community of Kiryas Joel was not merely one in a series of many communities eligible for equal treatment under Chapter 390's special school district laws. Because the statute's qualifying criteria were consciously drawn to benefit Kiryas Joel, other communities, both religious and secular, with similar education needs would not have an equal opportunity to create a publicly funded school district under Chapter 390.

> Thus, the non-neutral effect of the statute is to secure for one religious community a unique and significant benefit—a 'public school' where all students adhere to the tenets of a particular religion—unavailable to other, similarly situated communities. In doing so, Chapter 390 violates Establishment Clause principles by preferring one religion over another.

Employment: Disability Defined

Title I; Substantial Limitation; Mitigating Measures

Pre-employment; Corrected Vision

The U.S. Supreme Court, in a 7-2 opinion held that an airline did not violate the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §12111, when it refused to hire two passenger pilots because plaintiffs did not have a covered disability. Although their visual acuity was 20/200 or worse, which led to their not being hired, their corrected vision was 20/20 and their disability had to be considered with the benefit of corrective measures. ***Sutton v. United Air Lines, Inc., 119 S. Ct. 2139 (1999).***

United Airlines denied Karen Sutton and Kimberly Hinton jobs as passenger airline pilots because they did not meet its minimum uncorrected vision requirement of 20/100. Petitioners had vision of 20/200 and worse without corrective lenses, and 20/20 vision with corrective lenses. They sued, alleging United's policy violated Title I. A Colorado federal court held that United did not violate the ADA by refusing to hire individuals with uncorrected vision below 20/100 as passenger pilots. 1996 WL 588917 (D. Colo. Aug. 28, 1996), 21 MPDLR 63. The Tenth Circuit affirmed, holding petitioners did not have a disability that substantially limited the major life activity of working. 130 F.3d 893 (10th Cir. 1997), 22 MPDLR 53.

The Court, in an opinion by Justice O'Connor, affirmed. The major inquiry was whether petitioners had a physical impairment that substantially limits one or more of the major life activities. *See* 42 U.S.C. §12102(2). Because petitioners alleged that with corrective measures their vision was 20/20 or better, they were not actually disabled within the meaning of the ADA if the disability determination was made with reference to these measures. Consequently, petitioners argued that because the ADA did not directly address the issue, the Court should rely on federal agency guidelines providing that such a determination should be made without regard to mitigating measures. *See* 29 C.F.R. pt. 1630, App. 1630.2(J); 28 C.F.R. pt. 35, App. A, 35.104 (1998); 28 C.F.R. pt. 36, App. B, 36.104.

The Court disagreed, finding the approach adopted by the agency guidelines is an impermissible interpretation of the ADA. "If a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effect of those measures—both positive and negative—must be taken into account when judging whether that person is 'substantially limited' in a major life activity and thus 'disabled' under the Act," the Court ruled.

Justice O'Connor cited three separate provisions of the ADA to support this conclusion. First, the definition of disability appears in the "present indicative form . . . requiring that a person be presently—not potentially or hypothetically—substantially limited in order to demonstrate disability." Second, whether a person had a disability under the ADA requires an individualized inquiry. The federal agency approach would require courts and employers "to speculate about a person's condition and would, in many cases, force them to make a disability determination based on general information about how an uncorrected impairment usually affects individuals, rather than on the individual's actual condition." Third, the findings enacted as part of the ADA demonstrate that Congress did not intend to bring under the statute's protection all those whose uncorrected conditions amount to disabilities. Congress found that some 43 million Americans had one or more disabilities. This figure was inconsistent with the definition of disability pressed by the petitioners. *See* 42 U.S.C. §12101(a)(1).

Justice O'Connor also held that the petitioners failed to state a claim that United regarded them as having a disability. Petitioners failed to make the obvious argument that they were regarded as substantially limited in the major life activity of seeing due to their impairments. Instead, petitioners contended that United mistakenly believed that their physical impairments substantially limited the major life activity of working by precluding them from obtaining a job of a global airline pilot. "Because the position of global airline pilot is as single job, this allegation does not support the claim that respondent (United) regards petitioners as having a substantial limiting impairment."

Justice Ginsburg concurred on the ground that the ADA did not "reach the legions of people with correctable disabilities," especially in light of legislative findings that some 43 million Americans had disabilities. Congress intended "to restrict the ADA's coverage to a confined, and historically disadvantaged class."

Justice Stevens, joined by Justice Breyer, dissented:

> Nevertheless, . . . it is quite clear that the threshold question whether an individual is "disabled" within the meaning of the Act—and, therefore, is entitled to the basic assurances that the Act affords—focuses on her past or present physical condition without regard to mitigation that has resulted from rehabilitation, self-improvement, prosthetic devices, or medication. One might reasonably argue that

the general rule should not apply to an impairment that merely requires a nearsighted person to wear glasses. But I believe that, in order to be faithful to the remedial purpose of the Act, we should give it a generous, rather than a miserly, construction.

Termination; Perceived Disability; High Blood Pressure

The U.S. Supreme Court held that the determination as to whether an individual's impairment substantially limits a major life activity under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, should be made with regard to any mitigating or corrective measures used. ***Murphy v. United Parcel Serv., Inc., 119 S. Ct. 2133 (1999).***

Vaughn Murphy has had high blood pressure since he was a child, but with medication, he can function normally. When UPS hired him as a delivery truck mechanic, his blood pressure was so high that he did not meet Department of Transportation (DOT) health requirements for commercial drivers, 49 C.F.R. §391.41(b)(6). Despite this, he was erroneously granted certification and began work. The mechanic position required driving the delivery trucks after they were repaired. A month later, UPS discovered the error and re-tested Murphy's blood pressure, which was above UPS's and the DOT's upper threshold. UPS fired Murphy, and he sued under ADA Title I, §12111. The district court granted summary judgment for UPS, finding his high blood pressure, as controlled by medication, did not constitute a covered disability. 946 F. Supp. 872 (D. Kan. 1996), 21 MPDLR 60. The Tenth Circuit affirmed, 141 F.3d 1185 (10th Cir. 1998), 22 MPDLR 335, ruling that Murphy's high blood pressure in its medicated state, did not substantially limit any major life activity.

The Supreme Court affirmed, referring to its decision in *Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139 (1999), in which the Court held that an employee's disability must be made with reference to the mitigating measures he uses. Murphy's high blood pressure, when medicated, did not substantially limit him in any major life activity. Because the question whether Murphy is disabled when taking medication was not before the Court, it did not consider whether he is disabled due to limitations that persist despite his medication or its negative side effects.

Further, there were no genuine issues of material fact as to whether UPS regarded Murphy as having a disability because of his high blood pressure. UPS regarded Murphy as unable to meet DOT certification requirements because of his high blood pressure, but it did not regard him as unable to perform a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities. *See* 29 C.F.R. §1630(j)(3)(i). Under the ADA, one must be regarded as precluded from more than a particular job. Murphy has shown that he is regarded as unable to perform the job of mechanic only when that job requires driving a commercial motor vehicle—a specific type of vehicle used on a highway in interstate commerce. He has presented no evidence that he is regarded as unable to perform any mechanic job that does not call for driving a commercial vehicle and, thus, does not require DOT certification.

Justice Stevens, joined by Justice Breyer, dissented based on the same reasons as in the *Sutton* dissent—that an impairment in its unmedicated state could substantially limit a person's major life activities. In this case, without medication Murphy would likely be hospitalized due to his severe hypertension.

Termination; Qualified Individual; Monocular Vision

The U.S. Supreme Court, in a 7-2 opinion authored by Justice Souter, held that the Ninth Circuit failed to consider mitigating measures—such as an individual's ability to compensate for his impairment—when determining whether a former commercial truck driver's monocular vision substantially limited his ability to see and, thus, constituted a disability under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* Also, an employer who requires as a job qualification that an employee meet an otherwise applicable federal regulation—a U.S. Department of Transportation (DOT) regulation requiring commercial truck drivers to have 20/40 corrected vision in each eye—does not have to justify enforcing the regulation solely because its standard may be waived experimentally in an individual case. ***Albertsons, Inc. v. Kirkingburg, 119 S. Ct. 2162 (1999).***

Notwithstanding his monocular vision, Hallie Kirkingburg had driven commercial trucks since 1979, and his driving record was impeccable. When Albertsons hired him in 1990, he was certified under the DOT regulation requiring 20/40 corrected vision in each eye. *See* 49 C.F.R. §391.41(b)(10). In 1991, he had to be reexamined after an injury. Because his vision in one eye was 20/200, the doctor refused to recertify him. Although he obtained a vision waiver under a new, experimental Federal Highway Administration Program instituted to bring DOT standards into compliance with the ADA without sacrificing highway safety, Albertsons fired Kirkingburg. The company refused to accept the waiver on the grounds that it had a policy of employing only drivers who "meet or exceed the minimum DOT standards." Kirkingburg sued under Title I, and a district court granted summary judgment for Albertsons. The Ninth Circuit reversed, holding that Kirkingburg's monocular vision was a covered disability under the ADA and that his firing on the basis of his disability without regard to the DOT regulations violated the ADA. 143 F.3d 1228 (9th Cir. 1998), 22 MPDLR 459.

The Supreme Court reversed, addressing the issue of whether Kirkingburg was an individual with a disability "in order to correct three missteps the Ninth Circuit made in its discussion of the matter." First, the appeals court ruled that there was a significant difference between the manner in which Kirkingburg sees and the manner in which most people see.

However, by not determining whether he had a significant restriction in his ability to see, the appeals court undercut the fundamental statutory requirement that only impairments that substantially limit a major life activity constitute disabilities. Second, the appeals court appeared to suggest that it need not take account of a monocular individual's ability to compensate for the impairment, even though it acknowledged that Kirkingburg's brain had subconsciously done so. The Court found in *Sutton v. United Airlines Inc.*, 119 S. Ct. 2139 (1999), that mitigating measures must be taken into account, whether they are artificial aids, like medications and devices, or due to the body's own systems. Third, the appeals court ignored the statutory obligation to determine a disability's existence on a case-by-case basis. *See* 42 U.S.C. §12101(2). The Court here found that while some impairments may invariably cause a substantial limitation of a major life activity, monocular vision is not one of them.

Even if Kirkingburg had a covered disability, he was not qualified to perform the essential functions of his job with or without reasonable accommodation. "Albertsons was not insisting upon a job qualification merely of its own devising, subject to possible questions about genuine appropriateness and justifiable application to an individual for whom some accommodation may be reasonable." Instead, Albertsons was applying the DOT regulations, which were unchallenged, had the force of law, and contained no qualifying language about individualized determinations. The regulations establishing the waiver program did not modify the basic visual acuity standard so as to disentitle Albertsons from insisting on that standard. That program was simply an experiment proposed as a means of obtaining data, resting on a hypothesis whose confirmation or refutation would provide a factual basis for possible relaxing existing standards. Under the ADA, an employer who requires as a job qualification that an employee meet an otherwise applicable federal safety regulation does not have to justify enforcing the regulation solely because its standard may be waived experimentally in an individual case.

Justice Thomas, in a concurring opinion, agreed that it would be "unprecedented and nonsensical to interpret §12113 to require petitioner to defend the application of the Government's regulation to respondent when petitioner has an unconditional obligation to enforce the federal law." However, he joined the Court's opinion "only on the understanding that it leaves open the argument that federal laws such as DOT's visual acuity standards might be critical in determining whether a plaintiff is a 'qualified individual with a disability.'" Justice Thomas explained that Kirkingburg sought a job driving trucks in interstate commerce. Because he could not meet the DOT visual acuity requirement, he was unable to perform the essential functions of his job. The waiver program might be thought of as a way to reasonably accommodate him, but for the fact that the program did nothing to modify the regulation's unconditional requirements. For that reason, requiring Albertsons to make such an accommodation would have been unreasonable.

Termination; Title I; Reasonable Accommodation; Reassignment; Arm Injury; Hours Restriction

The Eighth Circuit found that a district court erred in finding that a unit restaurant manager with a permanent 30 percent arm injury and a maximum work hours restriction did not have a disability within the meaning of the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.* A factual dispute existed regarding whether the manger's injuries substantially limited her in the major life activity of working and whether the employer could have reassigned her to a vacant shift manager position. ***Fjellestad v. Pizza Hut of Am., 1999 WL 391911 (8th Cir. June 6, 1999).***

Ellen Fjellestad produced evidence that she lives in a rural town in South Dakota and that her entire work experience is in the restaurant management business, but she can no longer work the long hours or perform her duties to the level of success she previously achieved because of her injuries. Her doctors imposed restrictions that limit her to working 35 to 40 hours per week with no more than three consecutive days of work. Rick Ostrander, an occupational specialist reported that there were 28,000 available jobs in South Dakota that fit Fjellestad's vocational profile, but that she is eligible for only about 1,3000 of these jobs due to her functional limitations. He found that this represented a 91 percent reduction in employability, and a 95 percent reduction in labor market access based on actual positions available. Significantly, Fjellestad has been unable to obtain employment after her termination. Consequently, a triable issue exists as to whether her impairments have significantly restricted the condition, manner, or duration in which she can work as compared to an average person in the general population. *See* 29 C.F.R. §1630.2(j)(1)(i)-(ii).

There also was a genuine issue of material fact as to whether the employer failed to provide Fjellestad with reasonable accommodations by not reassigning her to a shift manager position that had become vacant. Reassignment to a vacant position is a possible accommodation under the ADA. *See* 42 U.S.C. §12111(9). The fact that Fjellestad competently performed her duties as a unit manager for close to 20 years creates a fact question as to whether she was qualified to perform the essential functions of the shift manager position and whether moving her to this position would be a reasonable accommodation. Thus, the Eighth Circuit reversed and remanded the district court's grant of summary judgment for the employer.

Pre-employment; Title I; Coverage; Scope

A Pennsylvania federal court ruled that an employee who did not have a covered disability under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, could sue his employer for terminating him for failure to disclose a previous back injury at a pre-employment medical exam. ***Mack v. Johnstown Am. Corp., 1999 WL 304276 (W.D. Pa. May 12, 1999).***

Troy Mack completed a job application for a laborer position at Johnstown America Corp. (JAC), certifying that all information provided would be true and accurate. His employment was conditioned on a physical exam. During the exam, he stated that he had no history of back injury. He was then offered employment. Four months later, Mack sustained an on-the-job back injury. He sought medical attention and told the examining physician that he had sustained a minor back injury while playing high-school football. The doctor released Mack as medically fit to return to employment, but notified JAC that Mack's disclosure was inconsistent with his statement during the pre-employment physical exam. Viewing the inconsistency as evidence of dishonesty, JAC terminated Mack. Mack sued under the ADA Title I, §12111, alleging that JAC submitted him to an unlawful exam, at which his denial of any history of back injury was elicited.

Under the ADA, employers cannot, until an offer of employment has been made, conduct a medical exam or make inquiries of a job applicant as to whether such applicant is an individual with a disability. *See* 42 U.S.C. §12112(d)(2)(A). Here, Mack attempted to assert a private right of action under the ADA despite his lack of a covered disability. Courts are split as to whether §12112(d) applies to qualified individuals with disabilities or to job applicants in general. Here, the court adopted the Tenth Circuit's holding in *Griffin v. Steeltek, Inc.*, 160 F.3d 591 (10th Cir. 1998), that the term applies to job applicants in general. Congress' use of the term "job applicant" as opposed to "qualified individual with a disability" cannot be accidental, and it points inextricably to the broader scope of coverage of §12112(d). Moreover, the ADA's goal to eliminate disability discrimination is best served by allowing all job applicants who are subjected to illegal medical questioning to bring a cause of action, rather than to limit that right to a narrower subset of applicants who are in fact disabled. In enacting §12112(d), Congress was concerned with the possible stigmatizing effect of medical inquiries and examinations, noting that individuals with diseases, such as cancer, may object merely to being identified. *See* 1990 U.S.C.C.A.N. §303.

Termination; Title I; Pretext; Back Injury

A Mississippi federal court ruled that an employer did not violate the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §12111, by terminating a trucker with a degenerative disk disease that restricted his sleeping and sitting, because he did not have a covered disability. Also, the employer provided a legitimate, nondisriminatory reason for firing him-dishonesty and fraud. ***Brady v. Wal-Mart Stores, 43 F. Supp. 2d 652 (S.D. Miss. 1998).***

James Brady alleged that his back injury affected the major life activities of sleeping and sitting. However, he failed to show that lack of sleep prevented him from performing normal daily activities. Also, his inability to sit for long time periods did not substantially limit his normal daily activities, other than driving. His doctor did not restrict his ability to drive trucks. When one can perform the normal activities of daily living, despite an impairment, then the person is not limited in that major life activity. *See Ray v. Glidden Co.*, 85 F.3d 227, (5th Cir. 1996), 20 MPDLR 507.

Wal-Mart also provided a legitimate, nondiscriminatory reason for firing him —dishonesty and fraud. It obtained a videotape of him performing physical activity for another employer while receiving workers' compensation and long-term benefits.

Termination; Title I

Back Injury

A New York federal court ruled that an employer did not violate the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §12111, when it terminated an employee with a back injury, because he did not have a covered disability. ***Baker v. County of Monroe, 47 F. Supp.2d 371 (W.D.N.Y. 1999).***

Richard Baker, a county labor foreman, injured his back and was out of work from February 1993 to April 1994. He returned to work and was reassigned to a position in the supply room for a sewage treatment plant. In October 1994, Baker re-injured his back. He was entitled to reinstatement to his position one year following the injury if he was medically certified to return to work. Baker applied for reinstatement in April 1995 with medical restrictions that he could not lift more than 40 pounds or perform repetitive bending. The county denied him reinstatement on the ground that a labor foreman was required to perform manual labor, including bending, pushing, pulling, and lifting up to 100 pounds. Baker sued under Title I for wrongful refusal to reinstate him because of his disability.

The court dismissed Baker's claim, finding his repetitive bending and lifting restrictions did not substantially limit the major life activity of working. Baker only showed that he is significantly restricted in the ability to perform labor or foreman work, not 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. §16302(j)(3)(i). In fact, Baker himself proposed that he be allowed to work in the positions of dispatcher, clerk III, security work, pump and process assistant, sewer repair supervisor, and sewer cleaning supervisor. Further, the county did not regard Baker as being substantially limited in working. It only regarded him as having an impairment that limited him performing the particular job he was hired for.

Similarly, the Sixth Circuit affirmed that a former haul driver with a lower back injury did not have a disability within the meaning of the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.* ***Wainscott v. Medusa Aggregates Co., 1999 WL 196561 (6th Cir. Apr. 1, 1999).***

The record clearly shows that Richard Wainscott's condition 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 McKay v. Toyota Motor Corp.*, 110 F.3d 369, 372 (6th Cir. 1997), 21 MPDLR 336. His back condition has resulted in only a five percent loss of function to his body as a whole. He remains capable of doing manual labor. Since he stopped working for his employer, Wainscott has engaged in a number of physical activities, including raising and harvesting tobacco, repairing various engines, and doing odd jobs. Accordingly, his impairment disqualifies him only from the narrow range of jobs that require lifting more than 50 pounds, driving on rough surfaces, or bending repetitively.

Termination; Title I; Fractured Vertebra

The Tenth Circuit found that a former pharmacy technician with a fractured vertebra failed to show that she had a disability under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* ***Jackson v. Univ. of Colorado Hosp. Auth., 1999 WL 285829 (10th Cir. Colo. Apr. 21, 1999).***

Cheryl Jackson failed to show that her fractured vertebra substantially limited a major life activity. *See* 29 C.F.R. §1630.2(i). In her deposition, she acknowledged that her impairments do not prevent her from participating in any major life activity. She testified that she was able to lift her children and do housework, provided she took a 15-minute break after two hours. Moreover, the assessment of her work capacities, performed by her treating physician and her chiropractor, found that Jackson is not substantially limited in her ability to stand, sit, bend, or lift. Finally, her treating physician found that she possessed the physical capabilities expected of a female of her age and stature.

On-the-Job; Title I; Qualified Individual; Reasonable Accommodation; Back Injury

An Ohio federal court decided that a dock worker with a back injury did not have a disability nor was he a qualified individual within the meaning of the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* ***Marcum v. Consolidated Freightways, 1999 WL 320876 (N.D. Ohio May 14, 1999).***

Todd Marcum, a dock worker for Consolidated Freightways (CF), injured his back on the job and began receiving temporary total disability and medical benefits. In their collective bargaining agreement (CBA), CF and the union created a modified work program that provided temporary positions for injured employees. After receiving permission from his doctor, Marcum participated in the program for four hours a day for eight months. However, CF removed him from the program when his doctors indicated that he had reached maximum medical improvement. The following year, Marcum underwent surgery to remove a herniated disk. CF subsequently allowed him to return to the program. Marcum sued CF under the ADA Title I, §12111, alleging he had been discriminated against based on his disability.

The court granted CF summary judgment, finding Marcum did not have a covered disability. He failed to show his back injury substantially limited the major life activity of working—that he was unable to perform either a class of jobs or a broad range of jobs in various classes. *See McKay v. Toyota Motor Mfg., U.S.A., Inc.*, 110 F.3d 369 (6th Cir. 1997), 21 MPDLR 336. Marcum's injury only impaired his ability to perform a narrow range of jobs—those involving heavy lifting.

Even if Marcum had a covered disability, he was not a qualified individual under the ADA. He could not perform the essential functions of his employment with reasonable accommodation. *See* 42 U.S.C. §12111(8). The court rejected Marcum's assertion that CF was required to permanently reassign him to the modified work program as a reasonable accommodation. The CBA's plain language states that the program only provides a temporary opportunity for workers to rehabilitate. Moreover, case law does not support the use of modified work programs as a means to provide reasonable accommodation under the ADA. *See Collins v. Yellow Freight Sys.*, 942 F. Supp. 449 (W.D. Mo. 1996), 21 MPDLR 71. Further, CF has taken steps to help Marcum. It appropriately considered his suggested accommodation and allowed him to participate in the program. Moreover, as Marcum's medical condition improved, CF permitted him to return to the modified work program.

On-the-Job; Title I; Perceived Disability; Record of Disability; Hand, Arm Injuries

A California federal court held that a medical secretary failed to show she had a disability, was perceived as disabled, or had a record of disability within the meaning of the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* ***Paulus v. Kaiser Permanente Med. Group, Inc., 1999 WL 342041 (N.D. Cal. May 24, 1999).***

Elizabeth Paulus worked as a medical secretary for Kaiser Permanente Medical Group. Her physician restricted her from using her hands repetitively for more than 45 minutes at a time and from raising her right arm above shoulder level. As a result, Kaiser modified her job duties, reduced her work schedule, granted her time off, ergonomically modified her work area, temporarily reassigned her, and hired another employee to assist her in typing and other essential job functions. Despite these accommodations, Paulus was unable to perform her job. Her physician declared her condition permanent and stationary, and Kaiser placed her on unpaid leave. She sued Kaiser under the ADA Title I, §12111, alleging she was discriminated against because of her disability.

The court granted Kaiser's motion for summary judgment, finding Paulus did not have a covered disability under the ADA—her physical impairment did not substantially limit her in the major life activity of working. Although she could not perform some data entry activities or other repetitive manual

tasks, she could perform a class or broad range of jobs as compared to an average person of similar training and ability. *See Thompson v. Holy Family Hosp.*, 121 F.3d 537, 540 (9th Cir. 1997), 2 MPDLR 609; *McKay v. Toyota Motor Mfg. USA, Inc.*, 878 F. Supp. 1012 (E.D. Ky. 1995), *aff'd*, 110 F.3d (6th Cir. 1997), 19 MPDLR 470.

Moreover, the mere fact that Kaiser acknowledged and attempted to accommodate Paulus' alleged impairment does not mean that it regarded her as having a disability. *See Wilmarth v. City of Santa Rosa*, 945 F. Supp. 1271, 1277 (N.D. Cal. 1996), 21 MPDLR 59. Also, Paulus did not have a "record of disability." The correspondence between her doctors and Kaiser only shows that she cannot do repetitive manual tasks, not that she is substantially limited in her ability to work. *See Olson v. General Elec. Aerospace*, 101 F.3d 947, 953-54 (3d Cir. 1996), 21 MPDLR 67.

Even if Paulus had a covered disability, she was not a qualified individual within the meaning of the ADA. Despite all of Kaiser's attempted accommodations, she was unable to perform the essential functions of her job. Under the ADA, Kaiser is not required to change the job's essential functions. *See Adams v. Budget Rent-A-Car*, 1996 WL 549399 (N.D. Cal. 1996), 21 MPDLR 65. Nor must Kaiser provide her with her preferred accommodation—voice activated software—but only a reasonable accommodation. *See Sharpe v. AT & T*, 66 F.3d 1045, 1050 (9th Cir. 1995). Finally, Kaiser is not obligated to reassign Paulus to another position consistent with her medical restrictions. *See Weiler v. Household Fin. Corp.*, 101 F.3d 519, 525 (7th Cir. 1996), 21 MPDLR 57.

Termination; Title I; Perceived Disability; Neck, Back Injuries

An Illinois federal court ruled that a former mechanic with a neck and back condition failed to show he had a disability or was regarded as having one under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* ***Tripodi v. Bill Kay Old's Honda, 1999 WL 299901 (N.D. Ill. May 3, 1999).***

Frank Tripodi, a mechanic for Bill Kay Old's Honda, suffered severe neck and back pain and took a medical leave of absence to undergo neck surgery. When he returned to work, he was put on light duty. However, after about two months, the pain became so severe that he took an indefinite medical leave. When he tried to return to work several months later with a 50-pound lifting restriction, Bill Kay informed Tripodi that he was being laid off due to a lack of work. He sued under the ADA Title I, §12111, alleging he was laid off because of his disability—a neck and back condition characterized by leg cramps, difficulty walking and exercising, and coordination and balance problems.

The court granted Bill Kay summary judgment, finding Tripodi failed to present evidence that he had a disability—was significantly restricted in the ability to perform a broad class of jobs that required heavy labor. *See Cochrum v. Old Ben Coal Co.*, 102 F. 3d 908, 911 (7th Cir. 1996), 21 MPDLR 210. He said that he could work in any job that did not exceed his 50-pound lifting restriction. Moreover, his physician said that Tripodi could work in a store, be a realtor, or continue to work as a mechanic with his lifting restriction.

Further, Bill Kay did not regard Tripodi as being disabled simply because it terminated him when he returned from his indefinite leave. Such timing was not suspicious because it occurred over a year after Tripodi originally sustained his injuries. *See Uhl v. Zalk Josephs Fabricators, Inc.*, 121 F.3d 1133, 1136 (7th Cir. 1997), 21 MPDLR 741. Also, a few vague remarks by a supervisor made more than a year before Tripodi was laid off failed to demonstrate a causal link between Tripodi's discharge and his medical condition.

Termination; Title I; Scoliosis; Bilateral Club Feet

A New York district court held that a hospital employee with scoliosis and bilateral club feet who had described the nature of her disabilities in general terms to her employer in order to protect her confidentiality failed to show she had a disability under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* ***Lasky v. City of N.Y., 1999 WL 314164 (E.D.N.Y. Mar. 10, 1999).***

Sharon Lasky had worked as a social worker for the New York City Health and Hospitals Corporation (H&HC) over 20 years when she left to take another job. A few years later, she was rehired and allegedly promised a salary of $45,239 and $3,017 in "longevity monies." She turned down another job offer and began working for the H&HC, but received only a salary of $36,029 plus $3,000 in "longevity monies." She sued H&HC under the ADA Title I, §12111, alleging that non-disabled employees with lesser or equal seniority or experience are paid higher salaries than she is paid. H&HC moved to dismiss.

The court granted the motion, finding Lasky failed to show she had a covered disability. Her complaint contained only a vague allegation that she suffered "from a disability known to defendants," and did not describe what her impairment was or how it substantially limited a major life activity. Such a vague allegation is insufficient.

Further, in a memorandum of law filed to oppose the H&HC's motion to dismiss, Lasky stated that she has scoliosis of the spine and bilateral club feet, and that she was attempting to keep her disability confidential by not including it in the complaint—a public document. However, a memorandum of law is also a public document, and the ADA requires her to state her claim specifically in the pleadings. Moreover, for purposes of Rule 12(c) motions, factual allegations in legal briefs are outside the pleadings and must be disregarded by the court. *See Fonte v. Continental Towers Condominium*, 848 F.2d 24, 25 (2d Cir. 1988); *O'Brien v. National Property Analysts Partners*, 719 F. Supp. 222 (S.D.N.Y. 1989).

Retaliation; Adverse Employment Action; Reasonable Accommodation; Knee Injury

A Texas federal court held that a package driver with a knee injury failed to show that he had a disability under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, or that an adverse action occurred to support his retaliation claim. Also, combining two part-time positions to create a full-time position was not a reasonable accommodation. ***Smith v. United Parcel Serv., 1999 WL 359742 (S.D. Tex. June 3, 1999).***

Darryl Smith injured his knee and underwent two operations. His doctor permanently restricted him to light duty, which allowed him to perform only 40 to 50 of his required 70 to 100 stops. Smith's employer, United Parcel Service (UPS), offered him the only available position that he could perform—a part-time car washer. Smith refused the offer and filed discrimination and retaliation charges with the EEOC. He sued UPS, alleging that he was discriminated against and retaliated against in violation of the ADA Title I, §12111.

The court granted UPS summary judgment. Smith did not have a covered disability because his knee injury did not substantially limit a major life activity. Although his doctor advised him that he should not regularly squat or climb, he can still perform a broad range of activities. At his deposition, Smith testified that he performs strenuous yard work, climbs three-and-a-half flights of stairs in one minute, drives extended distances, works out in a gym, and regularly works 10 to 12 hours per day at his new job.

Alternatively, even assuming Smith has a disability and is "otherwise qualified" to perform the essential functions of his job, UPS attempted to reasonably accommodate him by transferring him to the part-time car washer position. Smith contended that he would have accepted two part-time positions combined to create a full-time position. There is no evidence, however, that Smith raised this possibility to UPS at the time or even that two part-time positions were available that could be combined. Further, the ADA does not require an employer to cobble together two part-time jobs to create a full-time job—an option not generally available to other employees—as a reasonable accommodation. *See Fedro v. Reno*, 21 F.3d 1391 (7th Cir. 1994), 18 MPDLR 398.

With regard to his retaliation claim, Smith offered no evidence of an adverse employment action other than UPS's refusal or inability to combine two part-time jobs. Accordingly, he failed to make out a *prima facie* case of retaliation under the ADA.

Termination; Title I; Perceived Disability; Knee Injury

An Illinois federal court held a maintenance worker who dislocated his knee did not have a disability within the meaning of the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, because his injury was only temporary. Also, his employer did not regard him as having a disability. ***Kelly v. Woodridge Park Dist., 1999 WL 203020 (N.D. Ill. Mar. 31, 1999).***

The court granted the employer summary judgment, finding plaintiff's knee injury did not substantially limit a major life activity. Intermittent, episodic impairments are not "disabilities" under the ADA—the standard example being a broken leg. *See Vande Zande v. State of Wisconsin Dep't of Admin.*, 44 F.3d 538, 544 (7th Cir. 1995), 19 MPDLR 189. Moreover, where an injury is not sufficiently severe or its impact on life activities is not long-term, plaintiffs cannot, as a matter of law, establish that they are regarded as having a disability. *See Hamm v. Runyon*, 51 F.3d 721, 725 (7th Cir. 1995), 19 MPDLR 466. Several courts have found that injuries similar to plaintiff's are not severe or permanent enough to engender the ADA's protections. *See Rogers v. International Marine Terminals, Inc.*, 87 F.3d 755, 759 (5th Cir. 1996), 20 MPDLR 692.

Further, the fact that the employer terminated plaintiff because he could no longer perform the particular duties of the maintenance position does not establish that it regarded him as disabled in the major life activity of working. *See Byrne v. Board of Educ.*, 979 F.2d 560, 567 (7th Cir. 1992), 17 MPDLR 54. Moreover, the fact that the employer placed plaintiff on light duty for about a month shows that it perceived his injury to be temporary and believed he would eventually return to full-duty work. When plaintiff did not return to full duty, he was replaced. Although this decision may show a lack of sensitivity and compassion, it does not establish that plaintiff or the employer thought the injury was a permanent disability.

Title I; Depression

Termination; Pretext

A New York federal court found genuine issues of material fact existed as to whether a former secretary with depression was terminated because of her disability, in violation of the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, and the New York State Human Rights Act, N.Y. Exec. Law §296. ***Knorr v. Pepsico Food Servs., Inc., 1999 WL 200685 (N.D.N.Y. Apr. 8, 1999).***

Luann Knorr had a covered disability under the ADA and N.Y. Exec. Law §296. Depression meets the Equal Employment Opportunity Commission's definition of a mental impairment that substantially limits a major life activity. Moreover, the Second Circuit and other courts have regarded depression as a disability. *See Guice-Mills v. Derwinski*, 967 F.2d 794, 797 (2d Cir. 1992), 16 MPDLR 519. Knorr established that her depression substantially limited the major life activity of sleeping. The Second Circuit has recently held that sleep constitutes a major life activity. *See Colwell v. Suffolk County Police Dep't*, 158 F.3d 635, 643 (2d Cir. 1998), 22 MPDLR 745. Knorr claimed that she slept no more than one-and-a-half hours per night, and that her inability to sleep was chronic. Her insomnia was well

documented by her physician and therapist, who treated her for depression.

However, there was a genuine issue of fact as to whether Knorr was terminated or had resigned. A plaintiff is discharged when the employer uses language or engages in conduct that would logically lead a prudent person to believe his or her tenure had been terminated. *See Chertkova v. Connecticut Gen. Life Ins. Co.*, 92 F.3d 81, 88 (2d Cir. 1996). Inquiry focuses on the employee's reasonable perceptions, not on whether formal words of firing were in fact spoken. Here, Knorr perceived that she was being terminated and was given no choice but to accept the six-week severance offer.

There was also an issue of fact as to whether Pepsico knew about Knorr's disability. Knorr presented evidence that Pepsico received multiple notes from Knorr's doctors, a return to work authorization from the psychiatric hospital where she was treated, and several disability insurance letters from Pepsico's carrier about her illness. Also, Pepsico reportedly advised Knorr, due to her poor emotional state, to discuss the severance option with her mother.

Another issue of fact existed as to whether Knorr was terminated because of her disability. Knorr's operations manager testified at deposition that his supervisor brought up Knorr's disability leave and absenteeism as performance problems. Moreover, the supervisor's written summary of the January performance review session set forth Knorr's absenteeism as a performance problem. Thus, the court concluded, the issue of absenteeism pertained at least in part to the time Knorr was unable to work due to her psychiatric problems. Also, the suspicious timing of the review session, which occurred immediately on her return from leave, coupled with the fact that such sessions are supposed to occur during the anniversary month of an employee's hiring—here, August, rather than January—could lead a reasonable fact finder to infer the session was timed to fire Knorr for her disability.

On-the-Job; Actual Disability

The Sixth Circuit reversed the dismissal of a fire chief's claim under the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §12111, finding his severe depression substantially limited his ability to eat, sleep, concentrate, remember, participate in hobbies, and function in personal relationships, rendering him disabled under the Act. ***Berry v. City of Savannah, 1999 WL 196557 (6th Cir. Apr. 1, 1999).***

Between 1992 and 1995, fire chief James Berry was hospitalized several times for severe depression and anxiety. He alleged that thereafter he was the only city employee subjected to an interim review after a satisfactory annual performance, and the city manager reportedly began criticizing his performance and harassing him, forcing him to take additional sick leave. Berry relinquished his position as fire chief and was demoted to fire captain. Less than three months later, he resigned as fire captain when he realized his salary would be reduced. He was named the fire chief a month later. He sued the city under Title I. The district court granted the city summary judgment, finding Berry failed to show that he was substantially limited in the major life activity of working.

The Sixth Circuit reversed. There was sufficient evidence to suggest that Berry's severe depression substantially limited several major life activities other than work. His treating physician noted in his affidavit that in the three-year period preceding Berry's demotion, his depression substantially limited his ability to eat, sleep, concentrate, remember, participate in hobbies, and function in personal relationships. Thus, the court remanded for a determination of whether Berry's demotion was an adverse employment action taken by the city, or a voluntary and uncoerced decision made by Berry.

Actual Disability; Qualified Individual

A New York federal court ruled that a former guidance counselor who claimed she was denied tenure because of her depression, panic attacks, and stress in violation of the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §12111, did not have a covered disability nor was a qualified individual. ***Mescall v. Marra, 1999 WL 395113 (S.D.N.Y. June 11, 1999).***

Elizabeth Mescall's depression, panic attacks, and stress did not substantially limit the major life activity of working. She was only unable to work as a guidance counselor at a particular school. However, to be substantially limited in working, an individual must be significantly restricted in the ability to perform a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities. *See* 29 C.F.R. §1630.2(j)(3)(i). After being fired, Mescall worked as a guidance counselor in a different school district. Even if Mescall was substantially limited in working from February 1997 through June 1997, such temporary mental conditions do not qualify as a disability under the ADA. *See Colwell v. Suffolk County Police Dep't*, 158 F.3d 635, 646 (2d Cir. 1998), *cert. denied*, 119 S. Ct. 1253 (1999).

Assuming that Mescall had a covered disability, she was not qualified to perform the essential duties of her position, even with reasonable accommodation. She missed 41 days of school during her probationary period before taking a medical leave of absence. No reasonable accommodation could have improved Mescall's attendance record because her absences were not related to her mental disabilities. Her request that medically documented sick days not be counted when calculating her attendance record is unreasonable as a matter of law because it would eliminate an essential function of the job. *See Aquinas v. Federal Express Corp.*, 940 F. Supp. 73, 98-99 (S.D.N.Y. 1996).

Actual Disability; PTSD

An Illinois federal court found that a former auditor with depression and post-traumatic stress disorder (PTSD) failed to show that she had a disability within the meaning of the

Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* ***Hetreed v. Allstate Ins. Co., 1999 WL 311728 (N.D. Ill. May 12, 1999).***

The Seventh Circuit has instructed that in assessing the impact of an individual's impairments on her major life activities, the court is required to examine the extent of the impairment without mitigating measures such as medications. *See Baert v. Euclid Beverage Ltd.*, 149 F.3d 626 (7th Cir. 1998), 22 MPDLR 624. (**Note**: This is no longer the law in light of the Supreme Court's recent decisions in *Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139 (1999), 23 MPDLR 510; *Murphy v. United Parcel Serv., Inc.*, 119 S. Ct. 2133 (1999), 23 MPDLR 511; *Albertsons, Inc. v. Kirkingburg*, 119 S. Ct. 2162 (1999), 23 MPDLR 511). Mary Ann Hetreed failed to show that even without medication her depression and PTSD substantially limited the major life activity of working—that she could not perform a class of jobs or a broad range of jobs in various classes. *See* 29 U.S.C. §1630.2(j). The court noted that while it is difficult for Hetreed to prove what effect her untreated illness would have on her ability to work, it is possible to do so either by showing her symptoms before she went on medication or through medical testimony. Hetreed has not done this. Neither of her treating doctors expressed an opinion as to the effect her illness, if left untreated, would have on her ability to work. Moreover, she testified that her impairments imposed no appreciable limitations on her ability to work as an auditor and that she did not know what would happen if she were to stop taking the medication.

Termination; Title I; Perceived Disability; Current Illegal Drug Use

The Fifth Circuit held that an employee who stopped using cocaine only five weeks before he was told he would be fired, and while he was in treatment and rehabilitation, was a "current user of illegal drugs" not protected under the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §12111. Further, his employer did not regard him as having a disability. ***Zenor v. El Paso Healthcare Sys., Ltd., 176 F.3d 847 (5th Cir. 1999).***

Tom Zenor worked as a pharmacist at a medical center. He was addicted to cocaine for two years before he told his employer about his addiction. He then was referred for drug abuse treatment and a rehabilitation program, but was fired when his medical leave for his rehabilitation expired. Zenor sued for unlawful discharge under Title I. After a trial, the district court granted the employer judgment as a matter of law.

The Fifth Circuit affirmed. Zenor was a current user of illegal drugs when he was fired and, thus, was not protected under the ADA. *See* §12114(a). The reference to "current" means the date when the decision about termination is conveyed to the employee, rather than the actual termination date. *See McDaniel v. Mississippi Baptist Med. Ctr.*, 877 F. Supp. 321 (S.D. Miss.), *aff'd*, 74 F.3d 1238 (5th Cir. 1995) (table), 19 MPDLR 326. Zenor's employer told him in September, when he was in the rehabilitation program, that he would be terminated after his medical leave expired in November. Zenor had last used cocaine in August, just one month before he was told he would be fired. He had used cocaine numerous times per week for two years and, thus, his refraining from drugs for only five weeks while in treatment or rehabilitation was only the first step to recovery and did not constitute the completed rehabilitation that would bring him within the ADA's protection under §12114(b).

Alternately, Zenor did not have a perceived disability under §12102(2)(C). Although his employer may have regarded him as a drug addict, it did not necessarily perceive him as substantially limited in a major life activity. *See Equal Employment Opportunity Comm'n v. Exxon Corp.*, 973 F. Supp 612 (N.D. Tex. 1997) 22 MPDLR 58. Zenor presented no evidence that his employer perceived his addiction as a substantial impairment of his ability to work a broad range or class of jobs. Instead, it was simply concerned that he had access to pharmaceutical cocaine in his particular position at the medical center.

Termination; State Law; Drug Abuse

A Washington appeals court held that a former truck driver's drug abuse was not a "handicap" protected under the state disability discrimination law, Wash. Rev. Code §49.60.180. ***Rhodes v. URM Stores, Inc., 977 P.2d 651 (Wash. Ct. App. 1999).***

Although the law does not itself define "handicap," its accompanying regulations, Wash. Admin. Code §162-22-040(1), define it as an abnormal condition that is medically diagnosable, exists as a record or history, or is perceived to exist. George Rhodes, a truck driver, had a documented history of marijuana and cocaine abuse, but neither Rhodes nor his doctor labeled his condition as a dependency until after he lost his job. Hence, Rhodes did not have a medically recognized abnormal condition at the time of his discharge. Even if he did, he failed to show that he was fired because of his drug abuse. *See Doe v. Boeing Co.*, 846 P.2d 531 (Wash. Sup. Ct. 1993), 17 MPDLR 266. Instead, he was fired for violating the terms of his reentry agreement, which he entered into after he failed a drug test. Further, he could not meet a bona fide occupational qualification for his truck driving position—working free of controlled substances for safety reasons—as established in the employee handbook.

On-the-Job; Title I; Reasonable Accommodation; Kidney Disease

A Texas federal court ruled that an employer did not violate the Americans with Disabilities Act Title I, 42 U.S.C. §12111, by failing to provide a bulldozer operator with kidney disease with a non-rotating work schedule, because he did not have a

covered disability. ***Amos v. Wheelabrator Coal Servs., Inc., 47 F. Supp. 2d 798 (N.D. Tex. 1998).***

Robert Amos, a bulldozer operator for Wheelabrator Coal Services, underwent a kidney transplant. His physician then restricted him to working 8:00 a.m. to 4:00 p.m. Mondays through Fridays, explaining that he must take his medications on a regimented pattern. Wheelabrator accommodated Amos by allowing him breaks to take his medication, but did not provide the requested schedule change. Amos sued Wheelabrator under Title I, alleging failure to accommodate him by creating a non-rotating shift job for him. A jury returned a verdict for him. Wheelabrator moved for judgment as a matter of law.

The court granted the motion, finding Amos did not have a covered disability under the ADA. His kidney condition did not substantially limit the major life activity of working. He could perform a wide variety of jobs and the treatment only impaired his ability to work rotating shifts. Impairments affecting only a narrow range of jobs do not constitute a substantial limitation on the major life activity of working. *See Bridges v. City of Bossier*, 92 F.3d 329 (5th Cir. 1996), 20 MPDLR 682.

Moreover, the only jobs available were rotating shift jobs and the employer was unable to devise a work schedule to accommodate Amos. Employers are not required to promote employees to regular hours or to transfer an employee in violation of seniority procedures in the collective bargaining agreement.

On-the-Job; Title I; Lactation

A New York federal court found that a television producer who was lactating and needed a private area to pump breast milk did not have a disability within the meaning of the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* ***Martinez v. Nat'l Broadcasting Corp., 1999 WL 314183 (S.D.N.Y. May 19, 1999).***

With her supervisor's consent, Alicia Martinez left her work at the National Broadcasting Corp. (NBC) three times per day for about 20 minutes to pump breast milk in an empty edit room. On three occasions, someone tried to enter the room with a key while she was inside. Martinez raised concerns about her privacy, but rejected NBC's suggestion that she put a "do not disturb" sign on the door, or move to several alternative sites. She resigned and took a part-time position at another station. She sued NBC under the ADA Title I, §12111, alleging she was discriminated against because of her disability—lactation. Defendant moved for summary judgment.

The court granted the motion. Pregnancy and related medical conditions, absent unusual circumstances, do not constitute a disability under the ADA. *See Lacoparra v. Pergament Health Ctrs.*, 982 F. Supp. 213 (S.D.N.Y. 1997), 22 MPDLR 61. Equal Employment Opportunity Commission (EEOC) regulations, which are entitled to substantial deference in construing the ADA, explicitly exclude conditions such as pregnancy, that are not the result of a physiological disorder. *See* 29 C.F.R. §1630, App. §1630.2 (h) (1998).

State Law; Lifting Restriction; Endometriosis

A Michigan appeals court upheld summary judgment for an employer, finding that a restaurant prep cook with lifting restrictions after surgery for her endometriosis did not have a disability under the state's Persons with Disabilities Civil Rights Act (PWDCRA), Mich. Comp. Law §37.1101 *et seq.* ***Lown v. JJ Eaton Place, 1999 WL 366535 (Mich. Ct. App. June 4, 1999).***

The PWDCRA's disability definition, §37.1103(d)(i), includes the requirement of a substantial limitation on a major life activity, similar to the federal Americans with Disabilities Act definition. However, the Michigan appeals court found "an inherent inconsistency in the approach followed by" federal courts on the disability issue where lifting restrictions are involved. Hence, the court made its own ruling that "a lifting restriction constitutes a disability under the PWDCRA when it imposes substantial limitations on an individual's ability to perform the normal activities of daily living." *See Stevens v. Inland Waters, Inc.*, 559 N.W.2d 61 (Mich. Ct. App. 1996). Nevertheless, Joyce Lown failed to establish that her lifting restrictions substantially affected either her working or non-working activities. She first had a temporary 10-15 pound lifting restriction, which then changed to a 25-pound restriction, but she was still able to perform dishwashing jobs and the only activity she could no longer perform was bowling.

On-the-Job; Retaliation; Title I; Perceived Disability; Associational Discrimination; AIDS

A New York federal court denied a state's motion to dismiss a complaint under the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §12111, alleging a state agency discriminated and retaliated against an employee with HIV/AIDS and on the basis of his association with persons living with HIV/AIDS. ***Dollinger v. State Ins. Fund, 44 F. Supp. 2d 467 (N.D.N.Y. 1999).***

First, the State Insurance Fund (SIF) did not dispute that it was subject to the ADA or that Robert Dollinger was able to perform the essential functions of his job as an insurance premium auditor trainee. Second, Dollinger's allegations were sufficient to establish that SIF was aware of his HIV/AIDS status based on the numerous complaints he had made to SIF and the New York State Division of Human Rights. His allegations that SIF repeatedly denied him provisional or permanent promotions in place of less qualified candidates based on his perceived HIV/AIDS status was sufficient to satisfy the "regarded as" definition of individual with a disability and to establish a *prima facie* case of discrimination.

Third, Dollinger's allegations that he was isolated by his co-workers and employer and consistently denied promotions in place of less qualified employees based on his association with a person living with HIV/AIDS sufficiently alleged a causal connection between SIF's awareness of his association with persons with HIV/AIDS and adverse employment action. SIF's defense that it required Dollinger to attend work or account for his absences and his current employment with SIF were not sufficient cause to dismiss at the preliminary stage of the litigation.

Retaliation; Titles I, V; §504; Associational Discrimination

A Puerto Rico federal court held that former employees failed to show they had a disability within the meaning of the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §12111, and the Rehabilitation Act §504, 29 U.S.C. §794. Nor were they terminated for associating with or on for advocating on behalf of persons with HIV/AIDS, in violation of Titles I or V, 42 U.S.C. §12203. ***Sifre v. Department of Health, 38 F. Supp. 2d 91 (D.P.R. 1999).***

The court dismissed the two plaintiffs' complaints under Title I and §504, finding neither alleged in their complaints that they had a disability within the meaning of the statutes. *See Roth v. Lutheran General Hosp.*, 57 F.3d 1446, 1545 (7th Cir. 1995), 19 MPDLR 517. Rather, their cause of action is based on their behaviors in guaranteeing, defending, and advocating rights of HIV/AIDS patients. However, the court declined to dismiss one plaintiff's complaint, because he was blind, which is a covered disability under the ADA. *See* 29 C.F.R. §1630.2(i).

The court also dismissed plaintiffs' Title I association discrimination claims. Although plaintiffs met the first three elements of a *prima facie* case by showing they were qualified for their job positions, subjected to adverse employment action, and involved with people with HIV/AIDS through their positions at the Department of Health (DOH), they failed to show they were terminated because of that association. *See Hartog v. Wasatch Academy*, 129 F.3d 1076, 1085 (10th Cir. 1997), 22 MPDLR 65.

Finally, the court dismissed plaintiffs' Title V claims that they were terminated in retaliation for their advocacy on behalf of HIV/AIDS patients. Plaintiffs failed to show they were engaged in protected conduct. *See Solieau v. Guilford of Maine, Inc.*, 105 F.3d 12, 16 (1st Cir. 1997), 21 MPDLR 201. The conduct described by plaintiffs involved policy positions they took regarding HIV/AIDS related regulations and reports they made during their time at the DOH regarding the management of medical records of patients with HIV/AIDS. Protected conduct that has been found sufficient to state a retaliation claim includes requesting accommodation for a disabled person, an informal complaint to management, and the filing of an EEOC charge.

Termination; State Law; Title I; Reasonable Accommodation; Pretext; Hepatitis C

A Florida federal court ruled that although a former junior paralegal with Hepatitis C had a disability within the meaning of the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, and the Florida Civil Rights Act (FCRA), Fla. Stat. §760.01 *et seq.*, she failed to show that the accommodation she requested was reasonable. Also, her employer had a legitimate, nondiscriminatory reason for terminating her—a restructuring plan that predated the diagnosis and was impartially implemented. ***Quick v. Tripp, Scott, Conklin and Smith, P.A., 43 F. Supp. 2d 1357 (S.D. Fla. 1999).***

Dawn Quick's Hepatitis C substantially limited the major life activity of reproduction. In *Bragdon v. Abbott*, 524 U.S. 624 (1998), 22 MPDLR 449, a plurality of the U.S. Supreme Court held that the inability to have children is a cognizable disability under the ADA. *Bragdon* dispels the traditional notion that there be a nexus between the allegedly impaired employee's workplace abilities and the allegedly impaired major life activity. Moreover, since Quick could perform her job with or without accommodation, she was a qualified individual under the ADA and the FCRA.

However, her request that a non-disabled employee be terminated to create a vacant position for her was unreasonable. An employer is not required to create a position to accommodate a disabled employee, nor is the employer obligated to reassign the employee to a position occupied by a nondisabled employee. *See Terrell v. USAir*, 132 F.3d 621, 626-27 (11th Cir. 1998), 22 MPDLR 198. The ADA and FCRA do not demand that employers give employees with disabilities priority in hiring and reassignment over non-disabled employees. Quick's failure to prove that the accommodation was reasonable is sufficient grounds for granting the employer summary judgment. *See Willis v. Conopco, Inc.*, 108 F.3d 282, 283 (11th Cir. 1997), 21 MPDLR 351.

Further, Quick failed to show that her employer terminated her because of her disability. The employer's restructuring plans began before Quick's diagnosis was known. Her only evidence was that she had greater seniority than those employees who were retained. Seniority, however, was only one of a number of criteria used to determine who was retained. Other criteria included the individual's skills, qualifications, educational background, and area of specialization. Also, Quick did not establish that she was similarly situated to the two retained employees. While Quick may dispute the criteria used, this alone is insufficient to raise a genuine issue of pretext.

Termination; §501; Qualified Individual; Pretext; HIV

The Equal Employment Opportunity Commission (EEOC) determined that the Department of Treasury did not violate the Rehabilitation Act §501, 29 U.S.C. §791 *et seq.*, when it terminated a worker because of his numerous absences without leaves and his failure to follow leave request procedures, not his HIV status. ***Doe v. Rubin, No. 03990024 (EEOC May 20, 1999).***

The petitioner met the requirements for a disability under EEOC Regulation 29 C.F.R. §1614.203 (a) (1) in that his HIV status substantially limited the major life activity of reproduction. *See Bragdon v. Abbott*, 118 S. Ct. 2196 (1998), 22 MPDLR 449. Further, his ability to perform the essential functions of his job had not been impaired and, thus, he was a qualified individual within the meaning of the regulations. *See* 29 C.F.R. §1614.203 (a) (6). However, the petitioner failed to show his termination resulted from his disability, not from his prior instances of disciplinary action, and thus, did not prove that the Rehab Act was violated.

Retaliation; Title I; State Law; Multiple Disabilities

A New York federal court ruled that a former research assistant with several medical conditions failed to state an adequate claim under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, by not identifying a substantial limitation of a major life activity. Also, the employee's daughter who worked for the same employer failed to establish a claim of retaliation for supporting her mother's disability rights. ***Sacay v. Research Found. of the City Univ. of N.Y., 44 F. Supp. 2d 496 (E.D.N.Y. 1999).***

Valerie Sacay was terminated from her research assistant position after taking several medical leaves for her epilepsy, myocardial infarction, degenerative disc disease, and gastritis. She sued for discrimination and retaliation under the ADA Title I, §12111; the Rehabilitation Act §504, 29 U.S.C. §794; and state and local law, N.Y. Exec. Law §292(21) and Admin. Code of the City of N.Y. §8-102(16). Her daughter Melanie, who worked as a marketing assistant for the same employer, sued for retaliation under the same laws, alleging constructive termination after she supported her mother's right to redress her disability discrimination claims.

The court dismissed Valerie's claims for failure to state a claim, but granted her leave to amend her complaint within 20 days. Valerie failed to comply with Fed. R. Civ. P. 8(a)(2), which requires the pleader to disclose adequate information about the basis of her claim. The ADA defines disability as an impairment that substantially limits a major life activity, yet Valerie only alleged in a conclusory manner that her conditions were disabilities. *See Buckley v. Consolidated Edison Co. of N.Y., Inc.*, 908 F. Supp. 217 (S.D.N.Y. 1995), 20 MPDLR 216. She neither specified a particular condition as a disability, nor identified a major life activity that was substantially limited. "requiring an attorney to identify the substantial limitation of a major life activity is hardly an onerous task." Furthermore, although state and local law define disability differently as an impairment "demonstrable by medically accepted techniques" and broadly as an impairment, respectively, Valerie did nothing more than list every medical condition she ever had.

The court also dismissed Melanie's claims and granted her leave to amend her complaint. Melanie had not established that she had engaged in a protected activity, as required in a retaliation action. *See Sands v. Runyon*, 28 F.3d 1323 (2d Cir. 1994), 18 MPDLR 586. The only evidence she produced in support of her claims was one memorandum to her employer supporting her mother's assertion of disabilities and her right to pursue a disability discrimination claim. That memo was dated a few days after the employer informed her of her temporary transfer, but her attorney expressed the possibility that Melanie had made oral complaints regarding her mother's treatment before she was transferred.

Termination; Title I; Perceived Disability; Pretext; Epilepsy

A Texas federal court ruled that a former engineering instructor with epilepsy did not have a disability nor was he perceived as having one within the meaning of the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, and the employer had a legitimate, nondiscriminatory reason for terminating him. ***Webster v. Texas Eng'g Extension Serv., 1999 WL 261925 (N.D. Tex. Apr. 23, 1999).***

Dan Webster taught courses at the Texas Engineering Extension Service (TEEX). He and two other instructors were terminated and their division closed after a decline in business. Webster sued TEEX under the ADA Title I, §12111, alleging that it had terminated him on the basis of his disability—epilepsy.

The court granted TEEX summary judgment. Although Webster's epilepsy is a physical impairment, it does not substantially limit a major life activity. *See* 42 U.S.C. §12101(2); *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723 (5th Cir. 1995), 19 MPDLR 471. The only restriction ever placed on him was a four-week hiatus from driving. Even if driving were a major life activity, a transitory restriction or impairment as a matter of law would not bring Webster within the ADA's scope. *See Evans v. City of Dallas*, 861 F.2d 846 (5th Cir. 1988). Nor did TEEX regard Webster as having an impairment that substantially limits a major life activity. Webster's only evidence was the testimony of a human resources administrator, who did not know about Webster's epilepsy until after his discharge. Finally, even if Webster did have a disability, TEEX articulated a legitimate, nondiscriminatory reason for firing him—the division was in financial trouble and closed.

Termination; Title I; CTS

Actual Disability; Qualified Individual

A Texas federal court found that a former ice cream store clerk with carpal tunnel syndrome (CTS) failed to show she had a disability, or that she was able to perform essential job functions with reasonable accommodation under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* ***Adair v. W.H. Braum's Inc., 1999 WL 242696 (N.D. Tex. Apr. 20, 1999).***

Willa D. Adair failed to show that her CTS substantially limited 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)(i). The inability to work at the specific job of one's choosing does not constitute a substantial limitation. Adair's restrictions allowed her to work up to eight hours a day with a five-pound weight limit on lifting and a prohibition against dipping ice cream. She currently works as a clerk at a grocery store between 34 and 40 hours per week and performs such duties as renting videos, taking care of customers, and operating a cash register. The fact that she is presently employed and has performed her job satisfactorily for 10 months indicates her ability to sustain gainful employment.

Furthermore, even if Adair had a covered disability, she could not perform the essential functions of her job with reasonable accommodations. *See* 29 C.F.R. §1630.9(d). As set forth in her written job description, the ice cream store clerk position requires lifting and moving items, sweeping and mopping the store, and dipping frozen ice cream. Adair admitted that she could not perform these functions without an accommodation. The only available accommodation was to transfer her to another position. Her employer offered to transfer her to a higher volume store where she could operate a cash register on a full-time basis, but she refused.

Actual Disability; Constructive Discharge

A Kansas federal court decided that an employee who claimed his employer constructively discharged him because he had carpal tunnel syndrome (CTS) failed to show that he had a disability under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* ***Nowlin v. K-Mart Corp., 1999 WL 381799 (D. Kan. May 10, 1999).***

Donald Nowlin, an order filler at K-Mart, sustained several on-the-job injuries to his arms and hands resulting in bilateral carpal tunnel syndrome and tendonitis. After his doctor permanently restricted him from repetitive motion and lifting more than 40 pounds, K-Mart transferred him to a third-shift checker position in the receiving department. Three months later, the position was eliminated due to a reduction in work force. After being denied a second-shift checker position due to lack of seniority, Nowlin resigned. He sued K-Mart, alleging he was constructively discharged on the basis of his disability, in violation of the ADA Title I, §12111.

The court dismissed Nowlin's claim, finding he failed to show his CTS substantially limited his ability to lift and work. Proof of a lifting restriction alone is insufficient to show a substantial limitation. *See Gibbs v. St. Anthony Hosp.*, 1999 WL 57156 (10th Cir. 1997), 21 MPDLR 341. Moreover, Nowlin failed to offer any evidence comparing his lifting ability to that of the general population. Even with such evidence, courts have found more severe restrictions insufficient as a matter of law. *See Williams v. Channel Master Satellite Sys., Inc.*, 101 F.3d 346 (4th Cir. 1996).

Regarding working, Nowlin merely offered conclusory statements regarding a variety of jobs that he could not perform without presenting evidence of occupational requirements. He also failed to show that he is unable to perform a class of jobs or a broad range of jobs in various classes. By contrast, K-Mart offered evidence that Nowlin was able to perform a wide range of jobs: he oversaw the construction and design of his daughter's house, assisted in the construction of a modular home, and worked as a dispatcher and as an operations manager.

Perceived Disability; Qualified Individual; Reasonable Accommodation

An Illinois federal court found genuine issues of material fact existed as to whether (1) an employer regarded a salesperson with carpal tunnel syndrome (CTS) and tennis elbow as having a disability under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, and (2) the salesperson was a qualified individual who could perform the essential functions of her job with reasonable accommodation. ***Bicknell v. Thomas Tile & Carpet, Inc., 1999 WL 261738 (N.D. Ill. Apr. 16, 1999).***

As an outside salesperson for a tile company, Karen Bicknell was required to carry seven-pound sample tile boards when she visited customers. When she developed tennis elbow and CTS in both arms, her doctor told her to avoid lifting with outstretched arms. Accordingly, she asked her employer for accommodations—having the customers pick up the boards, providing her with an assistant to carry the boards to customers, and delivering the boards along with the tile—so that she could return to work. She was fired and sued the employer under the ADA Title I, §12111, for discriminatory discharge.

The court denied the employer summary judgment. There was evidence that Bicknell had a perceived disability, §12102(2)(C), because her employer regarded her as incapable of lifting the sample tile boards. Her arm problems did not rise to the level of an actual disability, §12102(2)(A), because they severely restricted her ability to lift for only a few months and did not have a permanent impact on her.

There also was evidence that Bicknell was a qualified individual who might be able to perform her essential job functions with reasonable accommodations. §12111(8). Having the sample boards available for customers, not the actual lifting, was the function essential to the outside salesperson job. Hence, Bicknell might be able to show that she could perform the marginal duty of lifting with a reasonable accommodation such as warehouse worker loading, customer assistance, and/or use of delivery services. Bicknell raised the possibility of some accommodations, but her employer never discussed the subject with her. *See Ross v. Indiana State Teacher's Ass'n Ins. Trust*, 159 F3d 1001 (7th Cir. 1998), 22 MPDLR 753, *cert. denied*, 119 S. Ct. 1113 (1999).

Title I; Qualified Individual; Pretext; CP

A South Carolina federal court ruled that a former cashier with cerebral palsy (CP) failed to show she had a covered disability or was a qualified individual under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, or that her

employer's reason for terminating her was a pretext for discrimination. ***McKenzie v. Target Stores, 1998 WL 1048361 (D.S.C. June 24, 1998).***

Target Stores hired Heather McKenzie, who had CP, as a cashier. After successfully completing her probationary period, her productivity began to suffer. McKenzie accepted a check that was made out to another company and incorrectly validated. As a result, Target transferred her to a switchboard operator job. However, she continued to make errors, such as advising a customer that an item was in stock when it was not and telling a customer that no manager was available on site. Target terminated McKenzie allegedly because of her failure to meet productivity standards. She sued Target for violating the ADA Title I, §12111.

The court dismissed McKenzie's claim. First, she did not have a covered disability. Her CP did not substantially limit her from performing a class or broad range of jobs, but only the particular job she had been hired for. Both before and after working at Target, McKenzie had worked successfully as a cashier.

Second, McKenzie was not qualified to perform the essential functions of the cashier position because she failed to satisfy Target's productivity standards and to meet its legitimate expectations. McKenzie had performed satisfactorily during her probationary period without any accommodation, and she never indicated that her condition was causing her difficulty in performing her job. Nor did she indicate that she needed an accommodation.

Finally, there was a legitimate reason for McKenzie's termination—failure to meet company productivity standards. This failure was not related to her CP, as she was able to meet those standards satisfactorily during her first 30 days of employment despite her condition. McKenzie failed to show that this reason was a pretext for discrimination. Where the hirer and firer are the same individual and the termination occurs within a relatively short time span following the hiring, a strong inference exists that discrimination was not a determining factor. *See Proud v. Stone*, 945 F.2d 796, 797 (4th Cir. 1991).

Termination; Title I; Reasonable Accommodation; Reassignment; RADS

A Florida federal court ruled that a former sheriff deputy with Reactive Airways Dysfunction Syndrome (RADS) had a covered disability under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, and that factual issues existed whether the department considered a reassignment to be a reasonable accommodation. ***Adams v. Henderson, 45 F. Supp. 2d 968 (M.D. Fla. 1999).***

Eric Adams worked as a sheriff deputy. His job required him to supervise inmate cleaning crews. After being diagnosed with RADS—a condition similar to asthma characterized by difficulty breathing, coughing, wheezing, and tightness in the chest—Adams could no longer perform the duties of his position. He requested work in other positions but was told that none were available. He applied for a community service program coordinator position, but another employee was selected. Adams was later terminated for failure to return to duty after an authorized medical leave of absence. He sued the county sheriff's department for violating the ADA Title I, §12111.

The court denied the department summary judgment. First, Adams had a covered disability because his RADS condition substantially limited the major life activity of breathing. He presented evidence showing that the nature and severity of his condition is such that he can expect a potentially life-threatening reaction to many chemicals that the ordinary person might encounter on a daily basis; that the duration of his condition could be lengthy; and that his condition is expected to have a permanent or long-term impact. *See* 29 C.F.R. §1630.2(j)(2). Adams' condition also substantially limits him in the major life activity of working. Department employees admitted that Adams' condition disqualified him from a broad range of jobs conducted in detention facilities, noting that virtually any jail or detention facility undergoes constant cleaning.

Second, although Adams was unable to perform the duties of a deputy, an issue of fact existed as to whether reasonable accommodation in the form of a reassignment to a vacant position was available. The department argued that there were no vacant positions within the jail itself, but focused "too narrowly" in not considering positions that were outside the jail and did not offer evidence that it "identified the full range of positions" for which Adams was qualified. Adams offered evidence that there were numerous vacant positions for which he was qualified, including community service officer, dispatcher, process server, fingerprint technician, storekeeper, and clerk. Factual issues also existed regarding the county reassignment rules, the selection method for the program coordinator position, and the county's policy for selecting disabled employees ahead of other job applicants as a reasonable accommodation.

Termination; Title I; Record of Disability; Perceived Disability; LD

A Texas federal court held a former supervisor with learning disabilities who was terminated after 14 years for using inappropriate language and failing to follow directions and correct a poor performance rating did not have a disability, a record of a disability, or a perceived disability under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* ***Avina v. Dallas Indep. Sch. Dist., 1999 WL 288673 (N.D. Tex. Apr. 30, 1999).***

The court granted the school district summary judgment. Alfred Avina's mental impairment did not substantially limit the major life activity of working. During the 14 years he worked for the school district, Avina primarily received satisfactory evaluations, and had been promoted from custodian to in-house floater/relief supervisor with an increase in pay. Moreover, after being

terminated, he worked for a steel company. Nor is Avina substantially limited in any other major life activity: he can read, write, and perform daily household chores.

Moreover, Avina did not have a "record of a disability"—a history of, or has been misclassified as having a mental impairment that substantially limits a major life activity. He also failed to show that the school district regarded him as being disabled, as he had worked for it for 14 years and received a promotion.

Termination; Title I; Temporary Physical Impairments

A Connecticut federal court ruled that a former employee who claimed that she was completely unable to work, drive, walk, or bathe herself for 10 months or to perform a wide range of jobs for an additional six months adequately alleged that she was substantially limited in several major life activities so as to survive a motion to dismiss her claims under the Americans with Disabilities Act Title I, 42 U.S.C. §12111. ***Cousins v. Howell Corp., 1999 WL 382600 (D. Conn. June 7, 1999).***

Although short-term, temporary impairments are generally not substantially limiting, some conditions that are severe and long-term may constitute disabilities. *See Katz v. City Metal Co.*, 87 F.3d 26 (1st Cir. 1996), 20 MPDLR 686. The duration of the impairment is simply one of the factors—together with the nature, severity, and long-term impact of the impairment—that must be considered in determining whether the impairment substantially limits a major life activity such as to constitute a disability under the ADA. Some conditions may be long-term or potentially long-term in that their duration is indefinite or unknowable. Such conditions, if severe, may constitute disabilities. Here, Arlene Cousins alleged that she was unable to work, drive, walk, or bathe herself for 10 months; that thereafter she was substantially limited in her ability to lift, walk, bend, and sit for lengthy periods and required prolonged rest periods; and that for six months following her complete disability, she was unable to perform a wide range of jobs including any position that would require significant filing, lifting, bending, or sitting for prolonged periods.

Termination; Title I

A New York federal court ruled that a maintenance manager failed to show that he had a disability under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* ***Matteliano v. United Cerebral Palsy Ass'n of W. N.Y., 1999 WL 307694 (W.D.N.Y. May 6, 1999).***

In 1986, Antonino Matteliano was hired for a maintenance position by United Cerebral Palsy Association of West New York. Over the next nine years, he received a number of promotions. However, in 1995, he was demoted and received a pay cut. The following year, he was terminated. Matteliano sued United under the ADA Title I, §12111, alleging he was fired because of his disability. Defendant moved for summary judgment.

The court granted the motion, finding Matteliano failed to allege, much less adduce any evidence of, a covered disability. Although he took a leave of absence from November 1995 to January 1996 allegedly for medical reasons, he offered no documentation, either in the pleadings or in his papers opposing the motion, of any medical condition. Significantly, he at no point suggests that he apprised his employer of a medical condition. The only specific ailment referred to in the record was his diagnosis of cancer in January 1997—two months after his termination.

Termination; Title I; Perceived Disability; Knee Injuries

The Tenth Circuit affirmed that the mere fact that a former employer filed two workers' compensation claims for knee injuries did not mean that his employer regarded him as having a disability under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, particularly when the employer retained him in his original position after his injuries. ***McDowell v. Farmland Indus., 1999 WL 311477 (10th Cir. May 18, 1999).***

While working as a transfer pumper for Farmland Industries, Inc., Kevin McDowell sustained two work-related knee injuries for which he received workers' compensation benefits. When the company needed to reduce its workforce, it planned to retain McDowell. However, two employees with less seniority, but different skills, were moved ahead of McDowell, and he was terminated. McDowell sued Farmland under the ADA Title I, §12111, alleging he was terminated because of his disability. The district court granted Farmland summary judgment, finding that McDowell failed to show that Farmland terminated him based on a perceived disability.

The Tenth Circuit agreed. The court rejected McDowell's claim that Farmland regarded him as having a disability that substantially limited a major life activity because he had filed two workers' compensation claims. Moreover, the fact that Farmland employed him in a heavy labor position after his knee injuries and up until the time of his termination shows that it did not regard him as being substantially limited in the major life activity of working—the only major life activity identified by McDowell.

Termination; Title I; Perceived Disability; Ankle Injury

The Third Circuit held that a food manager who could only stand 50 minutes before requiring a break did not have a disability under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* However, the court reinstated his claim that the employer regarded him as disabled, finding that an employer's innocent mistake, which may be a function of miscommunications, is sufficient to subject it to liability under the ADA. However, a limited defense of reasonable mistake exists where the employee is responsible for the employer's

erroneous perception and the employer's perception is not based on stereotypes about disability. ***Taylor v. Pathmark Stores, Inc., 177 F.3d 180 (3d Cir. 1999).***

Joseph Taylor, a frozen food manager at Pathmark Stores, slipped and injured his ankle. His physician told him to rest his ankle for 10 minutes each hour. His job was filled while he was on leave, and he worked stocking shelves and was able to take necessary breaks. When Taylor aggravated the injury and temporarily had increased work restrictions, Pathmark fired him. He sued alleging violations of Title I, §12111. A Delaware federal granted Pathmark summary judgment, finding Taylor did not have a covered disability under the ADA, nor was he regarded as disabled by his employer. 1997 WL 873547 (D. Del. Oct. 23, 1997), 22 MPDLR 333.

The appeals court affirmed on the actual disability claim. Taylor testified that he walks with a slight limp and requires 10-minute hourly breaks when standing or walking. However, there was no testimony that Taylor, during the 50 minutes per hour, stood or walked with any less ability than the average person. Because he could stand and walk for 50 minutes at a time and could continue for longer periods if he took a break every hour, he could carry out most regular activities that required standing and walking, even if he could not perform Pathmark's jobs without accommodation.

However, the appeals court found factual issues existed as to whether Pathmark regarded him as disabled. The court rejected Pathmark's argument that it could not be held liable for regarding Taylor as disabled where it relied on information supplied by Taylor's doctor in concluding that it had no job available that met his restrictions. The law in the Third Circuit makes clear that a "regarded as" plaintiff can make out a case even if the employer is innocently wrong about the extent of his or her impairment. *See Deane v. Pocono Med. Ctr.*, 142 F.3d 138 (3d Cir. 1998). An employer can rely on an employee's information about restrictions, but it has to be right when it decides that those restrictions are permanent and prevent the employee from performing a wide class of jobs, as opposed to one particular job. If the relevant decision-makers wrongly believed that Taylor was completely unable to work because of miscommunications within Pathmark, the ADA puts the burden of correcting the problem on Pathmark, rather than leaving Taylor out in the cold.

The appeals court noted that a limited defense of reasonable mistake exists where the employee is responsible for the employer's erroneous perception and the employer's perception is not based on stereotypes about disability. Here, Taylor offered Pathmark updated information on his condition and had his physician send further information. Thus, the court cannot say that he is unarguably responsible for the misunderstanding.

Termination; Title I; Perceived Disability; Hostile Work Environment; Blindness

A Minnesota federal court found that genuine issues of material fact existed as to whether a former employee's blindness in one eye constituted a disability under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, and whether the employer (1) regarded the employee as having a disability and (2) created a hostile work environment based on disability discrimination. ***Breitenfeldt v. Long Prairie Packing Co., 1999 WL 266425 (D. Minn. Apr. 28, 1999).***

Dennis Breitenfeldt was legally blind in one eye. He worked for several years as a "boner" for Long Prairie Packing Company, a meat packing plant. One day, while at home on break, he was unable to get up because of severe back pain. Three months before, he was injured on the job when he tore a muscle in his back. Breitenfeldt phoned the plant and was told he had to return to work to punch out. When he failed to do so, the plant terminated him for insubordination. He sued Long Prairie under the ADA Title I, §12111, claiming he was wrongfully terminated because of his vision impairment.

The court denied Long Prairie summary judgment. There was a genuine factual issue as to whether Breitenfeldt's blindness in one eye constituted a "disability" that substantially limited a major life activity under the ADA. Although he had a driver's license and did not always wear glasses, he had no depth perception. The Eighth Circuit has held that blindness in one eye, even if it can be corrected, is a disability that substantially limits the major life activity of seeing, because it requires a person to compensate for lack of depth perception and requires the "good" eye to carry the burden of seeing for the "bad" eye. *See Doane v. City of Omaha*, 115 F.3d 624 (8th Cir. 1997), 21 MPDLR 625, *reh'g denied* (July 30, 1997), *cert. denied*, 118 S. Ct. 693 (Jan. 12, 1998).

There were also genuine issues of fact as to whether Breitenfeldt's supervisors regarded him as having a disability and created a hostile work environment based on disability discrimination. Both supervisors regularly insulted him by calling him "One-Eyed Bitch," "Cyclops," and "One-Eyed Faggot." One supervisor told Breitenfeldt that he was worthless because of his vision problem, while the other mimicked the way Breitenfeldt tilted his head to compensate for his vision problem, subjecting him to general laughter in the plant.

Termination; Title I; Record of Disability; Pretext; Breast Cancer

A Minnesota federal court ruled that a reasonable jury could conclude that an employee who had a mastectomy for breast cancer had a "record of" a disability protected under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* ***Cornman v. N.P. Dodge Management Co., 43 F. Supp. 2d 1066 (D. Minn. 1999).***

In 1976, Marilyn Cornman had a mastectomy to treat breast cancer and then silicone breast implants. In 1992, the implants started to rupture, but Cornman learned that having the implants removed could trigger a recurrence of her cancer. At about the same time, she had problems with one of the properties she managed and was fired. She sued her employer under the ADA Title I, §12111.

The court denied the employer's motion for summary judgment. Comman's silicone leakage did not amount to an actual disability under the ADA, nor did her employer regard her as having a disability. However, she had a "record of a disability" under §12102(2)(B). Citing *Bragdon v. Abbott*, 524 U.S. 624 (1998), 22 MPDLR 449, the court noted that Comman's record of past impairment due to breast cancer was serious enough to affect her sexuality. Moreover, even if her history of cancer did not "place her squarely within the definition of a 'record of' disability, she may be classified as a person with a disability through an analysis which bridges the 'record of' and 'regarded as' prongs of the definition of a disabled person" given the attitudes of her clients and employer about the possibility of a relapse. Further, while the employer had some evidence of a legitimate reason for firing her, Comman also had some evidence that the reason was a pretext for discrimination.

Termination; Perceived Disability; Stress; Vertigo; Headaches

Oregon's federal district court ruled that a former project manager with situational stress, cervical vertigo, and vascular headaches did not have a perceived disability under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, but there were disputed fact questions as to whether he had an actual disability and was fired because of it. ***Kline v. Arcadis, Geraghty & Miller, Inc., 1999 WL 375725 (D. Or. Apr. 26, 1999).***

Kelly Kline was working as a project manager when he began experiencing vertigo, dizziness, nausea, headaches, and flickering vision. He took medical leave for a few months. Over the next four years, he was periodically treated for stress, vertigo, and vascular headaches, which all fluctuated in symptoms from time to time. In 1997, Kline missed several important meetings due to reoccurrence of his symptoms. When he told his supervisor about his condition, Kline was told he would be fired unless he got his medication and attended the meetings. After he was fired, Kline sued under the ADA Title I, 42 U.S.C. §12111. A magistrate judge recommended summary judgment for the employer on Kline's claims involving an alleged perceived disability, but denial of summary judgment on the claims alleging discrimination based on an actual disability.

The court adopted the magistrate's findings and recommendations. Under §12102(2), Kline produced sufficient evidence to create an issue of material fact as to whether he had an actual disability. Medical evidence indicated that his conditions, if not controlled by medication and treatment, might substantially limit his major life activities of reading, writing, driving, thinking, concentrating, performing manual tasks, or sleeping. There also was evidence that Kline's condition was not temporary, as he had been treated for his symptoms for four years. Further, agreeing with the majority of courts that follow the ADA regulation, 29 C.F.R. app. §1630.2(j)—stating that a disability determination should be made without regard to mitigating measures—the court rejected the employer's argument that Kline was not substantially limited because of his ability to function while taking medication and receiving treatment. However, the court noted that the Supreme Court was presently considering the mitigating measures issue, and if the Court determines before Kline's trial date in October 1999 that such measures should be taken into account, the employer could request reconsideration. *See Sutton v. United Airlines, Inc.*, 119 S. Ct. 2139 (1999), 23 MPDLR 510; *Murphy v. United Parcel Serv., Inc.*, 119 S. Ct. 2133 (1999), 23 MPDLR 511; *Albertsons, Inc. v. Kirkingburg*, 119 S. Ct. 2162 (1999), 23 MPDLR 511. There also was evidence that Kline could be a qualified individual if he was permitted to use sick leave as a reasonable accommodation, and that he was fired because of his disability, rather than for insubordination.

On the other hand, there was no evidence that Kline's employer perceived him as having a disability. The employer knew of Kline's illnesses before terminating him. However, it only thought that he could not perform his particular project manager position due to the required meetings, not that he was precluded from a broad class of jobs. *See Thompson v. Holy Family Hosp.*, 121 F.3d 537 (9th Cir. 1997), 21 MPDLR 609.

On-the-Job; Retaliation; Title II; Record of Disability; Perceived Disability; Diabetes

An Alabama federal court dismissed an Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §12111, failure-to-accommodate claim brought by an employee with diabetes, finding he did not have a covered disability under the ADA and there were legitimate financial reasons for placing him on medical leave until he could be accommodated. ***Evans v. Pemco Aeroplex, Inc., 1998 WL 1048470 (N.D. Ala. Feb. 23, 1998).***

Elliot Evans worked for Pemco Aeroplex, which refurbished aircraft. When he was diagnosed with diabetes, his physician restricted his climbing and working at heights. In December 1994, Evans was assigned to the position of cleaner on a crew of employees, requiring him to climb and work at heights. Pemco's medical and personnel departments contended that they were unable to confirm Evans' work restrictions. He obtained a verification and filed an EEOC charge. Pemco transferred Evans to another department where he was not required to climb or work at heights.

After a strike in 1996, Pemco adopted a policy requiring workers to perform all functions of the positions they had been hired for. Because all of the positions that did not require climbing or working at heights had been filled, Pemco placed Evans on medical leave. He amended his EEOC charge. Pemco recalled him from medical leave and created a position for him in the wash rack department where he stripped, washed, degreased, and brightened various parts of the aircraft. Evans sued Pemco pursuant to Title I.

The court dismissed Evans' claim. He did not have a covered disability. His diabetes did not substantially the major life activities of walking or working. Although he walked with an unsteady

gait, the nature and severity of this condition did not rise to the level of a substantial impairment. Evans contended that he was precluded from a broad range of jobs that required climbing and working at heights, but presented no comparable employment data dealing with the broad range of jobs in various classes.

Moreover, Evans' medical reports did not demonstrate a record of a disability. They were silent regarding his impairment's nature and severity. Finally, Pemco did not regard Evans as significantly restricted in his ability to perform a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities. *See* 29 C.F.R. §1630(j)(3)(i). He did not show how many and which jobs at Pemco required climbing or working at heights.

Further, the court rejected Evans' argument that Pemco accommodated other employee's restrictions after the strike, but failed to accommodate his because of his EEOC charge. The company articulated a nondiscriminatory reason for refusing to return Evans to work. Evans and other employees with medical restrictions were placed on temporary medical leave or in positions that did not implicate their restrictions. The financial concerns associated with the medical restrictions were the real reason for the medical leave and were not a pretext for discrimination.

Retaliation; Harassment; Title I; Perceived Disability; Pretext; Leg Injury

A Florida federal court found that a former restaurant cashier with a leg injury failed to show she was regarded as having a disability within the meaning of the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, and her employer had a legitimate, nondiscriminatory reason for firing her. ***McKenzie v. EAP Management Corp., 40 F. Supp. 2d 1369 (S.D. Fla. 1999).***

Khalilah McKenzie, a cashier at a fast food restaurant, had a steel rod in her leg from an auto accident and could not stand for longer than six hours without a break. Six weeks into her employment, she called in sick, stating that her leg was bothering her and that she could not stand. As requested McKenzie submitted a doctor's note, but the manager demanded a more extensive one. She eventually complied, but the manager terminated her because it took her too long to do so. McKenzie appealed to the district manager and was told to return to work. On her first day back, McKenzie and another co-worker were accused of stealing a $50 bill. Although the bill was never found, McKenzie was terminated for accessing another employee's register. She sued under the ADA Title I, §12111, alleging she was terminated because of her disability.

The court granted the employer summary judgment. McKenzie failed to show her employer regarded her as having a "disability"—that her leg condition substantially limited a major life activity. A handful of comments by the store manager about her leg did not rise to the level of a perceived disability. Further, because McKenzie did not show she was a member of a protected class—disabled—she could not bring a harassment claim under the ADA based on these comments.

McKenzie also failed to establish that she was fired in retaliation for complaining to the district manager following her initial termination. She did not show a causal link between her complaint and her second termination. *See Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278 (11th Cir. 1997), 21 MPDLR 619. In fact, she conceded in her deposition that the district manager's decision to terminate her was based upon the missing $50, not her leg injury. Therefore, there is no evidence of pretext based on disability.

Termination; Title I; Perceived Disability; Heart Condition

A New York federal court ruled that a police department that found an employee with mitral valve prolapse unable to perform the job of police officer did not perceive the employee as being disabled under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* ***Tubens v. Police Dep't of the City of N.Y., 1999 WL 350839 (S.D.N.Y. June 2, 1999).***

Evelyn Tubens had an enlarged heart and mitral valve prolapse. As a result, she could not do strenuous isometric exercises such as running, combat training, climbing stairs rapidly, and carrying an injured person. The chief surgeon concluded that she was not capable of performing the physical activities needed to continue police training or carry out police duties. Tubens was terminated. She sued the police department, alleging she had been terminated because of her disability, in violation of the ADA Title I, §12111.

The court granted the department summary judgment. Tubens failed to show that the police department perceived her heart condition as substantially limiting her ability to perform a class of jobs or a broad range of jobs in various classes. *See* 29 C.F.R. §1630.2(j)(3)(i). The department admitted that it terminated Tubens because she lacked the physical endurance to perform her duties. However, Tubens cannot show the department regarded her as disabled merely by proving that it believed her unfit for the single job of police officer. The inability to perform a single, particular job does not constitute a substantial limitation. *See Heilweil v. Mount Sinai Hosp.*, 32 F.3d 718, 723 (2d Cir. 1994). At most, Tubens demonstrated that the department perceived her as substantially limited in performing only a narrow range of jobs—those requiring regular strenuous isometric exercises.

Pre-employment; Title I; Perceived Disability; Herniated Disk

A Pennsylvania state court affirmed that a paramedic with a herniated disk who could not do heavy lifting failed to show that his employer regarded him as having a disability under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* ***Imler v. Hollidaysburg American Legion Ambulance Serv., 731 A.2d 169 (Pa. Super. Ct. 1999).***

Randy Imler, a former part-time paramedic with Hollidaysburg American Legion Ambulance Service (HALAS), applied for a full-

time position. HALAS offered him the position provided he pass a physical exam. Imler was unable to pass any of the lifting tests, and HALAS withdrew its offer. Imler sued under the ADA Title I, §12111, alleging he had been denied employment based on his disability. The trial court granted HALAS summary judgment.

The court of appeals affirmed. Imler failed to prove that he had a record of disability. A disability of limited duration is not considered a disability for ADA purposes. *See McDonald v. Commonwealth of Pa.*, 62 F.3d 92 (3d Cir. 1995), 19 MPDLR 613. Here, Imler sustained the herniated disk in 1986, and his doctor affirmed there was no further disability as of 1988. The total period of impairment was only 18 months.

Imler also failed to show that HALAS regarded him as having an impairment which substantially limited a major life activity due to his inability to lift over 100 pounds. A supervisor's mere awareness of an employee's impairment does not prove that the supervisor perceived the impairment as disabling for purposes of the ADA. *See Kelly v. Drexel Univ.*, 907 F. Supp. 864 (E.D. Pa. 1995), 20 MPDLR 689. Further, federal courts have held that an inability to lift a designated amount of weight does not constitute a covered disability because the lifting restriction does not significantly restrict major life activities. *See Williams v. Channel Master Satellite Sys., Inc.*, 101 F.3d 346 (4th Cir. 1996), 21 MPDLR 65.

Termination; Title I; Perceived Disability; High-Risk Pregnancy; ERISA

A New York district court ruled that a former pharmacist who had two high-risk pregnancies failed to show (1) her former employer had regarded her as having a disability within the meaning of the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, and (2) her former employer and its insurance carrier's had violated the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §1001 *et seq.*, by failing to provide her with a summary plan description (SPD) within 90 days after she became a participant. ***Moawad v. RX Place, 1999 WL 342759 (E.D.N.Y. May 27, 1999).***

When Irien Moawad, a licensed pharmacist for RX Place, experienced complications with her first pregnancy, she requested shorter workdays, breaks, and no consecutive 12-hour days. The supervising pharmacist denied her request, and Moawad went on short-, then long-term disability leave. During that time, RX hired another pharmacist. When she was ready to return to work, RX offered her a weekend position, when one became available. She declined. Due to a second high-risk pregnancy, she could not work consecutive 12-hour days. A few months later, RX denied Moawad's request for long-term disability benefits and terminated her in accordance with its policy to terminate all employees who had not worked for longer than 12 months. She sued RX under the ADA Title I, §12111, alleging she had been terminated on the basis of a perceived disability. She also claimed that RX and its insurance carrier had failed to provide her with a SPD within 90 days after she became a participant, in violation of the ERISA, 29 U.S.C. §1001 *et seq.*

The court granted RX's motion for summary judgment. Regarding the ADA claim, Moawad failed to show that RX regarded her as having a disability—that her high-risk pregnancies substantially limited the major life activity of working. The fact that RX hired another pharmacist when Moawad first took leave simply indicates that it knew she would be temporarily, not permanently or indefinitely, unable to work for several months. Moreover, RX's response when Moawad requested to return to work that it would offer her a position once one became available did not suggest that it regarded her as being unable to work. The store simply did not have an opening. It offered her a job when one arose, indicating that it viewed her as able to work.

The court rejected Moawad's claim that defendants' failure to provide her with a SPD within 90 days resulted in "cognizable prejudice," *see Veilleux v. Atochem N. Am., Inc.*, 929 F.2d 74 (2d Cir. 1991), in that she would have elected to continue with active employment or apply for long-term disability benefits directly instead of applying first for short-term disability benefits. Moawad submits nothing to show that the termination of her benefits was based on anything other than the fact that she was unable to provide the required medical documentation certifying that she was completely disabled under the terms of her insurance.

Termination; Title I; Perceived Disability; Hand Injury

The First Circuit held that an employer did not violate the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §12111, when it terminated an employee with a hand injury, because the employee did not have a perceived disability within the meaning of the Act. ***Lessard v. Osram Sylvania, Inc., 175 F.3d 193 (1st Cir. 1999).***

As a result of combat in Vietnam, Steven Lessard injured his hand, which was scarred, disfigured, and subject to chronic pain and numbness. Osram Sylvania fired Lessard from his trainee spot welder job over concerns about repetitive motion injury to his hand. Lessard sued under Title I, asserting he was fired because Osram Sylvania regarded him as having an impairment that substantially limited the major life activity of working. A New Hampshire federal court granted Osram Sylvania summary judgment.

The First Circuit affirmed. Osram Sylvania did not regard Lessard as having a disability under the ADA. To be substantially limited in working, an employee must be unable to perform a class or jobs or a broad range of job. *See* 29 C.F.R. §16302(j)(3)(i). Here, the company only regarded Lessard as unable to perform the particular job he was hired for.

On-the-Job; Title I; Perceived Disability; Fitness Exam; Personality Traits

The Eleventh Circuit ruled that a city did not violate the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §12111, when it relieved a police officer from duty pending a

fitness exam. The city did not regard the officer as having a mental disability and the exam was job-related and consistent with business necessity. ***Watson v. City of Miami Beach, 177 F.3d 932 (11th Cir. 1999).***

The court therefore affirmed summary judgment for the city. Although other officers regarded William Watson as disgruntled, difficult to interact with, and threatening, his defensive and antagonistic behavior simply showed that he had personality conflicts with other employees, which do not rise to the level of a mental impairment under the ADA. *See* §12102(2)(C). Further, the required fitness for duty and tuberculosis exams were not prohibited medical inquiries. *See* §12112(d)(4)(A). "In any case where a police department reasonably perceives an officer to be even mildly paranoid, hostile, or oppositional, a fitness for duty examination is job-related and consistent with business necessity." In addition, the tuberculosis exam addressed unrefuted health concerns regarding officer safety.

Termination; Title I; Perceived Disability; Qualified Individual; Hand Injury

A Missouri federal court decided that a violinist with nerve problems in his hands failed to show that the symphony regarded him as having a disability under the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.* ***Kampouris v. Saint Louis Symphony Soc'y, 1999 WL 382582 (E.D. Mo. June 10, 1999).***

To establish a perceived disability, an employee must show that his employer considers him substantially limited in a major life activity, and where that activity is working, the employee must be foreclosed from a broad range of jobs. *See Wooten v. Farmland Foods*, 58 F.3d 382 (8th Cir. 1995), 19 MPDLR 469. Although Louis Kampouris had to stop playing the violin because of his nerve problems, the symphony only viewed him as unable to perform a narrow, particular job—that of musician in a major symphony orchestra. Further, even if Kampouris had a perceived disability, he was not a qualified individual under the ADA. He did not have the hand strength to play his instrument and could not perform two performances a day. Thus, the court granted the symphony summary judgment.

On-the-Job; Title I; Perceived Disability; Heart Condition

A Kansas federal court ruled that an insurance salesman with a heart condition failed to show his employer regarded him as having a disability that substantially limited his ability to work, in violation of the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* ***Heffernan v. Provident Life & Accident Ins. Co., 45 F. Supp. 2d 1147 (D. Kan. 1999).***

Dan Heffernan, an insurance salesman for Provident, told his supervisors he had a heart condition. He reported that his condition "didn't look good" and that he was concerned he might have to go on disability. Shortly thereafter, Provident, which had recently merged with another insurance company, reduced Heffernan's sales territory, but not his sales quota. Heffernan's supervisors told him they would adjust his sales quota later that year. Heffernan resigned and sued Provident under the ADA Title I, §12111.

The court dismissed the claim, finding Heffernan failed to show that Provident treated him as having an impairment that substantially limited his ability to perform either a class of jobs or a broad range of jobs in various classes. The court rejected Heffernan's argument that a reasonable jury could infer that, because Provident knew he had a heart condition, it regarded him as unable to perform his job. If the court adopted Heffernan's reasoning, anyone could establish a disability under the "regarded as" prong simply by demonstrating that the employer had knowledge of the individual's condition and its potential effects. Such an interpretation would "stand the ADA on its head."

Termination; §501; Perceived Disability; Pretext; Depression

The Equal Employment Opportunity Commission (EEOC) determined that the Department of Justice (DOJ) improperly terminated a security guard based on its perception that he had a mental disability, but upheld the 30-day suspension he was given because he had violated policy by bringing a firearm onto DOJ grounds. ***Caronia v. Reno, No. 03980100 (EEOC May 2, 1999).***

Usually, a discrimination finding results in the petitioner's being reinstated with back pay. However, the EEOC characterized the decision to remove the petitioner in this case as a "mixed motive," noting that said decision was based on "permissible and impermissible factors." The DOJ perceived him as having a disability and charged him with conduct unbecoming of an officer. Because of this discrimination, the EEOC reinstated him. However, there was clear and convincing evidence to show that the petitioner engaged in misconduct when he brought a firearm onto agency grounds and, thus, a 30-day suspension was warranted.

Title I; Perceived Disability; Alcoholism

A D.C. federal court dismissed an Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §12111, complaint brought by an executive assistant with alcoholism, finding that he failed to show his employer regarded him as having a disability. ***Wilson v. International Bhd. of Teamsters, Chauffeurs & Warehousemen, 47 F.Supp.2d 8 (D.D.C. 1999).***

Robert Wilson worked as an executive assistant to a Teamsters official, who was aware of Wilson's alcoholism. The Teamsters fired Wilson, and he claimed he was terminated because of his

perceived disability, in violation of Title I. The Teamsters moved for summary judgment.

The court granted the motion. The mere fact that a Teamsters official verbally abused Wilson about his alcohol use did not show that the Teamsters regarded his alcoholism as substantially limiting his ability to work. *See* 29 C.F.R §1630.2 (j). Indeed, to the extend that the record contains any evidence at all about what work the official thought Wilson could do, it tends to show that the official considered Wilson's ability to work, even to be his chauffeur, unimpaired.

Employment: Medical Leave/Exams

On-the-Job; FMLA; Employer Interference; MS; Diabetes

The Tenth Circuit held that informing an employee that she would be deprived of all accrued sick and annual leave as a condition of taking leave under the Family and Medical Leave Act (FMLA), 29 U.S.C. §2601 *et seq.*, constitutes unlawful interference with her FMLA rights. ***Mardis v. Central Nat'l Bank & Trust of Enid, 1999 WL 218903 (10th Cir. Apr. 15, 1999.)***

Virginia Mardis worked for a bank from 1991 until July 7, 1995. In 1995, her husband was diagnosed with multiple sclerosis and diabetes. As a result, she was absent from work for six full days and three partial days between April 11 and May 22. Mardis met with her supervisor and a human resources official concerning her absences on May 24. She was allegedly told that she must take all future leave for her husband's illnesses as FMLA leave, but that she would lose all of her accrued vacation and sick leave as a condition of taking FMLA leave. Her situation would be reevaluated in October 1995. Mardis resigned. She sued her employer under the FMLA, alleging it interfered with her rights under the act by conditioning her receipt of FMLA leave on her forfeiture of accrued employment benefits. The district court granted the employer summary judgment.

The court reversed and remanded. The FMLA prohibits covered employers from interfering with, restraining, or denying the right to exercise FMLA rights. *See* 29 U.S.C. §2615(a). The Department of Labor's regulation implementing the FMLA explains that "interfering with the exercise of an employees rights would include . . . discouraging an employee from using such leave." *See* 29 C.F.R. §825.220(b). Here, the actions alleged by Mardis—being threatened with irrevocable loss of all accrued sick and annual leave for taking FMLA leave—fall squarely within the definition of unlawful "interference" under the FMLA. However, it is not entirely clear whether Mardis was in fact threatened with absolute forfeiture of her accrued leave, or whether it was possible that she might have received some of her unused vacation back after the October 1995 reevaluation. Depending on the circumstances, postponement of accrued leave, with no ultimate loss of accrued benefits, might not constitute unlawful "interference" with the exercise of FMLA rights.

Termination; FMLA; State University; Sovereign Immunity

An Ohio federal court dismissed an employee's Family and Medical Leave Act (FMLA), 29 U.S.C. §2601 *et seq.*, suit against a state-affiliated university on the grounds of sovereign immunity. ***Sims v. University of Cincinnati, 46 F. Supp. 2d 736 (S.D. Ohio 1999).***

The court agreed. The Eleventh Amendment prevents a federal court from entertaining a suit brought by a citizen against his own state. Its protections extend to "instrumentalities of the state where they are arm[s] or alter ego[s] of the state." The university is an arm of the State of Ohio and, thus, is protected by the Eleventh Amendment.

However, a state entity may be sued despite the Eleventh Amendment if it has waived its sovereign immunity or Congress has overridden it by abrogation. Here, neither condition was met. Although Congress drafted the FMLA to cover state and local government employers, it did not act pursuant to a constitutional provision that grants it the power to abrogate immunity. The only constitutional provision granting Congress this power is section five of the Fourteenth Amendment, which expressly gives Congress the power to enforce the Equal Protection Clause through legislation. A three-part test determines whether Congress properly enacts legislation under section five: whether the statute (1) may be regarded as an enactment to enforce the Equal Protection Clause, (2) is plainly adapted to that end, and (3) is not prohibited by, but is consistent with, the letter and the spirit of the constitution. *See Thomson v. Ohio State Univ. Hosp.*, 5 F. Supp. 2d 574, 577 (S.D. Ohio 1998), 20 MPDLR 481 (citing *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966); *Wilson-Jones v. Caviness*, 99 F.3d 203, 209 (6th Cir. 1996)).

The FMLA can be viewed as promoting equal protection between the sexes, but it is not "plainly adapted to its end since there was no congruence and proportionality between the injury to be prevented and the means adopted to that end." *See Thomson*, 5 F. Supp. 2d at 579 (citing *City of Boerne v. Flores*, 117 S. Ct. 2157, 2164 (1997)). If the injury to be prevented is simply gender-based discrimination for purposes of family-related leave, Congress acted excessively by mandating that employers provide up to 12 weeks of leave to protected employees in a variety of circumstances. This mandate far exceeds a prohibition on gender-based discrimination, which would be truly proportional under the Equal Protection Clause. Accordingly, Congress did not effectively abrogate state sovereign immunity from suit under the FMLA.

Termination; Title I; FMLA; Arbitration; Arthritis

A New York federal court declined to compel arbitration of a former registered nurse's claims under the Americans with