3d Cir. 1999), 23 MPDLR 345. Unlike the plaintiff in *Taylor*, Jones never requested an accommodation or assistance for his disability; he did not request a return to his old position as a package car driver; and he did not ask for any other jobs available with UPS. He failed to provide evidence that UPS should have known that he sought an accommodation.

Title I; Actual; Perceived; Depression

The Tenth Circuit ruled that a former employee with depression was neither substantially limited in the major life activities of learning, sleeping, thinking, or interacting with others, nor regarded as such by her employer and, thus, did not have a covered disability under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* ***Doyal v. Oklahoma Heart, Inc., 213 F.3d 492 (10th Cir. 2000).***

Carol Doyal, an administrator for Oklahoma Heart (OH), was diagnosed with major depression and anxiety attacks, and her doctor recommended reduced stress and workload. Doyal asked OH for a new position, and was transferred to a human resources director position with a reduction in pay. Doyal continued to have problems with memory and concentration, forgetting names and job applicants' qualifications. OH terminated Doyal for her inability to make decisions and her lapses in memory, judgment, and confidentiality. An Oklahoma federal court granted OH summary judgment.

The Tenth Circuit affirmed, finding Doyal did not have a covered disability under the ADA, *see* 42 U.S.C. §12102; *see also Abbott v. Bragdon*, 524 U.S. 624 (1999), 23 MPDLR 150. Doyal asserted that her depression limited her ability to perform the major life activities of learning, sleeping, thinking, and interacting with others. She cited the Equal Employment Opportunity Commission (EEOC) Guidance on Psychiatric Disabilities and the ADA as authority for her proposition that thinking and interacting with others are major life activities. However, the EEOC Guidance is not controlling authority. *See Pack v. Kmart Corp.*, 166 F.3d 1300 (10th Cir. 1999), 23 MPDLR 195. Nevertheless, the court assumed that Doyal's learning, sleeping, thinking, and interacting with others were major life activities, but found that Doyal was not substantially limited in these activities. *See* 29 C.F.R. §1630.2(j)(1). *See also Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), 23 MPDLR 511.

She failed to present evidence of any specific instances where she had difficulty learning, but instead generally asserted that she forgot the names of job applicants and that she had difficulty learning a new computer system. Although Doyal at times had insomnia, her problems were mitigated, though not cured, by medication. Although Doyal had difficulty choosing between job applicants and some trouble making simple decisions, this was not evidence of a significant restriction on her ability to think. She also failed to present evidence that she was significantly restricted in her ability to interact with others relative to an average person in the general population. Although Doyal presented evidence that her depression caused her to become lax in personal hygiene and become withdrawn from co-workers, there was also evidence that Doyal attended management meetings, laughed at jokes, and interacted normally with superiors.

Nor did OH regard Doyal as being substantially limited in any major life activity. She pointed to statements by management that she was "incapacitated" and that her difficulties at work were "not a fixable problem." Such generalized statements, however, do not support the conclusion that management misperceived her as being substantially limited in learning, sleeping, thinking, or interacting with others. Indeed, two of Doyal's supervisors testified in their depositions that the conversion to the new computer system was difficult for everyone, not just Doyal, and reported that she appeared and behaved normally at work during the time period in issue. Although OH management perceived Doyal as being unmotivated, forgetful, and irremediably unhappy in her job, this is not sufficient for a finding of perceived disability under the ADA.

Title I; Reasonable Accommodation; Pretext; Disparate Treatment; Bipolar Disorder

A Maine federal court ruled that while factual issues exist as to whether (1) an employee with bipolar disorder has a disability under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, (2) her employer failed to reasonably

accommodate her, and (3) she was terminated based on her misconduct, the employee failed to show that she was treated differently than non-disabled employees for the same conduct. ***Reed v. Lepage Bakeries, Inc., 2000 WL 761626 (D. Me. Feb. 29, 2000).***

Manuela Reed, who has bipolar disorder, worked for Lepage Bakeries. After a fight with a co-worker, Reed became so upset that she left work and was hospitalized for five days. Reed's counselor told her to ask Lepage for an accommodation—that she be allowed to walk away from situations when she was losing control. Reed's supervisors agreed to the accommodation. Several months later, Reed had a meeting with her supervisors to discuss switching shifts. When one of the supervisors told Reed she would not be allowed to do so, Reed used profanity and put her hand on the doorknob. The supervisor told her that if she walked out the door, she would not be able to return to work that day. Reed then "lost it" and went into a "blind rage." She was later fired over the incident. Reed sued under Title I, 42 U.S.C. §§12111-12117. Lepage moved for summary judgment.

The district court denied the motion. Factual issues exist as to whether Reed has an ADA disability, that is whether she is substantially limited in the major life activities of sleeping and interacting with others. However, she failed to present any evidence that her mental disabilities significantly restrict her ability to perform either a class of jobs or a broad range of jobs in various classes. *See* 29 C.F.R. §1630.2(j)(3). Thus, Reed is not limited in the major life activity of working. Factual issues also exist as to whether Reed's perception that she was not being allowed to use her accommodation in the meeting with her supervisors was reasonable. Lepage has not established that an accommodation allowing Reed to walk away temporarily from a stressful situation involving her supervisor would be unreasonable as a matter of law. *See Jacques v. Clean-Up Group., Inc.*, 96 F.3d 506 (1st Cir. 1996), 20 MPDLR 833.

Moreover, factual issues exist as to whether Reed was terminated on the basis of her misconduct alone. An employer need not tolerate misconduct because the misconduct is caused by a mental illness. *See EEOC v. Amego, Inc.*, 110 F.3d 135 (1st Cir. 1997), 21 MPDLR 346. However, Reed suggested that she would not have directed the profanity at her supervisor if she had been able to exercise her accommodation and walk away from the meeting until she could control her anger. Further, Lepage offered no evidence that it would have terminated any employee who behaved as Reed did toward her supervisor, nor does it have a policy prohibiting such conduct by employees.

Finally, the court rejected Reed's claim that she was treated less favorably than non-disabled employees with respect to the conduct that led to her termination. The evidence submitted by Reed regarding incidents of allegedly similar behavior for which Lepage provided no discipline involve the use of profanity by employees in their contact with co-workers. However, Reed was not terminated solely because she used vulgar and offensive words.

Title I; Actual; Qualified; Reasonable Accommodation; Depression

A Maine federal court ruled that a former home care nurse with temporary depression did not have a disability within the meaning of the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, nor was she qualified to perform her essential job functions with or without reasonable accommodation. Also, her employer offered a reasonable accommodation by offering her either a per diem position in long-term care or a severance package. ***Williams v. HealthReach Network, 2000 WL 760742 (D. Me. Feb. 22, 2000).***

Lorraine Williams worked as a home care nurse for HealthReach. When the company restructured, she began having difficulty keeping up with her job. In November 1996, she was informed that she would be discharged unless her work performance improved significantly. In December 1996, Williams was diagnosed with depression and prescribed an anti-depressant medication. She requested and received two months leave from HealthReach. After supervising Williams on the day of her return, her supervisor concluded that Williams could no longer perform her job without threatening the safety of others. HealthReach terminated Williams, but offered her the choice of resignation and a severance check, or continued employment as a per diem nurse in long-term care. Williams never responded to the offer. She sued under Title I, 42 U.S.C. §§12111-12117.

The district court granted HealthReach summary judgment. Williams did not have a disability as defined by the ADA. She had one bout of major depression that lasted at most for a few months before medication mitigated her impairment and allowed her to engage in all life activities without substantial limitation. Temporary depression generally does not amount to an ADA disability. *See Soileau v. Guilford of Me., Inc.*, 105 F.3d 12 (1st Cir. 1997), 21 MPDLR 201. Moreover, Williams was only limited with regard to her job as a home care nurse at HealthReach, as demonstrated by both her later success in nursing jobs after leaving HealthReach, as well as HealthReach's offer of a long-term care position, which it believed she could perform.

Even assuming Williams had an ADA disability, she was not qualified for the position of home care nurse, with or without accommodation. Her performance deteriorated after the restructuring, before anyone knew that she had depression. Williams argues that her performance before the restructuring is sufficient to show that she can perform the essential job functions. However, she may not rely on past performance to establish that she is a qualified individual without accommodation when HealthReach has produced undisputed evidence of diminished or deteriorated abilities. *See Mole v. Buckhorn Rubber Prods., Inc.*, 165 F.3d 1212 (8th Cir. 1999), 23 MPDLR 210.

The court rejected Williams' argument that HealthReach failed to offer her a reasonable accommodation because it abandoned an "action plan" that would have allowed her to ease back into work upon returning from leave. First, the plan called on Williams

to perform almost no essential job functions as a home care nurse. The ADA does not require an employer to accommodate a disability by foregoing an essential function of the position. *Feliciano v. Rhode Island*, 160 F.3d 780 (1st Cir. 1998), 23 MPDLR 71. Second, HealthReach's decision to abandon the "action plan" came after further concerns were raised about Williams' ability to perform her job safely. Third, HealthReach offered Williams reasonable accommodation. In addition to the two months of leave, on the day it terminated her, it offered her either a per diem position in long-term care or a severance package. A plaintiff's refusal to accept available reasonable accommodations precludes her from arguing that other accommodations should have been provided. *Hankins v. The Gap, Inc.*, 84 F.3d 797 (6th Cir. 1996), 20 MPDLR 510.

Title I; Reasonable Accommodation; Back Pay; Attys' Fees; Depression

An Illinois federal court held that an former employee with depression had a covered disability under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, and her requests for a revised schedule and work load to accommodate her disability were reasonable. The court offset the jury's back pay award by employer-financed disability benefits, but not Social Security benefits; granted her motion for prejudgment interest; and awarded attorneys' fees. ***Martyne v. Parkside Med. Servs., 2000 WL 748096 (N.D. Ill. June 8, 2000).***

Maureena Martyne worked for Parkside Medical Services as an alcohol and chemical dependency counselor. She requested that Parkside accommodate her depression by changing her schedule from five days to four so that she could undergo counseling, and by shifting her caseload. Parkside refused. After being hospitalized for depression, Martyne went on medication, which resulted in serious side effects. She felt "'overwhelmed professionally'" and "'stressed,'" and did not keep up with her patients' charts. When her workload was increased, she became unable to cope with working and requested a leave of absence. She did not return to work. Martyne sued Parkside under Title I, 42 U.S.C. §§12111-12117, alleging failure to provide reasonable accommodations for her disability. A jury awarded her $302,000 in back pay and $302,000 in compensatory damages. Parkside moved for judgment as a matter of law.

The court denied the motion. The court rejected Parkside's argument that Martyne did not have a covered disability under the ADA. Martyne had a depressive disorder for many years, and her impairment substantially limited the major life activity of working when she requested reasonable accommodations. She was not required to introduce medical testimony directly establishing that her condition substantially limited her ability to work. Parkside cited no decision by the Seventh Circuit requiring testimony from a medical professional to establish the existence of the plaintiff's disability in an ADA case. The cases cited by Parkside where medical testimony was required were distinguishable, because in those cases there was no objective manifestation of the employee's disability. *See, e.g., Heilweil v. Mount Sinai Hosp.*, 32 F.3d 718 (2d Cir. 1994), 18 MPDLR 658. The testimony of two co-workers constituted objective evidence that Martyne's condition had deteriorated. In addition, there was medical testimony that her coping skills had dissolved; she had trouble concentrating, eating, and sleeping; she felt depressed; and she experienced nightmares.

The court also rejected Parkside's argument that it had reasonably accommodated Martyne. Parkside had turned down her modest accommodation request for a four-day week. Although Parkside had subsequently allowed her to use vacation time to work a four-day schedule, the jury could have found that this accommodation was too late for the change to do any good. Parkside had also been unwilling to make shifts in patient assignments, even though there was no evidence that Martyne's request would have caused an undue hardship on Parkside.

Because the evidence supported the jury's finding that Martyne's inability to work was caused by Parkside's failure to provide her with reasonable accommodations for her disability, the court declined Parkside's request to set aside the back pay award. The jury could also have rationally concluded that the compensatory damage award was equivalent to Martyne's loss of back pay in light of her inability to work and emotional distress caused by Parkside's ADA violations. The court denied Parkside's motion that Martyne's back pay award should be reduced by the amount of Social Security benefits she received, but agreed with Parkside that the award should be reduced by the amount of disability benefits Martyne received pursuant to Parkside's financial plan. The purpose of the offset was not to prevent Martyne from being overcompensated, but rather to prevent Parkside from paying twice. Martyne had contributed to Social Security long before she was employed by Parkside.

The court denied Martyne's motion for front pay—a lump sum amount representing the discounted present value of the difference between the earnings Martyne would have received in her employment with Parkside and the earnings she could be expected to receive in her current and future employment. Martyne was unable to work, and reinstatement was not an available remedy. The jury had been instructed that Martyne's lost earning capacity was a component of compensatory damages. The court granted Martyne's motion for prejudgment interest on her back pay award for the period of time after her lawsuit was filed in September 1997. The court also granted Martyne's counsel $78,500 in attorneys' fees.

Title I; Actual; Statute of Limitations; Wrist; MI

A Pennsylvania federal court held that although an employee timely filed his charge of discrimination with the Equal Employment Opportunity Commission (EEOC), he failed to show that his wrist injury and mental breakdown substantially limited the major life activity of working and, thus, constituted a disability under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* ***Dubose v. District 1199C, 2000 WL 760465 (E.D. Pa. June 9, 2000).***

Robert Dubose, an environmental service attendant for Temple University Hospital, injured his right wrist in 1992 and 1993, limiting his ability to lift heavy objects. Although his doctor restricted him to light duty, Dubose alleged that Temple ignored the restriction and assigned him more work. In 1996, Dubose had a mental breakdown, which he alleged was caused by Temple's refusal to restrict him to light duty. Temple terminated Dubose on the ground that he was absent from work for three or more days without an excuse. Dubose's union denied his request to file a grievance. In March 1997, Temple and the union met to discuss Dubose's complaint. The union advised Temple that Dubose's serious medical condition was the reason for his unexcused absences. Temple asked the union for medical documentation of Dubose's condition, but Dubose did not sign the consent form until July 7, 1997. The next day, the union sent Dubose a letter stating that the union was canceling its file. Dubose filed an EEOC charge of discrimination against Temple and the union. After receiving a right-to-sue letter from the EEOC, Dubose filed his Title I, 42 U.S.C. §§12111-12117, failure-to-accommodate complaint against both Temple and the union.

The court granted defendants summary judgment. The court rejected Temple's contention that Dubose failed to file the EEOC discrimination charge until December 2, 1997—more than 350 days after he was terminated and beyond the 300-day filing period. Dubose had visited the EEOC on July 10, 1997, and had filled out a "Charge Questionnaire" identifying Temple as a defendant in a disability discrimination action. The questionnaire served as a sufficient charge for purposes of the limitation period.

Nevertheless, Dubose did not have a covered disability under the ADA. His wrist injury did not substantially limit the major life activity of working, as he worked for more than two years after reinjuring his wrist and was only restricted from lifting heavy objects with one hand. As for Dubose's mental impairment, there was no evidence that it was permanent or chronic. He was successfully treated with antidepressant medication.

State Law; Actual; Perceived; Stress

An Oregon appeals court found that a former employee with panic attacks and stress was not substantially limited in the major life activity of working nor perceived as such by her employer and, thus, was not disabled under the state anti-discrimination statute. ***Hardie v. Legacy Health Sys., 2000 WL 674890 (Or. Ct. App. May 24, 2000).***

Dorothy Hardie worked in accounts payable and purchasing for Legacy Health System. She was frequently absent from work, tardy, and had a chronic back log of work. Hardie filed a workers' compensation claim for panic attacks, stress, and agoraphobia (fear of leaving home). When Legacy discovered that Hardie had authorized the purchase of a microwave for herself but had failed to pay for it, Legacy terminated her. She sued Legacy under Or. Rev. Stat. §659.425(1), alleging failure to accommodate her disabilities and wrongful termination. A trial court found that Hardie did not have a covered disability under §659.425(1) because her disabilities were only temporary and had no lasting effects. The court also concluded that Legacy fired Hardie because of her unauthorized employee purchase, not because of her actual or perceived disabilities.

The state appeals court affirmed. Hardie failed to show that her agoraphobia and panic attacks substantially limited the major life activity of working. Although Hardie could not perform her duties under the supervision of one supervisor at Legacy and this supervisor was the source of her stress and resulting panic attacks and agoraphobia, nothing in the record showed that Hardie was incapable of working as a buyer generally. Similarly, there was no evidence that Legacy perceived Hardie as disabled. Although the supervisor thought Hardie was prone to headaches and other illnesses and that her absences affected her work, Legacy did not perceive Hardie's stress and panic attacks as incapacitating her indefinitely.

Title I; Mitigating Measures; Bipolar, Obsessive Compulsive Disorders

The Tenth Circuit affirmed a Kansas federal court decision (*see* 59 F. Supp. 2d 1132 (D. Kan. 1999), 23 MPDLR 678) that a former fraud investigator's bipolar and obsessive compulsive disorders—as controlled by medication—did not substantially limit a major life activity and, thus, did not constitute disabilities under the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.* ***Scherer v. G.E. Capital Corp., 2000 WL 377474 (10th Cir. Apr. 12, 2000).***

Title I; Qualified; Attendance; Pretext; CFS

The Tenth Circuit ruled that under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, a former employee's chronic fatigue syndrome (CFS) did not substantially limit the major life activity of sleeping and, thus, was not a covered disability; she was not a qualified individual because she could not be punctual; and she failed to show her being terminated for tardiness was a pretext for discrimination. ***Martinez v. Pacificorp, 2000 WL 504857 (10th Cir. Apr. 28, 2000.)***

Lisa Martinez alleged that she was an individual with a disability due to CFS, that Pacificorp failed to accommodate her disability by permitting her to work flexible hours, and that Pacificorp had terminated her because she had complained about its failure to accommodate her disability. A Utah federal court granted summary judgment for Pacificorp, holding that Martinez failed to assert any connection between her disability and her tardiness—the reason for her termination—or to present evidence of retaliation.

The Tenth Circuit affirmed. First, assuming that CFS is an impairment that substantially limits the major life activity of sleeping, Martinez failed to show that CFS significantly restricted her ability to sleep as compared to the average person in the general population and, thus, constituted a covered disability

under the ADA. *See* 29 C.F.R. §1630.2(j)(2). She only alleged that she had insomnia and resulting fatigue that made it difficult for her to "get going" in the morning.

Second, Martinez was not qualified to perform her essential job functions with or without reasonable accommodations. The court rejected Martinez's argument that punctuality was not an essential job function. *See* 42 U.S.C. §12111(8). Martinez contended that being present at her job eight hours, not the specific hours she should be present, was essential. However, her personal opinion could not override Pacificorp's stated requirements, or the language in its collective bargaining agreement stating her hours as from 8:00 a.m. to 5:00 p.m.

Third, the court rejected Martinez's argument that Pacificorp should have realized that her late arrivals were due to her CFS. Each time she arrived late for work she proffered an excuse unrelated to her CFS. She never stated that she was late because her CFS resulted in altered sleep habits. Martinez had a history of tardiness and had been counseled repeatedly about it. She admitted being late for work 25 percent of the time.

Finally, as to Martinez's retaliation claim—that after she complained of not being granted flex time, she was subjected to increased supervision until her termination—she failed to show that Pacificorp's stated reason for terminating her was a pretext for discrimination. Mere conjecture that the employer's explanation is pretextual is insufficient to defeat summary judgment. Martinez received written reprimands regarding her attendance in 1991 and three times in 1992. Another warning in 1994 stated that two more failures to comply with strict attendance requirements would result in immediate termination. Martinez's discharge "simply completed the disciplinary process already set in motion before Ms. Martinez engaged in any protected action," the court said.

State Law; Drug Exclusion

An Ohio appeals court found that a hospital did not violate a state handicap discrimination law when it terminated a surgical assistant for improper use of pain medication, because he was not participating in a supervised rehabilitation program and had not abstained from using illegal drugs at the time of his dismissal. ***Hall v. Jewish Hosp. of Cincinnati, 2000 WL 707073 (Ohio Ct. App. June 2, 2000).***

Robert Hall, a hospital surgical assistant, became addicted to the prescription pain medication he was taking for degenerative bone disease of his hips. The hospital terminated him for using and buying pain medication on hospital property. He sued the hospital for disability discrimination under Ohio Rev. Code Ann. §4112.02(A). A trial court granted the hospital summary judgment.

The appeals court affirmed. Section 4112.02(Q)(1)(a) excludes from protection employees who are currently engaged in illegal drug use. Hall contended that he fit within a "safe harbor" provision of the statute dealing with employees participating in a supervised rehabilitation program who were no longer engaged in the illegal use of drugs, *see* §4112.02(Q)(1)(b) and 42 U.S.C §12114(b). He argued that he was "arranging" to enter a treatment program in Indiana at the time of his dismissal. However, arranging to go into a program is not the same as having completed or being currently enrolled in a program. Expanding the safe harbor provision of the statute to include arrangements for going into a rehabilitation program would not have benefited Hall, because at the time he was fired he was improperly obtaining pain medication from a co-worker.

Title I; Eleventh Amendment; Qualified; Multiple Chemical Sensitivity

A Utah federal court found that the Eleventh Amendment did not bar an employee's claim that her state employer failed to accommodate her multiple chemical sensitivity in violation of the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-12117. Also, factual issues existed as to whether her condition substantially limited the major life activity of breathing and whether she was qualified to perform essential job functions. ***Davis v. Utah Tax Comm'n, 96 F. Supp. 2d 1271 (D. Utah 2000).***

Glenda Davis worked at the Utah Tax Commission. When she was moved next to an employee who wore strong perfume, she experienced headaches, nausea, mental confusion, numbness, a fast heart rate, and watery eyes. After receiving a note from Davis' doctor, the Commission moved Davis away from that employee, but next to an employee who used strongly scented hand lotion. Although she again obtained a doctor's note, the Commission refused to move her, but instead gave her a fan to ventilate her work area. Davis quit and sued the Commission under Title I.

The court denied the Commission's motion for summary judgment. The state was not immune from suit under the Eleventh Amendment. In *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631 (2000), 24 MPDLR 98, the Supreme Court held that Congress did not validly abrogate states' Eleventh Amendment immunity in the Age Discrimination in Employment Act (ADEA). The Commission argued that it was immune because Congress' statutory abrogation of Eleventh Amendment immunity in the ADA, just like the ADEA, was not a valid exercise of its power to enforce the Fourteenth Amendment. However, in *Martin v. Kansas*, 190 F.3d 1120 (10th Cir. 1999), 23 MPDLR 862, the Tenth Circuit determined that Congress' statutory abrogation of Eleventh Amendment immunity in the ADA was a valid exercise of its power to enforce the Fourteenth Amendment. *Cf. Erickson v. Board of Governors of State Colleges & Univs. for N. Ill. Univ.*, 2000 WL 307121 (7th Cir. Mar. 27, 2000), 24 MPDLR 457 (holding Title I is not a valid exercise of power under Section 5). The court rejected the Commission's argument that *Martin* was no longer controlling in light of *Kimel*. Because the Tenth Circuit, not the Supreme Court, has spoken directly on the issue of whether the ADA is constitutional as applied to the states, the court is bound to follow the Tenth Circuit. *Martin* applied the test *Kimel* required for analyzing whether Congress appropriately exercised its Section 5 enforcement power in abrogating states' immunity and, thus, is still good law.

Even if *Martin* were called into question by *Kimel*, however, the court concluded the ADA is still a permissible exercise of Congress' Section 5 power. First, Congress made its intention to abrogate the states' immunity unmistakably clear in the ADA, *see* 42 U.S.C. §12202. Second, relying on Judge Wood's dissenting opinion in *Erickson*, the court found Congress had made numerous findings of fact regarding the pervasiveness of discrimination against individuals with disabilities. There is a congruence and proportionality between the injury to be prevented and remedied (discriminatory conduct) and the means adopted to that end. The ADA only prohibits discrimination against qualified individuals with disabilities, requires only reasonable accommodation, and does not impose an undue burden on the states.

Turning to the merits, the court found that there was a disputed factual issue as to whether Davis had a covered disability under the ADA. The Commission argued that the medical evidence demonstrated that Davis' ability to breathe was not substantially impaired during her employment, and that having an impairment around only one employee was not a substantial limitation. Davis, however, provided significant evidence about the effects that strong fragrances had on her and the length to which she went to avoid being exposed to them. Specifically, a jury could reasonably determine that Davis was significantly restricted as to the condition, manner, or duration under she could breathe as compared to that of the average person in the general population.

Another factual issue existed as to whether Davis was qualified to perform the essential functions of her position with reasonable accommodations. Davis did not dispute that she could not have worked outside of the tax processing center because of the confidential nature of her job, but suggested that she could be reasonably accommodated by moving her or grouping together people who wore fragrances and those did not. A jury could have determined that Davis' request that her co-worker be instructed not to wear a strongly scented lotion would have been a reasonable accommodation.

Title I; Actual; Qualified; CTS

A Pennsylvania federal court decided that a former deputy clerk failed to show that her carpal tunnel syndrome (CTS) substantially limited a major life activity and, thus, she was not disabled within the meaning of the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* Also, even with reasonable accommodations, she was not qualified to do writing, an essential job function. ***Blackwell v. City of Philadelphia, 2000 WL 572706 (E.D. Pa. May 10, 2000).***

Julia Lee Blackwell, a deputy clerk, brought suit under Title I, 42 U.S.C. §§12111-12117, alleging she was forced to retire after more than 30 years of service because the city refused to provide reasonable accommodations, such as light-duty work or an assistant, for her CTS.

The court granted the city summary judgment. Blackwell did not have a covered disability under the ADA, *see* 42 U.S.C. §12102(2)(A); 29 C.F.R. §1630.2(g)(1). Blackwell did not specify which major life activity was substantially limited by her CTS. Her ability to work was not substantially limited by her condition, as she did not assert that she was significantly restricted in her ability to perform either a class of jobs or a broad range of jobs in various classes. *See* 29 C.F.R. §1630.2(j)(2), app.; *Aldrich v. Boeing Co.*, 146 F.3d 1265 (10th Cir. 1998), 22 MPDLR 610.

Also, she was not qualified to perform an essential function of her job. *See* 42 U.S.C. §12111(8). Because of her CTS, she could not write in longhand. Although the city attempted to accommodate Blackwell by temporarily assigning a second person to work with her, the ADA does not require the city to continue such an accommodation on a permanent basis nor to create a light-duty or new permanent position for Blackwell as a reasonable accommodation. *See Simmerman v. Hardee's Food Sys., Inc.*, 1996 WL 131948 at *9 (E.D. Pa. Mar. 25, 1996), 20 MPDLR 354.

Title I; Actual; Qualified; CTS; Reassignment

A Kansas federal court ruled that a former employee with carpal tunnel syndrome (CTS) and a thumb injury failed to show she was substantially limited in the major life activities of working or lifting and, thus, did not have a disability under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* Also, she was not qualified to perform essential job functions of her position even with the reasonable accommodation of reassignment. ***Riggs v. Boeing Co., 98 F. Supp. 2d 1252 (D. Kan. 2000).***

In 1991, due to on-the-job injuries, Boeing Company imposed medical restrictions on Rowana Riggs, a hand finisher, including no prolonged polishing or repetitive use of her right thumb. In 1993, Riggs was released from all restrictions. Over the next four years, she continued to seek medical attention for her injuries, but worked without restrictions. Riggs sought a job transfer as an accommodation. Boeing offered her a housekeeping position, which she declined on the grounds that it would aggravate her condition. Riggs was assigned various jobs instead. She filed with the Equal Employment Opportunity Commission (EEOC), claiming none of the jobs fit her restrictions. She then filed suit under Title I, 42 U.S.C. §§12111-12117.

The court granted Boeing summary judgment. Riggs failed to show she had a covered ADA disability. She mistakenly assumed that a disability under the Kansas Workers' Compensation Act, Kan. Stat. Ann. §44-566, was the same as an ADA disability. Pursuant to state law, a "handicapped employee" was an individual with a physical impairment who would be disadvantaged in obtaining employment because of that impairment. By contrast, an ADA disability is a physical or mental impairment that substantially limits a major life activity. Riggs failed to show that she was substantially limited in the major life activity of working, because she was not restricted from performing a class of jobs or a broad range of jobs in various classes. *See Williams v. Kerr-McGee Corp.*, 110 F.3d 74 (10th Cir. 1997), 21 MPDLR 490.

Moreover, even though she was prohibited from overhead work, Riggs presented no medical evidence of a restriction on her lifting ability. The overhead work restriction would preclude lifting over her head, but much lifting does not occur overhead. *See Lowe v. Angelo's Italian Foods, Inc.*, 87 F.3d 1170 (10th Cir. 1996), 20 MPDLR 687; *Gibbs v. St. Anthony Hosp.*, 107 F.3d 20 (10th Cir. 1997), 21 MPDLR 341.

Riggs also was not a qualified individual under the ADA. The court reviewed all of the jobs she had held. However, she produced no evidence that she could perform essential job functions even with reasonable accommodation. As for the jobs that Riggs identified that she could be reassigned to—first-line management, security, and inspector—there was no evidence that she was qualified for these positions.

Title I; Actual; Record; Perceived; Pretext; Alcoholism

The Tenth Circuit found that a former employee with alcoholism failed to show that he had a covered disability within the meaning of the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, or that his employer's reason for termination violating a Return-to-Work Agreement was a pretext for discrimination. ***Nelson v. Williams Field Servs. Co., 2000 WL 743684 (10th Cir. June 9, 2000).***

Thomas Nelson worked for Williams Field Services Company as an oil field operator. He was treated for depression and alcohol dependency. He signed a Return-to-Work Agreement, under which he agreed to refrain from alcohol, but was later terminated when he was arrested for driving under the influence. Nelson sued under Title I, 42 U.S.C. §§12111-12117. The district court granted Williams Field summary judgment.

The Tenth Circuit affirmed. Nelson failed to establish that his drinking was an impairment that substantially limited his ability to perform the major life activity of working or other major life activities, or regarded as such by Williams Field. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), 23 MPDLR 510. Nelson also failed to show that he had a record of a substantially limiting impairment. Even if Nelson had a covered disability under the ADA, he failed to show that Williams Field's reason for firing him was a pretext for discrimination. Nelson was terminated because he violated the Return-to-Work Agreement, not simply because he was a person with alcoholism and had consumed alcohol while off the job.

Hiring; Title I; Perceived; CTS

A Kansas federal court found there was a factual issue as to whether an applicant with carpal tunnel syndrome (CTS) was regarded by his employer as substantially limited in the major life activity of working and, thus, disabled within the meaning of the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.* ***Herman v. Raytheon Aircraft Co., 97 F. Supp. 2d 1249 (D. Kan. 2000).***

Raytheon Aircraft Company withdrew its offer to hire Todd Herman as a sheet metal assembler because a company physician found that his CTS medically restricted him. He sued Raytheon under Title I, 42 U.S.C. §§12111-12117.

The court denied Raytheon's summary judgment motion. A genuine factual issue existed as to whether Raytheon regarded Herman's CTS as a disability, that is as a physical impairment that substantially limited his ability to perform a class or range of jobs, not just a particular job. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), 23 MPDLR 510. Herman testified that his interviewer said that he was not fit for any job with the company.

Title I; Actual; Epstein-Barr

An Ohio federal court ruled that a former staff nurse's Epstein-Barr virus, which prevented her from working in the evenings, did not substantially limit the major life activity of working and, thus, did not constitute a covered disability under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* ***Eibest v. Planned Parenthood of Stark County, 94 F. Supp. 2d 873 (N.D. Ohio 2000).***

In 1985, Planned Parenthood (PP) hired Mary Ann Eibest to work as a staff nurse. Her schedule called for her to work 30 hours per week. Nearly half of those hours were scheduled for Mondays, when Eibest was scheduled to work from 8:00 a.m. to 8:00 p.m. In 1994, Eibest was diagnosed with Epstein-Barr virus, which causes debilitating fatigue. In 1998, Eibest's physician recommended that she no longer work between 5:00 p.m. and 8:00 p.m. on Mondays on account of her medical condition. PP refused to excuse Eibest from working Monday evenings, since the PP medical clinic was open in the evening only on Mondays. Instead, PP offered to allow Eibest work until 7:00 p.m., or to eliminate three hours from the beginning of her shift on Mondays. Eibest rejected the offer because the fatigue associated with her condition was greatest in the afternoons and evenings. Eibest resigned and sued PP under Title I, 42 U.S.C. §§12111-12117, for its failure to accommodate her disability.

The court granted PP summary judgment, finding Eibest failed to show she had a disability as defined by the ADA, *see* 42 U.S.C. §12102(2). According to Eibest, the Epstein-Barr virus substantially limited the major life activity of working by preventing her from working evenings. However, the Epstein-Barr virus did not hinder Eibest's ability to perform nursing tasks for a substantial number of hours during the week, and she received positive reviews of her work as a nurse. Eibest's medical condition merely required her to perform her work during the day, and she offered no compelling reason for concluding she was significantly restricted in finding a comparable nursing job. *See* 29 C.F.R. §1630(j)(3)(i). Federal appeals courts have found that medical conditions that merely limit an employee from working long hours or particular shifts are insufficient to establish a disability under the ADA. *See Colwell v. Suffolk County Police Dep't*, 158 F.3d 635 (2d Cir. 1998), 22 MPDLR 745; *Tardie v. Rehabilitation Hosp. of R.I.*, 168 F.3d 538 (1st Cir. 1999), 23 MPDLR 346.

Title I; State Law; Retaliation; Punitive Damages; Heart

The Second Circuit ruled that an employer who terminated an employee because of his heart condition and refused to rehire him after he filed an administrative charge of discrimination violated the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-12117; the New York State Human Rights Law (NYSHRL), N.Y. Exec. Law §290; and the New York City Human Rights Law (NYCHRL), N.Y. City Admin. Code §8-107. However, the employee was not entitled to punitive damages, as the employer did not act with malice or reckless indifference. ***Weissman v. Dawn Joy Fashions, Inc., 214 F.3d 224 (2d Cir. 2000).***

Steven Weissman, a salesman for Dawn Joy Fashions (DJF), had a heart attack and advised his supervisor that he would be out of work for four or five weeks. Two weeks later, Weissman's supervisor fired him, but said that the company would consider rehiring him after his doctor released him to return to work. A few weeks later, Weissman stated to his supervisor that he could return to work. When Weissman did not hear from his supervisor, he filed a charge with the New York City Commission on Human Rights, alleging he had been fired because of his heart condition. DJF then abandoned efforts to find him a job while the charge was pending. Weissman filed a complaint against DJF under the ADA, the NYSHRL, and the NYCHRL. A New York federal court denied DJF summary judgment. 1998 WL 458797 (S.D.N.Y. Aug. 11, 1997), 21 MPDLR 623. A jury awarded Weissman $75,000 economic damages, $95,000 compensatory damages, and $150,000 punitive damages. The district court reduced the compensatory damages award to $65,000, and ruled that Weissman was not entitled to punitive damages on both the retaliation and discrimination claims, *see* 1999 WL 144488 (S.D.N.Y. Mar. 17, 1999).

The Second Circuit affirmed on the liability issue. The appeals court did not address whether a heart attack constituted a disability under the ADA. The district court charged the jury, without objection by DJF, using the definition of disability under the NYSHRL and the NYCHRL. The district court correctly concluded that because the term "disability" was more broadly defined under the NYSHRL and the NYCHRL than it was under the ADA, and Weissman had pleaded violations of all three statutes, he only needed to satisfy the broader standard under the state and city laws in order to prevail. *See Reeves v. Johnson Controls World Servs., Inc.*, 140 F.3d 144, 155 (2d Cir. 1998), 22 MPDLR 359. The NYSHRL defined disability as a

> physical, mental, or medical impairment resulting from anatomical, physiological, genetic or neurological conditions, which prevents the exercise of normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques . . . or (c) a condition regarded by others as such an impairment.

See N.Y. Exec. Law §292(21) (McKinney Supp. 1999). The NYCHRL contained a similar definition, *see* N.Y. City Admin. Code §8-102(16)(a) and (b)(1). Under these definitions, there was evidence for a jury to find that Weissman's heart attack was a physical or mental impairment and, thus, a disability. There was also evidence that DJF regarded him as disabled. Alan Kleinberg, who was in charge of hiring and the administration of sales personnel, told Weissman, "[Y]our doctor says it might be four to five weks [until you return from the heart attack], but it may be four to five months or it may be never and we can't wait, so as of today consider yourself fired."

Further, sufficient evidence supported Weissman's retaliation claim. His supervisor promised to help Weissman find a job with DJF when he could return to work. After he filed his administrative complaint, DJF stopped looking for a position for Weissman even though additional sales positions had opened up at the company.

Finally, the appeals court affirmed the district court's rejection of the jury's punitive damages award. DJF stopped looking for a position for Weissman only after he filed his discrimination claim. This alleged retaliatory action did not rise to the level of malice or recklessness, *see Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999), 23 MPDLR 544, and did not evince bad faith because DJF was relying on the advice of counsel. Weissman admitted that the company was busy and could not afford to be without salespersons for an extended period of time. There was no evidence of continuous or multiple discriminatory acts, and there was evidence that Weissman's performance was poor and that his supervisors "attempted to let him down gently by attributing his firing to his heart attack rather than his performance."

Title I; Perceived; Qualified; Pretext; Cancer

A New York federal court ruled that a hospital did not perceive one of its residents with breast cancer as disabled under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*; that the resident was not qualified to perform her essential job functions; and that the hospital's stated reason for her discharge—negative performance evaluations—was not a pretext for discrimination. ***Pikoris v. Mount Sinai Med. Ctr., 2000 WL 702987 (S.D.N.Y. May 30, 2000).***

Bernadette Pikoris worked at Mount Sinai Medical Center as a first-year resident in its anesthesiology beginning in July 1991. In October, she was diagnosed with breast cancer and informed her supervisor of her need for surgery. Several days later, her intubation privileges were revoked. Pikoris took a six-month leave of absence, and returned to the program in May 1992. In September, she informed her supervisor that she was having a recurrence of breast cancer. Her clinical privileges were withdrawn in October and she was terminated in November. She sued the hospital under Title I, 42 U.S.C. §§12111-12117.

The district court granted the hospital's motion for summary judgment. Pikoris failed to show she was regarded as having an ADA impairment because she presented no evidence that the hospital regarded her as significantly restricted in the ability to

perform either a class or broad range of jobs. *See Ryan v. Grae & Rybicki, P.C.*, 135 F.3d 867 (2d Cir. 1998), 22 MPDLR 195. Rather, when the hospital decided that Pikoris' contract would not be renewed for the following year, it decided not to terminate her contract immediately to allow her time to find another position "preferably in a different specialty." The hospital offered her a medical research position through the remaining eight months of her residency. The alleged comment of Pikoris' supervisor that her intubation privileges were revoked because there was a general feeling that she could not handle the stress of breast cancer does not demonstrate that the hospital perceived her as generally unable to work. At most, it indicates that the hospital believed Pikoris' clinical responsibilities as an anesthesiology resident were too stressful for her given her personal circumstances.

In addition, Pikoris failed to show she was a qualified individual capable of performing her essential job functions. The majority of her job evaluations were negative and commented on her lack of knowledge, inability to answer questions and handle stress, and inadequate clinical skills. Because of Pikoris' insufficient knowledge and lack of clinical skills, the attending doctors were unable to rely on her in patient care situations without their constant direct supervision. Moreover, Pikoris failed to attend many of the educational conferences that were scheduled for residents, despite the fact that several doctors specifically recommended that she attend to improve her performance.

Even assuming that Pikoris has met her initial burden of establishing a *prima facie* case of discrimination under the ADA, the hospital has articulated a legitimate, non-discriminatory reason for terminating her—the negative performance evaluations. *See Meiri v. Dacon*, 759 F.2d 989 (2d Cir. 1985). Although the evaluation process was not mandatory, Pikoris provided no evidence to suggest that any of the doctors who evaluated her were motivated by discriminatory animus. Nor did Pikoris allege that there is a formal policy that the hospital failed to follow in terminating her without first providing remedial measures. Pikoris' supervisor testified that upon her return from medical leave, she was assigned to some of the senior teachers to try to bring her up to speed. Finally, Pikoris produced no evidence that other residents who received poor evaluations and were not discharged were "similarly situated in all material aspects." *See Shumway v. United Parcel Serv., Inc.*, 118 F.3d 60 (2d Cir. 1997).

Title I; Actual; Retaliation; Neck

A Maryland federal court found that a professional actor's neck injury did not substantially limit the major life activity or working and, thus, did not constitute a disability under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* Also, he failed to show that two casting firms retaliated against him for founding a group for performers with disabilities, for he had not engaged in a protected activity or suffered an adverse employment action. ***Billings v. Taylor Royall, Inc., 2000 WL 490734 (D. Md. Apr. 11, 2000).***

Josh Billings, a professional actor, sustained a neck injury while working. He later formed a group called Performers with Disabilities. As a result, he claimed that two casting agencies refused to refer him to potential employers for principal roles. He sued the agencies under Title I, 42 U.S.C. §§12111-12117, alleging disparate treatment and retaliation.

The district court granted the casting agencies summary judgment. Billings is not disabled under the ADA, because his injury does not substantially restrict his ability to work as an actor. He testified that he is able to perform 98 to 100 percent of the jobs available to performing artists. Moreover, the restrictions his doctors imposed on his lifting, running, and physical exertion are not "major life activities." Even assuming Billings is disabled within the meaning of the ADA, his conclusory evidence that he was not referred for principal roles is insufficient to establish a *prima facie* case.

The court rejected Billings' argument that the casting agencies retaliated against him for founding Performers with Disabilities. He made no showing that merely founding a group for disabled performers constitutes an invocation of rights under the ADA. There is no showing that it would have been reasonable for Billings to believe that he had engaged in activities protected by the ADA. *Cf. Glover v. South Carolina Law Enforcement Div.*, 170 F.3d 411, 415 (4th Cir. 1999), *cert. dismissed*, 120 S. Ct. 1005 (2000). Moreover, that is no evidence that Billings suffered any adverse treatment. Even crediting his assertion that he was threatened with a withholding of referrals because he was a member of Performers with Disabilities, the mere threat would not constitute an adverse action. *See Leskinen v. Utz Quality Foods, Inc.*, 30 F. Supp. 2d 530 (D. Md. 1998), *aff'd*, 165 F.3d 911 (4th Cir. 1998).

§501; Actual; Shoulder, Knee, Ankle Injuries; Retaliation

The Equal Employment Opportunity Commission (EEOC) found that the Department of Veterans Affairs did not violate the Rehabilitation Act §501, 29 U.S.C. §791 *et seq.*, when it placed a boiler plant operator on leave without pay and denied him the opportunity to continue serving as a light-duty employee. He did not have a covered disability, as he failed to show that his shoulder, knee, and ankle injuries substantially limited a major life activity. Also, his retaliation claim fails, as the person alleged to have discriminated against him was unaware of his EEOC discrimination charge. ***Spreng v. West, No. 01974610 (EEOC May 4, 2000).***

§501; Hypertension

The Equal Employment Opportunity Commission determined that the U.S. Postal Service did not violate the Rehabilitation Act §501, 29 U.S.C. §791 *et seq.*, by denying a letter carrier light duty as a reasonable accommodation, as his hypertension did not substantially limit a major life activity and, thus, did

not constitute a disability under §501. ***Klimek v. Henderson, No. 01973926 (EEOC Mar. 16, 2000).***

Title I; Employer Defined; Perceived; Thyroid; Menopause

The Eighth Circuit summarily affirmed a lower court's dismissal (*see* 59 F. Supp. 2d 838, (N.D. Iowa 1999), 23 MPDLR 709) of a secretary's claim against two affiliated companies of an insurance company under the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-12117, because one company was not an "employer" as defined by the ADA, and the other did not perceive her thyroid and menopause conditions as substantially limiting her ability to work. ***Loeckle v. State Farm Mut. Auto Ins. Co., 2000 WL 485211 (8th Cir. Apr. 25, 2000).***

Title I; Actual; Record; Qualified; Back

A Pennsylvania federal court held that a nursing assistant's back injury did not constitute a disability under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, because a doctor released her to work without restriction and without requiring any accommodation and she had no history of back problems. Further, she failed to show that she was qualified to perform her essential job functions because she testified in her deposition that there were no positions in the hospital that she could have performed. ***Machamer v. Hospital of Univ. of Pa., 2000 WL 558581 (E.D. Pa. May 8, 2000).***

Janice Machamer, a nursing assistant for the Hospital of the University of Pennsylvania, injured her back while lifting a patient. After a leave of absence, a doctor examined Machamer and found that she was able to return to work with no restrictions. In the days after her return, two incidents occurred that threatened the well being of patients under Machamer's care. The hospital terminated her for failure to provide competent care to her patients. She sued under Title I, 42 U.S.C. §§12111-12117, alleging the hospital refused to accommodate her disability by transferring her to the less burdensome night shift.

The district court granted the hospital summary judgment. Machamer failed to show that she had a covered ADA disability. A doctor examined Machamer and released her to work as a nursing assistant without restriction and without requiring any accommodation. Although Machamer claimed there were conflicting medical opinions regarding her condition, she did not provide any evidence of such a conflict. The court rejected Machamer's argument that, even if she was not disabled, she had a record of such impairment: a history of the condition, such as a chronic reoccurrence of an ailment. *See School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987), 11 MPDLR 110. Machamer stated in her deposition that she had never had a back injury before the one at issue.

Even assuming Machamer had a covered disability, she failed to show she was a qualified individual capable of performing essential job functions with or without reasonable accommodation. Although Machamer now argues that she was qualified if given an accommodation by placement on the night shift, she stated in her deposition that there were no positions in the hospital that she could have performed. Further, the hospital demonstrated that her performance was sub-standard. She inappropriately left a confused patient's bed in the high position with the side rails down, and she improperly manipulated a patient's dialysis bag, harming the patient. Machamer produced no evidence to counter these allegations.

Title I; Perceived; Qualified; Pretext; Hand

The Eighth Circuit summarily affirmed a district court's ruling (*see* 52 F. Supp. 2d 1096 (E.D. Mo. 1999), 23 MPDLR 529) that a violinist failed to show that (1) the symphony orchestra perceived the nerve problems in his hands as substantially limiting the major life activity of working and, thus, as a covered disability under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*; (2) he could perform his essential job functions without accommodation; and (3) the adverse action was discriminatory. However, the dissent found the symphony director's initial testimony—that he believed the performer was disabled from any occupation—created genuine issues of material fact. ***Kampouris v. St. Louis Symphony Soc'y, 210 F.3d 845 (8th Cir. 2000).***

The Eighth Circuit affirmed on the basis of the district court's ruling without a comprehensive opinion. However, the dissent cited the testimony of the symphony's director of orchestra personnel, who initially testified that it was his belief that plaintiff was disabled from any occupation. He later corrected his testimony to indicate that he merely understood that the disability insurer had so designated plaintiff. The dissent said these corrections raised genuine issues of material fact as to the symphony's perception of plaintiff's impairments, as well as to whether the symphony took employment action toward plaintiff because of its perception that plaintiff was disabled within the meaning of the ADA.

Title I; Actual; Perceived; Pretext; Foot

A New York federal court ruled that a carpenter's inability to wear safety shoes due to foot pain did not constitute a physical impairment or substantially limit the major life activities of working and walking and, thus, he did not have a covered disability under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* Also, the employer's reason for his discharge—failure to follow company rules—was not a pretext for disability-based discrimination. ***Cavallaro v. Corning Inc., 93 F. Supp. 2d 334 (W.D.N.Y. 2000).***

Rosario Cavallaro worked as a carpenter for Corning Incorporated. After a plant-wide safety audit, Corning implemented a rule requiring steel-toed foot protection for all carpenters. Corning arranged for all employees to be fitted for the safety shoes. Cavallaro obtained a pair of the shoes, but stopped wearing them after a couple of days because of pain in his right foot. His supervisor arranged for him to be fitted for another pair of shoes by another vender. After one day with the second pair of safety shoes, Cavallaro claimed they too were uncomfortable. After obtaining three more pairs of safety shoes—all of which he claimed were unsatisfactory—Cavallaro left work, claiming the shoes forced him to take disability leave. Corning discharged Cavallaro for failure to follow company rules. He sued under Title I, 42 U.S.C. §§12111-12117.

The district court granted Corning summary judgment. Cavallaro's inability to wear a certain shoe did not constitute a physical impairment. Assuming Cavallaro did have a physical impairment, he was not substantially limited in the major life activity of walking. He admitted in his deposition that not only can he walk but he can walk two to three holes of golf, and that he golfs a couple of time a week. He also cooks, goes to the grocery store, drives, and vacuums. Further, Cavallaro submitted the report of a physician who noted that Cavallaro "walks with a good gait with just a barely perceptible limp on his right foot."

Nor was Cavallaro substantially limited in the major life activity of working. Although wearing steel-toed shoes was a requirement of his job as a carpenter at Corning, the inability to perform a single particular job does not constitute a substantial limitation in the major life activity of working, *see* 29 C.F.R. §1630.2(j)(3)(i). Rather, the impairment must substantially limit employment generally. *See Byrne v. Board of Educ.*, 979 F.2d 560 (7th Cir. 1992), 17 MPDLR 54. Cavallaro had stated that he could work as a carpenter if he was not required to wear steel-toed shoes. He had also testified that he was qualified to work as a pipefitter, tinworker, and millwright, and that he "can do anything with glass." Thus, his inability to wear steel-toed shoes did not substantially limit his opportunities for employment generally.

The court rejected Cavallaro's argument that Corning discriminated against him because it regarded him as disabled. Although Corning did not dispute that it knew of Cavallaro's foot problem before he was dismissed, 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. *See Kelly v. Drexel Univ.*, 94 F.3d 102 (3d Cir. 1996), 20 MPDLR 689. Rather, Cavallaro must show that Corning perceived his impairment as substantially limiting the exercise of a major life activity. Cavallaro presented no such evidence.

Even if Cavallaro had a covered disability under the ADA, Corning offered a legitimate, nondiscriminatory reason for his termination—that Cavallaro refused to abide by Corning's safety rules. The safety shoe policy was precipitated by Corning's laudable attempt both to comply with OSHA regulations and to insulate its employees from injury in the workplace. Cavallaro's speculations otherwise were insufficient to establish pretext. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993).

Title I; Actual; Perceived; Pretext; Knee

An Illinois federal court ruled that factual issues existed as to whether (1) a former casino worker's knee injury substantially limited a major life activity and, thus, constituted a disability within the meaning of the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, and (2) the casino's reason for termination—failure to immediately escort a two-year-old boy out of the casino—was a pretext for disability discrimination. ***Moreno v. Grand Victoria Casino, 94 F. Supp. 2d 883 (N.D. Ill. 2000).***

Laurie Moreno sustained a knee injury while refilling a slot machine in the Grand Victoria riverboat casino. She returned to work with no restrictions, but injured her knee at work again. After surgery, she returned four days a week and used a motorized cart to get around. Over the next five months, she continued to have knee problems. She informed her supervisor that she would need additional surgery. One week later, she was fired, allegedly for her role in an incident where a two-year-old child was allowed to enter the casino. Moreno sued under Title I, 42 U.S.C. §§12111-12117, alleging she was terminated because of her disability. Grand Victoria moved for summary judgment.

The district court denied the motion. An issue of fact exists whether Moreno's knee injury is a disability under the ADA. Grand Victoria argued that Moreno's condition is a temporary impairment that does not substantially limit her ability to perform any major life activity. However, Moreno's orthopedic surgeon testified that Moreno would need further surgery sometime in the next 10 years. The doctor concluded that even surgery was unlikely to significantly improve the pain that impedes Moreno's "activities of daily living." Further, he testified that Moreno was to avoid prolonged standing and walking, and that she was not to perform the activities of climbing, jumping, running, stopping, kneeling, crouching, and crawling. Based on this testimony, a reasonable jury could find that Moreno's condition was at least indefinite and long-term, if not permanent, and that it substantially limited her ability to walk, run, stand, lift, squat, kneel, bend, and climb.

The court rejected Moreno's alternative argument that she was perceived by Grand Victoria as having a disability. Moreno pointed to an alleged statement by her supervisor calling her a "'crip'" and to her supervisor's willingness to accommodate her physical restrictions with a motorized cart and modified work schedule. However, once Moreno argued that her knee impairment substantially limits major life activities, she cannot argue that Grand Victoria was mistaken in its belief that she was so limited.

The court also found issues of fact exist about whether Moreno's disability was a substantial motivating factor in the discharge decision and whether Grand Victoria's explanation for the discharge is, at least in part, pretextual. Moreno's termination occurred only one week after she had informed her supervisor that she would need additional surgery, and the human resources manager told Moreno that she might be rehired if she "'got her legs fixed.'" Further, the depositions of co-workers suggested

that Moreno responded appropriately when learning that a child was in the casino, and that the disciplinary action was disproportionate to Moreno's role in the incident.

Title I; Actual; Epilepsy

A Kansas federal court decided that under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, a former materials handler with epilepsy did not have an impairment that substantially limited the major life activity of working. Also, driving is not a sufficiently significant or essential function to qualify as a major life activity. ***Moreno v. American Ingredients Co., 2000 WL 527808 (D. Kan. Apr. 7, 2000).***

Raul Moreno, a materials handler at a food processing plant, was discharged for exceeding the maximum number of allowable points under his employer's attendance policy. He sued his employer under Title I, 42 U.S.C. §§12111-12117, alleging it had failed to provide a reasonable accommodation for his epilepsy and terminated him on the basis of his disability.

The court granted the employer summary judgment. Moreno is not disabled as defined by the ADA. The court rejected Moreno's argument that he is substantially limited in the major life activity of working because during his epileptic attacks, he loses consciousness, becomes dizzy, disoriented, and weak, and cannot perform any kind of work for several hours afterwards. Moreno has a seizure about once every month to two months. Although his epilepsy is debilitating at times, it does not significantly restrict his ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities. *See* 29 C.F.R. §1630.2(j)(3).

The court also rejected Moreno's argument that he is disabled under the ADA because he is unable to drive due to his epilepsy. The court could not find any cases where driving was regarded as a major life activity, nor was the court persuaded that it should regard driving as a major life activity. *See Lopez v. Police Dep't of the Commonwealth of Puerto Rico*, 81 F. Supp. 2d 293 (D.P.R. 1999), 24 MPDLR 256 (holding that the significance of driving is simply not on par with those basic, essential human functions that are within the contemplation of the ADA).

Hiring; Title I; Record; Perceived; Epilepsy

A Wisconsin federal court decided that a city did not violate the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-12117, when it failed to hire an applicant with epilepsy for a firefighter position, as he failed to show that he had a record of a disability or was perceived by the city as having a physical impairment that substantially limited the major life activity of working. ***Arnold v. City of Appleton, Wis., 97 F. Supp. 2d 937 (E.D. Wis. 2000).***

The city offered Mark Arnold a firefighter position on the condition that he pass a medical exam. Arnold took Dilantin to control his epilepsy, and had not had a seizure since April 1991—more than four years before the conditional offer. A doctor selected by the city concluded that Arnold was not fit to be a firefighter. The city withdrew its conditional offer, and Arnold sued under Title I.

The court granted the city summary judgment. Arnold conceded that he did not have an actual disability under the ADA because his epilepsy, as controlled by medication, did not substantially limit a major life activity. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), 23 MPDLR 511; *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999), 23 MPDLR 511; and *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999), 23 MPDLR 511. However, he asserted that he had a record of impairment. He introduced as evidence his medical history regarding past seizures and treatment, the doctor's report noting his history of seizures, and the doctor's belief that Arnold continued to pose a potential for sudden and unexpected loss of consciousness. However, there was no evidence that Arnold's condition resulted in his being substantially limited in any major life activity. He drove a motor vehicle, climbed ladders, worked on the roof of his two-story home, and did not refrain from any activity out of fear that he might have a seizure.

Moreover, Arnold failed to show that the city regarded his epilepsy as substantially limiting his ability to work in a broad range of jobs. Even if the court accepted Arnold's contention that the city believed he could not perform the job of firefighter because of his epilepsy, the perceived inability to perform one job is not sufficient to establish that the plaintiff is substantially limited in the major life activity of working.

Title I; Perceived; Pretext; Heart

An Indiana federal court determined that questions of fact exist as to whether (1) an employee who had two heart attacks was regarded as substantially limited in the major life activity of working and, thus, disabled under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, and (2) the reason for his discharge—failure to comply with company audit procedures—was a pretext for disability-based discrimination. ***Orme v. Swifty Oil Co., Inc., 2000 WL 682678 (S.D. Ind. Mar. 28, 2000).***

Wilford Orme, who worked for Swifty Oil as an area manager, had two heart attacks. He was subsequently fired after he failed to detect an embezzlement scheme carried out by two service station managers under his supervision. He later died from a third heart attack. His estate sued Swifty under Title I, 42 U.S.C. §§12111-12117, alleging he was fired because of his heart condition. Swifty moved for summary judgment.

The district court denied the motion. Although Orme's heart condition did not substantially limit one or more of his major life activities, factual issues exist as to whether Swifty regarded Orme as disabled under the ADA. After his two heart attacks, Orme was still able to perform his functions at work, although with some lifting limitations and periodic breathing difficulties. He was

still able to play basketball and baseball with his son, and his doctors released him to return to "normal activities." However, there was evidence that Orme's supervisor thought his heart condition impaired his ability to do his job. The supervisor had complained about the problems caused by Orme not being at work because of his heart condition, and had said that if Orme could not take care of his work, he would be replaced. Other evidence shows that the supervisor fired or demoted other managers because of health problems. Another supervisor who participated in the decision to fire Orme had complained about Swifty employees who had health problems and about the costs of providing health insurance for those employees. Further, five days before he was fired, Orme had told his supervisor that his doctor had said he was under too much stress and was supposed to take it easy.

Factual issues also exist as to whether Swifty used the embezzlement discovery as a pretext for disability-based discrimination to fire Orme. Plaintiff came forward with evidence that Orme could not reasonably have been expected to detect the embezzlement scheme on his own, and that Swifty did not fire or discipline others who were not disabled and who also conducted audits of the same stores without detecting the scheme. The combination of this evidence with the animus of Orme's supervisor towards managers with serious health problems, his knowledge of Orme's heart problems, and the timing of Orme's firing, would allow a reasonable jury to find that Swifty's real reason for firing Orme was a desire to get rid of a manager whose health was seriously impaired. *See generally Troupe v. May Dep't Stores Co.*, 20 F.3d 734 (7th Cir. 1994) (allowing a plaintiff to use circumstantial evidence to show an employer's unlawful intent).

Title I; Actual; Perceived; Heart

A Maryland federal court decided that a former employee was not disabled within the meaning of the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, as his lifting restriction due to a heart condition did not substantially limit the major life activity of working, and his employer did not regard him as such. ***Fitch v. Solipsys Corp., 94 F. Supp. 2d 670 (D. Md. 2000).***

Keith Fitch, who has a heart condition (an artificial aorta and a deteriorating bicuspid heart valve), worked as computer systems director for Solipsys Corporation. His doctor restricted him from lifting more than 40 pounds or from engaging in any other isometric exercise. He alleged that when he requested accommodations for moving heavy equipment, his supervisors stated that the ADA was for a bunch of "'cripples,'" but his request was granted. Solipsys later terminated Fitch on the grounds that he was having trouble with other employees and his performance was unsatisfactory. Fitch sued Solipsys under Title I, 42 U.S.C. §§12111-12117.

The court granted Solipsys summary judgment. Fitch contended that he had a covered ADA disability because his heart condition restricted his lifting. However, his lifting restriction does not substantially limit the major life activity of working—his ability to perform a class of jobs or a broad range of jobs of various classes, *see* 29 C.F.R. §1630.2(j)(3). An employee engaged in manual labor who regularly and routinely engages in heavy and medium labor might qualify as "disabled" by a permanent medical restriction against bending over or lifting more than 25 pounds. Yet a white collar worker who relies upon highly specialized computer skills simply is not "disabled" by such a restriction, despite the fact that if he could lift, he might occasionally do some lifting on some computer installation jobs. Moreover, two months after his termination, Fitch found comparable work with a different employer.

Fitch also contended that Solipsys perceived him to be disabled, that is substantially limited in a major life activity. Although he was referred to as a "'cripple,'" this name-calling by itself does not establish that Fitch was regarded as disabled. *Cf. Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 512 (Cal. Sup. Ct. 1994), *cert. denied*, 513 U.S. 1058 (1994). By Fitch's own admission, employees regularly used derogatory nicknames for each other. Moreover, Fitch was never on limited duty of any kind. He never suffered an injury or accident at work and was never absent due to his medical condition for any extended period of time. In addition, his real complaint is that his employer treated him as if he were not disabled and needed no accommodation.

Title I; Permanent Condition; Actual; Perceived; Endometriosis

A California federal court ruled that a childcare counselor's endometriosis, whether actual or perceived, did not constitute a disability within the meaning of the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, as it was not permanent in nature. ***Barnes v. Homes, 2000 WL 558641 (N.D. Cal. May 4, 2000).***

Tina Barnes worked at Guadelupe Homes as a childcare counselor. Guadelupe Homes suspended Barnes for one day without pay due to excessive absences. One week after she returned to work, she began experiencing abdominal pain, left her shift, and went to the emergency room where she was diagnosed with endometriosis—a painful condition where the lining of the uterus spreads to other organs. Her supervisor terminated her for abandoning her shift. Barnes underwent laparoscopic surgery to alleviate her pain and was cleared to return to work three weeks later. She sued Guadelupe Homes under Title I, 42 U.S.C. §§12111-12117, claiming it discriminated against her on the basis of her disability, or perceived disability. Guadelupe Homes moved for summary judgment.

The district court granted the motion. Barnes did not have a disability, whether actual or perceived, within the meaning of the ADA because her endometriosis was not permanent or long-term in nature. *See McDonald v. Pennsylvania Dep't of Pub. Welfare*, 62 F.3d 92 (3d Cir. 1995), 19 MPDLR 613 (holding the ADA does not apply to transient, nonpermanent conditions). Barnes' condition lasted for less than four months, and the record does

not indicate the extent of duration of her symptoms during that period. Barnes testified that after recovering from her surgery, she no longer had any physical limitations. Furthermore, nothing in the record indicates that Barnes' supervisors believed that she had a disabling condition.

Even if Barnes' condition was permanent, the evidence does not establish that her endometriosis substantially limited her in any major life activity or was regarded as such. According to the record, the one major life activity that may have been affected was her ability to perform her job. However, to be substantially limited in the major life activity of working, a person must be precluded from performing a broad class of jobs. *See Real v. City of Compton*, 73 Cal. App. 4th 1407 (Cal. Ct. App. 1999), 23 MPDLR 687. Nothing in the record indicates that Barnes was substantially limited in the ability to perform her job as a child care counselor, much less a broad class of jobs, or regarded as such.

Title I; Perceived; Diabetes

A New York federal court held that an air traffic controller's diabetes did not substantially limit the major life activities of eating, walking, sleeping, or walking and, thus, did not constitute a disability within the meaning of the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* Nor did his employer perceive his diabetes as being so substantially limiting. ***Shields v. Robinson-Van Vuren Assoc., Inc., 2000 WL 565191 (S.D.N.Y. May 8, 2000).***

Robinson-Van Vuren Associates (RVA) hired William Shields as an air traffic controller conditioned upon his receipt of a medical certificate as required by 14 C.F.R. §65.31. Shields underwent a physical exam. His blood sugar test showed that he had diabetes mellitus. Because medical certificates cannot be awarded to a person with a "clinical diagnosis of diabetes mellitus that requires insulin or any other hypoglycemic drug for control," the medical examiner referred Shields for further tests to see if his diabetes could be treated through diet and exercise. *See* 14 C.F.R. subpart C §67.213(a). RVA terminated Shields based on his failure to obtain the medical certificate. Several months later, the additional blood tests showed that Shields did not require insulin. Shields sued RVA under Title I, 42 U.S.C. §§12111-12117, alleging it discriminated against him on the basis of his disability or perceived disability. RVA moved for summary judgment.

The district court granted the motion. Shields failed to show that his diabetes substantial limits any major life activity. His affidavit in response to RVA's motion swearing that his diabetes limits his ability to eat normally, walk, and sleep well contradicts his prior sworn testimony in his complaint and his deposition that his diabetes never affected his ability to walk, sleep, or perform a host of other activities. *See Raskin v. Wyatt Co.*, 125 F.3d 55 (2d Cir. 1997) (ruling that a plaintiff may not create a material issue of fact to defeat a motion for summary judgment that contradicts his own prior sworn testimony). Furthermore, Shields does not have an impairment in his ability to eat and digest food, and the dietary modifications he must make are not severe enough to be considered by any reasonable fact finder as substantially limiting. *See, e.g., Weber v. Strippit, Inc.*, 186 F.3d 907 (8th Cir. 1999), 23 MPDLR 688 (holding that dietary restrictions constitute a moderation limitation insufficient to constitute a disability under the ADA). Similarly, the assertions in Shields' affidavit as to sleeping and walking do not create a genuine issue of fact as to whether he was substantially limited in these activities. *See, e.g., Colwell v. Suffolk County Police Dep't*, 158 F.3d 635 (2d Cir. 1998), 22 MPDLR 745.

The district court rejected Shields' contention that he is substantially limited in the major life activity of working because he cannot work in the position of air traffic controller. Shields received his medical certification four months after the initial examination, and he is currently able to work as an air traffic controller. Even assuming Shields could not work as an air traffic controller, he has failed to 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, rather than a particular job. *See Muller v. Costello*, 187 F.3d 298 (2d Cir. 1999), 23 MPDLR 703 (*quoting* 29 C.F.R. §1630.2(j)(1)).

Finally, Shields failed to show that RVA perceived him as having a disability. He offered no evidence that his supervisor's knowledge of his diabetes had any effect on how he regarded Shields or on the reason for terminating him. Nor has Shields offered any evidence that RVA believed that Shields' diabetes substantially limited him in one or more major life activities. Instead, he conceded at his deposition that the only evidence that RVA may have regarded him as having a disability was "[j]ust that they terminated me and wouldn't allow me... employment," and that it was otherwise "just [his] belief."

§501; Gastroesophegeal Reflux

The Equal Employment Opportunity Commission determined that the Energy Department did not violate the Rehabilitation Act §501, 29 U.S.C. §791 *et seq.*, by terminating an employee with gastroesophegal reflux disease, which caused him to have severe heartburn. Jerald Bond was not "disabled" because he failed to medically document that his condition has permanent effects, or that the medication he was taking Prilosec caused him to experience fatigue at work. ***Bond v. Richardson, No. 03990132 (EEOC Mar. 28, 2000).***

Hiring; Title I; Mitigating Measures; Nearsighted

The Eighth Circuit reversed an Iowa federal court's decision (*see* 950 F. Supp. 1420 (N.D. Iowa 1996), 21 MPDLR 201) and held that an applicant's nearsightedness, mitigated to a visual 20/20 acuity level with corrective lenses (*see Sutton v. United Air Lines*, 119 S. Ct. 2139 (1999), 23 MPDLR 510), did not substantially limit any major life activity and, thus, was not a disability under the Americans with Disabilities Act, 42 U.S.C.

§12101 *et seq.* ***Sicard v. City of Sioux City, 2000 WL 688223 (8th Cir. May 30, 2000).***

Employment: Medical Leave/Exams

Termination; FMLA; Eleventh Amendment

The Second Circuit 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. ***Hale v. Mann, 2000 WL 675209 (2d Cir. May 25, 2000).***

Monroe Hale was the director of Goshen Facility, a state-run facility for male juvenile delinquents. In 1995, the state began to alter the procedures at the facility and a conflict between Hale and the state emerged. In December 1997, Hale took FMLA leave for job-related stress. While Hale was on leave, the state conducted an unannounced search and that the facility was "dirty," "unkempt," and "disorganized," and contraband was abundant. Hale was terminated on the date that his FMLA leave expired. He sued under the FMLA. The district court granted the state summary judgment.

The Second Circuit affirmed, finding the FMLA action was barred by the Eleventh Amendment. Congress has expressed its clear intent to abrogate states' immunity with respect to suits under the FMLA. *See McGregor v. Goord*, 18 F. Supp. 2d 204 (N.D.N.Y. 1998), 22 MPDLR 766. However, Congress in enacting the FMLA, exceeded its enforcement powers under the Fourteenth Amendment. The evil that Congress purported to address in enacting the FMLA was gender discrimination. *See* 29 U.S.C. §2601(b)(4). 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 legislation sweeps too wide. Accordingly, the states' Eleventh Amendment immunity remains intact, notwithstanding Congress' intention that it be abrogated. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996). Even if Hale's FMLA suit was valid, he presented no evidence indicating that the termination decision was related to his FMLA leave.

Title I; Qualified; FMLA; Eleventh Amendment

The Kansas supreme court ruled that a former state employee with cervical disk disease was not a qualified individual within the meaning of the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, because he was incapable of traveling—an essential job function. Also, the state was immune under the Eleventh Amendment from suit under the Family and Medical Leave Act (FMLA), 29 U.S.C. §2601 *et seq.*, because in enacting it Congress exceeded its authority under the Fourteenth Amendment. ***Schall v. Wichita State Univ., 2000 WL 731793 (Kan. Sup. Ct. June 9, 2000).***

Richard Schall was a clinical supervisor for The Physicians Assistant Department at Wichita State University (WSU). His job involved visiting students throughout the state of Kansas. Schall underwent surgery for cervical disk disease. In the four months after his surgery, Schall worked only three days. His supervisor wrote him and requested that he return to work full time. Schall requested that he be allowed to return to work on a part-time basis. His request was denied, and Schall was terminated. He sued under Title I, 42 U.S.C. §§12111-12117, and the FMLA. The trial court granted WSU summary judgment.

The state high court affirmed. The court deferred deciding whether the Eleventh Amendment provides WSU immunity on the ADA claim. Although a state has immunity from suit even when the action is brought in state court, the state's immunity may still be waived or abrogated by Congress when legislation is passed pursuant to its power under Section 5 of the Fourteenth Amendment. *See Alden v. Maine*, 527 U.S. 706 (1999). The U.S. Supreme Court will soon decide whether the ADA is a congruent and proportional exercise of Congress' enforcement powers under Section 5. *See Garrett v. University of Ala.*, 193 F.3d 1214 (11th Cir. 1999). Here, however, the issue is not important because Schall is not a qualified individual under the ADA. Travel was a fundamental part of Schall's job. Because he was unable to travel as a result of his chronic pain, he could not perform the essential function of his clinical supervisor job. Further, there was no reasonable accommodation that would have allowed Schall to perform the essential functions of his job. It would have been unreasonable to have other faculty members fill in for Schall's travel schedule without placing an undue burden on the faculty and WSU. *See* 42 U.S.C. §12112(b)(5)(A).

The court dismissed Schall's FMLA action as barred by the Eleventh Amendment. In enacting the FMLA, Congress exceeded its enforcement powers under the Fourteenth Amendment. *See 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(a)(5). However, the means adopted by Congress—a 12-week leave period—is not congruent or proportionate to the gender-based discrimination to be remedied. *See Kilvitis v. County of Luzerne*, 52 F. Supp. 2d 403 (D. Pa. 1999), 23 MPDLR 693. Thus, Congress failed to abrogate the states' sovereign immunity when it enacted the FMLA. In any event, Schall was given oral notice of his right to 12 weeks paid leave and received that sum. Under the circumstances, he is not entitled to 12 more weeks, even though WSU failed to follow the statute and give him written notice.

FMLA; Sovereign Immunity

A Connecticut federal court ruled that the Family and Medical Leave Act (FMLA), 29 U.S.C. §2601 *et seq.*, did not validly abrogate the states' Eleventh Amendment immunity from suit in federal court because it was not passed in response to any