officials' alleged failure to evaluate a student, who was suspended, for disability in accordance with the procedural requirements of the Rehabilitation Act §504, 29 U.S.C. §794, did not give rise to a claim that the officials discriminated against him solely on the basis of his disability. ***Mahaffey v. Aldrich, 236 F. Supp. 2d 779 (E.D. Mich. 2002).***

The Board of Education of the Waterford School District suspended Joshua from school for contributing objectionable material, including a list of people he wished would die, to "Satan's web page." His parents withdrew him from school and enrolled him in the Pontiac School District. They were then notified that Joshua could re-enroll in Waterford. Joshua graduated from Pontiac, and his parents sued Waterford and the school director for violating §504.

The district court granted summary judgment for the defendants. Their alleged failure to adhere to §504 procedures did not give rise to a claim that Waterford discriminated against Joshua solely on the basis of his disability. "Plaintiff has not directed this Court's attention to any case where a violation of Section 504's procedural protections was held to be discrimination based on disability."

Employment: Disability Defined/ Associational Discrimination

State Law; Scope; Title I; §504; Retaliation; Epilepsy

The Second Circuit reinstated a police officer's state law discrimination claim, noting that the definition of disability under the New York Human Relations Law (NYHRL), N.Y. Exec. Law. §296 *et seq.*, is broader than that under the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-117. Additionally, the court reinstated plaintiff's retaliation claims under the ADA; the NYHRL; and the Rehabilitation Act §504, 29 U.S.C. §794. ***Treglia v. Town of Manlius, 313 F.3d 713 (2d Cir. 2002).***

Joseph Treglia, a road patrol officer for the Town of Manlius Police Department, experienced an epilepsy seizure at home in April 1996 and a second seizure on the way to the hospital. He returned to work several days later and was restricted from driving and operating heavy machinery. In February 1997, the police department promoted two officers to sergeant over Treglia, although he had the highest score on the civil service exam for that position.

He filed a disability discrimination charge with the New York State Division of Human Rights (NYSDHR). Thereafter, he allegedly was subjected to three internal investigations, involuntarily transferred to an administrative position, given a negative performance evaluation after receiving favorable work evaluations in the past, and required to work three different shifts in one month. When Treglia was passed over again for a sergeant position, he filed a second charge with the NYSDHR and the Equal Employment Opportunity Commission (EEOC).

He then sued the Town for violating Title I, §504, and the NYHRL. A New York federal court dismissed the federal and state discrimination claims on the ground that Treglia did not have a protected disability, but refused to dismiss his retaliation claims. *See* 68 F. Supp. 2d 153 (N.D.N.Y. 1999), 24 MPDLR 85. Subsequently, the court granted summary judgment for the Town on the retaliation claims. *See* 181 F. Supp. 2d 83 (N.D.N.Y. 2001), 26 MPDLR 304.

The Second Circuit reinstated Treglia's state law discrimination claim. The district court would have had supplemental jurisdiction, because this claim arose out of the same set of events as Treglia's federal retaliation claim. Moreover, the NYHRL defines disability more broadly than the ADA, in that it does not require a plaintiff to identify a major life activity that is substantially limited by an impairment. "Therefore, the district court could not have properly dismissed the state discrimination claim based solely on the definition of disability it applied to the federal discrimination claim." *See Reeves v. Johnson Controls World Servs., Inc.*, 140 F.3d 144 (2d Cir. 1998), 22 MPDLR 359.

The appeals court also reinstated Treglia's federal and state retaliation claims. *See Weixel v. Board of Educ. of City of N.Y.*, 287 F.3d 138 (2d Cir. 2002), 26 MPDLR 451; *Weissman v. Dawn Joy Fashions, Inc.*, 214 F.3d 224 (2d Cir. 2000), 24 MPDLR 604. Treglia's decision not to appeal his federal discrimination claim did not affect his ability to pursue his federal retaliation claim. He produced evidence creating a factual issue as to whether the Town retaliated against him because of his epilepsy. There was a temporal proximity between the protected activity and the allegedly adverse employment actions.

Treglia presented evidence that the Town's proffered legitimate, nondiscriminatory reasons for each of the allegedly adverse actions—that other officers were more qualified than Treglia, that he had difficulty working with other officers, that internal investigations were initiated by outside parties, and that Treglia's performance reviews were warranted—were a pretext for discrimination. The Chief of Police reportedly had initially praised his work, but had advised him after he had epilepsy seizures that he would not receive the promotion "'now or ever.'" The Chief also reportedly stated that "'if [Treglia] wants to play hard ball, we can swing the bat back and play hard ball too.'" In addition, a performance evaluation prior to Treglia's epileptic

seizures stated that Treglia was "an important team player" who "works well with others."

State Law; Chronic Impairment

The Second Circuit held that a district court's interpretation of Conn. Gen. Stat. §46 a-51(15)—defining physical disability as any chronic physical impairment—to mean any chronic and permanent impairment improperly narrowed the statute's scope from including any impairment that may last a long time to including only those impairments not expected to change. An impairment could be chronic—of long duration or slowly progressive symptoms, *see Gilman Bros. v. Connecticut Comm'n on Human Rights & Opportunities*, 1997 WL 275578 (Conn. Super. Ct. May 13, 1997)—without being permanent—that is, continuing indefinitely without change. ***Caruso v. Siemens Bus. Sys., Inc., 56 Fed. Appx. 536 (2d Cir. 2003).***

State Law; Actual; Qualified; Reasonable Accommodation; Asthma

A North Carolina appeals court upheld a trial court's ruling that an employee with asthma was substantially limited in the major life activities of breathing and working and, thus, was disabled under North Carolina's anti-discrimination law, N.C. Gen. Stat. §168A-3(7a). Also, she was qualified because she could perform her essential job duties if provided with her requested reasonable accommodation—a well-ventilated workplace—and she was not required to suggest additional accommodations. ***Campbell v. North Carolina Dep't of Transp., 575 S.E.2d 54 (N.C. Ct. App. 2003).***

Carolyn Campbell, who has asthma and severe allergies, worked as a processing assistant for the North Carolina Department of Transportation (DOT). She noticed her conditions were aggravated at work, apparently by the dust in open files. When painters began working on her floor, she had a severe asthma attack and was hospitalized for five days. Upon her return to work, she asked to be placed in a well-ventilated environment without excessive dust. DOT denied her request, maintaining that its willingness to provide a HEPA filtration system and facemask constituted a reasonable accommodation. DOT informed Campbell that if she did not return to work by April 8, 1999 she would be deemed to have voluntarily resigned. She did not return.

Campbell sued the DOT under state law, alleging that she was discriminated against due to her asthmatic condition and was unlawfully terminated because of her disability. An administrative law judge (ALJ) found in her favor. The State Personnel Commission rejected the ALJ's recommended decision and found that jurisdiction was lacking, but that even if it existed the DOT had reasonably accommodated Campbell. The trial court reversed the Commission's decision and adopted the ALJ's recommended decision.

The appeals court affirmed the trial court's decision. The trial court was correct in finding the Commission had erred by determining that jurisdiction did not exist. The Commission determined that it lacked jurisdiction because Campbell did not have a disability within the meaning of N.C. Gen. Stat. §168A-3(7a). A "person with a disability" is "any person who has a physical or mental impairment which substantially limits one or more major life activities." *Id.* at §168A-3. Campbell alleged that she has asthma and severe allergies—physical impairments affecting her respiratory system. She further alleged that her asthma and allergies substantially limit her major life activities of breathing and working. Consequently, Campbell properly alleged that she was a "person with a disability" under §168A-3.

The trial court also correctly rejected the Commission's finding that Campbell failed to establish that she was a "qualified person with a disability," which is defined as "a person with a disability who can satisfactorily perform the duties of the job in question, with or without reasonable accommodation." *Id.* at §168A-3(9)a. The term "reasonable accommodation" includes making reasonable physical changes in the workplace for employees with disabilities. *Id.* at §168A-3(10)a.

In this case, Campbell requested a well-ventilated environment without paint fumes, open paper files, or excessive dust. She asserted that with these accommodations she could return to work and perform her job duties in a satisfactory manner. Because these accommodations to her workplace would be classified as "reasonable physical changes in the workplace," Campbell's evidence established that she is a qualified person with a disability.

Finally, the court rejected the DOT's argument that because Campbell did not make additional suggestions for reasonable accommodations, she breached her duty under N.C. Gen. Stat. §168A-4, and thereby lost her right to reasonable accommodation. Once an employee has requested accommodations, the employer "shall investigate whether there are reasonable accommodations that can be made and make reasonable accommodations." *Id.* at §168A-4(b). Thus, the duty of investigating reasonable accommodations falls squarely upon the DOT. Campbell did not abdicate her right to reasonable accommodations either by refusing to accept the DOT's offers or by failing to offer the DOT additional suggestions for what she would consider a reasonable accommodation.

State Law; Actual; Back

A Michigan appeals court determined that a former employee presented sufficient evidence for a jury to find that his back condition substantially limited the major life activities of lifting and moving about and, thus, he was disabled under Michigan's Persons with Disability Civil Rights Act (PWDCRA), Mich. Comp. Laws §37.1101 *et seq.* ***Olsen v. Toyota Technical Ctr., 2002 WL 31958183 (Mich. Ct. App. Dec. 27, 2002).***

Larry Olsen worked as a maintenance technician for Toyota Technical Center. In 1993 and 1994, he re-injured his back at work and had numerous restrictions. After spinal fusion surgery in April 1995, Olsen obtained Social Security benefits. He sued Toyota under the PWDCRA. A jury found that Olsen's back condition substantially limited one or more major life activity, the disability was unrelated to his ability to perform the essential functions of his job, and that Toyota had not provided a reasonable accommodation for Olsen's disability. The trial court denied Toyota's motion for judgment not withstanding the verdict.

The appeals court affirmed, finding that there was sufficient evidence to submit to the jury the question as to whether Olsen fit the statutory definition of a person with a disability. The PWDCRA requires employers to "accommodate a person with a disability," subject to the certain limitations. *See* §37.1201 *et seq.* A person with a disability is one who has "a determinable physical or mental characteristic . . . which may result from disease, injury, congenital condition of birth, or functional disorder" which "substantially limits 1 or more of the major life activities of that individual and is unrelated to the individual's ability to perform the duties of a particular job or position. . . . " *See* §37.1103(d)(i)(A). Significantly, a disability within the meaning of the PWDCRA cannot be related to a plaintiff's ability to perform the specified duties of a job. *See Hatfield v. St. Mary's Med. Ctr.*, 535 N.W.2d 272 (Mich. Ct. App. 1995).

Here, the record clearly showed that Olsen's back injury was a "determinable physical . . . characteristic," which resulted from his "injur[ies]." *See* §37.1103(d)(i). There was a consensus among Olsen's medical doctors that his back injury was real and debilitating. Therefore, his back condition met the first part of the statutory definition under the PWDCRA. Moreover, although Olsen claimed that his injury never prevented him from holding any sort of job during the period that he was employed by Toyota, his injury clearly impaired his ability to lift, bend, push, and move generally. The fact that Olsen had continued to work despite pain and physical limitations did not preclude him from being a person with a disability. Additionally, Olsen's injury impaired all other aspects of his life from his inability to sleep to his dependence on medication, which impaired his memory and his ability to carry on conversations. Thus, a jury could easily infer that it was increasingly difficult for Olsen to perform the tasks assigned to him at Toyota, and that lifting and moving might be major life activities.

State Law; Actual; Perceived; Back

A Texas federal court ruled that a former employee with a back condition failed to show that he was substantially limited in a major life activity or was regarded as such and, thus, was not disabled under the Texas Commission on Human Rights Act (TCHRA), Tex. Labor Code §21.001 *et seq.* ***Pegram v. Honeywell, Inc., 2003 WL 282448 (N.D. Tex. Feb. 5, 2003).***

In December 2000, Ron Pegram, a plant account manager for Honeywell, re-injured his back in a car accident. Honeywell had been trying to convince Pegram to take a service account manager position. Upon Pegram's return to work in January 2001, Pegram was transferred to the service account manager position. He voiced his unhappiness with his new position to his supervisor, who told Pegram that he would look for plant account manager positions for him within the company. On March 12, Honeywell notified Pegram that there were no such positions available, and that Honeywell would be looking for someone to fill Pegram's service account manager position. The next day, Pegram requested short-term disability benefits due to his impending back surgery in April. On March 14, Pegram was terminated. He sued Honeywell for violation of the TCHRA.

The district court granted Honeywell summary judgment on the ground that Pegram was not disabled under the TCHRA. *See* Tex. Labor Code Ann. §21.002. He failed to present evidence—other than his own conclusory allegations—that his back injury substantially impaired his ability to work or perform other major life activities. *See* 29 C. F.R. §1630.2(j)(1). Pegram worked at Honeywell up until the date of his termination. In addition, he failed to present any evidence about the duration or expected duration of his impairment or its long-term or expected impact.

Nor did Honeywell regard Pegram as having a substantially limiting impairment. *See* Tex. Labor Code Ann. §21.002(6). Pegram could not claim that Honeywell had mistakenly regarded his impairment as substantially limiting, because he himself had alleged that it was. Even if Honeywell believed that Pegram's back condition would affect his ability to perform his job, the inability to perform a single, particular job does not constitute a substantial limitation on the major activity of working. *See Deas v. River West, L. P.*, 152 F.3d 471, 481 (5th Cir. 1998), 22 MPDLR 744. As previously mentioned, Pegram

worked up until the time of his termination.

State Law; Actual; Perceived; Back

An Ohio appeals court held that a former employee with back pain was not "handicapped" under former Ohio Rev. Code §4112.01(A)(13), which defined "handicap" as "a physical or mental impairment that substantially limits one or more major life activities . . . ; a record of physical or mental impairment; or being regarded as having a physical of mental impairment." Plaintiff failed to present evidence that she could not participate in a major life activity and admitted that she was able to drive, occasionally walk home from work, climb stairs with difficulty, and bathe. Her medical restriction—requiring her to rise from her chair every one or two hours—did not establish that she was substantially limited in the major life activity of working. Even if plaintiff were limited in her ability to perform her job as a telephone operator, she was not significantly restricted in her ability to perform either a class of jobs or a broad range of jobs in various classes. *See Columbus Civil Serv. Comm. v. McGlone*, 697 N.E.2d 204 (Ohio Sup. Ct. 1998). Further, plaintiff failed to show that her employer perceived her alleged inability to meet the operator's physical requirements as foreclosing her from a class of jobs. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), 23 MPDLR 510. ***Hart v. Columbus Dispatch/ Dispatch Printing Co., 2002 WL 31819705 (Ohio Ct. App. Dec. 17, 2002).***

Title I; Actual; Record; Perceived; Diabetes; FMLA; Successor Employer

A Maine U.S. Magistrate found that a former employee whose non-insulin dependent diabetes triggered a leg circulatory problem was not disabled under the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-117, or the Maine Human Rights Act (MHRA), 5 Me. Rev. Stat. Ann. §4551 *et seq.* However, a factual issue existed as to whether he was employed for 12 months by a successor in interest of the employer and, thus, entitled to medical leave under the Family and Medical Leave Act (FMLA), 29 U.S.C. §2601 *et seq.* ***Carlson v. Rent-A-Ctr., Inc., 237 F. Supp. 2d 114 (D. Me. 2002).***

On August 23, 2000, Bernard Carlson, an account manager for Rent-A-Center (RAC), requested FMLA leave due to an onset of gangrene in his feet. RAC notified Carlson that he was ineligible for leave because he had not worked for RAC for the required 12 months. Carlson was out of work for seven weeks. Upon his return on October 14, RAC ordered him, as a collections department employee, to deliver and repossess merchandise. Carlson obtained a note from his doctor stating that he should be "on light duty indefinitely" and should not be on his feet more than 15 minutes at a time, lift objects over 10 pounds, or do outdoor work. RAC fired Carlson on the ground that he could not perform the essential functions of an account manager. Carlson sued RAC under the ADA, MHRA, and FMLA.

The Magistrate recommended that summary judgment be granted to RAC. First, Carlson was not disabled under the ADA or the MHRA. *See* 42 U.S.C. §12102(2). *See* 42 U.S.C. §12102(2)(A); *see also Bragdon v. Abbott*, 524 U.S. 624 (1998), 22 MPDLR 449. Although Carlson was limited to walking about a mile a day, his walking impairment was not severe when measured against the walking abilities of the average person in the general population. *See Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002), 26 MPDLR 73. Carlson did not show that RAC misclassified or perceived him to have an entirely different impairment than the walking impediments caused by the artery blockage in his legs. *See Santiago Clemente v. Executive Airlines, Inc.*, 213 F.3d 25 (1st Cir. 2000), 24 MPDLR 780. Nor did RAC regard Carlson as having a substantially limiting impairment. *See* 42 U.S.C. §12102(2)(C). Carlson presented evidence that RAC refused to grant him further medical leave after he stated that he could not perform all of his duties as an account manager. "However, . . . the fact that the employer is aware of health limitations does not mean that it thought the plaintiff to be substantially impaired." *See Lyons v. La. Pacific Corp.*, 217 F. Supp. 2d 171, 179 (D. Me. 2002), 26 MPDLR 1012.

Second, a factual issue existed as to whether Carlson was eligible for FMLA leave. In October 1996, he was hired by Wilson Enterprises, a RAC franchisee that operated multiple RAC stores in Maine. On June 27, 2000, Wilson sold the assets of the RAC franchisee to RAC, and on that date, Carlson was employed by RAC. According to RAC, as a summer 2000 new hire, Carlson had not worked for 12 months, and therefore was not entitled to FMLA leave under 29 U.S.C. §2602(A)(1). However, the FMLA provides that the term "employer" includes "any successor in interest of an employer." *See* 29 U.S.C. §2611(a)(4)(A)(ii)(II). A factual issue existed as to whether RAC was a successor to Wilson, so that Carlson's entitlement to FMLA leave would have been the same as if his employment by Wilson and RAC was "continuous employment by a single employer." *See* 29 C.F.R. §825.107(c).

Title I; Actual; Perceived; Employer Defined; Retaliation; Anxiety

A Maine federal court determined that a former employee with depression, anxiety, and a panic disorder

did not have a protected disability under the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-117, or the Maine Human Rights Act (MHRA), 5 Me. Rev. Stat. Ann. §4551 *et seq.*, but could bring his retaliation claims under both statutes. Also, the employee could not sue an alleged *de facto* employer under an "integrated enterprise" or "sham" theory. ***Johnson v. Spencer Press of Me., 2003 WL 169751 (D. Me. Jan. 24, 2003).***

Albert Johnson worked in the housekeeping/janitorial department of Spencer Press of Maine (SPM) from 1991 through May 2000. In June 1999, he was taken by ambulance to a hospital while at work after his supervisor screamed at him. Johnson remained off work for four weeks. He reportedly asked his supervisor for an accommodation for his depression, anxiety, and panic disorder—to refrain from treating him in an uncivil manner. His supervisor refused, and in April 2000, Johnson resigned. He then sued SPM and Spencer Press, Inc., (SPI) for disability discrimination and unlawful retaliation in violation of the ADA and MHRA.

The district court granted summary judgment for SPI. As to the "integrated-enterprise theory," there was no evidence that SPI controlled SPM's labor relations. SPI was merely a "passive parent corporation that is totally uninvolved in the day-to-day business and labor operations of its subsidiary." Nor was SPI Johnson's employer on a corporate "sham" theory, or "alter ego" theory. While SPI and SPM shared common ownership and common board membership and there was some degree of interrelation of operations, Johnson failed to show "pervasive control" of SPI by SPM or vice versa. That SPI transferred assets to SPM without consideration, and the companies' filed consolidated tax returns and joint financial statements did not amount to "confused intermingling" of assets.

The court also granted summary judgment for SPM on Johnson's disability discrimination claims, holding that Johnson had no legally protected disability under the ADA or the MHRA. *See* 42 U.S.C. §12102(2). His mental impairments did not substantially limit the major life activities of working and interacting with others. *See* 29 C.F.R. §1630.2(j); *see also Carroll v. Xerox Corp.*, 294 F.3d 231(1st Cir. 2002), 26 MPDLR 829. There was no evidence in April 2000 that Johnson's mental impairments were expected to have a long-term impact on his ability to work or to interact with others. Following the June 1999 time-off from work, Johnson resumed his job with SPM and performed it adequately until he resigned. After his termination, he immediately obtained full-time employment with another company. The court rejected Johnson's argument that SPM regarded him as disabled. Although Johnson's supervisor was aware of and mocked his mental impairments, there was no evidence that the supervisor regarded Johnson's impairment as substantially limiting a major life activity.

However, the court denied SPM summary judgment with respect to Johnson's ADA and MHRA retaliation claims. Johnson alleged that his former supervisor threatened him with violence in retaliation for his filing of the discrimination claims. "One can imagine that a plaintiff in these circumstances could prove that his former supervisor's conduct exacerbated his condition such as to render it more difficult for him to work."

State Law; Adverse Action; Perceived; Knee; Pretext

A Maine federal court decided that factual issues existed under the Maine Human Rights Act (MHRA), 5 Me. Rev. Stat. §4551 *et seq.*, as to whether (1) a former employee with a knee injury suffered an adverse employment action, (2) he was disabled, and (3) the employer's proffered reason for eliminating the employee's job was a pretext for disability discrimination. ***Webber v. International Paper Co., 239 F. Supp. 2d 88 (D. Me. 2002).***

Gary Webber worked as a project engineer for International Paper (IP). In February 2001, he underwent knee replacement surgery and was restricted from walking and standing more than 50 percent of the time, lifting more than 25 pounds, squatting, and kneeling. IP accommodated Webber by allowing him to work four hours per day, four days per week; installing a stairway lift chair for him; and moving his office from the third to the first floor. In June, IP underwent a reduction-in-force. Webber was terminated on July 15 due to the lesser quality and quantity of his work. On July 20, 2001, IP granted Webber long-term disability. In the fall, IP offered Webber another job, which he declined. He sued IP under the MHRA.

The district court denied IP's motion for summary judgment. A factual issue existed as to whether Webber suffered an adverse employment action. IP eliminated Webber's position, told him he would never work at IP again, and escorted him from the premises. As a consequence of the reduction-in-force, he lost his job, his wages, and several employee benefits. The fact that IP made a subsequent job offer to Webber did not mean that the adverse employment action did not occur. A fact finder could conclude that the offer was a "belated effort to make up for prior, discriminatory conduct."

Another factual issue existed as to whether IP regarded Webber as substantially limited in the major life activity of walking and, thus, as disabled under the MHRA. Webber pointed to the workplace accommodations provided by IP and its grant of long-term disability benefits.

Finally, a factual issue existed as to whether IP's proffered reasons for eliminating Webber's position—increased efficiency, Webber's alleged lack of skills to run major projects, and his lack of an engineering degree—were pretextual. Webber presented evidence that his lack of a degree had not been an issue with respect to his placement in the project engineer job, complex projects were outsourced to private engineering firms, his performance reviews were positive, his competence was not called into question while he was employed by IP, and IP retained an employee who had been the subject of numerous internal complaints.

§504; Perceived; MI

The Second Circuit determined that a former employee with suicidal tendencies provided sufficient evidence that her employer regarded her as substantially limited in the major life activity of caring for herself and, thus, as disabled under the Rehabilitation Act §504, 29 U.S.C. §794. ***Peters v. Baldwin Union Free Sch. Dist., 320 F.3d 164 (2d Cir. 2003).***

On March 7, 1998, Christina Peters, a guidance counselor for the Baldwin Union Free School District, jokingly expressed to a co-worker her desire to commit suicide, which came to the attention of the school psychologist. Peters was reassigned to administrative duties until it was clear that she would not commit suicide. At Baldwin's request, Peters went to a psychiatrist, who cleared her to return to work. However, Baldwin required that she see two more doctors. Both reported that she was fit to return to her regular counseling job. On April 8, Peters was allowed to return to her regular work as a counselor. However, she was not recommended for tenure, because Baldwin reportedly was notified that Peters had altered or falsified school documents to cover up deficiencies in her work. Peters was terminated on September 25, and sued Baldwin under the Rehabilitation Act. The district court directed a verdict in favor of Baldwin.

The Second Circuit vacated and remanded, finding that Peters provided sufficient evidence that Baldwin perceived her as disabled. *See* 29 U.S.C. §705(20)(B); *Bragdon v. Abbott*, 524 U.S. 624, 630-31 (1998), 22 MPDLR 449. The district court found that Peters failed to show that Baldwin perceived her mental illness as substantially limiting her working in a broad range of jobs. However, whether Peters was substantially limited in the major life activity of working was of no consequence, because she had presented evidence that she was substantially limited in the major life activity of caring for herself. This major life activity encompasses normal activities of daily living. *See Ryan v. Grae & Rybicki, P.C.*, 135 F.3d 867, 871 (2d Cir. 1998), 22 MPDLR 195. A mental illness that impels one to suicide clearly falls within the inability to care for oneself.

Title I; Actual; Perceived; Qualified; Pretext; PTSD

An Oregon federal court held that factual issues existed in an Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-117, case as to whether (1) a former employee's post-traumatic stress disorder (PTSD) constituted a covered disability under the ADA, (2) he was qualified for his job, and (3) he was terminated due to his disability. ***O'Riley v. United States Bakery, 2002 WL 31974407 (D. Or. Dec. 12, 2003).***

In November 1999, John O'Riley, a route sales representative for United States Bakery (USB), requested leave for inpatient treatment for his PTSD. USB told him he would be terminated if he took time off, but he took leave anyway. When O'Riley returned to work in December, he was not fired, but instead was assigned a new route. In February 2000, USB treated calls from customers, with whom O'Riley had discussed his suicidal ideations with, as complaints and placed him on a "Last Chance Agreement," which provided that O'Riley would be terminated if he continued such discussions. On June 13, USB terminated O'Riley for breaching the agreement. He sued USB under Title I.

The district court denied USB summary judgment. A factual issue existed as to whether O'Riley was disabled under the ADA. *See* 42 U.S.C. §12102(2). He contended that his PTSD substantially limited his ability to cope with stress and control his anger, as well as his interpersonal relationships, cognitive abilities, and sleep. "Whether these impairments substantially limit a major life activity is a factual issue." A factual issue also existed as to whether USB regarded O'Riley as disabled. USB prohibited O'Riley from speaking with co-workers, asked co-workers and customers to report anything out of the ordinary concerning O'Riley, expressed concerns for his safety, and restricted him from discussing suicide. Additionally, his supervisors advised O'Riley that he was a "problem child" and that "people like you scare people like us."

A further factual issue existed as to whether O'Riley was a qualified individual under the ADA. He presented evidence that he was satisfactorily performing his job until he began experiencing discrimination. O'Riley was promoted in early June 2000, and there was no evidence that he was incapable of delivering products. USB claimed that discussing suicide with customers is wholly at odds with the essential functions involved with customer service. O'Riley responded that the allegation that he discussed suicide with customers was overturned at a union grievance hearing.

Finally, a factual issue existed as to whether USB terminated O'Riley because of his disability. After O'Riley returned from inpatient treatment, his supervisor instructed co-workers not to speak with him, to keep an eye on him, and to report anything unusual. The supervisor also advised customers on O'Riley's route to report any wrongdoing. At the time O'Riley was fired, his supervisor stated that he had "busted bigger jerks" than O'Riley, and that he did not collect facts, but was "out to terminate" O'Riley.

Title I; Perceived; Harassment; Adverse Action; Hepatitis C

The Fifth Circuit dismissed a former employee's disability-based discrimination and harassment claims under the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-117, finding that she failed to show that her employer regarded her as disabled due to her hepatitis C. Even if she were disabled, the employer's return-to-work conditions did not rise to the level of actionable disability-based harassment, and she failed to demonstrate that she had been subject to a disability-based adverse employment action. ***Gowesky v. Singing River Hosp. Sys., 321 F.3d 503 (5th Cir. 2003).***

In February 1997, while treating a patient in the emergency room of the Ocean Springs Hospital—owned by the Singing River Hospital System (SRHS)—Dr. Brenda Gowesky was accidentally exposed to hepatitis C. In March, she informed the SRHS administrator that she tested positive for hepatitis C. She ceased active work at the hospital several days later, but maintained staff privileges and continued to attend monthly staff meetings for the next two years. During this period Gowesky underwent chemotherapy.

In February 1999, she informed the hospital administrator that the virus had gone into remission and that she wanted to return to work. However, SRHS engaged in corporate restructuring, and the emergency room staffing was transferred to the Emergency Room Group (ERG). SRHS gave each of the emergency room physicians in its employ, including Gowesky, a 60-day termination notice and promised their future employment with ERG. Gowesky did not return to work. She sued under Title I, and the district court granted summary judgment for SRHS.

The Fifth Circuit affirmed, finding that SRHS did not regard Gowesky as disabled. *See* 42 U.S.C. §12102(2)(C). Gowesky claimed that when she requested to return to work, the hospital administrator advised her that he was going to check with the hospital's attorneys to see whether she could work in the emergency department with hepatitis C, and that she needed a full medical release from her doctors, clearance from hospital physicians, weekly blood samples, and refresher courses. Gowesky also claimed that her supervisor allegedly threatened her and told her that if she returned to work, she would have to guarantee there would be no problems, that she would be able to do the work, and that she would not be infectious. The supervisor reportedly further questioned Gowesky on whether she knew of any other emergency room physicians with hepatitis C. "At most, the comments cited by Gowesky question her fitness to practice emergency room medicine, a professional calling in which routine exposure to blood and bodily fluids might allow the hepatitis C virus to spread. The supervisors' remarks, no matter how uninformed, do not suggest that Gowesky was otherwise unable to work as a doctor in a less-exposed or -exposing environment." Furthermore, SRHS kept reassigning Gowesky to an emergency room schedule and never limited her job duties or hindered her return to the full range of duties. "It was Gowesky who repeatedly declined to return to work."

Also, although the Fifth Circuit has previously recognized a cause of action for disability-based workplace harassment under the ADA, *see Flowers v. South Reg'l Physician Servs.*, 247 F.3d 229 (5th Cir. 2001), 26 MPDLR 412, the specific remarks by the hospital administrator and supervisor were not sufficient evidence to support such a claim. The return-to-work conditions imposed by the hospital administrator and supervisor—that Gowesky not present a risk of infection to employees and patients, reassure employees and patients of her continuing non-infectious status, and be fully capable of resuming her duties—were "eminently reasonable." Even if they were unreasonable, ". . . Gowesky has failed to present any authority, and we have located none, for the proposition that an unreasonable condition alone constitutes 'harassment' under the ADA. . . ." In addition, none of the alleged harassment occurred when Gowesky was actually working, but rather occurred via telephone or in writing. Moreover, the comments did not reach the level of severity or pervasiveness that was required to sustain a hostile environment claim.

As to Gowesky's discrimination claim, she failed to demonstrate that she suffered a disability-based adverse employment action. SRHS's decision not to extend an interim contract stemmed not from Gowesky's disability, but rather from her repeated failures to return to work.

Title I; Actual; Retaliation; Adverse Action; LD; Sleep; Heart

The Tenth Circuit held that an employee with mild to moderate learning disabilities, adult attention deficit disorder, obstructive sleep apnea, and pulmonary

disease was not was not substantially limited in any major life activities and, thus, was not disabled under the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-117. Also, her retaliation claimed failed because she did not suffer an adverse employment action. ***McCrary v. Aurora Pub. Schs., 2003 WL 191433 (10th Cir. Jan. 29, 2003).***

Karen McCrary established that she has some deficits in her ability to think and to learn compared to what would be expected from someone with her strengths, but her deficits were within the average range and did not significantly restrict her compared to the average person in the general population. *See* 29 C.F.R. §1630.2(j). She was not substantially restricted in the major life activity of working—significantly restricted from working in a class of jobs or a broad range of jobs in various classes. *Id.* at §1630.2(j)(3)(i). She only alleged a substantial limitation in her ability to continue working as a teacher. The court declined to determine whether she has limitations in concentration, because it is not, by itself, a major life activity. *See Pack v. K-Mart*, 166 F.3d 1300 (10th Cir. 1999), 23 MPDLR 195.

McCrary also failed to establish that her sleep disorders were sufficiently severe, long-term, or of permanent impact to substantially limit her ability to sleep. *See* 29 C.F.R. §1630.2(j)(2). A sleep study revealed that increasing the amount of oxygen pressure on her CPAP machine would ameliorate her symptoms. She also failed to show that her ability to breathe was substantially limited, because her use of supplemental oxygen while awake ameliorated any limitations on her breathing. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), 23 MPDLR 510.

Furthermore, her ADA retaliation claim failed, because her proposed transfer to another position without a reduction in pay, benefits, or seniority did not constitute an adverse employment action. *See Selenke v. Medical Imaging of Colo.*, 248 F.3d 1249 (10th Cir. 2001), 25 MPDLR 618.

Title I; Actual; Sleep Apnea

An Illinois federal court determined that an employee with sleep apnea failed to show that he was substantially limited in the major life activities of sleeping and breathing and, thus, was not disabled under the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-117. ***Wendt v. Village of Evergreen Park, 2003 WL 223443 (N.D. Ill. Jan. 31, 2003).***

In May 1999, Winfield Wendt, a police lieutenant for the Village of Evergreen Park, notified the police chief that, due to sleep apnea, he could not work a permanent midnight shift. He submitted a doctor's report recommending that he work the day shift. The Village requested another exam, which confirmed the sleep apnea diagnosis and recommended day work. Nevertheless, Wendt was assigned to the midnight shift. He sued under Title I.

The district court granted summary judgment for Evergreen Park on the ground that Wendt was not disabled under the ADA. *See* 42 U.S.C. §12102(2); *see also Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002), 26 MPDLR 73. He failed to show that he was substantially limited in the major life activities of breathing and sleeping. *See* 29 C.F.R. §1630.2(j)(1)(i). The medical evidence indicated that Wendt's sleep apnea had been well controlled by using the nasal Constant Positive Air Pressure (CPAP) device, which forces air into a tube that hooks into a mask placed over a person's head while sleeping. Wendt himself described the CPAP device as being effective 80 percent of the time. While his doctors stated that a transfer to the midnight shift would aggravate his condition, no conclusive findings as to whether the sleep apnea actually unduly affected his sleeping or breathing was presented. Moreover, prior to working the midnight shift, Wendt worked a rotating shift, which included a midnight shift for 28 days every third month, but never complained that he was disabled.

Title I; Actual; Back; Shoulder; FMLA

A Kentucky federal court held that a former employee with back and shoulder injuries who failed to show that she was substantially limited in the major life activity of performing manual tasks was not disabled under the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-117. However, a factual issue existed as to whether the employer violated the Family and Medical Leave Act (FMLA), 29 U.S.C. §2601 *et seq.*, by transferring her job duties, not hiring her for another position, and terminating her. ***English v. Baptist Healthcare Sys., Inc., 2003 WL 158705 (W.D. Ky. Jan. 22, 2003).***

Katie English worked at Baptist Healthcare's (BH) radiology department hanging X-rays and faxing radiology reports. In October 1999, English took three weeks of FMLA leave to care for her son. On the day she returned to work, she requested and was granted the next day off to take her son to the doctor.

In February 2000, after BH obtained a new machine that reduced English's duties, BH transferred her to the mammography unit of the hospital. In April, BH transferred English to a transporter position at her previous rate of pay. When English advised BH that she could not perform this job because of her inability to lift, she was advised that she could apply for another job prior to the effective date of the transfer.

English took vacation, and on April 27 submitted a doctor's note that she would be unable to work until May 18 due to work-related anxiety. On May 12, English submitted a note from the same doctor that she could not lift 20 pounds or transport patients due to back and shoulder injuries. That same day, English requested and was granted FMLA leave until May 18.

English returned to work and applied for six jobs, including mail processor and office specialist, but was not hired. In November, BH terminated English on the ground that her leave had expired and she had not obtained another job. English sued BH under Title I and the FMLA.

The district court granted summary judgment for BH on English's ADA claim on the ground that she was not disabled under the statute. *See* 42 U.S.C. §12102(2). English contended that her back and shoulder injuries substantially limited her ability to engage in the major life activity of performing manual tasks. Her doctor reported only that an impairment like English's could possibly prevent her from engaging in activities such as washing dishes, cleaning, vacuuming, yard work, gardening, and painting. English did not allege that her impairment actually prevented her from engaging in these activities. She admitted that she could care for herself and her home despite her injuries, and she failed to present evidence that her injuries actually prevented her from performing essential manual tasks that were central to the lives of most people. *See Toyota Motor, Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002), 26 MPDLR 73.

However, the court denied summary judgment with respect to English's FMLA claim. First, BH's transfer of English to patient transport, refusal to hire English for the mail processor and office specialist jobs, and decision to terminate English constituted adverse employment actions. Second, English presented evidence of a causal link between her use of FMLA leave and these adverse actions. This evidence included statements by her supervisor regarding English's need to take her son to the doctor and her FMLA-protected absences, as well as the supervisor's need to know English's whereabouts at all times. There was also evidence that BH's articulated legitimate reasons for not hiring English for the mail processor job—her lack of qualifications— and the office specialist job—English allegedly never informed BH of her qualifications for this position—were pretextual.

Hiring; Title I; Perceived; Qualified; Direct Threat; Back, Shoulder, Wrist Injuries

A Kansas federal court held that a job applicant with back, shoulder, and wrist injuries was not regarded as substantially limited in working and, thus, was not disabled under the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-117. Also, he could not perform the essential functions of the job he applied for, with or without reasonable accommodations, and doing so would have posed a direct threat to his health. ***Collins v. Raytheon Aircraft Co., 2003 WL 1925553 (D. Kan. Jan. 16, 2003).***

Raytheon Aircraft offered Robert Collins a job as an aircraft line assembler, conditioned on the results of a physical exam. It revealed that Collins was unable to bend over and touch his toes due to his back and knee impairments, had bilateral moderate median nerve neuropathies in both wrists, and had injured his shoulder. A Raytheon doctor restricted Collins from lifting more than 25 pounds; bending forward; using heavy equipment; repetitive forceful grasping, squeezing, and pinching; and placing his wrists, hands, and shoulders in awkward positions. Raytheon rescinded the offer, but advised Collins that he could be considered for other job openings. He sued Raytheon under Title I.

The district court granted summary judgment for Raytheon. First, Collins failed to establish that he was regarded as disabled. *See* 42 U.S.C. §12102(2); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), 23 MPDLR 510. He failed to show that Raytheon considered his alleged impairments as precluding him from performing a class of jobs or a broad range of jobs in various classes. *See* 29 C.F.R. §1630.2(j)(3)(i). Raytheon considered Collins unable to perform the single job of aircraft line assembler and did not review his ability to perform other jobs.

Second, Collins had not shown that he was a qualified individual under the ADA. *See* 42 U.S.C. §12111(8). He could not perform the essential functions of the aircraft line assembler with or without reasonable accommodations. Further, working in the aircraft line assembler position would have posed a threat to Collins' health. *See* 42 U.S.C. §12112(b)(6); *see also Chevron USA v. Echazabal*, 536 U.S. 73 (2002), 26 MPDLR 588. The potential harm from additional injury was substantial and severe. Collins faced increased risk of additional spinal damage due to the cramped working conditions required by the job.

Hiring; Title I; Perceived; Medical Exam; Shoulder Injury

A North Carolina federal court held that an employer did not regard a police officer applicant whose shoulder injury had healed as disabled under the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-117, or violate the ADA by conducting a pre-employment medical exam. ***Terry v. City of Greensboro, 2003 WL 151851 (M.D.N.C. Jan. 17, 2003).***

Michael Terry, a police officer for the City of Greensboro, dislocated his shoulder. After recovering from his injury, he resigned. The city subsequently offered Terry a police officer job, conditioned on the results of a medical exam. Terry's return to the police department was delayed for three months. He was eventually re-employed not as a police officer, but as telephone response technician. Terry sued the city under Title I.

The district court granted the city's motion to dismiss on the ground that the city did not regard Terry as disabled under the ADA. *See* 42 U.S.C. §12102(2)(C); *see also Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), 23 MPDLR 510; *Pollard v. High's of Baltimore, Inc.*, 281 F.3d 462 (4th Cir. 2002), 26 MPDLR 477. Terry was not barred from working in the police department generally, and the police department had rehired Terry with full knowledge of his prior shoulder injury. The city's placement of Terry in a telephone response technician position was insufficient to show that it regarded Terry as substantially limited in his ability to work. "Because the telephone response technician job is one within the [Police] Department, Plaintiff is not precluded from a broad range of jobs." *See Sutton.*

The city's requirement that Terry take a medical examination before returning to work, without more, was also insufficient to establish that it regarded him as disabled. Mental and physical exams have been upheld as preconditions to returning to work if the request is supported by a reasonable belief about the plaintiff's capabilities and the exam relates to the essential functions of the job. *See Nelson v. Thomasville Furniture Indus.*, 2002 WL 416374 (M.D.N.C. Jan. 17, 2002); *Tice v. Centre Area Transp. Auth.*, 247 F.3d 506 (3d Cir. 2001), 25 MPDLR 589; *Sullivan v. River Valley Sch. Dist.*, 197 F.3d 804 (6th Cir. 1999), 24 MPDLR 86; *Cody v. CIGNA Healthcare of St. Louis, Inc.*, 139 F.3d 595 (8th Cir. 1998), 22 MPDLR 332; *Porter v. United States Alumoweld Co.*, 125 F.3d 243 (4th Cir. 1997), 21 MPDLR 760. Terry had not argued that the medical exam was conducted outside the boundaries of his prior shoulder injury, and he failed to show that the city lacked a reasonable basis for requiring a medical exam given his prior shoulder injury. "Rather, an injury to Plaintiff's shoulder, which he admits affected his ability to lift, to hold and to push, among other activities involving the use of his upper extremities, would certainly be related to the essential functions of a police officer." *See* 42 U.S.C. §12112(d)(4); 29 C.F.R. §1630.14(c).

Title I; Actual; Qualified; Estoppel; Pretext; Back

An Indiana federal court held that a former employee with a back injury was not disabled under the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-117; could not perform his essential job functions, even with reasonable accommodation; failed to explain the apparent inconsistency between his qualification for Social Security disability benefits and his alleged status as a qualified person with a disability under the ADA; and did not show that his employer's legitimate, nondiscriminatory reason for terminating him—poor job performance—was a pretext for discrimination. ***Varga v. Clark Foodserv. of Ind., 240 F. Supp. 2d 851 (N.D. Ind. 2003).***

Clark Foodservice of Indiana hired John Varga as a night shift clerk in August 2000. The company accommodated Varga's back injury by providing him with a stool to use while he performed his duties and assistance from other co-workers. Clark later terminated Varga for poor performance, and he sued under Title I.

The district court granted summary judgment for Clark. Varga was not disabled under the ADA, for he failed to show his back condition substantially limited the major life activities of working and walking. *See* 42 U.S.C. §12102(2); *see also Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002), 26 MPDLR 73. "[A]n inability to perform a particular job for a particular employer is not sufficient to establish a substantial limitation on the ability to work for purposes of being qualified as disabled under the ADA; rather the impairment must substantially limit employment generally." *See Heimann v. Roadway Express*, 228 F. Supp. 2d 866 (N.D. Ill. 2002), 26 MPDLR 1013. Varga had worked at several different jobs after the onset of his condition and admitted that there were a number of jobs he could perform. Therefore, he was not significantly restricted in his ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities. *See* 29 C.F.R. §1630.2(j)(3)(i). Regarding Varga's ability to walk, he did not show that his back injury was a substantial burden on this major life activity. Varga admitted that he could mow grass while walking behind and pushing a lawn mower and walk distances up to a mile.

Varga also failed to show that he was a qualified individual under the ADA. Even with Clark's accommodation, Varga was unable to perform his essential job functions. He admitted that he had difficulty adapting to an eight-hour workday and had made mistakes in his duties that were unrelated to his condition. Moreover, Varga failed to explain the apparent inconsistency between his statement that he was totally disabled for Social Security purposes and his alleged status as a qualified person with a disability under the ADA. *See Cleveland v. Policy Mgmt. Sys. Corp.*, 526

U.S. 795 (1999), 23 MPDLR 532. For 19 years, Varga's qualification for Social Security disability benefits had been upheld. He admitted that he had been careful not to take employment where his earnings would jeopardize his receipt of benefits.

Finally, Varga failed to show that Clark's reason for terminating him was a pretext for disability discrimination. Clark presented evidence that it has terminated many of its employees during their probationary periods for poor job performance.

Title I; Perceived; Retaliation; Adverse Action; Back

An Indiana federal court held that a former employee with degenerative disc disease who failed to show that her employer regarded her as unable to perform central daily life functions or to work in a broad class of jobs was not disabled under the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-117. Also, her retaliation claim failed due to the lack of an adverse employment action. ***Gilbert v. Indianapolis Pub. Schs., Dep't of Transp., 2002 WL 31968235 (S.D. Ind. Dec. 5, 2002).***

In 1991, Marietta Gilbert, a school bus monitor for the Indianapolis Public Schools (IPS), was diagnosed with degenerative disc disease and wore a cervical neck collar on an as-needed basis. In May 1999, IPS requested that Gilbert's doctor submit a medical form clearing her to work, which he did. IPS repeatedly requested more information. As a result, Gilbert was not allowed to return to work until August. Gilbert sued IPS under Title I.

The district court granted IPS summary judgment. First, Gilbert was not disabled under the ADA. She failed to show that IPS regarded her back condition as substantially limiting her ability to perform a broad class of jobs, *see Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 492 (1999), 23 MPDLR 510, or the central functions of daily life, *see Toyota Motor Mfg., Ky., Inc. v. Williams*, 122 S. Ct. 681 (2002), 26 MPDLR 73. There was no indication that IPS believed that Gilbert's use of a cervical collar had any broader impact on her functional capabilities beyond what was required to accomplish her specific job.

Second, Gilbert failed to demonstrate that she had suffered an adverse employment action. Gilbert's transfer was lateral; she did not allege any reduction in salary or in fringe or retirement benefits. *See Stutler v. Illinois Dep't of Corr.*, 263 F.3d 698, 703 (7th Cir. 2001); *Place v. Abbott Lab., Inc.*, 215 F.3d 803, 810 (7th Cir. 2002).

Title I; Actual; Lifting Restriction

An Idaho federal court ruled that an employee failed to show that her 25-pound lifting restriction substantially limited a major life activity and, thus, was not disabled under the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-117. ***Mickelsen v. Albertson's, Inc., 226 F. Supp. 2d 1238 (D. Idaho 2002).***

When Marigrace Mickelsen, a receiving clerk for Albertson's, Inc., was released to return to work following her leave of absence for back surgery, she was restricted from lifting more than 25 pounds. Her employer informed her that one warehouse clerk position had been eliminated, and that there were no available warehouse clerical jobs that fit within her restriction. Mickelsen applied for an open position as Personnel Assistant, but was not selected. She was subsequently terminated, and sued Albertson's under Title I.

The district court granted summary judgment for Albertson's, finding that Mickelsen was not disabled under the ADA—that is, has a physical impairment that substantially limits a major life activity. *See* 42 U.S.C. §12101(2). She failed to show that she was unable to perform activities that were centrally important to most people's daily lives, or that the impairment was permanent or had a long-term impact. *See Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002), 26 MPDLR 73. Nor was Mickelsen substantially limited in working, for she did not establish that she was unable to work in a broad range of jobs. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 491 (1999), 23 MPDLR 510. In fact, following her termination she performed temporary work for various employers.

Title I; Actual; Qualified; Pretext; Depression

An Illinois federal court held that a former employee with depression failed to show she was substantially limited in the major life activity of sleeping and, thus, was not disabled under the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-117. Also, she was not a qualified individual under the ADA, because she could not get along with co-workers. Finally, the employer's legitimate, nondiscriminatory reasons for terminating her—her demeanor and conflicts with co-workers—were not pretextual. ***Grevas v. Village of Oak Park, 235 F. Supp. 2d (N.D. Ill. 2002).***

In August 1999, Kathryn Grevas began work as an Executive Secretary in the Village of Oak Park Human Resources department. She exhibited incompetence in many work areas, including a lack of timeliness in executing certain forms and inefficient prioritization of office tasks. She also experienced conflicts with her co-workers. In January 2001, the Village terminated Grevas, and she sued under Title I.

The district court granted summary judgment for the Village. Grevas was not disabled under the ADA,

because she failed to show that her depression substantially limited her in the major life activity of sleeping. *See* 42 U.S.C. §12102(2). Grevas' assertion that she had chronic insomnia and experienced little more than an hour or two of sleep every three to four days was unsubstantiated. *See Stein v. Ashcroft*, 284 F.3d 721 (7th Cir. 2002), 26 MPDLR 492. In fact, a psychiatric evaluation performed in April 2002 stated that she "sometimes sleeps too much, ten or twelve hours." Grevas admitted that she often fell asleep with the use of medication.

Although she presented 15 pages of medical records dating from 1996 to 2001 that contained five sleep-related remarks, four of these were Grevas' own subjective description of her symptoms. There was no evidence that Grevas was treated for insomnia, and no information on its severity, duration, or relation to her depression. "In summary, there is no indication that her sleep problems were severe, long term, or had a permanent impact and no evidence showing whether her problems persist or are resolved, when, where or how the problems developed, how severe they were, how long they may have lasted, or whether she received medical treatment for insomnia." *See Pack v. Kmart Corp.*, 166 F.3d 1300 (10th Cir. 1999), 23 MPDLR 195.

Even if Grevas were disabled, she was not a qualified individual. She could not get along with co-workers, and therefore her continued employment became disruptive to the workforce. Also, the Village's reasons for terminating her were not a pretext for disability-based discrimination.

Title I; Actual; Depression; Sleep/Panic Disorders; High Blood Pressure

A New York federal court held that a former employee with depression, sleep and panic disorders, and high blood pressure was not disabled under the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-117. ***Hawana v. City of N.Y., 230 F. Supp. 2d 518 (S.D.N.Y. 2002).***

Hameed Hawana worked as a caseworker for the City of New York. Between April 1997 and October 1999, numerous co-workers and supervisors filed grievances against Hawana for allegedly creating an intimidating, hostile, and offensive work environment and making sexual gestures and remarks towards female workers. Hawana sought to transfer out of his department, but the city denied his requests. In December, the city suspended Hawana for 10 days for misconduct. Hawana filed an Equal Employment Opportunity Commission discrimination charge on December 10. The city terminated him on February 10, 2000, and he sued under Title I.

The district court granted summary judgment for the city on the ground that Hawana was not disabled under the ADA. *See* 42 U.S.C. §12102(2). He did not show that his impairments substantially limited a major life activity, and failed to specify how these conditions affected him. *See Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002), 26 MPDLR 73. Hawana was not substantially impaired in working, as one doctor suggested that Hawana could perform the same job but for a different supervisor. *See Colwell v. Suffolk County Police Dep't*, 158 F.3d 635 (2d Cir. 1998), 22 MPDLR 745.

Assuming that Hawana was disabled, he failed to show that he was discriminated against because of his disability. He did not show that there was an available position that he could have been transferred to, or that a transfer would have accommodated his depression any better than the position he held. *See Pimentel v. City of N.Y.*, 2001 WL 1579553 (S.D.N.Y. Dec. 11, 2001), 26 MPDLR 486.

Title I; Perceived; MI: Adverse Action; Confidentiality

An Illinois federal court ruled that factual questions existed under the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-117, as to whether (1) an employer regarded an employee's anxiety as substantially limiting her ability to interact with others; (2) she suffered an adverse employment action when the employer reduced her job authority; and (3) the employer improperly disclosed her confidential medical information. ***Fitch v. Continental Cas. Co., 2002 WL 31834877 (N.D. Ill. Dec. 16, 2002).***

Cheri Fitch worked as an underwriter for Continental Casualty Company (CCA). After being yelled at by a co-worker (Michael Pellittieri), she experienced panic attacks and had difficulty sleeping. She advised CCA of those problems, and in March 1999 was given a Performance Improvement Plan (PIP), which required her to see a professional counselor. Fitch continued to complain about Pellittieri's hostility. In November, another PIP required Fitch to focus on her job and be more sensitive to customer needs. Fitch's performance rating was lowered, and she became ineligible for her annual bonus. After her underwriting authority was reduced from $150 million to $25 million, Fitch was denied a transfer to another position. She resigned on December 16 and sued CCA for violation of Title I.

The district court denied CCA's motion for summary judgment. First, Fitch created a genuine factual issue as to whether CCA regarded her as having a mental impairment that substantially limited a major life activity. *See* 42 U.S.C. §12102(2). The purpose behind the ADA's "regarded as" definition is to protect individuals from

adverse treatment based on fears and stereotypes associated with disabilities. *See Amadio v. Ford Motor Co.*, 238 F.3d 919, 925 (7th Cir. 2001), 25 MPDLR 222. To succeed under a "regarded as" claim, the court must determine whether the perceived impairment prevents the claimant from "perform[ing] the variety of tasks central to most people's daily lives, not whether the claimant is unable to perform the tasks associated with her specific job." *See Mack v. Great Dane Trailers*, 308 F.3d 776, 780-82 (7th Cir. 2002). In written notes, CCA's clinical professional counselor concluded that Fitch's mental illness, inability to control her impulses, and paranoia substantially limited her ability to work with others. The ability to interact with others in any context is an activity that is "central to most people's daily lives" and, thus, constitutes a major life activity under the ADA.

Second, Fitch suffered an adverse employment action. While the Seventh Circuit has defined an adverse action broadly, the action must still be material. *See Drake v. Minnesota Mining & Mfg.*, 134 F.3d 878, 885 (7th Cir. 1998). It must be more disruptive than "a mere inconvenience or an alteration of job responsibilities," *see Crady v. Liberty Nat'l Bank & Trust Co.*, 993 F.2d 132, 136 (7th Cir. 1993), but need not result in a loss of pay or benefits, *see Smart v. Ball State Univ.*, 89 F.3d 437, 441 (7th Cir. 1996). Fitch's ineligibility for her annual bonus did not constitute an adverse employment action, because the bonus was discretionary. *See Rabinowitz v. Pena*, 89 F.3d 482, 488-89 (7th Cir. 1996). Moreover, without a showing that someone at the company blocked her transfer, there was no adverse employment action when her request for a transfer was denied. However, the reduction in Fitch's underwriting authority constituted an adverse action, because it materially altered her job responsibilities by requiring her to get approval from a supervisor on a regular basis.

Finally, Fitch presented sufficient evidence that her medical information was not kept confidential, in violation of the confidentiality provisions of the ADA and state mental health law. *See* 42 U.S.C. §12112(d)(3)(B), (4)(C); 704 Ill. Comp. Stat. 110/1 *et seq.* At a meeting of CCA staff, the clinical professional counselor indicated that Fitch was unable to control her impulses, might be mentally ill, and was not going to improve. Under the ADA, supervisors and managers can only be told of necessary restrictions and accommodations that an employee may require. *See* 42 U.S.C. §12112(d)(3)(B)(i), (4)(C).

Title I; Perceived; Retaliation; Stress

A Puerto Rico federal court ruled that a former employee who took a two-week leave of absence due to work-related stress was not regarded as disabled by his employer, in violation of the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-117. However, he stated a retaliation claim under Title V of the ADA, 42 U.S.C. §12203(a). ***Vasquez v. Salvation Army, Inc., 240 F. Supp. 2d 150 (D.P.R. 2003).***

Gilberto Quinones Vasquez worked for the Salvation Army (SA) as Development and Community Relations Director. On May 22, 2000, as a result of stress and tension, Quinones sought outpatient psychological and psychiatric treatment at the Instituto Pscicoterapeutico de Puerto Rico (INSPIRA) and took a two-week leave of absence. Quinones was not diagnosed with any condition or illness at INSPIRA. He returned to work, but was terminated for allegedly soliciting funds without properly identifying the SA logo in the mailing. Following his dismissal, Quinones was treated by a psychiatrist, who diagnosed major depression and anxiety. Quinones sued the SA for violations of Title I and Title V of the ADA.

The district court granted summary judgment for the SA on the Title I claim. Quinones failed to show that SA regarded his work-related stress as substantially limiting him in the major life activity of working. *See* 42 U.S.C. §12102(2)(c); *see also Bailey v. Georgia-Pac. Corp.*, 306 F.3d 1162 (1st Cir. 2002), 26 MPDLR 1010; *Rineheimer v. Cemcolift, Inc.*, 292 F.3d 375 (3d Cir. 2002), 26 MPDLR 678. "Quinones' immediate reinstatement after the misunderstanding between him and his supervisors was clarified shows that defendant Salvation Army found Quinones capable of performing not only a wide array of jobs, but *his* job at the Salvation Army." (emphasis in original)

However, the court denied summary judgment with respect to Quinones' Title V retaliation claim. *See Oliveras Sifre v. Department of Health*, 38 F. Supp. 2d 91 (D.P.R. 1999), 23 MPDLR 520. There was evidence that Quinones was discharged after he allegedly made an informal complaint to the SA regarding the leave of absence he took for stress-related symptoms. In addition, after Quinones questioned his discharge, he was reinstated for a short time, only to be fired again after he mentioned the possibility of conferring with his attorney.

Title I; Perceived; Pretext; Hearing

An Illinois federal court held that a former police dispatcher failed to show that his employer regarded him as substantially limited in the major life activity of hearing and, thus, he was not disabled under the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-117. Also, the employer's legitimate, nondiscriminatory reason for terminating the employee–her inability to perform her telecommunication duties—was not pretextual. ***Buchmeier v. Village of***

Richton Park, 2002 WL 31817985 (N.D. Ill. Dec. 13, 2002).

Penny Buchmeier, a telecommunicator for the Village of Richton Police Department, dispatched information from incoming calls to police officers in the field. She was suspended twice for failing to timely and accurately relay pertinent information, and ultimately terminated when she dispatched a call for an ambulance as one for a domestic disturbance with a gun. Buchmeier sued Richton for violating Title I. In a prior decision, the district court dismissed Buchmeier's failure-to-accommodate claim due to her failure to include it in her Equal Employment Opportunity Commission discrimination charge.

The district court granted summary judgment for Richton. Buchmeier failed to show that Richton regarded her as disabled under the ADA. *See* 42 U.S.C. §12102(2); 29 C.F.R. §1630.2(g). "[I]f the condition that is the subject of the employer's belief is not substantially limiting, and the employer does not believe that it is, then there is no violation of the ADA under the 'regarded as' prong of the statute." *See Mack v. Great Dane Trailers*, 308 F.3d 776 (7th Cir. 2002). The only evidence that Buchmeier relied on to support her claim was her supervisor's recommendation that she submit to a hearing exam. "[A] request to submit to an examination, in and of itself, is not sufficient to demonstrate that [Richton] regarded her as substantially limited in the major life activity of hearing." *See Ogburn v. United Food & Commercial Workers Union, Local No. 881*, 305 F.3d 763 (7th Cir. 2002), 26 MPDLR 1009. Had Richton regarded Buchmeier as substantially limited in the major life activity of hearing, it likely would not have allowed her to continue in her telecommunicator position, which relies heavily on the ability to hear incoming information. After Buchmeier's supervisor indicated that Buchmeier should submit to a hearing exam, Richton continued to employ her up until her termination. Even if Richton believed that Buchmeier's hearing interfered with her job performance, Buchmeier was required to demonstrate that Richton believed that her hearing substantially limited her daily life activities, not just her ability to perform a single job. *See Mack.*

Buchmeir also failed to rebut Richton's reason for terminating her. Buchmeier's employment file indicated written warnings and suspensions preceding her termination. "This is not a case where an employer concocted an unfavorable review shortly before her termination, but one in which an employee's difficulty continued to mount."

Title I; Actual; Pretext; Hearing Device

A New York federal court ruled that a city employee failed to show that his hearing impairment substantially limited a major life activity and, thus, did not have a protected disability under the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-117. Also, he failed to show that the city's delay in providing a hearing amplification device was motivated by discriminatory intent. ***Manessis v. New York City Dep't of Transp., 2003 WL 289969 (S.D.N.Y. Feb. 10, 2003).***

Theodore Manessis, a research assistant for the New York City Department of Transportation (DOT), requested a hearing amplification device. His supervisor informed Manessis that he could save time by purchasing the device and being reimbursed by DOT, but Manessis rejected the offer. After some time passed, Manessis inquired again about the device. His supervisor admitted that he had forgotten to order it, but promised to do so immediately. Manessis received the device on July 24, 2001. He sued the city for violation of the ADA due to the delay.

The district court granted summary judgment for the city. First, Manessis was not disabled under the ADA, because he failed to show that his hearing impairment substantially limited a major life activity. *See Colwell v. Suffolk County Police Dep't*, 158 F.3d 635, 641-45 (2d Cir. 1998), 22 MPDLR 745. Manessis admitted that his impairment did not prevent him from doing anything in his daily life. *See Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 195 (2002), 26 MPDLR 73.

Manessis also failed to show that the city's delay in providing the device was motivated by a discriminatory intent. *See Powers v. Polygram Holding, Inc.*, 40 F. Supp. 2d 195, 202 (S.D.N.Y. 1999), 23 MPDLR 558. The delay was the result of nothing more than negligent oversight by Manessis' supervisor.

Hiring; Title I; Actual; Perceived; Record; Muscular Dystrophy

A Texas federal court ruled that an applicant for an electrician job who could not raise his arms over the level his shoulders due to muscular dystrophy was not disabled under the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-117. ***McClure v. General Motors Corp., 2003 WL 124480 (N.D. Tex. Jan. 10, 2003).***

General Motors (GM) offered Carey McClure an electrician job, conditioned on his passing a physical examination. A doctor reported that McClure could not raise his arms over the level of his shoulders, and GM withdrew its employment offer. McClure sued GM for violating Title I.

The district court granted summary judgment for GM on the ground that McClure was not disabled under the ADA. *See* 42 U.S.C. §12102(2). He was not substantially

limited in any major life activity. McClure could perform all daily life activities without assistance from others. While he experienced difficulties completing some activities, he had successfully compensated for his impairment by taking mitigating measures, such as supporting one arm with another and using step stools and ladders. *See Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999), 23 MPDLR 511; *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), 23 MPDLR 510. Moreover, he was not substantially limited in the major life activity of working, because he had not shown that he was unable to work in a broad range of jobs. *See Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002), 26 MPDLR 73. He worked as an electrician both before and after GM withdrew its offer of employment. The court rejected McClure's argument that GM regarded him as substantially limited in working. GM only regarded McClure as unable to perform a single electrician job. *See* 29 C.F.R. §1630.2(j)(3)(i); *see also Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999), 23 MPDLR 510. Finally, there was no evidence that a record of an impairment motivated GM to withdraw its employment offer. *See* 29 C.F.R. Pt. 1630, App. at 352.

Title I; Actual; Record; Perceived; Cancer

A New Hampshire federal court held that an employee with breast cancer was not disabled under the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-117, because she was not substantially limited in a major life activity, did not have a record of a substantially limiting impairment, and was not regarded as having such an impairment. ***Pimental v. Dartmouth-Hitchcock Clinic, 236 F. Supp. 2d 177 (D.N.H. 2002).***

Mary Ann Pimental worked as a registered nurse on the core management team of the Nurse First Program for Dartmouth-Hitchcock Clinic (DHC). In September 1998, she took eight months of medical leave after being diagnosed with breast cancer. During Pimental's absence, her position was eliminated. Before returning to work, Pimental applied for a staff pediatric nurse job, but was not hired. In June 1999, DHC offered Pimental a staff nurse position, requiring 20 hours per week in the urgent care center, which she accepted. Pimental subsequently applied for a manager job and another urgent care position, but was not hired. In October, she took a nursing job with a school district, but remained a per diem employee for DHC, making herself available when DHC needed additional nursing staff. She sued DHC for violating Title I.

The district court granted summary judgment for DHC, holding that Pimental was not disabled under the ADA. *See* 42 U.S.C. §12102(2); *see also Bailey v. Georgia-Pac. Corp.*, 306 F.3d 1162 (1st Cir. 2002), 26 MPDLR 1010; *Bragdon v. Abbott*, 524 U.S. 624 (1998), 22 MPDLR 449. Her breast cancer did not substantially limit her ability to perform various tasks associated with her employment, or to care for herself on a long-term basis. *See Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002), 26 MPDLR 73. Pimental admitted that her concentration was not impaired to the point that it prevented her from doing her job, prescription medication reduced her hot flashes and helped her sleep, she was able to accommodate her periodic forgetfulness, she no longer suffered from radiation burns, she was able to perform a range of household chores, and she no longer experienced shortness of breath.

Moreover, although had Pimental become pregnant during her chemotherapy the fetus might well have been placed at substantial risk, nothing in the record suggested that she intended to have more children. *See Bragdon*. Similarly, she failed to show that her cancer had a permanent and long-lasting effect on her intimate relations with her husband. She admitted that after reconstructive surgery, her intimate relationship with husband changed for the better. *See Gillen v. Fallon Ambulance Serv., Inc.*, 283 F.3d 11 (1st Cir. 2002), 26 MPDLR 467.

The court rejected Pimental's argument that she had a record of a substantially limiting impairment. *See* 42 U.S.C. §12102(2)(B). The court also rejected Pimental's argument that she was regarded as having an impairment that substantially limited her ability to work. *See* 42 U.S.C. §12102(2)(C). *See also Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), 23 MPDLR 510. There was no evidence that DHC regarded Pimental as incapable of performing a wide range of jobs for which she was trained. *See Doyal v. Oklahoma Heart, Inc.*, 213 F.3d 492 (10th Cir. 2000), 24 MPDLR 597. Three DHC employees provided Pimental with strong references for the position with the school district.

Title I; Actual; Reasonable Accommodation; Re-Certify; Kidney

An Illinois federal court decided that a truck driver with renal failure was not disabled under the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-117. Also, his employer did not fail to accommodate his efforts to become re-certified to drive. ***Jones v. Roadway Express, Inc., 2003 WL 76868 (N.D. Ill. Jan. 8, 2003).***

Anthony Jones was diagnosed with end-stage renal disease in 1991 and underwent kidney dialysis three times a week. Roadway Express hired Jones as a local truck driver in 1998 and accommodated his dialysis schedule. In September 1999, Roadway granted Jones' request for a leave of absence. In May 2000, Jones sought to return to work. Roadway had a standard policy that if

an employee was off work for more than 29 days, the employee had to see a company doctor to be reinstated. Jones saw Dr. O'Neill, who advised Jones that she would need to see some blood work and lab reports to make sure he was qualified to drive. Jones refused. O'Neill eventually obtained information about Jones' condition, and on May 17, 2000, issued a certification for Jones with no restrictions, effective for three months. Jones was re-certified on August 22 and returned to work. He sued Roadway under Title I.

The district court granted Roadway's motion for summary judgment. Jones was not disabled under the ADA, because his renal failure did not substantially limit a major life activity. Jones could care for himself, perform manual tasks, walk, see, hear, speak, learn, and work. *See* 29 C.F.R. §1630.2(j)(1)(ii); *see also Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), 23 MPDLR 510; *Furnish v. SVI Sys. Inc.*, 270 F.3d 445 (7th Cir. 2001), 26 MPDLR 90. Jones conceded that as long as he maintained his dialysis schedule, there was no reason he could not work as a truck driver. Although Jones contended that he was restricted in coaching certain sports, this restriction did not constitute a substantial limitation on a major life activity. *See Moore v. J.B. Hunt Transport, Inc.*, 221 F.3d 944 (7th Cir. 2000), 24 MPDLR 783.

Also, Jones' accommodation request—that Roadway pressure Dr. O'Neill to certify him sooner—was unreasonable. "This request for elimination of a barrier outside the work environment that included interfering with a doctor's professional opinion would not be reasonable." Jones was not qualified to be a truck driver during the times in May and August 2000 when he did not have a valid Department of Transportation medical certification. *See Emerson v. Northern States Power Co.*, 256 F.3d 506 (7th Cir. 2001), 25 MPDLR 832; *Bay v. Cassens Transport Co.*, 212 F.3d 969 (7th Cir. 2000), 24 MPDLR 616.

Title I; Actual; Statute of Limitations; Continuing Violation; Equitable Tolling; CP

A New York federal court held that factual issues existed as to whether a school custodian with cerebral palsy was disabled under the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-117, and whether his Equal Employment Opportunity Commission (EEOC) disability discrimination charge was timely filed. ***Stalter v. Board of Co-op. Educ. Servs. of Rockland County, 235 F. Supp. 2d 323 (S.D.N.Y. 2002).***

James Stalter worked as a custodian for the county. Although his cerebral palsy diminished his ability to speak coherently, he was able to communicate effectively by using audible sounds, written signs, hand spelling, directional movements, and an augmentative communication device. Stalter complained to his supervisor that he was not being afforded the same overtime opportunities as other custodians, that he was limited to working at one school (the Kaplan School), and that a less senior non-disabled custodian was assigned to a shift he had requested a transfer to. After his supervisor refused his request to be transferred to another school because he was unable to speak, Stalter sued the county under Title I.

The district court denied the county's motion to dismiss. A factual issue existed as to whether Stalter was substantially limited in the major life activity of speaking and, thus, was disabled under the ADA. *See* 42 U.S.C. §12102(2); *see also Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), 23 MPDLR 510; *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002), 26 MPDLR 73. The remedial measures Stalter takes may allow him to communicate, but not to speak. A factual issue also existed as to whether the county regarded Stalter as having a substantially limiting impairment. Stalter's supervisor told him that he could not work in another building because he could not speak. Another factual issue existed as to whether Stalter suffered any adverse employment action. He argued that the denial of a shift change constituted such an action because the position he sought had greater overtime opportunities, was more prestigious, and involved less objectionable duties.

A factual issue also existed as to whether the county's actions toward Stalter constituted a continuing violation—that is, were part of an ongoing policy of discrimination—so that any allegedly discriminatory acts that occurred outside the requisite 300-day period for filing a discrimination charge with the EEOC would still be timely. Because Stalter filed his charge with the EEOC on January 14, 2002, any allegedly discriminatory acts that occurred prior to March 20, 2001, would be untimely unless proven to be part of a continuing violation. Stalter presented evidence that the county's actions toward him (e.g., limiting his work to the Kaplan School, denying him a shift change, and limiting overtime work) were part of a policy of prohibiting him from working in a building alone because of his disability.

Alternatively, a factual issue existed as to whether the doctrine of equitable tolling applied to defer the start of the EEOC filing period from the time of the county's discriminatory action until the time that Stalter should have discovered the acts discriminatory in nature. *See Dillman v. Combustion Eng'g, Inc.*, 784 F.2d 57, 59 (2d Cir. 1986). The doctrine applies when an employer's actively misleading conduct is responsible for the employee's unawareness of his or her cause of action. *See Miller v. International Tel. & Tel. Corp.*, 755 F.2d 20, 24 (2d Cir. 1985). Stalter alleged that the county had

advised him that he could not receive a shift change because the shift required a "level one" custodian. He argued that this justification was misleading because the custodian who had previously held the shift was not a level one custodian, and that this misleading conduct was responsible for his unawareness that the county had discriminated against him due to his disability.

Title I; Actual; Perceived; Pretext; Asthma

An Ohio federal court found that because a former employee with asthma was not substantially limited in the major life activity of breathing and was not regarded as substantially limited in working, she was not disabled under the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-117. Also, the employer's reasons for not placing her in other positions were not pretextual. ***White v. Honda of Am. Mfg., Inc., 241 F. Supp. 2d 852 (S.D. Ohio 2003).***

In October 1999, Honda of America transferred Cynthia White to work as an Office Support Assistant in its plastics department. White stopped working after one week due to her asthma. Honda's doctor diagnosed White with "odor sensitivity" and recommended that she avoid paints, thinners, solvents, exhaust, and gasoline. In November, White went on disability leave. In January 2000, Honda asked White to return to work and gave her a paper dust mask to wear while she walked through areas of the plant. Nevertheless, White had an asthma attack. In February, Honda attempted to limit White's exposure to fumes by taking her through a different route in the plant, but she again had an asthma attack. In May, Honda fit White with a respirator, but she was unable to wear it due to her claustrophobia. In November, Honda terminated White on the ground that she had not actively worked for a year. She sued Honda under Title I.

The district court granted summary judgment for Honda, concluding that White was not disabled under the ADA. *See* 42 U.S.C. §12102(2). White was not substantially limited in the major life activity of breathing. *See Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002), 26 MPDLR 73. Her asthma only affected her when she breathed certain irritants, such as exhaust and paint fumes. She admitted that she was able to perform many normal life activities like driving, pumping her own gas, walking, exercising, smoking cigarettes, and going to restaurants. White's exposure to irritants resulted in only brief symptoms, not chronic problems, and she could avoid flare-ups by staying away from these irritants.

Furthermore, Honda did not regard White as disabled in the major life activity of working. *See* 42 U.S.C. §12102(2)(C). White failed to show that Honda regarded her as unable to work in a broad class of jobs. *See Mahon v. Crowell*, 295 F.3d 585 (6th Cir. 2002), 26 MPDLR 825. The company only regarded her as unable to work in the presence of certain environmental contaminants. Honda made numerous attempts to return White to work after her asthma attacks.

Finally, Honda's reasons for not placing White in different positions —her poor job performance and lack of necessary skills—were not pretextual excuses to terminate her because it regarded her as disabled. Honda had a competitive application process for transferring employees. White only applied for 14 of 37 job openings during the one-year period after she left the plastics department until she was terminated. Of those 14 applications, nine were untimely filed. White lacked the skills necessary for many of the jobs and was not the best candidate for any of them.

Title I; Actual; Perceived; ADD

A Wisconsin federal court decided that a former employee with attention deficit disorder (ADD) failed to show that he was substantially limited a major life activity or was regarded as such and, thus, was not disabled under the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-117. ***Felten v. Eyemart Express, Inc., 241 F. Supp. 2d 935 (E.D. Wis. 2003).***

Scott Felten was hired as a general manager of an Eyemart Express store in 1990. He was diagnosed with ADD in 1996. In August 1999, Eyemart terminated Felten for poor job performance, and he sued under Title I.

The district court granted summary judgment for Eyemart on the ground that Felten was not disabled under the ADA. *See* 42 U.S.C. §12102(2); *see also Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), 23 MPDLR 510; *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002), 26 MPDLR 73. Felten alleged that his ADD resulted in him leaving the hose on and forgetting to pick up his children at school, but these are not major life activities. "And he fail[ed] to present any evidence showing that intermittent difficulties with memory, decision-making, impulsiveness, and forgetfulness impact a particular major life activity or are themselves major life activities, i.e. basic, central functions of life." Felten did not present evidence that he was substantially limited in any of these tasks, or that his symptoms so exceeded the experience of the general population. "Memory lapses, impulsiveness, and poor decision-making are commonplace for the average person; if they constituted disabilities, the ADA would have to be interpreted broadly, not strictly as the Supreme Court now requires."

As to the major life activity of working, Felten did

not provide evidence about an inability to perform a class of jobs or a broad range of jobs, or the number and types of jobs for which he was disqualified. The evidence indicated that Felten was not barred from a broad class of jobs— not even the class consisting of optical-related management jobs. He found another job managing an optical department after Eyemart fired him. *See Moore v. J.B. Hunt Transp., Inc.*, 221 F.3d 944 (7th Cir. 2000), 24 MPDLR 783. There was also insufficient evidence that Felten was substantially limited in his job at Eyemart. For two years after his diagnosis, Felten functioned as general manager. He admitted that although his ADD caused him to jump from project to project, he eventually would get back to each project and finish it. He also admitted that his ADD did not impair his ability to perform his job as general manager or even made it more difficult for him to do his job, except when Eyemart criticized him for having a disorganized store. Finally, Felten admitted that the medication prescribed by his doctor helped with his symptoms, and that stress from work was temporary and could be ameliorated with the right medication.

Regarding the major life activities of caring for oneself, walking, and learning, Felten failed to present evidence of a significant restriction as compared to the average person in the general population. *See Toyota*; *Davidson v. Midelfort Clinic, Ltd.*, 133 F.3d 499 (7th Cir. 1998), 22 MPDLR 193.

The court rejected Felten's argument that Eyemart regarded him as having a substantially limiting impairment. *See* 42 U.S.C. §12102(2)(C); *Sutton*; *Moore*. Felten provided no evidence that Eyemart thought Felten unable to perform a class or range of jobs, but only that Eyemart knew about Felten's ADD and terminated him from his one job as a general manager at one of its stores. "Even if Eyemart thought Felten's ADD prevented him from performing the single job of general manager, that is not enough."

Title I; Actual; Perceived; Monocular Vision

A New York federal court adopted a Magistrate's finding that a former employee with monocular vision was not substantially limited in the major life activities of seeing and working or regarded as such, and therefore was not disabled under the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-117. ***Hoehn v. International Sec. Servs. & Investigations, Inc., 2002 WL 31987786 (W.D.N.Y. Nov. 26, 2002).***

Francis Hoehn contracted with the U.S. General Services Administration (GSA) to provide security at federal buildings throughout New York. GSA entered into a contract with International Security Services and Investigations (ISS) that granted ISS the right to remove an employee deemed "unfit," specifying that employees must have binocular vision correctable to 20/20. ISS terminated Hoehn on the ground that his monocular vision made him physically unfit. He sued ISS under Title I.

Earlier, the district court denied both parties' motions for summary judgment, finding that a factual issue existed as to whether ISS's visual acuity requirement was job-related and consistent with business necessity. *See* 120 F. Supp. 2d 257 (W.D.N.Y. 2000), 25 MPDLR 1. ISS filed a second summary judgment motion that Hoehn was not disabled under the ADA.

The district court adopted the Magistrate's finding that Hoehn's condition was not a covered disability under the ADA. *See* 42 U.S.C. §12102(2). Monocular vision is not a *per se* disability under the ADA. Whether monocular vision substantially limits a major life activity of a particular individual must be determined on a case-by-case basis in terms of the impairment's impact on the individual. *See, e.g., Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999), 23 MPDLR 510; *Sutton v. United Air Lines, Inc.*, 527 U.S. 471(1999), 23 MPDLR 510.

Here, Hoehn's monocular vision did not substantially limit the major life activities of seeing and working. Although he reported that depth perception difficulties attributed to his monocular vision caused him difficulty driving, walking, navigating stairs, and playing sports with his grandchildren, ". . . the Supreme Court and various courts within the Second Circuit have found similar sight restrictions do not constitute a substantial impairment on one's ability to see so as to render an individual disabled. . . ." *See Kirkingburg*; *Sherman v. Peters*, 110 F.3d 194 (W.D.N.Y. 2000), 24 MPDLR 934; *Ditullio v. Village of Massena*, 81 F. Supp. 2d 397 (N.D.N.Y. 2000), 24 MPDLR 244; *Rivera v. Apple Indus. Corp.*, 148 F. Supp. 2d 202 (E.D.N.Y. 2001), 25 MPDLR 809. Hoehn submitted no evidence identifying the extent of his monocular vision in terms of his loss of depth perception and visual field. With respect to working, Hoehn did not allege that he is unable to work in any specific job, much less a broad class of any jobs. In his deposition, he made numerous references to his ability to perform the duties of his security guard position and denied experiencing any difficulty due to his visual deficit.

Nor did ISS regard Hoehn as substantially limited in these activities. "The mere fact that an employer is aware of an employee's impairment is insufficient to demonstrate either that the employer regarded the employee as disabled, as defined in the ADA, or that such perception cause the adverse employment action challenged under the ADA." *See Reeves v. Johnson Controls World Servs.*, 140 F.3d 144 (2d Cir. 1998), 22 MPDLR 359.

Title I; Actual; Skin Condition

A Puerto Rico federal court held that a former employee who failed to show that his skin condition substantially limited his ability to work was not disabled under the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-117. ***Arce v. Aramark Corp., 239 F. Supp. 2d 153 (D.P.R. 2003).***

Ventura Tirado Arce, a food service director for Aramark, took time off from work after a work-related accident. He was authorized to return to work, but was advised that his job had been eliminated, there were no vacant positions, and he was being laid off. Tirado sued Aramark under Title I, alleging he had been discriminated against based on his disability—vitiligo, a skin condition that results in patches of depigmentation.

The district court dismissed Tirado's claim on the ground that he failed to show that he was disabled under the ADA. *See* 42 U.S.C. §12102(2); *see also Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002), 26 MPDLR 73. He admitted that his vitiligo did not affect his ability to perform manual tasks, take care of himself, walk, see, hear, speak, breathe, learn, or work. Tirado claimed that his condition substantially limited the major life activities of working and walking under the sun. Assuming that working is a major life activity, Tirado failed to show that he was unable to perform a broad range of jobs, as distinguished from the particular job he held at Aramark. *See Toyota*; *Gonzalez v. El Dia, Inc.*, 304 F.3d 63 (1st Cir. 2002). And, "[w]e have not located a single case in which a court found that 'walking under the sun' is a major life activity under the ADA and we find that it is not."

§501; Actual; Depression; Anxiety

The Fourth Circuit summarily affirmed a Maryland federal court ruling that a postal employee whose workers' compensation benefits for depression and anxiety were cancelled after the Postal Service discovered he was operating his own business was not substantially limited in the major life activity of working and, thus, not disabled under the Rehabilitation Act §501, 29 U.S.C. §791 *et seq.* ***Walker v. Potter, 55 Fed. Appx. 198 (4th Cir. 2003).***

Employment: Medical Leave/Exams

FMLA; Health Insurance; Termination; *Per Se* Violation

A Michigan federal court found that an employer's failure to maintain an employee's health insurance, at its own expense, during his leave of absence under the Family and Medical Leave Act (FMLA), 29 U.S.C. §2601 *et seq.*, constituted a *per se* FMLA violation. ***Tornberg v. Business Interlink Servs., Inc., 237 F. Supp. 2d 778 (E.D. Mich. 2002).***

Eric Tornberg, a truck driver, participated in Business Interlink Services' (BIS) Employee Benefit Plan, which reimbursed eligible employees for medical expenses. Tornberg paid about $22.00 weekly to cover his share of the cost. When Tornberg was diagnosed in May 1999 with a kidney stone, BIS gave him time off for treatment. Neither BIS nor Tornberg mentioned the FMLA. When Tornberg called BIS to inquire about paying his premiums while off work, he was told that he would have to pay the entire cost of the monthly premium. Tornberg paid the entire amount for June 1999, but did not pay the subsequent premium. When Tornberg was ready to return to work, there was no work available for him. He then got a job with another transportation company. Thereafter, BIS terminated Tornberg's health insurance retroactive to May 31, 1999. Tornberg sued BIS under the FMLA.

The district court granted Tornberg's motion for summary judgment. As a preliminary matter, Tornberg provided BIS with adequate notice of his intention to take FMLA leave. Employees are only required to state that leave is needed; they do not have to expressly assert rights under the FMLA, or even mention the FMLA. *See* 29 C.F.R. §825.303 (1995); s*ee also Manuel v. Westlake Polymers Corp.*, 66 F.3d 758, 763 (5th Cir. 1995), 19 MPDLR 752. Furthermore, Tornberg's leave was for a "serious health condition" and, therefore, qualified under the FMLA. *See* 29 C.F.R. §825.100. His kidney stone required both inpatient care (overnight stay in a hospital) and continuing treatment (placement of a urethral stent, a lithotripsy procedure to break up the stone, and recuperation time).

The court then found that BIS's failure to maintain Tornberg's health care coverage while he was on FMLA leave constituted a *per se* violation of the FMLA. *See Stubl v. T.A. Sys., Inc.*, 984 F. Supp. 1075, 1089 (E.D. Mich. 1997). Under §2614(c)(1) of the FMLA, an employer "shall maintain coverage under any group health plan for the duration of the leave at the level and under the conditions coverage would have been provided if the employee had continued in employment continuously for the duration of such leave." The court rejected BIS's argument that it did not violate the FMLA because Tornberg violated its policy of failing to pay entire premiums during the time that he was off work. This policy violated §2614(c)(1). An employer may not impose a greater premium cost upon an employee on an FMLA-qualifying leave than it does upon those employees actively at work. Even if BIS's policy were proper, the FMLA requires an employer to give notice of the policy