fied based on his physical attributes and football skills. Scouting reports in high school described Bowers as having "excellent size" and being "very strong."

Fourth, the NCAA was a public accommodation under Title III. Bowers had adequately alleged that NCAA managed, controlled, or regulated places of public accommodation of which he was allegedly denied enjoyment. The NCAA exercised substantial control over the operations of sports facilities used in intercollegiate athletics, including the selection of sites and dates for sports events, the size of fields, ticket and seating arrangements, the use of dining facilities, and playing rules in athletic facilities. Several other courts have ruled that the NCAA operated a place of public accommodation under Title III. *See Butler v. NCAA*, 1996 WL 1058233 (W.D. Wash. Nov. 8, 1996); *Ganden v. NCAA*, 1996 WL 680000 (N.D. Ill. Nov. 2, 1996), 21 MPDLR 108; *Tatum v. NCAA*, 992 F. Supp. 1114 (E.D. Mo. 1998), 22 MPDLR 245; and *Matthews v. NCAA*, 79 F. Supp. 2d 1199 (E.D. Wash. 1999), 24 MPDLR 238.

Fifth, a factual issue exists as to whether Bowers was discriminated against under the ADA by implementation of unnecessary eligibility criteria that screened out individuals with disabilities. The NCAA did not demonstrate as a matter of law that its treatment of high school special education courses under the core course requirement of its policy was essential or necessary to its goal of ensuring that student-athletes would succeed academically in their freshman year. Bowers had presented evidence that the core course requirement, as it related to students with learning disabilities, did not promote the NCAA's stated goal of ensuring successful academic performance.

Sixth, a factual issue exists as to whether Bowers' proposed accommodation of the NCAA eligibility requirements was a reasonable modification or would fundamentally alter the NCAA's program. Bowers proposed that, if the NCAA would have accepted as core courses his special education courses which contained 75 percent of the content of a regular course, he would have received a scholarship to play football. The court rejected the NCAA's argument that it had already afforded Bowers a reasonable modification in the form of a waiver procedure consistent with a Consent Decree entered between the NCAA and the U.S. Department of Justice. The waiver process in July 1997 occurred too late for it to be effective for Bowers.

Finally, the court rejected the NCAA's argument that it did not receive federal funds for purposes of Bowers' §504 claim. A factual issue exists as to whether the NCAA effectively controlled and administered the National Youth Sports Program, a federally funded summer enrichment program that operated on the campuses of the NCAA's member institutions.

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

A California federal court ruled that a graduate student who was terminated from his program for poor academic performance was not disabled as defined by the Rehabilitation Act §504, 29 U.S.C. §794, or the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, because his depression was temporary. ***Green v. Graduate Theological Union, 2000 WL 1639514 (N.D. Cal. Oct. 27, 2000).***

In July 1998, Lewis Green, a student in the Ph.D. program at the Graduate Theological Union (GTU), was dismissed for unsatisfactory work. He sued GTU under §504 and the ADA Title III, 42 U.S.C. §§12181-12189. Green alleged that he had an "'experience of depression'" during a limited period of time while at GTU, which "'substantially limited, and was regarded as substantially limiting, major life activities (such as learning).'"

The district court granted GTU summary judgment, as Green was not disabled as defined by §504 or the ADA. Intermittent, episodic impairments are not disabilities under the ADA. *See Vande Zande v. Wisconsin Dep't of Admin.*, 44 F.3d 538, 544 (7th Cir. 1995), 19 MPDLR 189. Green did not allege that his mental condition constituted a permanent disability, or that he had a permanent disability. He characterized his depression as an "experience", which by definition cannot qualify as a permanent disability, or as a mental state that developed as a result of his difficulties with the professors at GTU.

Employment: Disability Defined

Title I; Mitigating Measures; Hypertension

The Sixth Circuit held that a truck driver with hypertension was not disabled as defined by the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, because when he took his medication he was able to work. ***Hein v. All Am. Plywood Co., 232 F.3d 482 (6th Cir. 2000).***

Wayne Hein, a truck driver for All America Plywood Company (AAP), has hypertension. He was fired after he refused to make an out-of-town delivery that was assigned to him five days in advance. Hein contended that he was unable to make the delivery because he would have run out of high blood pressure medicine before his return. He sued AAP for violating Title I, 42 U.S.C. §§12111-12117. A Michigan federal court granted summary judgment for AAP.

The Sixth Circuit affirmed, finding that Hein's hypertension was not an ADA disability. The U.S. Supreme Court has ruled that courts, in determining whether individuals are disabled, must evaluate their condition in its medicated state. *See Murphy v. United Parcel Serv.*, 527 U.S. 516 (1999), 23 MPDLR 511. Hein argued that the plaintiff in Murphy was on medication when he was fired, while AAP prevented him from taking his blood pressure medication by demanding that he go out on the road at a time when he had no refill. However, the Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 488 (1999), 23 MPDLR 510, held that "the use or nonuse of a corrective device does not determine whether an individual is disabled; that determination depends on whether the limitations an individual with an impairment actually faces are in fact substantially limiting." Hein successfully

performed his duties with the aid of his blood-pressure medication. He admitted that while on medication, he had no problems. His hypertensive condition did not substantially limit him from working. It was Hein's voluntary failure to obtain medication, rather than the physical condition of hypertension itself, that was the direct cause of his temporary inability to work.

Title I; Mitigating Measures; Constructive Discharge; Mobility

The Seventh Circuit reinstated an employee's claim under the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-12117, finding that a question of fact exists as to whether nerve damage in her legs substantially limited her ability to walk and, thus, was a disability under the ADA. However, the court affirmed dismissal of her constructive discharge claim, finding that she failed to show that her employer made her working conditions so intolerable as to force a reasonable person to resign. ***EEOC v. Sears, Roebuck & Co., 233 F.3d 432 (7th Cir. 2000).***

Judith Keane worked as a sales associate at Sears, Roebuck & Co. She provided her supervisor with a doctor's note stating that she should avoid walking long distances and for prolonged periods. The supervisor asked Keane for additional information regarding her restrictions. Keane's doctor advised that Keane should limit excessive walking and be allowed "'. . . easy/short access to the job site.'" Sears then allowed Keane to park in the space immediately outside the door leading to her department and to go through the shoe stockroom as a "short-cut." Keane quit after the shoe department manager, who was unaware of Keane's health conditions, told her not to cut through the stockroom. She filed a discrimination charge with the Equal Employment Opportunity Commission (EEOC), which sued Sears under Title I for failing to provide reasonable accommodations and for constructive discharge. Keane intervened. An Illinois federal court granted summary judgment for Sears, holding that Keane's nerve damage was not an ADA disability and that the working conditions did not justify her resignation. *See* 1999 WL 977072 (N.D. Ill. Oct. 22, 1999), 24 MPDLR 77.

The Seventh Circuit reversed in part and remanded in part. A factual issue exists as to whether Keane was disabled under the ADA. The EEOC argued that Keane's neuropathy substantially limited her ability to engage in the major life activity of walking. *See* 42 U.S.C. §12102(2)(A); 29 C.F.R. §1630.2(j). The EEOC presented evidence that Keane was not able to walk more than one city block, and that doctors diagnosed her as having an impairment that required that she limit her walking. On remand, the court instructed the district court to consider the actual distance Keane was able to walk, how her impairment limited her ability to walk in comparison to the average member of the population, and how the use of a cane (a mitigating device) impacted her ability to walk. The Supreme Court has held that the analysis of whether a person is substantially limited in a major life activity must be conducted with reference to mitigating devices. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482 (1999), 23 MPDLR 510.

The appeals court affirmed dismissal of the constructive discharge claim. Sears did not make Keane's working conditions so intolerable so as to force a reasonable person to leave. *See Miranda v. Wisconsin Power & Light Co.*, 91 F.3d 1011, 1014 (7th Cir. 1996), 20 MPDLR 700. The district court was correct in concluding that quitting was not the only option available to Keane. Keane could have discussed with her supervisor the shoe department manager's refusal to allow Keane to use the shortcut, but instead she resigned. Though the situation may have been uncomfortable, a reasonable person in her position would not have been compelled to resign.

Title I; Mitigating Measures; Reasonable Accommodation; Myopia

A New York federal determined that an employee's eye condition, as corrected by surgery, did not substantially limit the major life activity of seeing or working and, thus, did not constitute a disability within the meaning of the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* ***Wheeler v. Corporation Counsel of N.Y.C., 2000 WL 1760947 (S.D.N.Y. Nov. 30, 2000).***

Richard A. Wheeler worked for the New York City Comptroller's Office in various positions including special investigator and claims examiner. He sued the Comptroller under Title I, 42 U.S.C. §§12111-12117, alleging it failed to reasonably accommodate his eye condition—myopia with moderately reduced vision in his right eye and substantially reduced vision in the left eye—and to promote him because of his disability.

The court granted defendant's motion for summary judgment. Plaintiff's eye condition did not substantially limit him in the major life activities of seeing or working as compared to the average person in the general population. *See Wernick v. Federal Reserve Bank of N.Y.*, 91 F.3d 379, 383 (2d Cir. 1996), 20 MPDLR 685. With regard to working, plaintiff testified that he can perform all of his job duties above the norm. It cannot be the case that plaintiff was both performing his job at a high level and simultaneously suffering a disability that substantially limited his ability to work. Moreover, plaintiff worked for nearly a full year after sustaining his eye injury, but before alerting his supervisors to his alleged disability. No evidence suggests that plaintiff experienced difficulties performing any duties at the office. With regard to seeing, plaintiff had corrective surgery, after which his vision in his right eye improved to 20/40 and to 20/50 in his left eye when he wore corrective lenses. Two doctors opined that plaintiff's vision problems, although negatively affecting his vision, did not substantially impair his ability to see.

Assuming that plaintiff was disabled, he failed to request a reasonable accommodation on the first two occasions that he informed defendant that he had an eye injury. *See Stone v. City of Mount Vernon*, 118 F.3d 92, 96-97 (2d Cir. 1997), 21 MPDLR 614. His request to be transferred to the Hearing Unit was unreasonable, because that unit demanded more computer work than the one he worked in. Nevertheless, defendant accommodated plaintiff by no longer assigning him to "field work." Plaintiff

never informed defendant that he was unsatisfied with this accommodation, but requested transfers or promotions.

Regarding plaintiff's failure-to-promote claim, he never actually applied for any positions but instead made generalized inquiries about other positions. *See Brown v. Coach Stores, Inc.*, 163 F.3d 706, 709 (2d Cir. 1998). Even if plaintiff had specifically requested a promotion, he could not have been promoted because he was not on a state required "civil service list."

Title I; State Law; Mitigating Measures; Pretext; Depression

An Ohio federal court ruled that a former employee presented sufficient evidence that (1) his depression, even when treated, substantially limited a major life activity and, thus, constituted a disability under the state handicap discrimination law, Ohio Rev. Code §4112.02, and the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, and (2) his employer's reason for terminating him—his poor performance—was a pretext for disability discrimination. ***Maxwell v. GTE Wireless Serv. Corp., 121 F. Supp. 2d 649 (N.D. Ohio 2000).***

After GTE Wireless Service Corporation restructured the wireless department, Thomas Maxwell, an account executive, failed to meet his monthly quotas. Maxwell's supervisor suggested that if Maxwell was having difficulty with depression, he should see a doctor. Maxwell was granted a six-week leave of absence. When he returned, his performance did not improve, and he took a second leave of absence. Maxwell later returned to work, but his performance still failed to improve. GTE terminated Maxwell, and he sued GTE under state law and the ADA Title I, 42 U.S.C. §§12111-12117.

The district court granted GTE summary judgment. First, Maxwell produced sufficient evidence to establish that his depression, even when treated by counseling and episodic medication, substantially limited a major life activity. *See Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139, 2147 (1999), 23 MPDLR 510. Maxwell was granted a short medical leave from GTE to treat his depression in 1996, and a six-week leave of absence in the Fall of 1997. The court's analysis on the ADA claim applies to the state law claim.

Second, Maxwell presented sufficient evidence that GTE's reason for terminating him—his poor performance—was a pretext for discrimination. Under a mixed-motive analysis, Maxwell's failure to meet his monthly performance quotas does not establish an irrefutable conclusion that GTE would have terminated him even without the use of discriminatory factors. *See Dockery v. City of Chattanooga*, 134 F.3d 320 (6th Cir. Dec. 23, 1997), 22 MPDLR 215.

Title I; Mitigating Measures; Reasonable Accommodation; No Request; Diabetes

A Michigan federal court ruled that a former employee's insulin dependent diabetes, as corrected by medication, was not a disability as defined by the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, and dismissed his failure-to-accommodate claim. ***Montgomery v. Alcoa, Inc., 2000 WL 1769526 (E.D. Mich. Sept. 29, 2000).***

Duane Montgomery worked as a program analyst for Alcoa, Inc. He was terminated for being late, absent, or leaving work early on numerous occasions. Montgomery sued Alcoa under Title I, 42 U.S.C. §§12111-12117.

The district court granted Alcoa summary judgment. Montgomery's diabetes, when medicated, did not substantially limit a major life activity. *See Sutton v. United Airlines, Inc.*, 119 S. Ct. 2139 (1999), 23 MPDLR 510. Montgomery conceded that he was "'basically able to do anything any other person is able to do with this one restriction that I do need to take what I call a time out to do some diabetes maintenance.'" He also conceded that there were no jobs that he was restricted from performing because of his diabetes, as long as he has flexibility to take a time out.

As to Montgomery's failure-to-accommodate claim, he never asked Alcoa if he could leave work in order to lie down at home, as he could not do so at the office. The burden of requesting an accommodation is unquestionably on the employee. *See Gantt v. Wilson Sporting Goods Co.*, 143 F.3d 1042, 1046 (6th Cir. 1998), 22 MPDLR 480. Because he made no such request, there is no genuine issue of material fact that Alcoa failed to reasonably accommodate him.

Title I; Mitigating Measures; Record; Bipolar Disorder

A New York federal court ruled that a former employee with bipolar disorder was not disabled nor did she have a record of disability under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, because her condition was controlled by medication and therapy. ***Horwitz v. L & J.G. Stickley, Inc., 122 F. Supp. 2d 350 (N.D.N.Y. 2000).***

L & J.G. Stickley terminated Amy Horwitz, a part-time receptionist, for responding untruthfully and incompletely on a post-hire medical questionnaire. She indicated on the questionnaire that she has bipolar disease, takes medication, and has been hospitalized twice. However, she did not answer the question whether she ever had a workers' compensation injury or illness or collected short-term disability benefits, which she had. Horwitz also failed to check a box indicating whether she has any of 11 listed diseases. Moreover, when an L & J.G. Stickley nurse asked Horwitz if she had been treated by a physician within the past 12 months, she stated that she had not, although she had been treated by a psychiatrist. Horowitz sued L & J.G. Stickley under Title I, 42 U.S.C. §§12111-12117.

The district court granted L & J.G. Stickley summary judgment. Horwitz was not disabled under the ADA, because her bipolar disease, when mitigated by medication, did not substantially limit the major life activities of caring for herself, socializing, and working. There was no evidence that Horwitz was unable to

care for herself or socialize because of her bipolar disorder. The evidence suggests that the medication and therapy she is receiving have sufficiently countered the debilitating effects of her bipolar disorder such that it does not substantially interfere with her major life activities. While Horwitz states that at times the treatment is not effective and she experiences depression and mania, these incidents appear to be isolated and sporadic and therefore are insufficient to establish a disability under the ADA. *See Oblas v. American Home Assurance Co.*, 199 F.3d 1323 (2d Cir. 1999). As to the major life activity of working, there was no evidence that Horwitz was restricted in her ability to perform either a class or broad range of jobs in various classes compared to the average person having comparable training, skills, and abilities. *See* 29 C.F.R. §1630.2(j)(3).

The court rejected Horwitz's argument that she was disabled within the meaning of the ADA because she has a record of bipolar disorder, *see* 42 U.S.C. §12102(2)(B). The court stated:

> . . . it is tempting to immediately conclude that Plaintiff has a record of impairment because she wrote on her medical questionnaire that she suffered from bipolar disorder, that she had been hospitalized twice for that disorder, and that she continues to need medications and therapy to treat her disorder, and that she had received workers' compensation benefits. It is not enough, however, that there merely be a record of a disability. Rather, there must be a record of a disability that substantially limited a major life activity.

There is little doubt that Horwitz's hospitalization limited her ability to work for that period of time during which she was in the hospital. However, absent any evidence of substantial residual limitations impacting a major life activity, a brief hospitalization is insufficient to constitute a record of a disability. *See Sanders v. Arneson Prods., Inc.*, 91 F.3d 1351, 1353 (9th Cir. 1996), 20 MPDLR 685, *cert. denied*, 117 S. Ct. 1247 (1997). Although the medical questionnaire indicated that Horwitz continues to need therapy and medication, that record further reveals that both have effectively controlled her disorder and rendered her able to perform her major life activities. *See Sherman v. New York Life Ins. Co.*, 1997 WL 452024 (S.D.N.Y. 1997), 21 MPDLR 608.

Title I; §504; Actual; Perceived; FMLA; Multiple Disabilities

The Eleventh Circuit ruled that an employee with seizures, diabetes, migraines, and depression was not disabled or regarded as such under the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.*, or the Rehabilitation Act §504, 29 U.S.C. §794. Also, she was not qualified for leave under the Family and Medical Leave (FMLA), 29 U.S.C. §2601 *et seq.*, because her personal physician stated that her conditions were controlled by medication and that she could perform her job functions. ***Cash v. Smith, 231 F.3d 1301 (11th Cir. 2000).***

Granting summary judgment for Alabama Power Company, the appeals court found that Brenda Cash failed to show that her mental and physical impairments substantially limited any major life activities. In fact, she testified that she considers herself an active person who walks, swims and has worked for eight years. She is briefly incapacitated during the short time she experiences "focal" seizures, but they occur mainly at night and are controlled by medication. *See Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139, 2143 (1999), 23 MPDLR 510.

Cash also failed to show that Alabama Power regarded her as substantially limited in the major life activity of working—significantly restricted in her ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities. *See* 29 C.F.R. §1630.2(j)(3)(i). Although Alabama Power barred Cash from driving a company car after learning about her medical problems, there was no evidence that the company viewed this restriction as limiting her in the performance of her duties as a typesetter. Moreover, Cash failed to identify the broad range of jobs she was foreclosed from performing.

Finally, Cash failed to establish that she exercised a protected right under the FMLA. She argued that she was not given the print specialist position in retaliation for taking time off from work for medical reasons. However, the medial leave that Cash took was not under the auspices of the FMLA. Alabama Power requested that Cash have her doctor complete its standard FMLA certification form, and Cash's personal physician indicated on the form that Cash did not qualify for FMLA because her conditions were being controlled by medication, and she was able to perform the functions of her position.

Title I; State Law; Actual; Perceived; Record; Retaliation

The Sixth Circuit affirmed that a former employee with physical and mental impairments failed to show that she was disabled, regarded as disabled, or had a record of disability as defined by state law and the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, or that her employer retaliated against her by failing to consider her for two jobs that did not require overtime. ***Linser v. Ohio Dep't of Mental Health, 2000 WL 1529809 (6th Cir. Oct. 6, 2000).***

Amy Linser, a psychiatric nurse with the Ohio Department of Mental Health, was assaulted on-the-job. As a result, she had migraines, chronic muscle and cervical tension, depression, and anxiety. Linser requested that she be exempt from working overtime as a reasonable accommodation. The Department granted her request for a month, but later reinstated the usual overtime requirements. Linser sued the Department under Title I, 42 U.S.C. §§12111-12117, and Ohio's disability discrimination statute, Ohio Rev. Code §4112.02(A), for failure to accommodate her disabilities. She also claimed retaliation under the ADA. An Ohio federal court granted the Department summary judgment.

The Sixth Circuit affirmed. Linser did not have a disability as

defined by the ADA or state law because her impairments did not substantially limit any major life activity. *See* 42 U.S.C. §12102(2)(A). Linser claimed that her impairments affected her work, concentration, sleep, household duties, sex life, and ability to lift items. First, Linser was not substantially limited in the major life activity of working. She conceded that she could work 40 hours per week. Moreover, the inability to work in excess of eight hours per day does not constitute a disability. *See Doren v. Battle Creek Health Sys.*, 187 F.3d 595 (6th Cir. 1999), 23 MPDLR 852. Second, Linser's concentration difficulties did not make her disabled, because concentrating is not a major life activity. Third, she did not have a substantial limitation in her ability to sleep, because she took medication that curbed her sleeping problem and her sleep was disrupted infrequently. *See Pack v. Kmart Corp.*, 166 F.3d 1300 (10th Cir. 1999), 23 MPDLR 195, *cert. denied*, 120 S. Ct. 45 (1999). Fourth, there was no evidence as to how Linser's condition affected her sex life or her ability to perform household chores. Finally, Linser failed to present evidence that her impairments substantially limited the major life activity of lifting. Although she provided a doctor's report indicating that she could lift no more than 10 pounds, the report did not detail the nature of this limitation, whether it was permanent, or any specific facts supporting it.

Nor did Linser have a record of disability, because she was not substantially limited in performing major life activities and had not been so misclassified. *See* 42 U.S.C. §12102(2)(B); *see also Hilburn v. Murata Elec. N. Am., Inc.*, 181 F.3d 1220, 1228 (11th Cir. 1999), 23 MPDLR 688. Further, the Department did not regard Linser as having a disability. *See* 42 U.S.C. §12101(2)(C). The fact that the Department previously granted Linser's request for an accommodation did not establish that the Department regarded her as incapable of working in a class or broad range of jobs. Finally, there was no evidence that the Department was aware of the limits her impairments placed on her ability to perform the activities of sleeping, having sex, and engaging in household chores when it made its adverse employment decision (requiring her to work overtime).

Finally, Linser's ADA retaliation claim fails, *see* 42 U.S.C. §12203(a). She cannot show that she suffered an adverse employment action, because she failed to establish that she was qualified for either of the two positions. *See Workman v. Frito-Lay, Inc.*, 165 F.3d 460, 469 (6th Cir. 1999), 23 MPDLR 218. Even if Linser had suffered such an action, she failed to establish a causal connection between her protected activity (filing her discrimination charge) and the alleged action.

Title I; Actual; Pretext; Delusional Disease

An Illinois federal court ruled that a former employee's mental disability did not substantially limit his ability to work and, thus, did not constitute a disability under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, and that, even if he was disabled, the employer's reasons for terminating him—lying, unprofessional behavior, and lack of integrity—were not a pretext for disability discrimination. ***Walsh v. Andersen Consulting LLP, 2000 WL 1809960 (N.D. Ill. Dec. 11, 2000).***

Joseph Walsh, a programmer/analyst for Andersen Consulting LLP, missed several project deadlines on an account with Allstate. Anderson gave Walsh 60 days to improve his performance and drafted a performance improvement plan (PIP). Andersen subsequently terminated Walsh prior to the completion of the PIP for lying that an Andersen employee was selling Allstate information to other companies. Walsh sued Andersen under Title I, 42 U.S.C. §§12111-12117, alleging he had been terminated because of his delusional disease.

The district court granted Andersen summary judgment. Walsh was not substantially limited in the major life activity of working and, thus, was not disabled under the ADA. He failed to establish that his mental disability restricted him from working in a class or broad range of jobs in various classes. *See Webb v. Clyde L. Choate Mental Health and Dev. Ctr.*, 230 F.3d 991, 997 (7th Cir. 2000). Walsh conceded that his condition did not affect his ability to work as a computer programmer. Within about five months after his termination, Walsh started working full time as a programmer at a higher salary than he received at Andersen. At his new job, he has not taken any leaves of absence, missed any days of work, nor experienced any effects from his condition. Moreover, Walsh has not requested any accommodations for his disability. Even if Walsh was disabled, he failed to establish that Andersen fired him because of his mental disability. Walsh never told the Andersen employee who terminated him that he was disabled. By the time Walsh requested an accommodation, the decision to fire him had been made.

Title I; Actual; Perceived; Depression; Anxiety

The Eighth Circuit held an employee whose depression and anxiety restricted him to working 40 hours per week during daylight hours was not disabled or regarded as such under the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.* ***Kellogg v. Union Pac. R.R., 233 F.3d 1083 (8th Cir. 2000).***

Clyde Kellogg, a senior manager for Union Pacific Railroad Company, had a severe panic attack at work. He was diagnosed with depression and anxiety, and restricted to working a 40-hour week during daylight hours. Kellogg's supervisor responded that if the restrictions were permanent, Kellogg would not be able resume his job. He went on long-term disability. When his benefits expired, the railroad terminated him. Kellogg sued under Title I, 42 U.S.C. §§12111-12117. A Nebraska federal court granted summary judgment for the railroad. *See* 2000 WL 766281 (D. Neb. Jan 28, 2000), 24 MPDLR 768.

The Eighth Circuit affirmed. Kellogg failed to show that his mental conditions substantially limited him in the major life activity of working. To be substantially limited, individuals must be restricted in their ability to perform either a class or broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities. *See* 29 C.F.R. §1630.2(j)(3)(i); *see also Sutton v. United Air Lines, Inc.*, 527

U.S. 471 (1999), 23 MPDLR 510. The inability to perform a single, particular job does not constitute a substantial limitation.

Here, Kellogg admitted that although he could not perform the duties of his former senior management position, which required 60 to 80 hours per week, he could perform any number of other 40-hour per week jobs with the railroad. An employee who can work a 40-hour week is not substantially limited in working. *See Taylor v. Nimock's Oil Co.*, 214 F.3d 957 (8th Cir. 2000), 24 MPDLR 779.

Nor did the railroad regard Kellogg as substantially limited in the major life activity of working. *See* 42 U.S.C. §12102(C). Kellogg introduced evidence that the railroad knew about his disabilities and failed to hire him for other jobs for which he applied. However, an employer's knowledge of an employee's disability, without more, is not sufficient to establish a "regarded as" claim. *See Ceretti v. Runyon*, 162 F.3d 1163 (8th Cir. 1998). Nor is an employer required to violate the rights of other employees to accommodate an employee's disability. *See Mason v. Frank*, 32 F.3d 315, 319 (8th Cir. 1994), 18 MPDLR 529.

Title I; Actual; Perceived; Qualified; Retaliation; Adverse Action; MI

A D.C. federal court ruled that a former employee with a neurological condition and claustrophobia was not a qualified individual with a disability under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, and did not suffer a material adverse employment action as a result of filing a grievance claiming disability-based discrimination. ***Weigert v. Georgetown Univ., 120 F. Supp. 2d 1 (D.D.C. 2000).***

Susan Weigert, a researcher in the psychiatry department at Georgetown University, received written and verbal warnings about her behavior and interactions with co-workers and supervisors. She requested reasonable accommodations for her condition. She filed a grievance with the university over the alleged inadequate accommodations, but the university took no action. After additional incidents between Weigert and her co-workers and supervisors, the university terminated Weigert. She sued the university under Title I, 42 U.S.C. §§12111-12117.

The court granted the university summary judgment. Weigert was not disabled under the ADA, *see* 42 U.S.C. §12102(2). She failed to show that her conditions substantially limited her ability to work—to perform a class or broad range of jobs in various classes as compared to the average person with comparable training, skills, and abilities, *see* 29 C.F.R. §1630.2(j)(3)(i). Weigert contended that her disabilities would have prevented her from working in any job while her symptoms were plaguing her because fluorescent lights anywhere affected her. However, she failed to demonstrate that, as a research assistant, she would be unable to obtain jobs in other locations or in the area of her expertise. *See* 29 C.F.R. §1630.2(j)(3)(ii). She also failed to show that her doctors disqualified her from any jobs at the time of her employment. Nor did the university regard Weigert as substantially limited in the major life activity of working, *see* 29 C.F.R. §1630.2(l). Her supervisors and colleagues believed that Weigert was exaggerating or fabricating her claims. In fact, Weigert conceded that many of her co-workers and supervisors stated that they believed that her disability was psychosomatic and that her need for accommodation was due to "manipulativeness."

She also was not qualified to perform an essential job function—to work cooperatively and collegially with co-workers and supervisors—even with reasonable accommodation. Numerous courts have held that technical skills and experience are not the only essential requirements of a job, and that stability and the ability to interact with co-workers and supervisors can constitute an essential function, *see Grenier v. Cyanamid Plastics, Inc.*, 70 F.3d 667, 674-75 (1st Cir. 1995), 20 MPDLR 73. Weigert asserted that the medicines she took interfered with the normal, interactive functions of her job. The court could not discern any accommodation to control Weigert's consumption of medication that would have permitted her to compatibly interact with her co-workers and supervisors. *See also Hill v. Kansas City Area Transp. Auth.*, 181 F.3d 891, 893 (8th Cir. 1999), 23 MPDLR 677. Moreover, courts have consistently held that one who displays abusive and threatening conduct toward co-workers is not a qualified individual. *See Palmer v. Circuit Court of Cook County*, 905 F. Supp. 499, 508 (N.D. Ill. 1995), 20 MPDLR 69.

Finally, Weigert's retaliation claim fails because she did not suffer an adverse action as a result of filing her grievance. *See McDonnell v. Cisneros*, 84 F.3d 256, 258 (7th Cir. 1996). There must be a tangible change in duties or working conditions constituting a material employment disadvantage in order for an employment decision to rise to the level of an adverse action. *See Jones v. Billington*, 12 F. Supp. 2d 1, 14 (D.D.C. 1997). As adverse actions, Weigert alleged that she was issued a departmental memorandum containing a low performance evaluation, given less substantial work assignments after her return from administrative leave, and denied secretarial support. Poor performance evaluations do not ordinarily constitute adverse actions unless they are unjustified. *See Batson v. Powell*, 912 F. Supp. 565, 576 (D.D.C. 1996). Here, the poor performance evaluation in the area of cooperation was a justified response necessitated by Weigert's behavioral problems. Moreover, giving Weigert less substantial work assignments was reasonable in light of her deteriorating relationships with her co-workers. With regard to the alleged denial of secretarial support, Weigert received the same support as other employees, but she demanded immediate support without regard to the needs of others.

Title I; Actual; Perceived; Qualified; FMLA; Serious Health Condition; Depression

An Indiana federal court ruled that a former employee with depression failed to show that she was a qualified individual with a disability as defined by the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, and that she had a serious health condition within the meaning of the Family and Medical Leave Act (FMLA), 29 U.S.C. §2601 *et seq.* ***Niese v. General Elec.***

Appliances, 2000 WL 1617774 (S.D. Ind. Oct. 26, 2000).

Donna Niese worked as an assembly line coordinator for General Electric Appliances. From October 6, 1997 through October 26, 1997, she took a paid medical leave for her depression, and returned to work with restrictions. On October 27, she requested an unpaid leave of absence, citing personal problems and child care issues, and her supervisor signed the form. Assuming that the leave had been approved, Niese did not report to work. On November 11, 1997, she told GE that her son had irritable bowel syndrome, and that she was entitled to receive vacation pay. However, on December 12, 1997, GE terminated Niese for unexcused absences. She sued GE for violating the ADA Title I, 42 U.S.C. §§12111-12117, and the FMLA.

The court granted GE summary judgment on both claims. Niese was not disabled within the meaning of the ADA. Her depression, as treated with medication, did not substantially limit her ability to perform the major life activities of caring for herself and her family, performing household chores, taking care of her personal health, and working. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482-83 (1999), 23 MPDLR 510. Niese reported that she did grocery shopping with her family, helped make meals, cleaned house with her husband's help, drove, and cared for her son. Moreover, Niese had obtained a medical release from her doctor to return to work without restriction, and the GE clinic cleared her to return to work. Thus, she was not significantly restricted in her ability to perform a class or broad range of jobs in various classes. *See Weiler v. Household Fin. Corp.*, 101 F.3d 519, 524 (7th Cir. 1996), 21 MPDLR 57. Further, the beneficial impact of Prozac on Niese's condition supported the finding that she was not substantially limited in any major life activity.

Nor did GE regard Niese as substantially limited in her ability to work. The only permissible inference is that GE believed that Niese was unable to perform her particular job at the time of her leave, which is not enough to show a substantial limitation in working. *See Weiler*, 101 F.3d at 524. The fact that GE was aware of her depression and granted her prior request for leave is insufficient to establish that the company regarded her as disabled. *See Moore v J.B. Hunt Transp.*, 221 F.3d 944, 954 (7th Cir. 2000). Furthermore, Niese's medical release to return to work without any restrictions and her having "cleared" GE's clinic are strong evidence that GE did not believe that she was unable to perform a class or broad range of jobs, or even her particular position.

Assuming Niese was disabled, she was not a qualified individual under the ADA because she could not perform her essential job function—regular attendance. *See, e.g., Waggoner v. Olin Corp.*, 169 F.3d 481, 484 (7th Cir. 1999), 23 MPDLR 361. Niese had failed to return to work after October 27, 1997, and did not submit any medical information that she was unable to work or was in any way limited in her ability to work. The fact that GE may have tolerated a greater number of absences for other employees was of no consequence, because attendance was not an essential function for some other jobs.

As to the FMLA claim, Niese failed to show that she had a serious health condition—that her depression made her unable to perform her job at the time she requested leave on October 27, 1997. *See* 29 U.S.C. §2612(a)(1)(D). At that time, Niese's doctor released her to work with no restrictions. An employer may determine whether an employee's requested leave is FMLA-qualifying based on certification by the employee's physician that the employee was not qualified for such leave. *See Stoops v. One Call Communication, Inc.*, 141 F.3d 309, 312-13 (7th Cir. 1998). Even if Niese could establish that she had a serious health condition, she failed to provide GE with adequate or timely notice of her need for leave. When providing notice, an employee must state a qualifying reason for that leave. *Id.* Neither "personal problems" nor "child care issues" is a reason that qualifies for FMLA leave, or fairly implies a serious health condition. Niese's discussion with GE's human resources director approximately two weeks after her request for leave was not timely. *See* 29 C.F.R. §825.303 (notice expected to be given in one or two working days).

Title I; Employer Awareness; MI

A Massachusetts federal court dismissed an employee's Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-12117, claim that he was terminated because of his depression and panic disorder. The fact that the employee had once mentioned to his supervisor that he was "taking anti-anxiety medication" was insufficient to establish that the employer knew that he was disabled or perceived him as disabled for purposes of the ADA. ***Boy v. General Elec. Co., 115 F. Supp. 2d 109 (D. Mass. 2000).***

State Law; Reasonable Accommodation; PTSD

A California appeals court determined that factual issues exist as to whether a former employee with post-traumatic stress disorder (PTSD) was disabled within the meaning of the California Fair Employment and Housing Act (FEHA), Cal. Gov't Code §12900 *et seq.*, and whether her employer's accommodation—allowing her to compete for open job positions meeting her work restrictions—was reasonable. ***Jensen v. Wells Fargo Bank, 102 Cal. Rptr. 2d 55 (Cal. Ct. App.2000).***

Leanne Jensen, a manager at Wells Fargo Bank, experienced PTSD as result of an attempted robbery. She was unable to perform the usual functions of a branch manger, and requested that she be reassigned to a vacant position. The bank informed Jensen that it had no jobs available within her work restrictions. She sued the bank under the FEHA for failure to accommodate. The trial court granted the bank summary judgment, finding that Jensen was not disabled under the FEHA, and that the bank had reasonably accommodated Jensen.

The appeals court reversed. A disputed factual issue exists as to whether Jensen's PTSD constituted a disability under the FEHA. In *Swenson v. County of Los Angeles*, 75 Cal. App. 4th 889 (Cal. Ct. App. 1999), 23 MPDLR 842, *review granted*, 2000 WL 1121396 (Cal. Sup. Ct. Jan. 13, 2000), 24 MPDLR 767, this

court disagreed with the holding in *Muller v. Automobile Club of So. Cal.*, 61 Cal. App. 4th 431 (Cal. Ct. App. 1998), 22 MPDLR 222, that to be disabled under the FEHA plaintiffs must show that their disability "substantially limited" a major life activity. The FEHA states that physical disability includes a disease or condition that "limits an individual's ability to participate in major life activities." *See* Cal. Gov't Code §12926(k)(1)(B). Unlike the Americans with Disabilites Act (ADA), 42 U.S.C. §12101 *et seq.*, the FEHA does not use the language "substantially limits." Here, the court found that Jensen provided sufficient evidence to establish a disability under the FEHA and the ADA. Federal courts utilizing the more restrictive ADA definition of disability have ruled that PTSD may constitute a disability. *See, e.g., Paleologos v. Rehab Consultants*, 990 F. Supp. 1460, 1464 (N.D. Ga. 1998), 22 MPDLR 207. Jensen stated that she suffers from anxiety, nervousness, depression, lack of confidence, a helpless feeling, a feeling of humiliation, headaches, teeth grinding, nightmares, sleeplessness, and panic attacks. There is no evidence on the issue of the severity of Jensen's PTSD. "On these facts, we cannot say that (Jensen's) . . . stress disorder does not meet the definition of disability even were we to apply the stricter ADA test," the court said.

There is also a disputed factual issue as to whether the bank reasonably accommodated Jensen. She was put on unpaid leave while she collected workers' compensation and long-term disability. It was undisputed that Jensen was unlikely to be able to return to branch work. The bank offered Jensen a temporary job, which she rejected. A temporary position is not, however, a reasonable accommodation. It represents, like unpaid leave, a way to put a disabled employee on hold while the attempt to locate a permanent position is ongoing. *See Champ v. Baltimore County, Md.*, 884 F. Supp. 991, 999-1000 (D. Md. 1995), 19 MPDLR 620. The bank never attempted to establish that there were no positions within the organization that met Jensen's qualifications. Instead, it attempted to show that, with respect to the positions Jensen located and applied for on her own, she lacked the required skills or that others were better qualified. "This begs the question of whether there were other vacant positions within the Wells Fargo organizational structure of which she was unaware or unknowledgeable which might have met her limitations and qualifications," the court said. The bank improperly attempted to shift the entire burden of locating a suitable vacant position on Jensen. Putting this burden on the employee risks shutting out many workers simply because they do not have superior knowledge of the workplace that the employer has. *See Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1113 (9th Cir. 2000), 24 MPDLR 956. Furthermore, to the extent Wells Fargo rejected Jensen for the positions for which she was qualified because it had applicants who were more qualified or had seniority, it overlooks that when reassignment of an existing employee is the issue, the disabled employee is entitled to preferential consideration. *Id.*

Title I; Actual; Qualified; Pretext; Depression

A Florida federal court ruled that factual issues exist as to whether a former employee with manic depression had a disability under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*; whether he was a qualified individual as he explained that his statement to the Social Security Administration that he was unable to work was due to a change in his medication; and whether he was terminated because of his disability. ***Hansen v. Smallwood, Reynolds, Stewart & Assocs., Inc., 119 F. Supp. 2d 1296 (M.D. Fla. 2000).***

Smallwood, Reynolds, Stewart & Associates terminated Donald Hansen from his position as a specification writer. He sued under Title I, 42 U.S.C. §§12111-12117.

The district court denied the employer summary judgment. Hansen introduced sufficient evidence to establish that his manic depression substantially limited his ability to perform the major life activity of working. Deposition testimony showed that Hansen was putting in more than 40 hours per week, had trouble meeting deadlines, and sometimes forgot what he had done. Moreover, the company had to hire extra administrative assistants because the work was not being done properly during regular business hours.

Hansen also provided sufficient evidence to establish that he was a qualified individual under the ADA, as he explained why his statement to the Social Security Administration that he was unable to work was consistent with his ADA claim that he can perform the essential job functions, *see Cleveland v. Policy Mgmt. Sys.*, 526 U.S. 795 (1999), 23 MPDLR 532. Hansen stated that he experienced job difficulties only after his medication was changed, and that he would begin to take his normal medication again.

In addition, Hansen established that his employer's reason for termination—Hansen's failure to follow the employer's methodology and inability to complete projects on time—was a pretext for disability discrimination. Hansen testified that his employer did not tell him he used an incorrect methodology and terminated him only after he informed it about the disability.

The court denied Hansen's cross-motion for summary judgment. Factual issues exist as to whether his depression limited one or more major life activities. His wife testified at a deposition that Hansen was able to maintain his personal hygiene, his work, and help around the house. Also, testimony that Hansen had to work overtime and that his employer had to hire extra assistants for him established a material issue of fact as to whether he was qualified. Finally, a factual issue exists as to whether his employer's reason for termination was pretextual.

Title I; Disability Defined; Actual; Temporary; Perceived; Memory Loss; Dizziness

A Kansas federal court ruled that a former employee who experienced severe dizziness, short-term memory loss, sleeplessness, impaired gross motor skills, headaches, and fatigue was not disabled under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, because these symptoms were not expected to have a long-term or permanent impact and she failed to

show that her employer regarded her as substantially limited in a major life activity. ***Everist v. Blue Cross & Blue Shield, 2000 WL 1708504 (D. Kan. Oct. 20, 2000).***

Carol Everist, a nurse consultant for Blue Cross & Blue Shield (BCBS), reported to her supervisor that she had a "'bad weekend,'" and that her thought processes were not functioning. For several weeks, Everist came to work but was not functional. She took time off from work to undergo multiple medical tests. During this time period, she failed to complete an assigned task. At a meeting with her supervisor, Everist reported that her completed test results were normal, but that she needed a few more tests. During this meeting, the supervisor fired Everist for poor work performance. She sued BCBS under Title I, 42 U.S.C. §§12111-12117.

The district court granted BCBS summary judgment. Everist was not disabled within the meaning of the ADA, *see* 42 U.S.C. §12102(2). Her impairment, which lasted for less than two months, did not substantially limit a major life activity. Impairments of such a short duration do not constitute a disability. *See Sorenson v. University of Utah Hosp.*, 194 F.3d 1084, 1087 (10th Cir. 1999), 23 MPDLR 854. Although she had some problems for a short time period that were severe—dizziness, short-term memory loss, sleeplessness, impairment of gross motor skills, headaches, and fatigue—there was no expectation that these symptoms were permanent or would have a long-term impact. Her doctors had reached no conclusions concerning the nature of her problems or their expected duration. Moreover, the results of her medical tests she had undergone were normal.

The court rejected Everist's argument that BCBS regarded her as disabled based on her supervisor's awareness of her impairment and concern about her inability to perform her assigned work. Under the ADA an employer's knowledge that an employee has an impairment is insufficient to demonstrate that the employer perceived the employee as having a substantially limiting impairment. *See Webb v. Mercy Hosp.*, 102 F.3d 958, 960 (8th Cir. 1996), 21 MPDLR 62. Further, "[w]here a defendant's recognition of plaintiff's limitations was not an erroneous perception, but instead was a recognition of a fact, a finding that plaintiff was regarded as disabled, and, therefore, is entitled to the protections of the ADA, is inappropriate." *See Hilburn v. Murata Elecs. N. Am., Inc.*, 181 F.3d 1220, 1230 (11th Cir. 1999), 23 MPDLR 688.

Title I; Qualified; Current Drug User

A New York federal court determined that a factual issue exists as to whether a former employee was currently engaging in the illegal use of drugs and, thus, was not a qualified individual with a disability as defined by the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* ***Toscano v. National Broadcasting Co., 2000 WL 1742097 (S.D.N.Y. Nov. 28, 2000).***

Fabio Toscano, a design engineer for the National Broadcasting Company (NBC), became chemically dependent on opiates that had been prescribed for a back injury and checked himself into for inpatient treatment. After returning to work, he began using opiates again, and NBC placed him in a drug treatment center for two months. After Toscano returned to work, NBC referred him to an outpatient counseling center. However, Toscano continued to use opiates, reported the relapse to NBC, and participated in a different outpatient clinic. NBC terminated him on the ground that "'we just don't think you can do your job anymore.'" Toscano subsequently sued NBC under Title I, 42 U.S.C. §§12111-12117.

The court denied NBC's motion to dismiss, as the court could not conclude on the limited factual record that Toscano "engaged in the illegal use of drugs." The ADA provides that a person currently engaging in the illegal use of drugs is not a qualified individual with a disability. *See* 42 U.S.C. §12114(a). The ADA's definition of the "illegal use of drugs" does not include the use of a drug taken under the supervision of a licensed health care professional, *see* 42 U.S.C. §12111(6)(A). Toscano asserted that all of the prescription drugs he took during his employment with NBC were taken under such supervision. He also asserted that he had been attending an outpatient drug program over two months when he was fired, and that he remained drug free throughout that time.

Title I; Actual; Fibromyalgia

A New York federal court determined that a former employee with fibromyalgia was not disabled as defined by the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, because this condition did not substantially limit her ability to work, and exercise is not a major life activity. ***Johns-Davila v. City of N.Y., 2000 WL 1725418 (S.D.N.Y. Nov. 20, 2000).***

The city granted Maureen Johns-Davila's request for a medical leave of absence due to her fibromyalgia from June 1997 to August 1997, but denied her request for an extension of her leave. She did not return to work, and was terminated. Davila sued the city under Title I, 42 U.S.C. §§12111-12117.

The court granted the city summary judgment. Davila claimed that her fibromyalgia was a disability under the ADA, *see* 42 U.S.C. §12102(2), because it substantially limited her ability to exercise. However, exercise is not a major life activity. *See Colwell v. Suffolk County Police Dep't*, 158 F.3d 635 (2d Cir. 1998), 22 MPDLR 745. Even if Davila had alleged that she was unable to work, her claim still would have failed. She did not show that she was unable to perform a class or broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities. *Id.* Davila admitted in deposition testimony that she could perform sedentary and clerical work, as long as she could stretch a few times during an eight-hour shift. Moreover, courts have found repetitive motion restrictions not to be substantially limiting. *See, e.g., Helfter v United Parcel Serv.*, 115 F.3d 613, 618 (8th Cir. 1997), 21 MPDLR 507. Finally, Davila's inability to work in "sick buildings" throughout the city does not constitute a substantial limitation on working, because an impairment that only restricts a plaintiff from working in a particular location does not satisfy the disability requirement

under the ADA. *See, e.g., Manzi v. DiCarol*, 62 F. Supp. 2d 780, 791 (E.D.N.Y. 1999), 23 MPDLR 692.

Title I; Actual; Qualified; Asthma; Osteoporosis

The Seventh Circuit ruled that a former psychologist with asthma, osteoporosis, and a weakened immune system was not a qualified individual with a disability within the meaning of the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, because he was not substantially limited in the major life activity of working and could not perform his essential job functions even with accommodation. ***Webb v. Choate Mental Health & Dev. Ctr., 230 F.3d 991 (7th Cir. 2000).***

Jeffrey Webb requested that his employer exempt him from contact with patients known to be violent or infectious as an accommodation for his health conditions. His employer refused, and he sued under Title I, 42 U.S.C. §§12111-12117.

The Seventh Circuit granted the employer summary judgment. First, Webb is not disabled as defined by the ADA, because his conditions do not substantially limit him in performing the major life activity of working. Although he was limited in performing the specific psychology practiced at the mental health center, which requires direct interaction with violent or infectious patients, his condition does not prevent him from performing a class of jobs. *See Davidson v. Midelfort Clinic*, 133 F.3d 499 (7th Cir. 1998), 22 MPDLR 193.

Second, Webb is not a qualified individual as defined by the ADA because he is unable to perform his essential job function—counseling violent or infectious individuals. Moreover, his requested accommodation to not interact with known violent or infectious patients was not reasonable because it would be impossible for the mental health center to constantly monitor patients' health or potential violent behavior.

Title I; Substantial Limitation Defined; Back Injury

The Eleventh Circuit affirmed that a former assembly line worker failed to show that his back injury substantially limited him in the major life activity of walking as compared to the average person in the general population and, thus, was not disabled within the meaning of the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* ***Maynard v. Pneumatic Prods. Corp., 233 F.3d 1344 (11th Cir. 2000).***

While working for Pneumatic Products Corporation, Donald Maynard sustained on-the-job back injury. He was later terminated purportedly because the company was discontinuing the product line on which Maynard worked. He filed a charge of discrimination with the Equal Employment Opportunity Commission, claiming he was fired because of his disability. He then sued Pneumatic alleging violations of Title I, 42 U.S.C. §§12111-12117. The district court granted the employer judgment as a matter of law, finding that plaintiff failed to establish that he was disabled within the meaning of the ADA.

The Eleventh Circuit affirmed. Plaintiff failed to establish that his back injury substantially limited him in the major life activity of walking as compared to the average person in the general population. *See Gonzales v. National Bd. of Med. Exam'rs*, 225 F.3d 620 (6th Cir. 2000) (comparing appellant's abilities with those of the average person in the general population). Plaintiff claimed that his back injury significantly restricted his ability to walk because he cannot walk more than 40 to 50 yards. However, he offered no evidence as to how far the average person can walk.

The court emphasized that plaintiffs must present comparator evidence to demonstrate their substantial limitations. However, this evidence may not be necessary in every case. Comparator evidence may already be established where, for example, case law, the regulations, or the interpretive guidance by the Equal Employment Opportunity Commission makes clear that a plaintiff's condition substantially limits a major life activity as compared to the average person in the general population.

Title I; Actual; Record; Perceived; Neck, Back Injuries

A Kansas federal court decided that an employee with neck and back injuries was not disabled or regarded as such by his employer, nor did he have a record of a disability within the meaning of the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* ***Wicks v. Riley County Bd. of County Comm'rs, 2000 WL 1772471 (D. Kan. Nov. 30, 2000).***

Jeffrey Wicks, a county animal control officer, took five months off due to neck and back injuries he sustained in a work-related automobile accident. His doctor subsequently discharged Wick to full duty. For a two-week period, Wicks' supervisor granted Wick's request for an additional 30 minutes of break time, but thereafter denied this request, as well as a request for a two-wheeled dolly and access to a patrol truck with a ramp. The county terminated Wicks for unsatisfactory performance, and he sued under Title I, 42 U.S.C. §§12111-12117.

The court granted the county summary judgment. Wicks' neck and back injuries did not constitute disabilities as defined by the ADA, *see* 42 U.S.C. §12102(2), because they did not substantially limit the major life activity of lifting. Wicks could lift 150 pounds off the floor, and 45 pounds repetitively. Several circuits, including the Tenth Circuit, have found more severe lifting restrictions to be insufficient as a matter of law for inclusion under the ADA. *See, e.g., Thompson v. Holy Family Hosp.*, 121 F.3d (9th Cir. 1997), 21 MPDLR 609 (ruling that 25-pound lifting restriction is not substantially limiting); *Williams v. Channel Master Satellite Sys., Inc.*, 101 F.3d 346 (4th Cir. 1996), 21 MPDLR 65 (same); *Aucutt v. Six Flags Over Mid-Am., Inc.*, 85 F.3d 1311 (8th Cir. 1996), 20 MPDLR 502 (same); *Huckans v. United States Postal Serv.*, 201 F.3d 448 (10th Cir. 1999) (ruling that 35-pound lifting restriction is not substantially limiting); and *Barnard v. ADM Milling Co.*, 987 F. Supp. 1337 (D. Kan. 1997), 22 MPDLR197 (holding that 42-pound lifting restriction is not

substantially limiting). Moreover, Wicks was not substantially limited in his ability to sit. His doctor reported that he could sit in a vehicle for approximately two hours before he would need to take a break. *See Helfter v. United Parcel Serv., Inc.*, 115 F.3d 613, 616 (8th Cir. 1997), 21 MPDLR 507 (ruling that plaintiff's statement that she was unable to sit for longer than 30 minutes was insufficient to establish disability under ADA).

Nor was Wicks substantially limited in his ability to work, as he failed to demonstrate that he was restricted from a class or broad range of jobs. *See Bolton v. Scrivner, Inc.*, 36 F.3d 939 (10th Cir. 1994), 18 MPDLR 659, *cert. denied*, 513 U.S. 1152 (1995). Wicks argued that he is restricted from performing a "class" of jobs because his lifting restriction precludes him from working in the "very heavy" class of jobs (those requiring lifting over 100 pounds and repetitive lifting of 50 pounds). He relied on an Equal Employment Opportunity Commission (EEOC) regulation, *see* 29 C.F.R. Pt. 1630, App. 1630.2(j), which states: "For example, an individual who has a back condition that prevents the individual from performing any heavy labor job would be substantially limited in the major life activity of working because the individual's impairment eliminates his or her ability to perform a class of jobs. . . ." However, Wicks' reliance on this example detracts from the case-by-case examination that is required within the ADA context. Moreover, the interpretative section of the EEOC regulations is not controlling, but only to be relied upon for guidance. *See Gile v. United Airlines, Inc.*, 95 F.3d 492, 497 (7th Cir. 1996), 20 MPDLR 830. Furthermore, the great weight of authority holds that lifting restrictions alone are insufficient to substantially limit the major life activity of working. *See, e.g., Burgard v. Super Valu Holdings, Inc.*, 1997 WL 278974 (10th Cir. May 27, 1997), 21 MPDLR 484. Finally, after his termination Wicks applied for numerous jobs that did not require physical activity beyond his restrictions—court clerk, maintenance worker, security officer, sanitation worker, and custodial worker—and accepted a job as a custodial worker.

The court rejected Wicks' argument that he had a record of an impairment that substantially limited any of his major life activities, *see* 42 U.S.C. §12102(2)(B). Wicks' performance evaluation, which indicates he has trouble patrolling due to his neck and back injuries, in no way reflects that he is substantially limited in a major life activity. *See Sorenson v. University of Utah Hosp.*, 194 F.3d 1084, 1087 (10th Cir. 1999), 23 MPDLR 854. Further, following Wicks' car accident, his doctor released him to work without restriction. *See Prince v. Claussen*, 1999 WL 152282 (10th Cir. Mar. 22, 1999), 23 MPDLR 348.

The court also rejected Wicks' argument that the county regarded him as having an impairment that substantially limited his ability to work and sit, *see* 42 U.S.C. §12102(2)(C). Wicks failed to allege that the county regarded him as unable to perform a class or broad range of jobs. Moreover, although the county believed that Wicks could not sit for several hours without a break, this impairment did not substantially limit the major life activity of sitting.

Title I; Actual; Statute of Limitations; Back Injury

A Kansas federal court ruled that a former employee with a back injury failed to show that she was substantially limited in the major life activity of working and, thus, disabled under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* ***Land v. Midwest Office Tech., Inc., 114 F. Supp. 2d 1121 (D. Kan. 2000).***

Sylvia Land injured her back in October of 1992 and was medically released before May 1994. In June 1995, she filed a charge of disability discrimination with the Equal Employment Opportunity Commission, alleging that her employers' failure to accommodate her back injury began in 1993. Land then sued her employer under Title I, 42 U.S.C. §§12111-12117.

The district court granted the employer summary judgment. As a threshold matter, Land's suit was not time-barred. Employees must file ADA claims within 300 days after the occurrence of an unlawful discriminatory practice. *See* 42 U.S.C. §2000e-5(e). The many incidents of discrimination that occurred within the 300-day time limit, when viewed together with those incidents that occurred outside the limit, represented a continuing pattern of discrimination. *See Martin v. Nannie and Newborns, Inc., 3 F.3d 1410 (10th Cir. 1993).*

Nevertheless, Land failed to show that her cervical strain substantially limited her ability to perform the major life activity of working, as required by the ADA. She continued to work at the same job both before and after her injury, and her injury did not preclude her from performing a wide range of jobs in various classes or a class of jobs, *see* 29 C.F.R. §1630.2(j)(3).

Title I; Actual; Back Injury

The Seventh Circuit held that a former service mechanic with a back injury was not disabled as defined by the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.*, because at the time of his discharge a doctor had cleared him to return to regular duty work without restrictions, and medical restrictions placed on him a year later did not substantially limit his ability to perform a class of jobs or a broad range of jobs in various classes. ***Stone v. City of Indianapolis, 2000 WL 1597785 (7th Cir. Oct. 24, 2000).***

Title I; Qualified; Pretext; Neck, Back Injuries

The Second Circuit affirmed the district court's grant of summary judgment to the employer (*see* 1999 WL 997279 (E.D.N.Y. Oct. 18, 1999), 24 MPDLR 96), finding that a former engineering technician with neck and back injuries was not a qualified individual with a disability within the meaning of the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.*, and the employer's reasons for terminating him—excessive sick leave and misrepresentation of the extent of his condition—was not a pretext for disability discrimination. ***Lama v. Consolidated Edison, 2000 WL 1804510 (2d Cir. Dec. 7, 2000).***

Title I; Actual; Tendinitis

The Eleventh Circuit affirmed that a former employee was not disabled under the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.*, because his tendinitis did not substantially limit his ability to perform manual tasks. ***Chanda v. Engelhard/ICC, 234 F.3d 1219 (11th Cir. 2000).***

Ishaq Chanda worked for Engelhard/ICC as a quality control engineer. He was transferred to a quality control technician job, which required that he cut various widths of honeycomb foamboard with a retractable utility knife and metal scraper to obtain test samples. Chanda was later diagnosed with tendinitis, and his doctor permanently restricted him from performing the cutting function. Engelhard/ICC terminated Chanda, and he sued for Title I, 42 U.S.C. §§12111-12117, violations. A Florida federal court granted summary judgment for Engelhard/ICC.

The Eleventh Circuit affirmed. Chanda failed to show that his tendinitis substantially limited the major life activity of performing manual tasks. In fact, Chanda acknowledged that he could help his wife with household activities, dress and feed himself, and drive a car. In addition, he took four classes and was able to take notes. Chanda also admitted that he could perform the functions of a quality control engineer, which involved writing and computer use. The court rejected his physician's statement that Chanda's condition restricted him in major life activities that require movement of the right forearm and wrist: tennis, typing, cutting, grasping objects, writing with a pen, and working on a computer. The physician's failure to articulate any specific facts describing Chanda's limitation deprives this diagnosis of probative value. *See Hilburn v. Murata Elecs. N. Am., Inc.*, 181 F.3d 1220, 1227-28 (11th Cir. 1999), 23 MPDLR 688.

Hiring; Title I; Perceived

A Missouri federal court ruled that an employer did not violate the Americans with Disabilities Act Title I, 42 U.S.C. §§12111-12117, when it denied production line jobs to 19 job applicants with carpal tunnel syndrome (CTS), because it did not regard them as substantially limited to work in a broad range of jobs. ***EEOC v. Woodbridge Corp., 124 F. Supp. 2d 1132 (W.D. Mo. 2000).***

Nineteen individuals applied for production line jobs with Woodbridge Corporation, which produced polyurethane foam pads used in automobile seat covers. These jobs require repetitive hand and wrist motions. Woodbridge offered each person employment conditioned on the results of a neurometry test administered to identify applicants with, or at a high likelihood of developing, CTS. Based on the test results, Woodbridge revoked its offers. The EEOC, on behalf of the applicants, sued under Title I.

The district court granted Woodbridge's motion for summary judgment. Woodbridge did not regard the applicants as disabled, that is substantially limited in the major life activity of working. *See* 42 U.S.C. §12102(2)(C). Woodbridge regarded them as precluded from performing the particular job of production line worker, not from a class or broad range of jobs as compared to the average person having comparable training, skills, and abilities. *See Murphy v. United Parcel Serv.*, 119 S. Ct. 2133 (1999), 23 MPDLR 511.

Title I; State Law; Actual; Qualified; Shoulder Injury

A Pennsylvania federal court found that factual issues exist as to whether a former employee's shoulder injury constituted a disability as defined by state law and the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, and whether he was qualified to perform essential job functions with reasonable accommodation. ***Lukens v. National R.R. Passenger Corp., 2000 WL 1622745 (E.D. Pa. Oct. 25, 2000).***

In February 1992, Kenneth Lukens injured his left shoulder while working as a field technician rider maintaining electrical systems on trains. He was diagnosed with a ruptured tendon, a torn rotator cuff, and adhesive capsulitis. Because he could no longer perform his job, Lukens requested as a reasonable accommodation "'[a] bench type position affecting repairs or trouble shooting within a radius of 50 miles of my house.'" Amtrak told him that there were no such jobs available. In August 1993, Lukens returned to work with Amtrak as an electrical technician, but Amtrak abolished this position in December 1998. Lukens filed a job displacement notice with Amtrak, seeking to "bump" a less senior employee who worked as an E-clean electrician, responsible for maintaining electrical systems on passenger cars. Amtrak denied the notice due to Lukens' physical restrictions. Lukens sued Amtrak for violating Title I, 42 U.S.C. §§12111-12117, and the Florida Civil Rights Act of 1992, Fla. Stat. Ann. §260.01 *et seq.*

The district court denied Amtrak summary judgment. First, a factual issue exists as to whether Lukens was substantially limited in any major life activity and, thus, was disabled under the ADA. He claimed that he was unable to engage in recreational activities and intimacy with his wife and family, to sleep, to work, and to maintain personal hygiene. Recreational activities are not major life activities. *See Ouzts v. US Air, Inc.*, 1996 WL 578514 (W.D. Pa. July 26, 1996), 21 MPDLR 59, *aff'd*, 118 F.3d 1577 (3d Cir. 1997). Sexual intimacy (*see Bragdon v. Abbott*, 524 U.S. 624 (1998), 22 MPDLR 449), sleeping (*see Reese v. American Food Serv.*, 2000 WL 1470212 (E.D. Pa. Sep. 29, 2000), 24 MPDLR 935), and caring for oneself (*see Howell v. Sam's Club*, 959 F. Supp. 260 (E.D. Pa 1997), 21 MPDLR 340, *aff'd*, 141 F.3d 1153 (3d Cir. 1998)) are major life activities. However, Lukens alleged only that his injury impeded these activities, not that he was significantly restricted as to the condition, manner, or duration under which he could engage in them as compared to the average person. *See* 29 C.F.R. §§1630.2(j)(1)(i)-(ii). Further, Lukens' inability to lift more than 10 pounds does not constitute a substantial limiation on the major life activity of lifting. *See Marinelli v. Pennsylvania*, 216 F.3d 354 (3d Cir. 2000). Nevertheless, a fac-

tual issue exists as to whether Lukens has a manual impairment that substantially limits the major life activity of reaching. *See* 29 C.F.R. §1630.2.(1). His orthopedist reported that Lukens experiences pain with repetitive use of his left arm, and that he is precluded form engaging in all heavy jobs and all medium light and sedentary positions requiring bilateral grip or repetitive use of his left arm.

A factual issue also exists as to whether Lukens could perform the essential functions of the E-clean electrician position with reasonable accommodation, such as the provision of specialized equipment at minimal cost. Finally, because there is no substantive difference between the ADA and the state law, the scope of the court's opinion applies equally to Lukens' state claims as well.

Title I; Actual; Constructive Discharge; Fibromyalgia; Tendinitis

A Missouri federal ruled that a former employee's 50-pound lifting restriction did not substantially limit any major life activity and, thus, did not constitute a disability as defined by the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, and that her constructive discharge claim fails because her employer did not impose working conditions with the intent to make her quit her job. ***Broadus v. State Farm Ins., 2000 WL 1585257 (W.D. Mo. Oct. 11, 2000).***

Karen Broadus, a claims specialist, alleged that State Farm Insurance discriminated against her on the basis of her fibromyalgia and tendinitis in both arms in violation of Title I, 42 U.S.C. §§12111-12117, and that she was forced to resign.

The district court granted State Farm summary judgment, finding that Broadus was not disabled under the ADA. She acknowledged that at the time of her resignation she was capable of performing her job functions. As a matter of law, her medical restrictions—no ladder carrying or lifting weights in excess of 50 pounds—did not substantially limit her ability to perform any major life activity. *See* 29 C.F.R.§1630.2(g)(1). *See also Weber v. Strippit, Inc.*, 186 F.3d 907 (8th Cir. 1999), 23 MPDLR 688 (a 25-pound weight lifting restriction does not substantially limit a major life activity). Further, ladder carrying in not a major life activity as contemplated by the ADA regulations. *See Aucutt v. Six Flags Over Mid-Am., Inc.*, 85 F.3d 1311 (8th Cir. 1996), 20 MPDLR 502 (ruling that shoveling, gardening, and mowing the lawn are not major life activities).

Further, Broadus' constructive discharge claim must fail, as she did not show that State Farm required her to drive to Kansas City or Sedalia for meetings with her supervisor to and cart items and files with the intent to make her quit her job. *See Gartman v. Gencorp, Inc.*, 120 F.3d 127, 129-30 (8th Cir. 1997). These requirements were imposed on all claims specialists.

Title I; Actual; FMLA; Shoulder Injury

An Illinois federal court determined that a former employee's shoulder injury did not substantially limit her ability to work and, thus, was not a disability as defined by the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* Also, the employer complied with the Family and Medical Leave Act (FMLA), 29 U.S.C. §2601 *et seq.*, by granting the employee a 12-week leave of absence, which she exceeded. ***Palao v. Fel-Pro, Inc., 117 F. Supp. 2d 764 (N.D. Ill. 2000).***

Drucy Palao, a machine operator and inspector for Fel-Pro, was diagnosed with partial rotator tendinitis of her right shoulder. Her doctor recommended a 20-pound lifting restriction and limited, but no repetitive, use of her right arm. Fel-Pro accommodated Palao by allowing her to work the inspector position full time, without rotating to other jobs. As a result, the other members of her work crew were unable to rotate through the five positions and were limited to operating four machine presses. Palao subsequently went on maternity leave. When she attempted to return to work, Fel-Pro told her that there were no positions available. She sued Fel-Pro for violating the ADA Title I, 42 U.S.C. §§12111-12117, and the FMLA.

The district court granted summary judgment for Fel-Pro. As for the ADA claim, Palao was not disabled because she was not substantially limited in the major life activity of working. Her shoulder injury prevented her from performing only a single, particular job rather than an entire class or broad range of jobs. *See Sinkler v. Midwest Property Mgmt.*, 209 F.3d 678, 685 (7th Cir. 2000), 24 MPDLR 427. While her shoulder injury was permanent, Palao did not show that it was either severe enough or would have a long-term impact sufficient to substantially limit her ability to work. *See* 29 C.F.R. §1630.2(j)(3)(i).

As for the FMLA claim, Palao exceeded the 12 weeks of leave during any 12-month period that all employees are entitled to under the statute. *See* §2612(a)(1). Employers have no responsibility to restore a person's job if that 12-week period is exceeded. It was irrelevant that she took 11 weeks of disability leave for her shoulder injury, worked five months, and then took eight weeks of maternity leave.

Title I; Actual; Wrist Injury

An Illinois federal court ruled that a former employee with a wrist injury was not substantially limited in his ability to perform manual tasks and to work and, thus, was not disabled as defined by the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* ***Battle v. Logistics, 2000 WL 1671505 (N.D. Ill. Nov. 3, 2000).***

Leon Battle, a forklift truck operator for Logistics, worked in a refrigerated warehouse. He injured his left hand while driving and was placed on light duty, which meant that he was not required to pick product or drive. When Battle continued to experience pain, his doctor restricted him from lifting more than 10 pounds. Battle would move pallets with his right hand, ask another employee for assistance, or leave the pallets in their original location. After an altercation with a co-worker and Battle's doctor released him to do "regular work," Logistics terminated

him. He sued for violations of Title I, 42 U.S.C. §§12111-12117.

The district court granted Logistics summary judgment. Battle was not disabled under the ADA, because he was not substantially limited in the major life activities of performing manual work or working. As to performing manual work, Battle's doctor did not consider the injury to be severe or permanent. Temporary, non-chronic impairments of short duration with little or no long-term or permanent impact are usually not disabilities. *See Bragg v. Tri Lite, Inc.*, 1999 WL 965419 (N.D. Ill. Sept. 30, 1999), 24 MPDLR 80. Moreover, Battle was not restricted from performing a broad range of manual tasks. *See Stevo v. CSX Transp., Inc.*, 1997 WL 667816 (N.D. Ill. Oct. 24, 1997), 22 MPDLR 55. He admitted in his deposition that while working with his injured wrist, he moved product, picked up garbage, and filed papers—all tasks requiring manual dexterity. Moreover, since leaving Logistics, Battle performed relatively strenuous manual tasks in at least two other jobs.

As for working, Battle failed to show that his disability precluded him from performing a class or broad range of jobs, rather than just his particular job. *See Webb v. Clyde L. Choate Mental Health & Dev. Ctr.*, 230 F.3d 991 (7th Cir. 2000). Battle was able to perform a host of other jobs at Logistics, as well as most of the tasks required of his job. Also, as previously mentioned, Battle worked for two employers since leaving Logistics and lifted heavy objects in both jobs. Moreover, in general courts within the Seventh Circuit have held that a plaintiff's lifting restriction does not constitute a significant barrier to employment. *See, e.g., Duffin v. Federal Express Corp.*, 1997 WL 208428 (N.D. Ill. Apr. 22, 1997), 21 MPDLR 484 (ruling no ADA protection for courier's 25-pound lifting restriction).

Title I; Actual; Perceived; Pretext; FMLA; Cancer

A magistrate of a Maine federal court recommended that an employer's motion for summary judgment be denied, as a former employee with prostate cancer established that (1) he was regarded as disabled and fired because of his disability in violation of the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§ 12111-12117, and the Maine Human Rights Act, 5 Me. Rev. Stat. Ann. §4572, and (2) he was fired for attempting to exercise his rights under the federal Family and Medical Leave Act (FMLA), 29 U.S.C. §2601 *et seq.*, and the state FMLA, 26 Me. Rev. Stat. Ann. §§843-848. ***Saunders v. Webber Oil Co., 2000 WL 1781835 (D. Me. Nov. 17, 2000).***

In September 1997, Webber Oil Company offered to promote Hubert Saunders to Vice President, which would require him to relocate. At a September 30 meeting, Saunders informed Webber's CEO that he had been diagnosed with prostate cancer. Saunders was told that he would not be relocating for at least two years. At an October 16 meeting, Saunders informed the CEO that his treatment might require him to be out of work three to five days. The CEO replied, "'No more than five days because that's all the sick days you get.'" On October 22, Saunders was terminated for allegedly insulting the CEO. Saunders sued under the ADA, the Maine Human Rights Act, and the federal and state FMLA.

The magistrate recommended that Webber's motion for summary judgment be denied. Saunders did not have an actual disability as defined by the ADA or state law, because his alleged inability to engage in sexual relations was not a substantial limitation at the time of his termination. *See Monroe v. Cortland County*, 37 F. Supp. 546, 550 (N.D.N.Y.1999), 23 MPDLR 356. Saunders had been unable to have sex for five days, and there was little evidence as to the expected duration of his impairment. Although hindsight reveals that Saunders' sexual dysfunction lasted for three years, his impairment was not long-term at the time of his discharge.

However, Saunders established that Webber regarded him as disabled in the major life activity of working. His termination in such close proximity to the disclosure of his illness is significant. *See Heyman v. Queens Village Comm. for Mental Health*, 198 F.3d 68, 73 (2d Cir. 1999), 24 MPDLR 84. An inference could be drawn that, when Webber learned of Saunders' cancer and upcoming treatment, it believed he could not be counted on during the winter season.

Saunders also established that Webber's reason for terminating him—insubordination—was a pretext for discrimination. There is evidence that Saunders was fired because of Webber's perception that his usefulness had been compromised. The CEO knew of Saunders' cancer and had known employees whose work had been significantly impacted by cancer.

Finally, Saunders also established that he was terminated for attempting to exercise his rights under the state and federal FMLA. Employees need not exercise these rights in order to be covered under the statute. *See Hodgens v. General Dynamics Corp.*, 144 F.3d 151, 159 (1st Cir. 1998), 22 MPDLR 478. When he was terminated, Saunders expressed an intent to use up to five days of sick leave. Webber's CEO, based upon his own experience with cancer and the experiences of other employees, may have believed that Saunders would need more time off than that.

Title I; Actual; Perceived; Cancer

An Ohio federal court held that a nurse in remission from breast cancer was not substantially limited in the major life activity of working nor regarded as such and, thus, is not disabled within the meaning of the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* ***Alderdice v. Americans Health Holding, Inc., 118 F. Supp. 2d 856 (S.D. Ohio 2000).***

Sheryl Alderdice, a nurse for American Health Holding underwent a partial mastectomy and radiation therapy, during which she was allowed to modify her work schedule. She had two more surgeries, and returned to work on December 8, 1997. On August 18, 1998, Alderdice requested a one-month leave of absence to have exploratory surgery to alleviate repeated sinus infections. She was terminated. She sued under Title I, 42 U.S.C. §§12111-12117.

The district court granted American Health summary judg-

ment. Alderdice offered no evidence that her cancer substantially limited a major life activity at the time she was terminated. Although she underwent several surgical procedures, which substantially limited her ability to work during that period, at the time she was terminated, her cancer was in remission. The fact that her cancer may recur or might require further surgery does not make the condition substantially limiting. *See Roush v. Weastec, Inc.*, 96 F.3d 840 (6th Cir. 1996), 20 MPDLR 822.

The court rejected Alderdice's argument that American Health regarded her as disabled. After her surgeries, she was under no medical restrictions. As a result, American Health never modified her working conditions. Alderdice admits that she was able to perform the duties of her job, and offers no evidence that American Health perceived her as substantially limited in or unable to fulfill her work.

Even assuming, that Alderdice could establish a prima facie claim for ADA discrimination, American Health offered a legitimate nondiscriminatory reason for Alderdice's termination—her tardiness and poor work history. Alderdice asserted that her inability to come to work on time was caused by the continuing effects of her cancer treatment. Yet, when she was confronted by her supervisors about being tardy, she offered various other excuses. Further, she testified that she was never disciplined for tardiness during her period of cancer treatment.

Hiring; Title I; Perceived; Heart Murmur

A Delaware federal court held that an employer did not regard a job applicant with a heart murmur as substantially limited in the major life activity of working in violation of the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-12117. ***Taraila v. City of Wilmington, 2000 WL 1708218 (D. Del. Oct. 12, 2000).***

When Dawn Taraila applied for a firefighter position with the City of Wilmington, she indicated she had a mild heart murmur. She passed all the stages of the hiring process and received an offer of employment conditional on the results of a medical evaluation. These showed that Taraila had a systolic ejection murmur, which could be symptomatic of valvular heart disease. The city withdrew its offer, and Taraila sued under Title I.

The district court granted the city summary judgment. Because the city did not regard Taraila as substantially limited in the major life activity of working, she was not disabled as defined by the ADA. *See* 42 U.S.C. §12112(a). The city only regarded Taraila as unfit to be a firefighter, but not restricted from a class or broad range of jobs within her geographic area as compared to the average person having comparable training, skills, and abilities. *See* 29 C.F.R. §1630.2(j)(I). A substantial limitation on a broad range of jobs impacts many different professions in many different environments. *See* 29 C.F.R. App. §1630.3(j). Other courts have held that an impairment preventing someone from being a firefighter is not a substantial limitation on a class or range of jobs. *See, e.g., Shipley v. City of Univ. City*, 195 F.3d 1020 (8th Cir. 1999), 24 MPDLR 84; *Smith v. City of Des Moines, Iowa*, 99 F.3d 1466 (8th Cir. 1996), 21 MPDLR 64. Employers are entitled to establish reasonable, nondiscriminatory physical criteria in making hiring decisions. *See Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139 (1999), 23 MPDLR 510. "Given the unique demands of firefighters and the role they play in protecting the public, the city should certainly be able to screen out applicants based on physical criteria that do not rise to the level of a 'disability' under the ADA," the court said.

Title I; Actual; Qualified; Heart Disease

A Pennsylvania federal court determined that a jury could reasonably find that a former production supervisor at a manufacturing plant was a qualified individual with a disability as defined by the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.*, because his hypertensive cardiovascular disease substantially limited the major life activity of social interaction and sufficient evidence indicated that working overtime or a three-shift rotation was not an essential job function. ***Garvey v. Jefferson Smurfit Corp., 2000 WL 1586077 (E.D. Pa. Oct. 24, 2000).***

Title I; Perceived; Qualified; Pretext; Respiratory Condition

A Florida federal court ruled that, although a former office manager was a qualified individual with a disability as defined by the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, the reason for her discharge—the employer's honest belief that she had misappropriated funds—was not a pretext for disability-based discrimination. ***Story v. Sunshine Foliage World, Inc., 120 F. Supp. 2d 1027 (M.D. Fla. 2000).***

Paulette Story, an office manager for Sunshine Foliage World, has Alpha-1, Antitrypsin deficiency, a congenital condition that causes severe respiratory problems. After she was terminated, Story sued under Title I, 42 U.S.C. §§12111-12117.

The district court granted Sunshine Foliage's motion for summary judgment. Notwithstanding Story's claim that she was required to take intravenous antibiotics everyday for a period of two weeks, she did not demonstrate that she was substantially limited in any major life activity, such as working. However, she was regarded as having a disability by Sunshine Foliage. The business was put on actual notice of the alleged disability when Story informed her supervisor of her condition. Further, the business perceived Story's alleged disability as substantially limiting and significant because it contends that she missed work on several occasions, and that it was forced to hire more employees who would be able to cover Story's workload if she was unable to come into work. Moreover, Story established that she is a qualified individual because she was able to perform the essential functions of her job as office manager with such reasonable accommodations as were provided—a nurse that would come to the workplace and administer intravenous antibiotic injections to Story.

Although Story is a qualified individual with a disability as defined by the ADA, Sunshine Foliage offered a legitimate, nondiscriminatory reason for terminating her—misappropriation of funds. Even assuming that Story did not misappropriate her employer's funds, under the "honest belief" rule, as long as Sunshine Foliage honestly believed that Story had acted improperly, summary judgment must be granted for the employer. *See Kariotis v. Navistar Int'l Trans. Corp.*, 131 F.3d 672 (7th Cir. 1997). Story failed to establish that Sunshine Foliage did not reasonably and honestly believe that she had misappropriated funds not owed to her in violation of the company's policy.

Title I; Actual; Reasonable Accommodation; Constructive Discharge; TMJ

An Illinois federal court ruled that material issues of fact exist as to whether a former employee's temporomandibular joint (TMJ) disorder substantially limited her ability to speak and, thus, constituted a disability as defined by the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, and whether she was reasonably accommodated. However, the employee's constructive discharge claim fails because her work did not threaten her physically, and quitting was not the only way she could have addressed an allegedly intolerable working environment. ***EEOC v. United Airlines, Inc., 2000 WL 1738346 (N.D. Ill. Nov. 21, 2000).***

After Mary Hermann, an account controller at United Airlines, developed TMJ—a condition caused by repeated clenching of her teeth—her supervisor accommodated her by placing her in a job that did not require her to answer phones. Hermann continued to answer the phones after a different supervisor directed her to "work hand in hand" with another employee who was assigned to answer the phone. When the other employee was absent one day, Hermann resigned without notice. The Equal Employment Opportunity Commission (EEOC), on Hermann's behalf, sued United under Title I, 42 U.S.C. §§12111-12117, alleging failure to reasonably accommodate her TMJ and constructive discharge.

The district court granted United's motion for summary judgment in part and denied it in part. First, material issues of fact exist as to whether Hermann had a covered disability under the ADA. The EEOC introduced sufficient evidence to establish the permanency of the TMJ, and given her headaches, earaches and pain a reasonable jury could infer she was significantly restricted in the major life activity of speaking. *See* 29 C.F.R. §§1630.2(j)(2)(i), (ii) & (iii). Hermann's doctor opined that phone use would worsen her condition because she used her jaw while talking and the phone struck her joint.

Second, a factual issue exists as to whether United's accommodation was reasonable in that it effectively addressed Hermann's job-related difficulties, *see Vande Zande v. Wisconsin Dep't of Admin.*, 44 F.3d 538 (7th Cir. 1995), 19 MPDLR 189. The evidence suggests that United failed to provide her with a job that did not require phone use and, therefore, failed to provide a reasonable accommodation. Given her supervisor's instructions that Hermann has to "work hand in hand" with the other employee and failure to ensure Hermann that she was not expected to answer the phones when she raised the issue, Hermann could reasonably believe that she had to answer the phone.

However, Hermann's constructive discharge claim fails. Her working conditions did not pose a "grave threat to physical integrity," which is considered intolerable conduct sufficient to establish constructive discharge. *See Simpson v. Borg-Warner Auto., Inc.*, 196 F.3d 873 (7th Cir. 1999). Evidence did not support the EEOC's claim that Hermann experienced "intense" and "excruciating" pain, because she was able to work and perform daily activities despite her pain. Moreover, quitting was not the only way she could leave the intolerable condition. *See Sweeney v. West*, 149 F.3d 550 (7th Cir. 1998). Hermann did not explore other avenues for redress. She resigned without notice after she learned that she would be solely responsible for answering the phones on one day. She did not discuss her concerns with anyone else at United, or request a transfer or leave of absence. United did not have to honor her request to rescind her resignation as an accommodation, because the ADA does not require employers to give an employee a "second chance." *See Seifken v. Village of Arlington Heights*, 65 F.3d 664 (7th Cir. 1995).

Title I; Actual; Pregnancy

A New York federal court ruled that an employer did not violate the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-12117, when it fired an employee for excessive absenteeism, because she failed to show that complications resulting from her pregnancy constituted a disability under the statute. ***Minott v. Port Auth. of N.Y., 116 F. Supp. 2d 513 (S.D.N.Y. 2000).***

In February 1994, Natalie Minott, a probationary police officer for the Port Authority of New York (PA), became pregnant. From November 1993 through April 1995, she was absent due to illness on seven occasions, for a total of 30 workdays. She was absent on five or more occasions during a 12-month period. Absences from May 10 to May 24 1994 were due to a miscarriage. Minott was later terminated because of her absenteeism. She sued under Title I, alleging she had been terminated because of her pregnancy.

The district court granted summary judgment for PA. Minott failed to show that complications from her pregnancy substantially limited a major life activity and, thus, constituted a disability under the ADA. Every court to consider the question of whether pregnancy in and of itself is a disability within the meaning of the ADA has concluded that it is not. *See, e.g., Martinez v. N.B.C., Inc.*, 49 F. Supp. 2d 305 (S.D.N.Y. 1999), 23 MPDLR 519. Only in extremely rare circumstances would complications arising from pregnancy constitute a disability under the ADA.

Title I; Temporary; Qualified; Retaliation; Kidney, Liver Disease

A New York federal court decided a former bus driver was not disabled within the meaning of the Americans with Disabilities

Act, 42 U.S.C. §12101 *et seq.*, because her polycystic kidney and liver disease cause diarrhea and fatigue only two to three days each month during her menstrual cycle. Also, she failed to establish that any reasonable accommodation existed that would allow her to perform her essential job duties, and that a causal connection existed between her filing of a discrimination charge with the Equal Employment Opportunity Commission and her termination to support her retaliation claim. ***Irby v. New York City Transit Auth., 2000 WL 1634413 (S.D.N.Y. Oct. 30, 2000).***

Title I; Perceived; Diabetes

A Louisiana federal court ruled that material issues of fact exist as to whether an employer regarded a former employee's diabetes as substantially limiting the major life activity of working in violation of the American with Disabilities Act Title I, 42 U.S.C. §§12111-12117. ***Price v. Dolphin Servs., Inc., 2000 WL 1789962 (E.D. La. Dec. 5, 2000).***

Title I; Perceived

The Eighth Circuit affirmed *de novo* summary judgment for a railroad, ruling that it did not regard a former employee as disabled in violation of the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.*, because the manager responsible for terminating the employee had no knowledge of his physical condition or history of injuries. ***Stoll v. C.P. Rail Sys., 2000 WL 1673384 (8th Cir. Nov. 8, 2000).***

§501; Actual; Monocular Vision

The Second Circuit affirmed the district court's grant of summary judgment for the United States Postal Service (*see* 68 F. Supp. 2d 147 (N.D.N.Y. 1999), 23 MPDLR 850), finding that a tractor trailer operator failed to show that his monocular vision substantially limited him in the major life activity of working and, thus, constituted a disability under the Rehabilitation Act §501, 29 U.S.C. §791 *et seq.* ***Tone v. United States Postal Serv., 2000 WL 1836764 (2d Cir. Dec. 13, 2000).***

Hiring; Title I; State Law; Perceived; Color Blindness

A California appeals court reversed a jury's finding that a county discriminated against an applicant for a deputy sheriff job who failed a color vision test, because the county did not regard the applicant as disabled under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, or the California Fair Employment and Housing Act (FEHA), Cal. Gov't Code §12900 *et seq.* ***Diffey v. Riverside County Sheriff's Dep't, 101 Cal. Rptr. 2d 353 (Cal. Ct. App. 2000).***

The county refused to hire Teg Diffey as a deputy sheriff. Diffey sued under the ADA Title I, 42 U.S.C. §§12111-12117, and the FEHA for disability-based discrimination. A jury awarded Diffey $307,000. A California trial court ordered a new trial, and both sides appealed.

The appeals court reversed and remanded. There was no substantial evidence to support the jury's findings that the county regarded Diffey's color-deficiency as a disability—an impairment that substantially limits a major life activity. *See Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139 (1999), 23 MPDLR 510. The county regarded Diffey as unqualified for the deputy sheriff job, as color vision was a valid job requirement for the position. Individuals are not substantially limited in the major life activity of working merely because they are prevented from working in a specific, particular job. Rather, they must be significantly restricted from a broad class or range of jobs. *See Bridges v. City of Bossier*, 92 F.3d 329 (5th Cir. 1996), 20 MPDLR 682. Lieutenant Grotefend testified that Diffey could qualify to perform 63 other jobs with the sheriff's department.

Employment: Qualified/Direct Threat

Title I; Estoppel; Stress

A Massachusetts federal court ruled that a former employee with stress was not a qualified individual as defined by the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, because he failed to explain the inconsistency in his statement to the Social Security Administration that he was totally disabled and his statement in his ADA complaint that he could perform his essential job function with reasonable accommodation. ***Quintiliani v. Massachusetts Bay Transp. Auth., 2000 WL 1801841 (D. Mass. Nov. 29, 2000).***

In 1988, Donato Quintiliani was rehired by the Massachusetts Bay Transportation Authority (MBTA) as a special projects coordinator. His primary responsibility was to identify and sell obsolete or redundant parts. In 1993, he had open heart surgery. That same year, Quintiliani was informed that his absenteeism, tardiness, and early departures from work would result in disciplinary action, up to and including termination. In 1994, he requested a job transfer because of the stress caused by his daily commute. MBTA rejected the request, because Quintiliani failed to present documentation of his condition, and he could readily use available public transportation free. In May 1995, Quintiliani was terminated allegedly because his job was eliminated. After his termination, Quintiliani was awarded Social Security disability benefits. He later sued MBTA under Title I, 42 U.S.C. §§12111-12117.

The district court granted MBTA summary judgment. Quintiliani was not a qualified individual within the meaning of the ADA. He failed to explain the apparent contradiction between his statement to the Social Security Administration that he is totally disabled and his statement in his ADA complaint that he is qualified to perform his essential job functions with reasonable accommodation. *See Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795 (1999), 23 MPDLR 532. When asked if he was capable