less than a month after the parents requested one. Further, the school system met its duty under §1412(a)(3) of the IDEA to ensure that students in need of special educational requirements are identified and serviced by (1) disseminating informational material to all schools in the area, to day care centers, and to medical personnel who would be likely to encounter children with special educational requirements; (2) making public service announcements; and (3) engaging in outreach to low income communities. ***Doe v. Metropolitan Nashville Pub. Sch., 2001 WL 549431 (6th Cir. May 16, 2001).***

IDEA; IEP; Autism

A New York appeals court held that if a school district opts to resolve impasses about an individualized education program by taking a vote at a Committee on Preschool Special Education meeting, the school district must include all members of the Committee who had knowledge or special expertise regarding the child in that vote. An amendment to the Individuals with Disabilities Education Act defines an "IEP Team" to include individuals who have knowledge or special expertise regarding the child, including related services personnel, *see* 20 U.S.C. §1414[d][1][B][vi]. Consequently, a home-based applied behavior assessment program must be included in the IEP of a child with autism, and his preschool schedule should be concomitantly reduced. ***Sackets Harbor Cent. Sch. Dist. v. Munoz, 725 N.Y.S. 2d 119 (N.Y. Sup. Ct. App. Div. 2001).***

Employment: Disability Defined

State Law; Handicapped Defined; Mitigating Measures

Massachusetts' highest court held that the determination as to whether a person has a "handicap" under the Massachusetts state anti-discrimination statute, Mass. Gen. Laws ch. 151B, should be made without regard to corrective devices or other mitigating measures. ***Dahill v. Police Dep't of Boston, 748 N.E.2d 956 (Mass. Sup. Jud. Ct. 2001).***

Richard Dahill entered the Boston Police Academy's training program after a police department physician certified that Dahill met the hearing requirements with the use of hearing aids. During the 26-week training program, Dahill did not respond to an oral instruction to retrieve water, and did not hear a gunshot during a training exercise. The police department's physician re-examined Dahill, and concluded that there was a major safety question regarding his ability to perform his duties as a police officer. As a result, he was eventually terminated. Dahill sued under the state anti-discrimination statute.

Answering a certified question, the high court concluded that Massachusetts Gen. Laws ch. 151 B does not require consideration of mitigating evidence or corrective devices in determining whether a person has a handicap. The court deferred to the Massachusetts Commission Against Discrimination (MCAD), as the state legislature granted this entity the express authority to "formulate policies to effectuate the purposes" of the state anti-discrimination statute and to "adopt, promulgate, amend and rescind rules and regulations" to implement those policies. MCAD guidelines provide that "the existence of an impairment is generally determined without regard to whether its effect could be mitigated by measures such as medication, auxiliary aids or prosthetic devices." *See* MCAD Guidelines ch. 151B, §II.A.7 (1998). These guidelines are entitled to substantial deference, even though they do not carry the force of law. *See Berrios v. Department of Pub. Welfare*, 583 N.E.2d 856 (Mass. Sup. Jud. Ct. 1992).

Interpreting the statute so as to bar consideration of corrective devices or other mitigating measures is consistent with its public policy: to protect handicapped individuals from deprivations based on prejudice, unfounded fear, or stereotypes. A contrary interpretation excludes from the statute's protection numerous people who may mitigate serious physical or mental impairments to some degree, but who may nevertheless need reasonable accommodations to fulfill the essential functions of a job. Moreover, determining handicap with reference to mitigating measures might produce anomalous results. For example, an employee who could not afford a hearing aid would be protected by the statute, while an employee who could afford one would not be. And, the legislature has directed that the statute's provisions "shall be construed liberally" for the accomplishment of the remedial purposes of the statute.

The court pointed out that its ruling diverges from the U.S. Supreme Court's decision in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), 23 MPDLR 510, that corrective devices or other mitigation measures must be considered in determining whether an individual is disabled as defined by the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* However, the state anti-discrimination statute differs from the ADA in at least two critical aspects. First, the Court in *Sutton* did not defer to the Equal Employment Opportunity Commission's (EEOC) guidelines, which provide that the determination of whether an individual is substantially limited in a major life activity should be made *without* regard to mitigating devices, because Congress had not granted the EEOC the authority to

promulgate regulations interpreting the ADA. By contrast, the state legislature had expressly authorized the MCAD to interpret the state anti-discrimination statute. Second, Congress in the preamble to the ADA estimated that 43 million Americans have disabilities. The Court in *Sutton* reasoned that this number would have been far larger if Congress had intended the ADA to cover people with corrected physical limitations. By contrast, the Massachusetts statute contains no such estimate of the number of people in the state with handicaps, nor does it contain any analogous provision suggesting that the legislature intended to exclude from coverage the many persons with significant, but correctable impairments.

This ruling will not open the floodgates of litigation. Since 1983, judges and litigants in Massachusetts have assumed that a person with a significant physical or mental impairment met the threshold definition of "handicap," whether he or she used corrective devices or took other mitigating measures. In addition, the determination of whether an individual has a handicap is a threshold inquiry. He or she must still prove that he can perform his or her essential job functions with or without reasonable accommodation.

Title I; Actual; Mitigating Measures; Qualified; Administrative Exhaustion; Arthritis

The Ninth Circuit ruled that an employee with arthritis exhausted his administrative remedies under the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-12117, and that that factual issues existed as to whether he was disabled as defined under the ADA and qualified to perform essential job functions with reasonable accommodations. ***Stephenson v. United Airlines, Inc., 2001 WL 580459 (9th Cir. May 30, 2001). [Unpublished Opinion; Ninth Circuit Rules Apply].***

Keith Stephenson, a United Airlines employee, underwent hip replacement surgery. Upon his return to work, he was restricted from standing, walking, driving, and lifting or carrying more than 25 pounds, but was allowed to occasionally kneel, bend, and lift between 11 and 25 pounds. United denied Stephenson's request for light or modified duty on the ground that company policy prohibited such duty for non-occupational illnesses or injuries. Stephenson filed a disability discrimination charge with the Equal Employment Opportunity Commission (EEOC), and then a Title I complaint alleging that United failed to reasonably accommodate him on two occasions after he had missed time for surgery and for medical leave. The district court granted United summary judgment.

The Ninth Circuit reversed and remanded. As a threshold matter, the district court erred in ruling that Stephenson had failed to exhaust his administrative remedies. *See* 42 U.S.C. §12117(a). The district court concluded that he could not base any claim on allegations not specifically included in his EEOC charge. However, the claims that Stephenson raised before the district court are reasonably related to allegations made in his previous EEOC charge. *See Anderson v. Reno*, 190 F.3d 930, 935 (9th Cir. 1999). His EEOC charge and corresponding investigation addressed his disability leave, hip replacement surgery, arthritis, and physical restrictions.

Further, a factual issue existed as to whether Stephenson was disabled as defined by the ADA. The district court, relying on *Sutton v. United Air Lines, Inc.*, 527 U.S. 471(1999), 23 MPDLR 510, concluded that Stephenson's hip replacement surgery was a mitigating measure that obviated the need for further inquiry into whether he had a physical impairment that substantially limited a major life activity. However, *Sutton* did not hold that mitigating measures preclude further inquiry, and the U.S. Supreme Court "took pains to emphasize that, in some situations, mitigating measures might have adverse side effects." *See Sutton*, 527 U.S. at 484. The fact that Stephenson received a prosthetic hip did not mean that he was not substantially limited in the major life activity of walking. Even with the prosthetic hip, he was released to work with considerable restrictions and was in pain. Consequently, the appeals court concluded that "[t]he present record affords us no basis for concluding that an individualized inquiry was conducted to determine whether or not Stephenson was disabled."

Moreover, it is unclear whether Stephenson's restrictions were temporary or permanent. The fact that United classified him as temporarily disabled does not foreclose all further inquiry under the ADA, as "our precedent establishes that a classification of temporary disability does not preclude ADA claims." *See Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243 (9th Cir. 1999), 23 MPDLR 207.

A factual issue also existed as to whether Stephenson was a qualified individual, defined by the ADA as one who can perform his essential job functions with or without reasonable accommodation. The record was not adequately developed concerning how Stephenson's alleged disability related to his essential job functions. Neither the district court nor United determined whether reasonable accommodation was possible. Instead, United relied on a *per se* policy prohibiting light or modified duty for non-occupational illnesses or injuries as justification for not conducting an interactive individualized inquiry. "Our precedent establishes that

employers must engage in an interactive, individualized dialogue with employees to identify potential options which might serve as a reasonable accommodation." *See Barnett v. U.S. Air, Inc.*, 228 F.3d 1105 (9th Cir. 2000) (en banc), 24 MPDLR 956, *cert granted*, 121 S. Ct. 1600 (2001), 24 MPDLR 956; *Humphrey v. Mem'l Hosps. Ass'n*, 239 F.3d 1128 (9th Cir. 2001).

Title I; Actual; Perceived; Mitigating Measures; Bipolar Disorder

A New York federal court held that a former employee was not disabled under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, because his bipolar disorder, when treated, did not substantially limit the major life activity of working and he was not regarded as such. ***Kramer v. Hickey-Freeman, Inc., 142 F. Supp. 2d 555 (S.D.N.Y. 2001).***

Beginning in 1995, Barry Kramer, a sales manager for Hickey-Freeman (HF), went to a psychologist for anxiety allegedly caused by his supervisor, and was prescribed Ativan. Kramer then took a medical leave of absence. Despite HF's reminders that Kramer had to submit a medical certification every 30 days, he submitted only one certification during four months of leave. He also failed to submit certification indicating that he was medically fit to return to full-time duty. HF terminated Kramer, and he sued HF for Title I, 42 U.S.C. §§12111-12117, violations.

The district court granted HF summary judgment, finding that Kramer was not disabled under the ADA. His bipolar disorder did not substantially limit the major life activity of working, and HF did not regard him as such. Lithium, and when necessary Ativan, controlled Kramer's condition and allowed him to perform all of his job duties. In *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), 23 MPDLR 510, the Supreme Court made clear that mitigating measures, such as effective medical treatment, must be taken into account in determining whether an impairment is substantially limiting. Further, the fact that HF offered Kramer a medical leave of absence did not show that the company regarded him as incapable of working in a broad range of jobs suitable to person of his age, experience, and training. *See Colwell v. Suffolk Police Dep't*, 158 F.3d 635 (2d Cir. 1998), 22 MPDLR 745.

§501; Actual; Mitigating Measures; Hypertension

An Illinois federal court denied the government's motion to dismiss a failure-to-accommodate claim brought by a former employee under the Rehabilitation Act §501, 29 U.S.C. §791 *et seq.*, finding that plaintiff presented sufficient evidence that his hypertension, even when controlled by medication, constituted a covered disability. He alleged that the three medications he took daily caused him to urinate frequently and to be moody. In *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 521 (1999), 23 MPDLR 511, the Supreme Court held that in considering mitigation measures to determine whether a person is disabled, courts must consider the limitations that persist despite the medication and its side effects. ***Bazewick v. Chao, 2001 WL 467930 (N.D. Ill. Apr. 30, 2001).***

Title I; Actual; Mitigating Measures; Limitations; Diabetes

The Ninth Circuit reversed a district court's grant of summary judgment to a school district, finding that a question of fact existed as to whether a former employee with diabetes was disabled within the meaning of the Americans with Disabilities Act, 42 U.S.C. §§12111-12117, because she was substantially limited in the major life activity of walking. She could not walk for even a minimal distance more than one time every couple of months due to her diabetes. The court ruled that not only must mitigating measures be considered in assessing the degree of an individual's limitation, but also the limitations imposed by the mitigation measures themselves. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482 (1999), 23 MPDLR 510. Even with insulin, plaintiff still experiences frequent, extreme, and unpredictable blood sugar fluctuations. Given the potentially life-threatening consequences of a low blood sugar level, the extreme limits she places on the manner and duration of her walking are an appropriate attempt to mitigate the symptoms of her diabetes. ***Lutz v. Glendale Union High Sch., 2001 WL 408989 (9th Cir. Apr. 20, 2001).***

Title I; §504; Substance Abuse; Safe-Harbor Provision; Reasonable Accommodation; Costs

The Ninth Circuit held that the Americans with Disabilities Act's (ADA) safe-harbor provision, 42 U.S.C. §12114(b), did not apply to an employee with substance abuse who had not refrained from using drugs and alcohol for a sufficient length of time. Additionally, the employer had no duty to excuse her absences as a reasonable accommodation, and her claim under the Rehabilitation Act §504, 29 U.S.C. §794, failed because she did not establish that her employer was receiving federal financial assistance. Moreover, the court remanded because the district court had erred in not explaining its reason for denying the employer costs.

Brown v. Lucky Stores, Inc., 246 F.3d 1182 (9th Cir. 2001).

Previously, the district court (*see* 1999 WL 66138 (N.D. Cal. Feb. 8, 1999), 23 MPDLR 374) granted Lucky Stores summary judgment in a case alleging violation of Title I and the Rehabilitation Act §504, 29 U.S.C. §794. Karen Brown, who was in custody for drunk driving and drug offenses, was terminated for failing to obtain authorization for missing three consecutive shifts. Brown had been incarcerated from November 10, 1996 to November 15, 1996, and attended a court-ordered rehabilitation program from November 15, 1996 to February 12, 1997. She missed work on November 10, 11, and 16, in violation of the company policy. Employers may terminate employees with alcoholism for violating a rule of conduct, even if the conduct is related to alcoholism. *See Collings v. Longview Fibre Co.*, 63 F.3d 828 (9th Cir. 1995), 19 MPDLR 616. Also, Lucky Stores did not have a duty to accommodate Brown because she never requested an accommodation, and her §504 claim was dismissed because Brown failed to establish that Lucky Stores received federal financial assistance.

The Ninth Circuit affirmed. The ADA does not apply to current drug users, *see* 42 U.S.C. §12114(a). However, the act's safe-harbor provision protects persons who are no longer engaging in the illegal use of drugs and (1) have successfully completed a supervised drug rehabilitation program, (2) have otherwise been successfully rehabilitated, or (3) are participating in a supervised rehabilitation program. *See* 42 U.S.C. §§12114(b)(1), (2). Mere participation in a rehabilitation program is not enough to trigger the safe-harbor provision. Employers are entitled to seek reasonable assurances that no illegal use of drugs is occurring or has occurred recently enough so that continuing use is a real and ongoing problem. *See Zenor v. El Paso Healthcare Sys., Ltd.*, 176 F.3d 847 (5th Cir. 1999), 23 MPDLR 518. Brown argued that her participation in a court-ordered rehabilitation program following her arrest for drunk driving and possession of illegal drugs triggered the safe-harbor provision. However, her continuing use of drugs and alcohol was clearly an ongoing problem at least until November 10. Because she had not refrained from the use of drugs and alcohol for a sufficient length of time, she was not entitled to the protections of the safe-harbor provision.

Further, Lucky Stores had no duty to excuse Brown's absence from her November 16 shift in order to attend the rehabilitation as a reasonable accommodation for her disability. Brown did not request such an accommodation, and Lucky Stores neither knew nor had reason to know that Brown had a disability preventing her from making such a request. *See Barnett v. U.S. Air, Inc.*, 228 F.3d 1105 (9th Cir. 2000), 24 MPDLR 956. As for Brown's §504 claim, she failed to show that Lucky Stores received federal financial assistance, thereby triggering the act's protections. *See* 29 U.S.C. §794(a); *see also Hingson v. Pacific S.W. Airlines*, 743 F.2d 1408, 1414-15 (9th Cir. 1984), 9 MPDLR 27.

Finally, the court remanded for the district court to explain why it denied costs to the employer. The ADA allows courts to award costs to prevailing parties if the plaintiff's action was frivolous, unreasonable, or without foundation. *See Summers v. A. Teichert & Son, Inc.*, 127 F.3d 1150 (9th Cir. 1997). Courts denying costs must explain their rationale. *See Association of Mexican-Am. Educators v. California*, 231 F.3d 572, 591-93 (9th Cir. 2000) (en banc).

Title I; Safe Harbor; Drug Addiction

An Ohio federal court held that a former city sanitation worker was not entitled to protection under the safe-harbor provision of the Americans with Disabilities Act (ADA), 42 U.S.C. §12114(b), because he was currently engaged in the illegal use of drugs when he was terminated, even though he had been participating in a drug rehabilitation program. ***Johnson v. City of Columbus, 2001 WL 605040 (S. D. Ohio May 29, 2001).***

Lacy Johnson smoked marijuana regularly for many years. In January 1998, he tested positive for marijuana, was placed on leave and was referred to the Employee Assistance Program. In February, Johnson passed a drug test and was permitted to return to work but was subject to random drug testing for a 12-month period. He continued to attend an outpatient rehabilitation program. In March, Johnson tested positive for marijuana during a random test, and was placed on leave pending disciplinary charges. The city terminated him in May. Johnson sued the city under Title I, 42 U.S.C. §§12111-12117.

The district court granted the city's motion for summary judgment. Although drug addiction is recognized as a disability under the ADA, the statute specifically excludes individuals "currently engaging in the illegal use of drugs" from the definition of qualified individuals with disabilities. *See* 42 U.S.C. §12114(a). Regulations promulgated pursuant to the ADA permit employers to discharge persons who illegally use drugs. *See* 29 C.F.R. §1630.3 App. However, the ADA provides a "safe harbor" for individuals who (1) have successfully completed or are participating in a supervised rehabilitation program and are no longer engaged in the illegal use of drugs or (2) are erroneously

regarded as engaging in the illegal use of drugs.

The court rejected Johnson's contention that, because he was participating in a drug rehabilitation program and was not using drugs when he was terminated, he is protected under the safe-harbor provision. "Current" drug users are excluded from protection under this provision. The term "currently" is to be construed broadly. The ADA's legislative history states that current drug users are those whose illegal use of drugs occurred recently enough to justify a reasonable belief that their drug use is current. *See* H.R. Conf. Rep. No. 101-596, at 64 (1990). The Fourth Circuit has ruled that "current" means a periodic or ongoing activity, in which a person engaged, that has not permanently ended. *See Shafer v. Preston Mem'l Hosp. Corp.*, 107 F.3d 274 (4th Cir. 1997), 21 MPDLR 334. The Fifth Circuit has ruled that courts should examine factors, including the length and severity of the employee's addiction, in determining whether an employee was a current drug user at the time of termination. *See Zenor v. El Paso Healthcare Sys., Ltd.*, 176 F.3d 847 (5th Cir. 1999). Johnson was a current drug user, because he tested positive for marijuana in March, during a time when he was also apparently participating in drug rehabilitation. Although he claimed the test results were erroneous, he produced no evidence to support his claim, and also never exercised his right that the test be repeated.

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

A Texas federal court held that a former employee with depression and alcoholism was not disabled, regarded as such, or had a record of a disability as defined by the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* Also, the employer's reason for firing the employee—resuming his abuse of alcohol—was not a pretext for discrimination in violation of the Family and Medical Leave Act (FMLA), 29 U.S.C. §2601 *et seq.* ***Lottinger v. Shell Oil Co., 143 F. Supp. 2d 743 (S.D. Tex. 2001).***

In 1995, Kenneth Lottinger, a senior administrative representative for Shell Oil Company, was diagnosed with depression and began abusing alcohol. Shell arranged for his admission to an inpatient program. After completing treatment, Shell had Lottinger sign a "return-to-work" agreement that conditioned is employment on abstention from alcohol abuse, attendance at AA meetings, and random drug tests. In August 1996, Lottinger relapsed into alcohol abuse, was readmitted to the inpatient program, and upon his release signed another return to work agreement. In May 1997, he relapsed again. Shell fired him on the ground that he failed to attend sufficient AA meetings and did not submit required paperwork. Lottinger sued Shell under Title I, 42 U.S.C. §§12111-12117, and the FMLA.

The district court granted Shell summary judgment on Lottinger's ADA claim that Shell discriminated against him on the basis of his alcoholism and depression. First, Lottinger failed to show that he had an impairment that was severe enough to substantially limit one or more major life activities. *See* 42 U.S.C. §12102(2)(A). The Fifth Circuit has declined to find alcoholism to be a *per se* disability under the ADA. *See Burch v. Coca-Cola Co.*, 119 F.3d 305 (5th Cir. 1997), 21 MPDLR 620, *cert. denied*, 522 U.S. 1084; *see also Nelson v. Williams Field Servs. Co.*, 216 F.3d 1088 (10th Cir. 2000), 24 MPDLR 603. Lottinger admitted that when he took anti-depressants he could "'absolutely'" do his job, and could complete his assignments despite his depression. There was no indication that his sleeping and appetite problems were severe, long-term, or had a permanent impact. The fact that Lottinger had to be hospitalized did not automatically mean that his major life activities were substantially limited. *See Burch.* The evidence failed to demonstrate that his impairments prevented him from performing an entire class of jobs or even a broad range of jobs.

Second, Lottinger failed to produce evidence that he had a record of a substantially limiting impairment. *See* 42 U.S.C. §12102(2)(B). The fact that he was treated with anti-depressants and for alcoholism did not establish a record that either of his impairments substantially limited a major life activity. *See Sherrod v. American Airlines, Inc.*, 132 F.3d 1112 (5th Cir. 1998), 22 MPDLR 214; *Pryor v. Trane Co*, 138 F.3d 1024 (5th Cir. 1998), 22 MPDLR 608.

Third, Lottinger did not show that he was regarded by Shell as having a substantially limiting impairment. *See Sherrod* and *Pryor*. Although his job changed after his repeated absences, he was assigned additional clerical duties. He worked late and on weekends, and contended that his duties should have been shared with his co-workers. He asserted that his supervisors ignored his health problems.

Finally, Shell provided Lottinger with reasonable accommodations. Shell gave Lottinger more than one opportunity to receive treatment, complete rehabilitation, and return to work. Although he asked for another chance, second chances or pleas for grace are not an accommodation as contemplated by the ADA. *See Burch*, 119 F.3d at 320; *see also Siefken v. Village of Arlington Heights*, 65 F.3d 664 (7th Cir. 1995), 19 MPDLR 746; *Evans v. Federal Express Corp.*, 133 F.3d 137 (1st Cir. 1998), 22 MPDLR 224.

The court also granted Shell summary judgment on Lottinger's FMLA claim. First, Shell afforded Lottinger paid leave on more than one occasion to obtain treatment

for his alcoholism. Lottinger had not contended that Shell had ceased paying him or denied him benefits following his hospitalization and prior to his dismissal. Although Lottinger claimed that he requested extended leave in May 1997 after he had relapsed again, he did not assert that the additional leave was mandated because his health condition rendered him unable to perform the functions of the job, as necessary to qualify for FMLA leave. *See* 29 U.S.C. §2612. Finally, Lottinger had not produced evidence that his termination could be attributed to his taking leaves of absence for treatment and hospitalization, and he had not lost pay or benefits during this time. Instead, Shell discharged Lottinger because he had resumed his alcohol abuse, which was a direct violation of his return-to-work agreement.

Hiring; Title I; Pleadings; Major Life Activity; Epilepsy

The Sixth Circuit ruled that an Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-12117, complaint was sufficient under Fed. R. Civ. P. 8(a), even though it did not specify the major life activity substantially limited by a job applicant's epilepsy, because it gave the defendant fair notice of the claim and the grounds upon which it rested. Further, the pleading was not self-defeating in its acknowledgment that the applicant took medication for his condition. ***EEOC v. J.H. Routh Packing Co., 246 F.3d 850 (6th Cir. 2001).***

In 1995, J.H. Routh Packing Company offered Jason Polak a meat cutter/trimmer job, contingent upon his passing a physical exam. On a health questionnaire, Polak disclosed his history of epilepsy, that his epilepsy was controlled by medication, and that he had experienced a seizure within the past two months. Routh rescinded its offer, advising Polak that he must be seizure free for at least six months. Polak filed a charge with the Equal Employment Opportunity Commission (EEOC), which filed a complaint against Routh under Title I. After the U.S. Supreme Court's ruling in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 475 (1999), 23 MPDLR 510, that "the determination of whether an individual is disabled should be made with reference to measures that mitigate the individual's impairment," the district court granted Routh's motion for judgment on the pleadings. The court found that the EEOC had failed to properly identify Polak's major life activity.

The Sixth Circuit reversed and remanded. "Federal jurisprudence is unclear on the necessity of including . . . a major life activity in a complaint under the Act." Few circuits have addressed the issue, and the district courts that have have reached inconsistent conclusions. *See, e.g., Menkowitz v. Pottstown Mem'l Med. Ctr.*, 154 F.3d 113 (3d Cir. 1998), 22 MPDLR 730 (finding a pleading that simply alleged that the disability is recognized under the ADA sufficient, not requiring identification of the major life activity); and *Duda v. Board of Educ.*, 133 F.3d 1054, 1059 (7th Cir. 1998), 22 MDPLR 192 (finding pleading that stated the defendant regarded the plaintiff as substantially limited in major life activities without listing those activities was sufficient); *Smallberger v. Federal Realty Inv. Trust*, 1999 WL 126919 (E.D. Pa. Mar. 8, 1999), 23 MPDLR 378 (finding sufficient pleading that stated plaintiff is disabled and defendant perceived plaintiff as disabled within the meaning of the ADA).

The appeals court then held that

> so long as the complaint notifies the defendant of the claimed impairment, the substantially limited major life activity need not be specifically identified in the pleading. Rule 8 requires only that the complaint give the defendant notice of the claim and its supporting facts. . . . An accusation of discrimination on the basis of a particular impairment provides the defendant with sufficient notice to begin its defense against the claim. If the defendant cannot adequately affirm or deny whether the impairment falls under the Act's protection, the defendant "shall so state and this has the effect of a denial." . . . We note that a plaintiff would be wise to mention her specific limited major life activity, but failing to do so in not fatal to her complaint.

The EEOC satisfied Rule 8(b), as the complaint provided Routh with fair notice of the EEOC's claim and the grounds upon which it rested, even though it did not state the particular major life activity substantially limited by Polak's epilepsy. The complaint alleged that Polak was a qualified individual with a disability (epilepsy or seizure disorder) who, with or without an accommodation, could perform the essential job functions. In addition, the complaint stated that Polak has taken medication for his epilepsy since he was a child, described the types and frequency of his seizures, and explained the physical effects of his seizures.

The appeals court rejected Routh's argument that statements in the complaint that Polak has taken medication for his epilepsy since he was a child and that his epilepsy was controlled with medication were self-defeating. The facts in this case distinguished it from *Sutton*, in which plaintiffs alleged that with corrective measures their vision is 20/20 or better. Here, the EEOC did not affirmatively plead that Polak's epilepsy had been completely eliminated. "Controlling

a disability does not necessarily mean removing a disability." Moreover, *Sutton* stated that "individuals who take medicine to lessen the symptoms of an impairment so that they can function [may] nevertheless remain substantially limited." *See* 527 U.S. at 488.

Title I; Actual; Perceived; Epilepsy

The Eleventh Circuit affirmed summary judgment for the county, finding a county nurse who was unable to drive to work for six months due to epilepsy was not disabled as defined by the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.*, or the Rehabilitation Act, 29 U.S.C. §794, because she was not substantially limited in a major life activity. First, driving is not a major life activity; it is absent and different in character from the list of major life activities enumerated by the Equal Employment Opportunity Commission, which include "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." *See* 29 C.F.R. §1630.2(i). Second, plaintiff was not substantially limited in the major life activity of working. She produced no evidence that she was unable to perform her job, or that the county regarded her as such. Finally, plaintiff was not substantially limited in the major life activity of childbearing, *see Bragdon v. Abbott*, 524 U.S. 624 (1988), 22 MPDLR 449. Although the medication she was taking increased her risk of bearing a child with birth defects, that risk had no relevance to her work for the county or to her request for accommodation. ***Chenoweth v. Hillsborough County, 250 F.3d 1328 (11th Cir. 2001).***

Title I; Actual; Qualified; Reasonable Accommodation; Mobility Impairments

The Sixth Circuit reinstated a jury verdict for an employee with various mobility impairments who was denied a permanent position because he could not fully rotate through all of the assigned jobs. Plaintiff established that he was disabled and qualified to perform his essential job functions within the meaning of the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, and that his employer failed to accommodate him. ***Kiphart v. Saturn Corp., 251 F.3d 573 (6th Cir. 2001).***

Jeffrey Kiphart, a Saturn Corporation employee, was removed from his work team, moved through a series of temporary jobs, and finally placed on involuntary medical leave for seven months. Kiphart sued Saturn under the ADA Title I, 42 U.S.C. §§12111-12117, alleging that it improperly used the concept of job rotation—under which each team member rotates through each of the jobs assigned to the team—to justify its refusal to place him on any team that assigned one or more tasks that he could not perform. The jury found for Kiphart, but the district court ordered the clerk not to enter the verdict. Instead, six months later, the court granted Saturn's in-trial motion for judgment as a matter of law.

The Sixth Circuit reversed and remanded for a calculation of post-judgment interest from the date the jury rendered its verdict. First, Kiphart presented sufficient evidence that he was substantially limited in the major life activity of performing manual tasks and, thus, disabled within the meaning of the ADA. *See Williams v. Toyota Motor Mfg., Ky.*, 224 F.3d 840 (6th Cir. 2000), 24 MPDLR 776. Tendinitis and ulnar neuropathy prevented him from performing repetitive manual motions, and Saturn's medical staff identified a class of manual activities that he was not able to perform due to his impairments. Further, Kiphart's physician restricted him from lifting more than 30 pounds, repetitively bending his arms or neck, and using air vibrating power tools.

Second, Kiphart was otherwise qualified to perform his essential job functions with or without a reasonable accommodation. *See Brickers v. Cleveland Bd. of Educ.*, 145 F.3d 846, 849 (6th Cir. 1998), 22 MPDLR 619. Kiphart offered significant evidence that the ability to fully rotate in a team was not an essential job function. Some job announcements did not list the ability to rotate fully as a necessary qualification. In addition, many employees swapped job functions with the management's knowledge, and did not operate under the job rotation system. In fact, some employees testified that they knew of not one team that was fully rotational. Moreover, prior to 1997, the only time that Saturn fully enforced the job rotation concept was when the company was placing employees on medical restrictions, like Kiphart. It was not until 1997 that Saturn formally included the full rotation concept in its "Guiding Principles."

Finally, a reasonable jury could have found that Saturn failed to reasonably accommodate Kiphart's disabilities. *See School Bd. of Nassau County v. Arline*, 480 U.S. 273, 289 n.19 (1987), 11 MPDLR 110. Saturn refused to consider medically restricted employees for permanent job openings unless the employees were fully rotational. However, as previously mentioned, the fully rotational concept was not officially implemented by Saturn until 1997, and before that time, Saturn acquiesced to widespread noncompliance with the job rotational system. Moreover, Kiphart was frequently able to perform all but one or two tasks, and providing him with reasonable accommodations would not have placed an undue burden on Saturn.

Title I; Actual; Perceived; Qualified

The Sixth Circuit found that a former employee was not disabled as defined by the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, because his leg, foot, and shoulder injuries did not substantially limit the major life activities of running, playing sports, or working. Also, another former employee with neck and back injuries whose doctor had not released her to return to work was not a qualified individual under the ADA. ***Anderson v. Inland Paperboard & Packaging, Inc., 2001 WL 406463 (6th Cir. Apr. 4, 2001).***

During their employment with Inland Paperboard and Packaging, William and Lisa Anderson were involved in two motorcycle accidents. They met with Inland's human resources manager to discuss their injuries and the possibility of performing other jobs, but did not request new jobs or reasonable accommodations. They were terminated. Both sued Inland under Title I, 42 U.S.C. §§12111-12117, for failure to accommodate. The district court granted summary judgment to Inland.

The Sixth Circuit affirmed. First, William was not disabled under the ADA. The fact that he was considered disabled under a collective bargaining agreement was not sufficient to establish disability under the ADA. *See McKay v. Toyota Motor Mfg. USA, Inc.*, 110 F.3d 369, 371 (6th Cir. 1997), 21 MPDLR 336. Moreover, his single conclusory statement that his leg and foot injuries substantially limited the major life activities of running and playing sports was not sufficient to avoid summary judgment sought by Inland. *See Penny v. United Parcel Serv.*, 128 F.3d 408, 415 (6th Cir. 1997), 21 MPDLR 748. There is no indication regarding the extent to which running and playing sports are major life activities for William, nor how substantially limited he is in these activities. Further, Williams failed to show that his inability to work more than eight hours per day substantially limited the major life activity of working—significantly restricted him from performing a class or broad range of jobs as compared to the average person having comparable training, skills, and abilities, *see* 29 C.F.R. §1630.2(j)(3)(i). Nor was William regarded as disabled by Inland. The fact that Inland recognized that his physical limitations qualified him for benefits under the collective bargaining agreement was not sufficient, because the company was cognizant of the definition of disability under the collective bargaining agreement as opposed to the ADA.

Second, Lisa was not a qualified individual under the ADA. Her doctor had not yet released her to return to work at the time that she was terminated. *See Grant v. Wilson Sporting Goods Co.*, 143 F.3d 1042, 1047 (6th Cir. 1998).

Title I; Actual; Lifting Restriction

The Eighth Circuit affirmed that a former employee with a wrist injury was not disabled as defined by the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, because a 15-pound lifting restriction is not a substantial limitation on the major life activity of working. ***Mellon v. Federal Express Corp., 239 F.3d 954 (8th Cir. 2001).***

In January 1996, Nancy Mellon injured her wrist while working for Federal Express Corporation and re-injured it. Her doctor restricted her from lifting more than 15 pounds. Although she underwent wrist surgery, her efforts to return to her previous job were delayed. She was fired for her absences and sued under Title I, 42 U.S.C. §§12111-12117. The district court granted Federal Express summary judgment, concluding that Mellon was not disabled.

The Eighth Circuit affirmed. To be substantially limited in the major life activity of working, one must be precluded from a broad range of jobs or a class of jobs. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 492 (1999), 23 MPDLR 510. This court has previously ruled that a 10-20 pound lifting restriction is not sufficiently disabling under the ADA. *See Wooten v. Farmland Foods*, 58 F.3d 382 (8th Cir. 1995), 19 MPDLR 469. *See also Helfter v. United Parcel Serv., Inc.*, 115 F.3d 613 (8th Cir. 1997), 21 MPDLR 507. The court rejected Mellon's reliance on her vocational rehabilitation counselor's statement in an affidavit that she had a 13-percent impairment due to her right arm's condition. The counselor's opinion was dependent on what Mellon had told him; he had not been shown to have either personal knowledge or expertise on the medical claim.

Title I; Actual; Shoulder

A Kansas federal court held that an employee with a shoulder injury failed to show that her employer regarded her as substantially limited in the major life activity of working and, thus, was not disabled within the meaning of the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* ***Henry v. Modine Mfg. Co., 2001 WL 487943 (D. Kan. Mar. 28, 2001).***

After injuring her shoulder, Candee Henry, a core assembly processor (CAP) for Modine Manufacturing Company, returned to light-duty work for three to six weeks and then resumed full duty. At a workers' compensation hearing, she testified that her CAP duties violated the physical restrictions—no repetitive above-shoulder activities, forceful extension of her elbow, and repetitive pushing and pulling of her shoulder—set out by a doctor who had evaluated her for workers'

compensation purposes. When Modine learned of these restrictions, it placed Henry on layoff status because no work was available that met these restrictions. After a year on layoff status, Modine terminated Henry pursuant to company policy. She sued Modine under Title I, 42 U.S.C. §§12111-12117.

The district court granted Modine summary judgment. Henry failed to establish that Modine regarded her as substantially limited in the major life activity of working and, thus, disabled under the ADA. *See* 42 U.S.C. §12102(C). She did not present evidence establishing that Modine regarded her as significantly restricted in her ability to perform a class of jobs, *see* 29 C.F.R. §1630.2(j)(3)(i). Henry cited to a statement by Doug Jacowski, who was in charge of reviewing employees' medical restrictions, that she was "no longer qualified for an entire class of positions, that being all of Class 4, all of Class 3, and all of Class 2 in the manufacturing plant." However, the jobs referred to encompass only 12 production jobs in Modine's plant, which do not qualify as a class under the ADA. Rather, the appropriate class of jobs would consist of all manufacturing jobs in the Emporia, Kansas area. *See McKay v. Toyota Mfg., U.S.A., Inc.*, 110 F.3d 369, 373 (6th Cir. 1997), 21 MPDLR 336.

Furthermore, Henry did not provide evidence as to "the number and types of jobs utilizing similar training, knowledge, skills or abilities, within the geographic area," from which she was disqualified. *See* 29 C.F.R. §1630.2(j)(3)(i) There is no evidence to demonstrate her level of training, skills, and abilities in order to compare them to the average person. Finally, she failed to introduce evidence regarding the geographical area to which she has reasonable access, or the number and type of jobs demanding similar training from which she would also be disqualified. *Id.*

Title I; Actual; Perceived; Medical Exam; Back Injury

The Third Circuit affirmed that a former employee with a back injury was not disabled under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* He was not substantially limited in the major life activity of working, and his employer's request for an independent medical examination (IME) did not establish that he was regarded as such. ***Tice v. Centre Area Transp. Auth., 247 F.3d 506 (3d Cir. 2001).***

Randy Tice, a bus driver for the Centre Area Transportation Authority (CATA), injured his back and went out on medical leave. Before he could be reinstated, CATA required an IME. When Tice did not return to work after the two-year leave period expired, he was terminated. He sued CATA under Title I, 42 U.S.C. §§12111-12117. The district court granted CATA summary judgment, finding that Tice was not disabled under the ADA.

The Third Circuit affirmed. Tice failed to show that he was substantially limited in the major life activity of working—precluded from a class or broad range of jobs *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), 23 MPDLR 510. His injury only limited his ability to drive a bus. In fact, both before and after his termination, Tice worked for an airline, and began operating a ticket sales business out of his home.

Moreover, the fact that Tice was required to undergo an IME did not show that CATA regarded him as substantially limited in the major life activity of working. The ADA explicitly allows examinations or inquiries as to whether an employee has a disability or as to the severity of a disability if they are job-related and consistent with business necessity. *See* 42 U.S.C. §12112(d)(4)(A). The act also explicitly permits inquiries as to an employee's ability to perform job-related functions. *See* 42 U.S.C. §12112(d)(4)(A). However, the ADA is unclear as to whether examinations are permissible if intended to evaluate the employee's ability to perform job-related functions, even if such exams are not intended to discover whether an employee is disabled. The EEOC regulations clarify that a request for an IME that is job-related and consistent with business necessity will never, without other evidence, be sufficient to establish that an employer regarded the employee as substantially limited in the ability to work. *See Sullivan v. River Valley Sch. Dist.*, 197 F.3d 804 (6th Cir. 1999), 24 MPDLR 86. A request for an examination only establishes that the employer has doubts about an employee's ability to perform a particular job, rather than a broad class of jobs.

The court rejected Tice's argument that the IME was not consistent with business necessity. Throughout the course of his dealings with CATA, Tice complained of severe pain and difficulty walking to the point of requiring "narcotic" medication. Moreover, he had apparently experienced "spasms" that interfered with his use of his legs such that CATA had received complaints about reckless driving. Such a history raised legitimate safety concerns about Tice's ability to drive a bus. Further, CATA's unwillingness to rely on his doctor's opinion was reasonable given that the doctor relied on Tice's assessment of his capabilities when assessing his ability to drive.

Title I; Actual; Qualified; Retaliation; Shoulder Injury

A New Mexico federal court decided that factual issues existed as to whether a former employee's

shoulder condition substantially limited the major life activity of lifting and, thus, was a disability under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*; whether lifting truck doors was an essential job function; whether he was qualified to perform his essential job functions with or without reasonable accommodation; and whether his employer contested his unemployment compensation award in retaliation for his filing a discrimination charge with the Equal Employment Opportunity Commission (EEOC). ***Ward v. Wal-Mart Stores, Inc., 140 F. Supp. 2d 1220 (D.N.M. 2001).***

Thomas Ward, a loss prevention officer for Wal-Mart Stores, monitored incoming and outgoing freight. After being diagnosed with adhesive capsulitis and chronic impingement syndrome in both shoulders, he was unable to lift the trailer doors on the back of freight trucks to inspect their contents. When he asked Wal-Mart to issue a memo requiring the truck drivers to do so, Wal-Mart refused and terminated Ward for his failure to perform an essential job function. He sued Wal-Mart under The ADA Title I, 42 U.S.C. §§12111-12117, alleging basic discrimination and retaliation for filing a charge with the EEOC.

The district court denied summary judgment for Wal-Mart. A factual issue existed as to whether Ward was substantially limited in the major life activity of lifting and, thus, disabled as defined by the ADA, *see* 42 U.S.C. §12102(2). The Tenth Circuit has found that lifting falls within the definition of a major life activity, *see Rusk v. Ryder Integrated Logistics*, 238 F.3d 1237, 1240 (10th Cir. 2001). The court found that Ward's shoulder impairment, which permanently restricted him from both reaching overhead on a repetitive basis and lifting more than two pounds, was substantially limiting on its face. Thus, he did not have to present evidence comparing his lifting ability to the capabilities of an average person in the general population. *See Lowe v. Angelo's Italian Foods, Inc.*, 87 F.3d 1170, 1174 (10th Cir. 1996), 20 MPDLR 687 (ruling that 15-pound lifting restriction substantially limiting on its face).

A factual issue also existed as to whether Ward demonstrated that he was qualified to perform his essential job functions with or without reasonable accommodation. Ward contended that opening trailer doors was not an essential function or, alternatively, that Wal-Mart failed to provide him with a reasonable accommodation that would have allowed him to perform that function. "While it appears from the evidence that loss prevention officers must have the ability to verify the contents, or lack thereof, of incoming trucks, the ability to open the doors on those trucks is peripheral." There was no policy requiring these officers to open trailer doors. One manager described this function as a "'courtesy'" to Wal-Mart's third-party carriers. The amount of time devoted to truck gate duty comprised only a third of the job, and officers were required to lift the doors only on a few occasions. Most significantly, the Wal-Mart Distribution Centers Matrix of Essential Job Functions Form, which is intended solely to advise applicants with disabilities of their position's essential functions, did not list upper body mobility as an essential function for the loss prevention officer position.

Finally, a factual issue existed as to whether Wal-Mart's reason for appealing Ward's unemployment compensation award—that it appeals all such awards—was a pretext for discrimination. Because Wal-Mart filed its appeal less than a month after Ward's EEOC charge, the temporal proximity of the two actions raised an inference of a retaliatory motive sufficient to establish a causal connection. New Mexico law provides that the only legitimate reason for denying unemployment compensation to a terminated employee is discharge for wrongful conduct. *See* N.M. Stat. Ann. §51-1-7(B). Wal-Mart acknowledged that the only reason for Ward's termination was his inability to perform an essential job function. Therefore, a fact finder could determine that Wal-Mart had no legitimate basis for its appeal.

Title I; Actual; Perceived; Hostile Work Environment; Stress; Knee; Heart

A North Dakota federal court decided that an employee with a knee injury, mental stress, and an episode of atrial fibrillation failed to show that he was (1) substantially limited in the major life activity of working or regarded as such and, thus, disabled under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, and (2) subjected to a hostile work environment. ***Anderson v. Richardson, 145 F. Supp. 2d 1131 (D.N.D. 2001).***

Bernard Anderson sued Western Power Administration (WPA) under Title I, 42 U.S.C. §§12111-12117, alleging he was suspended on several occasions and subjected to a hostile work environment because of his disabilities.

The district court granted WPA summary judgment, finding that Anderson failed to show that he was disabled within the meaning of the ADA. *See* 42 U.S.C. §12102(2). As to all his conditions, he failed to establish that they substantially limited his ability to perform the major life activity of working, that is significantly restricted his ability to perform a broad range of jobs. As to his knee condition, Anderson only had a 2-percent permanent loss of knee function, and he had reached maximum medical improvement. *See Robinson v. Neodata Servs., Inc.*, 94 F.3d 499 (8th Cir. 1996), 20

MPDLR 827; *Wooten v. Farmland Foods*, 58 F.3d 382 (8th Cir. 1995), 19 MPDLR 469. Moreover, he offered no evidence beyond the fact of the impairment. With regard to his mental stress, he never sought treatment nor had been hospitalized. Regarding his heart condition, Anderson had one episode of atrial fibrillation after he drank 20 cups of coffee, and has not had a heart problem since. Anderson also failed to show that WPA regarded him as substantially limited in working. Finally, he failed to establish that he suffered harassment severe enough to alter the terms and conditions of employment. *See Wallin v. Minnesota Dep't of Corrections*, 153 F.3d 681, 687 (8th Cir. 1998). 22 MPDLR 621.

Title I; Hiring; Actual; Perceived; Lifting Restriction

The Fourth Circuit affirmed the district court's grant of summary judgment to an employer (*see* 2001 WL 13238 (D. Md. Jan. 4, 2001), 25 MPDLR 227), finding that a job applicant with a 10-pound lifting restriction failed to show that he was substantially limited in his ability to work or regarded as such by his employer and, thus, was not disabled within the meaning of the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.* ***Palov v. Ikon Office Solutions, Inc., 2001 WL 627614 (4th Cir. June 7, 2001).***

Title I; Actual; Perceived; FMLA; Equivalent Position; Depression

The Eighth Circuit found that an employee with depression failed to show that she was disabled or regarded as such under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* However, a triable issue existed as to whether she was restored to an equivalent position upon her return from leave under the Family and Medical Leave Act (FMLA), 29 U.S.C. §2601 *et seq.* ***Cooper v. Olin Corp., 246 F.3d 1083 (8th Cir. 2001).***

Linda Cooper, a locomotive engineer who transported explosives, took a leave of absence for personal problems. Although her health care providers cleared her to return to work, her employer's medical director told her she could not operate a locomotive until he was confident that she could do so safely. Cooper had a relapse of her depression and took FMLA leave. When she returned to work, the medical director again prohibited her from operating a locomotive. Cooper was assigned to an administrative position, but received the same pay and benefits of her locomotive job and retained her job title. She eventually went on long-term disability after having another relapse of depression. Cooper later sued her employer under the ADA Title I, 42 U.S.C. §§12111-12117, and the FMLA. The district court granted the employer summary judgment.

The Eighth Circuit affirmed in part and reversed in part. First, Cooper was not disabled as defined by the ADA. She failed to show that her depression substantially limited a major life activity when compared to the general population, *see Cody v. CIGNA Healthcare of St. Louis, Inc.*, 139 F.3d 595 (8th Cir. 1998), 22 MPDLR 332. Cooper, who has had this condition for more than 30 years, has remained employed, raised a family, takes care of her own finances, cares for numerous pets and farmland, operates large machinery, and has social relationships with others.

Nor did Cooper's employer regard her depression as substantially limiting the major life activity of working, that is as significantly restricting her ability to perform a class of jobs or a broad range of jobs in various classes. *See* 29 C.F.R. §1630.2(j)(3)(i). *See also Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999), 23 MPDLR 511. The medical director's conclusion that Cooper was precluded from operating a locomotive was not sufficient to show that he regarded her as disabled. The inability to perform one particular job does not constitute a substantial limitation on working, *see Webb v. Garelick Mfg. Co.*, 94 F.3d 484 (8th Cir. 1996), 20 MPDLR 827.

Further, the medical director stated that another job would be found for her. Cooper had been part of the train crew for only five or six of the many years she spent at the plant. It cannot be concluded that the director considered her precluded from working with explosives generally or from the broad range of jobs involving her engineering expertise outside of those specifically transporting explosives at the plant.

Second, factual issues exist as to whether upon Cooper's return from FMLA leave, she was restored to an equivalent position, as required under the FMLA. *See* 29 U.S.C. §2614. Although she continued to retain her job title, classification, pay, and benefits when she returned to work, Cooper was not returned to her locomotive position. She contended that the duties and functions of her office assignment were so much different from those of a locomotive engineer. In determining whether an employee was restored to an equivalent position, the employer must take into account the employee's work and compensation involved. An equivalent position is one that is virtually identical to the employee's former position in terms of pay, benefits, and working conditions, including privileges, perquisites, and status. The position must involve the same of substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort,

responsibility, and authority. *See Watkins v. J & S Oil Co.*, 164 F.3d 55 (1st Cir. 1998), 23 MPDLR 225.

Title I; Actual; Perceived; Anxiety Disorder; Depression

A Pennsylvania federal court held that a former employee with anxiety disorder and depression failed to show that she was substantially limited in the major life activity of working or regarded as such by her employer and, thus, was not disabled under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* ***Endres v. Techneglas, Inc., 139 F. Supp. 2d 624 (M.D. Pa. 2001).***

Tess Endres, a shipping coordinator for Techneglas Inc., alleged that she was constantly sick to her stomach and had headaches as a result harassment from a co-worker. She took a leave of absence due to anxiety and depression. When Endres returned, she continued to suffer from the co-worker's behavior and again went on sick leave. After her doctor cleared Endres to return to work, she indicated to Techneglas that she would not return as the conditions that forced her to leave were not corrected. Techneglas construed the remark as a resignation. Endres then sued Techneglas for violating Title I, 42 U.S.C. §§12111-12117.

The district court granted Techneglas summary judgment. Endres failed to show that her anxiety disorder and depression substantially limited a major life activity and, thus, was not disabled under the ADA. *See* 42 U.S.C. §12102(2). She was not significantly restricted in her ability to perform a class of jobs or a broad range of jobs in various classes as compared to the average person. *See* 29 C.F.R. §1630.2(j)(3)(i). Rather, her work was limited only to the extent that she could not work with one co-worker. Although Endres claimed that she had a difficult time shopping, Endres failed to present evidence that she was significantly restricted in this activity. Finally, Endres failed to show that Techneglas regarded her as substantially limited in the major life activity of working. Following her leaves of absence, Techneglas permitted her to return to work. Moreover, Endres declined to be reinstated despite the fact that Techneglas offered her work.

§501; Actual; Retaliation; Hostile Work Environment; PTSD

A Florida federal court held that a postal employee with post-traumatic stress disorder (PTSD) failed to show that she was substantially limited in a major life activity and, thus, disabled as defined by the Rehabilitation Act §501, 29 U.S.C. §791 *et seq.* Also, she failed to show her employer retaliated against her and created a hostile work environment. ***Johnston v. Henderson, 144 F. Supp. 2d 1341 (S.D. Fla. 2001).***

Juanita Johnston, who processed mail that lacked proper postage, saw her co-worker handle an unaddressed envelope marked "Happy Holiday postal employee" on the front, and "just been exposed to anthrax" on the back. Johnston, who never touched the envelope, filed a federal compensation claim for PTSD, which was denied. After a four-month absence, she returned to light-duty work with the restriction she have limited exposure to conflict, stress, and dangerous situations. Johnston filed six discrimination charges with the Equal Employment Opportunity Commission (EEOC), alleging discrimination and harassment on the basis of her PTSD. She then sued the Postmaster General for §501 violations.

The district court granted the Postmaster summary judgment. Johnston failed to show that she was disabled under §501. *See* 29 U.S.C. §706(8)(B). She did not explain how her symptoms (i.e., excessive stress, anxiety, headaches, flushing, fatigue, emotional drain, sexual dysfunction, sleeping problems, learning disorder, memory retention, relusiveness, and obesity) substantially limited a major life activity. Johnston had returned to work full-time in a limited duty capacity, and had requested overtime. In addition, she cooked, walked, drove, read books, cared for herself and mother, and used a computer.

Because Johnston was not disabled, she was not entitled to reasonable accommodations. *See Terrell v. U.S. Air*, 132 F.3d 621 (11th Cir. 1998), 22 MPDLR 198. Even if she were disabled, she failed to request any accommodations. Further, Johnston's retaliation claim failed because the allegations contained in her EEOC charges—improper denial of sick leave, unauthorized release of confidential medical records, issuance of an unfounded notice to report questioning Johnston's leave of absence, and harassment—do not amount to a serious and material change in the terms, conditions, or privileges of employment. *See Davis v. Town of Lake Park, Fla.*, 2001 WL 289882 (11th Cir. 2001). Also, she failed to show that the postal service's reasons for its actions were a pretext for discrimination.

Finally, Johnston failed to state a claim for a hostile work environment, because the conduct she complained of was not severe or pervasive. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993). The vast majority of actions which defendant allegedly took—deliberate improper filing of insurance forms, alteration of workers' compensation records, release of confidential medical records, incorrect processing of Family and Medical Leave Act forms—have nothing to do with the terms and conditions of her employment. At worst,

defendant's conduct caused Johnston to suffer "inconveniences" in the form of benefit delays.

Title I; Actual; Comparator Evidence; Anxiety Disorder

An Illinois federal court ruled that a former machine operator was not disabled as defined by the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, because he failed to show that his anxiety disorder significantly limited a major life activity as compared to the average person in the general population. ***Huizenga v. Elkay Mfg., 2001 WL 640973 (N.D. Ill. June 5, 2001).***

Samuel Huizenga, a laborer and machine operator for Elkay Manufacturing, received treatment for an anxiety disorder with panic attacks, requiring him to take a day off from work every three months. Elkay counted each absence as unexcused. Under the company's attendance policy, the accumulation of four unexcused absences in a three-month period resulted in a verbal warning and, thereafter, increasingly severe penalties, culminating in termination. In the three-and-one-half years of employment with Elkay, Huizenga received 10 disciplinary actions and was eventually terminated for excessive absenteeism. He sued Elkay under Title I, 42 U.S.C. §§12111-12117, alleging the company failed to reasonably accommodate his anxiety disorder by not excusing his quarterly absences.

The district court granted Elkay summary judgment, concluding that Huizenga was not disabled under the meaning of the ADA because he failed to show that his anxiety disorder substantially limited a major life activity. Huizenga stated that his anxiety disorder interfered with his ability to think, reason, analyze, remember, communicate, and care for himself. However, he failed to explain the degree of limitation his condition imposed on the condition, manner, or duration under which he could perform such major life activities as speaking, learning, or cognitive thinking. His statements were too conclusory and uninformative to be given any weight. *See Stop-N-Go of Madison, Inc. v. Uno-Ven Co.*, 184 F.3d 672, 677 (7th Cir. 1999).

As to the major life activity of working, Huizenga testified at his deposition that he was able to continue working during a panic attack, albeit at a slower pace; that his medication allowed him to perform his job; and that he could work through a full eight- or nine-hour job. This testimony does not show that Huizenga was 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, as is required under the ADA. *See* 29 C.F.R. §1630.2(j)(3)(i). In addition, Huizenga admitted at deposition that he could care for himself and was able to drive himself to and from work and treatment.

Most significantly, Huizenga failed to present "comparator evidence" to show that he was "significantly restricted" as compared to the "average person in the general population." *See* 29 C.F.R. §1630.2(j)(1)(ii). *See also Maynard v. Pneumatic Prods. Corp.*, 233 F.3d 1344,1348-49 (11th Cir. 2000), 25 MPDLR 73. His affidavit barely goes beyond the language of the ADA, saying little more than he is substantially limited in major life activities. Because Huizenga's descriptions were too generic, a reasonable jury could not conclude that he was significantly restricted in his ability to perform a major life activity as compared to the average person.

Title I; Actual; Depression; Anxiety; CTS

A Kansas federal court granted the city summary judgment, finding that a former city airport employee was not disabled as defined by the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.* She failed to show that her depression and/or anxiety substantially limited the major life activities of learning and sleeping, or that her carpal tunnel syndrome substantially limited her ability to stand, lift, and reach. ***Ratts v. Board of County Comm'rs, 141 F. Supp. 2d 1289 (D. Kan. 2001).***

Title I; Actual; Bipolar Disorder

The Tenth Circuit affirmed summary judgment for an employer, finding that an employee who was terminated for failing to produce a urine sample failed to show that his bipolar disorder substantially limited him in the major life activities of sleeping or urinating and, thus, constituted a disability under the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.* ***Williams v. Hallmark Cards, 2001 WL 617821 (10th Cir. June 5, 2001).***

Title I; Actual; CTS

The First Circuit affirmed that a former airline gate agent with carpal tunnel syndrome (CTS) was not disabled under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, because she failed to show that she was substantially limited in a major life activity of working. ***Gelabert–Ladenheim v. American Airlines, Inc., 252 F.3d 54 (1st Cir. 2001).***

Lisa Gelabert-Ladenheim, a part-time gate agent for American Airlines in Puerto Rico, developed CTS in both hands; was assigned a 20-percent permanent impairment rating; and was permanently restricted from

lifting more than 30 pounds, sitting or standing for more than eight hours, and typing more than one or two hours at a time. As a result, she could no longer perform her previous duties as a gate agent, and American placed her on unpaid medical leave and authorized job search assistance to try to find her an alternate position at American.

Gelabert was informed that several positions were available at the San Juan airport, but she did not apply because she did not feel she could perform the duties they required. She eventually applied and interviewed for other positions, but they were given to other candidates. However, American offered Gelabert a reservation sales representative position, but she declined on the ground that the position involved heavy repetitive typing. Gelabert subsequently sued American under Title I, 42 U.S.C. §§12111-12117, alleging failure to accommodate her disability. The district court granted American summary judgment.

The First Circuit affirmed, concluding that Gelabert was not disabled under the ADA because she failed to show that she was substantially limited in the major life activity of working. To be substantially limited, plaintiffs must show they are significantly restricted in their ability to perform a class of jobs or a broad range of jobs in various classes. *See* 29 C.F.R. §1630.2(j)(3)(ii). Whether a plaintiff's impairment limits the major activity of working involves a multi-level analysis, starting with the skills of the plaintiff, and moving to the nature of the jobs available or unavailable to plaintiff. A court should consider jobs that are actually available to a plaintiff, rather than only those jobs that are unavailable. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 492 (1999), 23 MPDLR 510 (ruling that "if jobs utilizing an individual's skills but perhaps not his or her unique talents are available, one is not precluded from a substantial class of jobs").

Here, Gelabert was clearly qualified for a great variety of jobs. Comparing her to the average college-educated bilingual woman in San Juan with computer skills and experience in retail sales, the entertainment industry, the news industry, and the hospitality and transportation industries, it was evident that she did not have limited job prospects. Further, the fact that she was currently employed at a higher salary and had continued to work part-time after going on medical leave from American belied her conclusory claim that she was substantially limited in her ability to work. *See Santiago-Clemente v. Executive Airlines, Inc.*, 213 F.3d 25, 32-33 (1st Cir. 2000), 24 MPDLR 780; *Gutridge v. Clure*, 153 F.3d 898, 901 (8th Cir. 1998), 22 MPDLR 748. While CTS can substantially limit in certain circumstances a person in the major life activity of working, *see, e.g., Wellington v. Lyon County Sch. Dist.*, 187 F.3d 1150, 1155 (9th Cir. 1999), 25 MPDLR 850; *Quint v. A.E. Staley Mfg. Co.*, 172 F.3d 1, 13 (1st Cir. 1999), 23 MPDLR 385, it did not in Gelabert's case.

§501; Perceived; Retaliation; Causation; Hand Tremor

The Fourth Circuit affirmed that a former employee with a hand tremor failed to show that she was substantially limited in the major life activity of working or was regarded as such and, thus, was not disabled under the Rehabilitation Act §501, 29 U.S.C. §791 *et seq.* Also, she failed to establish a causal connection between her protected activity under §501 and her employer's alleged retaliatory acts. ***Hooven-Lewis v. Caldera, 249 F. 3d 259 (4th Cir. 2001).***

The Army accommodated Cheryl Hooven-Lewis, a laboratory technician in the retrovirology department at Walter Reed, by not requiring her to handle any hazardous or infectious substances. However, after she reported some errors in data, she was ordered to work active HIV samples. The Army removed Hooven-Lewis from the retrovirology department, pending an evaluation of the impact her hand tremors would have on her handling of dangerous, infectious, radioactive, and chemical substances, and gave her temporary assignments. Hooven-Lewis requested a return to retrovirology with the previous accommodation she had been provided. In response, the Army repeatedly requested that she provide medical records indicating that she was permanently precluded from performing work in the lab handling dangerous agents. Although Hooven-Lewis ignored these requests, the Army transferred her back to the retrovirology department. When she refused to perform lab work involving potentially infectious materials, the Army fired her. She sued the Army under §501. The district court granted summary judgment for the Army.

The Fourth Circuit affirmed. Hooven-Lewis failed to show that she was substantially limited in the major life activity of working and, thus, disabled under §501. *See* 29 U.S.C. §706(8)(B). Her ability to work in labs handling non-infectious and non-hazardous materials and to do administrative and supervisory duties demonstrated that she could still do work in her field. *See Forrisi v. Bowen*, 794 F.2d 931, 935 (4th Cir. 1986), 10 MPDLR 552. In fact, she was offered several positions with other laboratories, notwithstanding her tremor. In *Halperin v. Abacus Tech. Corp.*, 128 F.3d 191, 199 (4th Cir. 1997), 21 MPDLR 756, this circuit has held that there is no indication that an employee's impairment has limited his or her ability to perform a wide range of jobs if he or she can, and does, find comparable employment with a different employer.

Hooven-Lewis was not limited from work in general or in the class of jobs for which she was trained, but was only precluded from performing her particular job in the retrovirology lab. *See Forrisi v. Bowen*, 794 F.2d 931 (4th Cir. 1986), 10 MPDLR 552; *Gupton v. Virginia*, 14 F.3d 203 (4th Cir. 1994), 18 MPDLR 522. Nor did the Army regard Hooven-Lewis as substantially limited in the major life activity of working, as it believed that she could in fact do the particular work she asserted that she could not do and placed her in various positions. *See Beaver v. Delta Airlines*, 43 F. Supp. 2d 685 (N.D. Tex. 1999), 23 MPDLR 355.

As for Hooven-Lewis' claim that the Army refused to continue accommodating her, removed her from the retrovirology lab, and terminated her in retaliation for her filing a charge of discrimination with the Army's EEO office, she failed to demonstrate a causal connection between the filing of her EEO charge and her transfer or termination. The majority of the alleged retaliatory acts occurred before Hooven-Lewis contacted the EEO.

Title I; Actual; Double Vision

A Kansas federal district court held that a former employee with double vision was not disabled under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, because she was not substantially limited in the major life activity of seeing. ***Monell v. Kansas Assoc. of Sch. Bds., 2001 WL 487766 (D. Kan. Apr. 18, 2001).***

In February 1995, Louise Monell, Director of Finance with the Kansas Association of School Boards (KASB), was assaulted. The following year, her supervisor requested that she provide a statement from her doctor regarding her health problems, the approximate dates and length of times she would need to be absent, any restrictions due to her injuries, and any accommodations that she would need to perform her duties. The physician responded by stating that Monell would only need time off from work for medical appointments and therapy. In April 1996, KASB terminated Monell for poor work performance. She sued KASB under Title I, 42 U.S.C. §§12111-12117, alleging that she was terminated because of her disability. KASB moved for summary judgment.

The district court granted the motion. Monell claimed that she was disabled under the ADA, because she was substantially limited in the major life activities of seeing and concentrating. The court joined the Tenth Circuit's decision in *Pack v. Kmart Corp.*, 166 F.3d 1300, 1305 (10th Cir. 1999), 23 MPDLR 195, *cert. denied*, 528 U.S. 811 (1999), that "concentration may be a significant and necessary component of a major life activity, such as working, learning, or speaking, but it is not an 'activity' itself." As for seeing, Monell's physicians testified that she has a continued sensation of dyplopia that limits her ability to perform tasks on a computer for prolonged periods and to drive, especially at night. However, the physicians failed to discuss the nature or severity of Monell's impairment (i.e., whether she has double vision in all directions of gaze), its expected duration (i.e., whether she has double vision at all times), or its ability to be alleviated or corrected by glasses. Moreover, Monell failed to testify as to how her double vision impacts her life. The record demonstrated that prior to her termination, Monell drove to work and performed the ordinary tasks of her job. Case law supports the view that where a plaintiff suffers from some form of visual impairment but is still able to perform most daily activity, plaintiff is not disabled under the ADA. *See Still v. FreeportMcMoran, Inc.*, 120 F. 3d 50 (5th Cir. 1997), 21 MPDLR 752; *Chandler v. City of Dallas*, 2 F.3d 1385, 1390 (5th Cir. 1993), 18 MPDLR 172, *cert. denied*, 511 U.S. 1011 (1994); *Cline v. Fort Howard Corp.*, 963 F. Supp. 1075, 1080–81 (E.D. Okla. 1997), 21 MPDLR 485.

Title I; State Law; Actual; Pretext; Throat, Back Injuries

A Minnesota federal court ruled that a former employee with throat difficulties was not disabled under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, or the Minnesota Human Rights Act (MHRA), Minn. Stat. §363.01 *et seq.*, because the condition only temporarily interfered with his ability to work. Also, there was no evidence that his being terminated for absenteeism was a pretext for discrimination. ***Bey v. Brooklyn Ctr. Hotel, Ltd., 2001 WL 567825 (D. Minn. May 23, 2001).***

William Bey, a van driver for the Brooklyn Center Hotel, informed his supervisor that, due to back problems, he was unable to carry luggage for guests, keep the hotel common areas clean during non-driving time, and assist with deliveries. Bey was excused from performing these duties. On April 10, 1999, Bey submitted to his supervisor a doctor's note stating that due to throat soreness Bey should not return to work for seven days. On April 16, Bey informed his supervisor he would need more time off because he was scheduled for a tonsillectomy. The supervisor advised Bey that he would need to provide further documentation from his doctor, which he failed to provide. When Bey did not report to work on April 17-20, and on April 23, the hotel terminated him. According to a doctor's letter dated July 13, Bey was hospitalized with a tonsillectomy and adenoidectomy on April 27, and was unable to work

until May 4. Bey sued the hotel for ADA Title I, 42 U.S.C. §§12111-12117, and MHRA violations.

The district court granted the hotel summary judgment, finding that Bey was not disabled as defined by the ADA or the MHRA. Temporary, non-chronic impairments of short duration, with little or no long-term or permanent impact, are generally not disabilities, *see* 29 C.F.R., App. §1630.2(j), pt. 352 (July 1, 2000); *see also Heintzelman v. Runyon*, 120 F.3d 143 (8th Cir. 1997). Bey characterizes his disability as his inability to work due to his throat difficulties. However, his condition interfered with his work for only a period of several weeks, from April 10, 1999 through May 4. There was no evidence that Bey suffered any lingering effects from his throat condition or the surgery. As for Bey's back condition, even assuming it constituted a disability under the ADA and MHRA, there was no evidence that his termination for absenteeism was a pretext for disability discrimination. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 146-8 (2000). The hotel had granted Bey's request that he be excused from various duties as an accommodation for his back condition.

Title I; Actual; Perceived; Adverse Action; MS

A Kansas federal court held that an employee whose multiple sclerosis (MS) only affected her ability to engage in recreational activities was not disabled as defined by the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, nor was regarded as such by her employer. Even if she was disabled, she had no adverse action as she was transferred to two positions with no pay cut or reduced job responsibilities. ***McCoy v. USF Dugan, Inc., 2001 WL 579820 (D. Kan. May 21, 2001).***

Ellen McCoy, an accounts receivables clerk, was notified several times that her job performance needed improvement. She was later transferred to an administrative support position, and received the same pay and benefits as she had received in her prior position. She was again transferred to a human resource/payroll department position. Three days later, she quit. McCoy then sued her employer, alleging Title I, 42 U.S.C. §§12111-12117, violations.

The district court granted the employer summary judgment. McCoy is not disabled as defined by the ADA. She failed to show that her MS limits a major life activity. *See Selenke v. Medical Imaging of Colo.*, 248 F.3d 1249 (10th Cir. 2001). McCoy stated that her MS only limits her ability to perform certain recreational and sports activities: bowl, bicycle, play tennis, and dance. Moreover, she failed to show that her 20-pound lifting requirement is substantially limited by offering evidence comparing her lifting restrictions to capabilities of an average person in the general population. *See Gibbs v. St. Anthony Hosp.*, 1997 WL 57156 (10th Cir. Feb. 12, 1997), 21 MPDLR 341. McCoy also argued that a company e-mail noting the existence of her medical condition showed that the company regarded her MS as a substantially limiting impairment. Although the e-mail noted her physical condition, it concluded with a note that it owed McCoy the chance to show that she could do the job.

Even if McCoy were disabled, she had no adverse employment action. Each time she was transferred, she stayed at the same pay rate as her accounts receivables clerk position. Moreover, the positions she was transferred to involved numerous responsibilities and, thus, could not be characterized as dead-end or make-work positions. In addition, upon her transfer to the human resources department, she was given immediate work and scheduled for further training. Further, a reasonable person in McCoy's position would not have concluded after only three days that the working conditions in this department were demeaning or intolerable. The lack of a permanent cubicle was a temporary result of staffing problems, and McCoy's decision to quit prevented any accommodation. Finally, two isolated comments allegedly describing McCoy as "lame" and "foggy" do not support the conclusion that the company had harassed McCoy on the basis of her disability. *See Smith v. Norwest Fin. Acceptance*, 129 F.3d 1408 (10th Cir. 1997).

Title I, Actual; Record; Perceived; Pretext; Dyslexia

A Virginia federal court held that a former employee who did not produce any medical evidence that he had dyslexia failed to show that he was disabled under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* Also, he failed to show that his employer's reason for terminating him was a pretext for discrimination. ***Marshall v. Wal-Mart Stores, Inc., 2001 WL 420381 (W.D. Va. Feb. 28, 2001).***

Wal-Mart Stores obtained a criminal complaint against Scott Marshall for theft. Because of his arrest, Wal-Mart suspended Marshall until the charges were resolved. During this interim period, Marshall entered a Wal-Mart store. When his supervisor asked him to leave, Marshall allegedly became unruly and aggressive. Wal-Mart terminated him, and he sued under Title I, 42 U.S.C. §§12111-12117.

The district court granted summary judgment for Wal-Mart. Marshall claimed that he is disabled under the ADA because his dyslexia substantially limits a

major life activity. However, he did not offer medical proof or qualified expert testimony to support his allegation that he had dyslexia. His co-workers' knowledge of his alleged dyslexia was based only on what he told them. Although Marshall produced a letter from a school psychologist that Marshall had a "'specific learning disability, sometimes referred to as dyslexia,'" and that he likely continued to need accommodations, that letter was unsworn, unauthenticated, and contained hearsay.

Marshall also failed to establish that he has a record of a substantially limiting impairment, or that Wal-Mart regarded him as being substantially limited in the major life activity of working—significantly restricted in the ability to perform a broad range of jobs as compared to the average person. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 492-93 (1999), 23 MPDLR 510. Moreover, he failed to show that his employer's reason for terminating him—insubordination—was a pretext for discrimination.

Title I; Temporary; Reasonable Accommodation; Pretext; Diverticulitis

A New York federal court held that a former employee with diverticulitis and a temporary colostomy failed to show he was disabled under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, because he was only unable to work for three months. Also, his request for a three-month recuperation period was not a reasonable accommodation, and he failed to show that his employer's reason for terminating him was a pretext for discrimination. ***Murray v. Rick Bokman, Inc., 2001 WL 603698 (W.D.N.Y. May 24, 2001).***

In September 1997, Donald Murray began working as an auto body technician for Rick Bokman, Inc. From the outset, his co-workers complained about his behavior, which included calling a co-worker an "asshole" and an "idiot." Murray's supervisor allegedly spoke with him four or five times about his behavior, and after one such discussion Murray "pointed to his ass" and left. After being diagnosed with diverticulitis, which would require resection of his large intestine and a temporary colostomy, Murray informed Bokman that he would not be able to work for three months, beginning the last weekend of December 1997. While Murray was on sick leave, he advised the company that he would be returning to work in March 1998. However, on February 23, 1998, during a telephone conversation with Bokman, Murray was terminated for disruptive behavior. Murray sued Bokman under Title I, 42 U.S.C. §§12111-12117.

The district court granted Bokman summary judgment. First, Murray was not disabled as defined by the ADA, because his diverticulitis and temporary colostomy did not substantially limit the major life activity of working. "A three month impairment in the ability to work does not constitute a disability because it 'is of too short a duration' to be considered substantially limiting for purposes of the ADA." *See Colwell v. Suffolk County Police Dep't*, 158 F.3d 635 (2d Cir. 1998), 22 MPDLR 745; *Adams v. Citizens Advice Bureau*, 187 F.3d 315 (2d Cir. 1999); *McDonald v. Pa. Dep't of Pub. Welfare*, 62 F.3d 92 (3d Cir. 1995), 19 MPDLR 613; *Sanders v. Arneson*, 91 F.3d 1351 (9th Cir. 1996), 20 MPDLR 685. Second, Murray's request for three months to recuperate was not a reasonable accommodation. ". . . a reasonable accommodation only applies when the employee is able to remain at work and to perform the essential functions of his job with that accommodation—and plaintiff would certainly not be performing the essential functions of his job if and while he was absent therefrom for three months recuperating." Finally, Murray failed to show that Bokman's reason for terminating him was a pretext for disability.

Title I; Actual; ADD; Chronic Fatigue, Bronchitis

An Indiana federal court determined that an employee with attention deficit disorder, chronic fatigue syndrome, and acute bronchitis failed to show that he was substantially limited in the major life activity of working and, therefore, disabled under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* ***Geerligs v. Henderson, 2000 WL 33309723 (S.D. Ind. May 8, 2000).***

John Geerligs, a supervisor in the computerized forwarding unit, sued the Postmaster General of the U.S. Postal Service (USPS) under Title I, 42 U.S.C. §§12111-12117, alleging failure to accommodate his disabilities and a hostile work environment. Geerligs claimed that USPS denied his request for limited overtime and failed to provide him with an additional employee to assist him in catching up on paperwork when he returned from medical leave after 10 weeks. He also claimed that his supervisor teased him about his conditions and disciplined him for a messy desk and miscommunication regarding the holiday work schedule.

The district court granted the Postmaster summary judgment, finding Geerligs failed to show that he was disabled as defined by the ADA. To be substantially limited in the major life activity of working, one must be substantially restricted from working in 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 Davidson v. Midelfort*

Clinic, Ltd., 133 F.3d 499, 506 (7th Cir. 1999). Geerligs merely showed that his various conditions could prevent him from working in his particular position should it continue to demand working unlimited hours. He did not introduce any evidence that he will be unable to find employment opportunities that only require him to work 40 hours per week. Moreover, Geerligs' testimony that as a result of a broad array of over-the-counter medications and supplements, he generally feels 80 to 90 percent functional negates a finding that he is disabled. In *Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139 (1999), 23 MPDLR 510, the U.S. Supreme Court stated that courts must consider mitigating measures when determining whether an individual is disabled.

Title I; Actual; Perceived; Qualified; Diabetes; Heart Disease

A Maryland federal court ruled that a former employee with diabetes and heart disease was not disabled under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, because his 25-pound lifting restriction did not substantially limit his ability to perform the major life activity of working. Also, he was not a qualified individual under the ADA, because he could not perform an essential job function and requiring other employees to assist him was not a reasonable accommodation. ***Jones v. Baltimore County, 2001 WL 539600 (D. Md. May 18, 2001).***

Brooks Jones, who worked in a county store containing electronic equipment, had a 30-pound lifting restriction due to medical problems caused by diabetes and heart disease. After a county doctor concluded that Jones could not perform his duties safely, the county sent him a letter stating that he could not remain in the storekeeper position, and he had to pursue other county jobs. The county rejected Jones' proposal that he continue working as a storekeeper and obtain assistance lifting more than 25 pounds (a new lifting restriction). Jones received disability retirement. He sued the county under Title I, 42 U.S.C. §§12111-12117.

The district court granted the county summary judgment. Jones failed to show he is disabled under the ADA. *See* 42 U.S.C. §12102(2). He was not substantially limited in the major life activity of working, that is significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities. *See* 29 C.F.R. §1630.2(l)(3)(i). Jones could perform and was regarded by the county as being able to perform a broad range of clerical jobs. He was invited by the county to apply for several jobs, but chose not to. Jones currently works in the private sector at a salary substantially higher than his county pay. Although the county regarded Jones as being unable to perform clerical jobs that required lifting over 25 pounds, Jones cited no authority to support the proposition that such jobs constituted either a class of jobs or a broad range of jobs in various classes. Indeed, the Fourth Circuit had held to the contrary. *See Williams v. Channel Master Satellite Sys., Inc.*, 101 F.3d 346 (4th Cir. 1996), 21 MPDLR 65.

Jones also failed to show that he was a qualified individual under the ADA who could perform his essential job functions with or without reasonable accommodation. He acknowledged that he was unable to perform one essential function—lifting more than 25 pounds—but argued that the county should have accommodated him by having other employees (electronic technicians or clerical personnel in an adjacent office) assist him. However, requiring these employees to assist Jones would cause work disruption. The fact that Jones worked under a 30-pound lifting restriction from 1986 until he was fired does not mean that the accommodation that had been made was reasonable. "The fact that an unacceptable situation has been tolerated does not mean that the accommodation that has been made is reasonable." Public and private businesses must be soundly managed; lax employment practices need not be continued.

Title I; Actual; Hypertension; Migraines

The Sixth Circuit affirmed that a former employee was not disabled under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, because she failed to show that her hypertension and migraines substantially limited her ability to perform the major life activity of working. ***Williams v. Stark County Bd. of County Comm'rs, 2001 WL 302035 (6th Cir. Mar. 23, 2001). [Unpublished Opinion; Sixth Circuit Rule Applies.]***

Arnetta Williams worked for the county as a specialist determining eligibility for welfare and disability benefits. In 1996, she requested a demotion to a less stressful job due to her migraine headaches and hypertension, but failed to identify a specific position. She subsequently applied for a typist position, but was rejected because she could not type the requisite words per minute. In August 1997, the county fired Williams for inefficiency. She sued under Title I, 42 U.S.C. §§12111-12117, alleging she was terminated because of her disabilities. The district court granted the county summary judgment, finding she failed to show that she was disabled under the ADA.

The Sixth Circuit affirmed. As a preliminary matter, the appeals court found that although Congress had granted the Equal Employment Opportunity Commission (EEOC) authority to promulgate regulations under Title

I, *see* 42 U.S.C. §12116, no agency has authority to issue regulations under the overarching definitions in 42 U.S.C. §12102, which define the term "disability." Nonetheless, the EEOC issued regulations further defining the term "disability." The EEOC includes working as a major life activity, *see* 29 C.F.R. §1630.2(j), and further defines "substantially limits" and lists three factors for considering whether an impairment substantially limits a major life activity: (1) the impairment's nature and severity; (2) its expected duration; and (3) its permanence or expected long-term effect, *see* 29 C.F.R. §1630.2(j)(2). Recently, the U.S. Supreme questioned the EEOC's authority to issue these regulations and expressed concern about the circularity of including work as a major life activity. *See Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139 (1999), 23 MPDLR 510. However, because the parties neither raised nor briefed these issues, the court assumed that the regulations are valid and entitled to deference. *See Bragdon v. Abbot*, 524 U.S. 624 (1998), 22 MPDLR 449.

Turning to the merits, the court found that Williams failed to show that her hypertension substantially limited the major life activities of working, walking, seeing, and caring for her children. Although she missed three months of work due to this condition, since that episode she had controlled her high blood pressure through medication. In *Sutton*, the U.S. Supreme Court held in determining whether an employee has a substantially limiting disability courts must consider mitigating measures. *See* 119 S. Ct. at 2146-47. Williams presented no evidence that medication failed to control her hypertension and that her condition in no way limited her life.

Williams also failed to show that her migraines substantially limited her ability to perform the major life activity of working, that is significantly restricted her ability to perform either a class of jobs or a broad range of jobs in various classes. *See* 29 C.F.R. §1630.2(3)(i). Williams had requested a demotion, not a long-term or an indefinite leave of absence, and she admitted she could perform other jobs for which she applied. At most, Williams demonstrated that her condition made it difficult for her to perform her particular job, which does not constitute a substantial limitation on the major life activity of working under the ADA. Finally, the medical opinions did not regard Williams' migraines as a permanent condition or one that caused a significant functional impairment.

Title I; Actual; Perceived; Administrative Exhaustion; Pregnancy

A New York federal court held that although a former employee exhausted administrative remedies with respect to her claim under the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-12117, she was not disabled as defined by the act or regarded as such because her pregnancy-related complication only temporarily interfered with her ability to work. ***Cvern v. Enterprise Solution Providers, Inc., 2001 WL 533723 (S.D.N.Y. May 18, 2001).***

In August 1999 Mindy Cvern, the chief financial officer for Enterprise Solution Providers (ESP), told the company that she was pregnant. In January 2000, she was hospitalized for ruptured membranes, and ESP approved her absence. On February 10, her daughter was born prematurely. She returned to work five days later, fearing that she would be considered to be on disability leave or terminated. ESP demoted Cvern, denied her request to work from home, and on April 26, terminated her. After filing a charge for gender discrimination with the Equal Employment Opportunity Commission (EEOC), Cvern sued ESP for Title I violations.

The district court granted ESP's motion to dismiss. Cvern's failure to specify disability discrimination in her EEOC charge was not fatal to her ADA claim, because her gender and disability discrimination claims were reasonably related. The EEOC claim had reported discrimination based on pregnancy and related complications, and the disability claim arose out of the same conduct as the gender discrimination claim and fell within the reasonable scope of the EEOC investigation. *See Alonzo v. Chase Manhattan Bank, N.A.*, 25 F. Supp. 2d 455, 457-58 (S.D.N.Y. 1998).

Nevertheless, Cvern failed to show that she was disabled under the ADA. "Most courts are extremely hesitant to hold that pregnancy and related conditions constitute disabilities under the ADA." *See Conley v. United Parcel Serv.*, 88 F. Supp. 2d 16 (E.D.N.Y. 2000), 24 MPDLR 434. *But see Cerrato v. Durham*, 941 F. Supp. 388 (S.D.N.Y. 1996), 20 MPDLR 821. Cvern had not alleged any long-term impact on her health or any resulting substantial impairment on a major life activity after the birth of her child. She was hospitalized for only a month, gave birth, and returned to work five days later. The ADA regulations instruct that short-term, temporary restrictions are not substantially limiting. *See* 29 C.F.R. §1630.2(j)(2). Further, Cvern failed to show that she was substantially limited in the major life activity of working, as she had not alleged an inability to work in a broad class of jobs. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), 23 MPDPR 510. Even if she could not work in a broad class of jobs while hospitalized, she was only in the hospital for a month and never reported any further symptoms other than exhaustion, presumably resulting from working while caring for a newborn. Finally, Cvern failed to demonstrate ESP regarded her as disabled, as she had

not pleaded ESP believed her pregnancy involved a more serious inability to work than reflected in her one-month hospital stay and prompt return to work.

Title I; Actual; Eighth Amendment

The Sixth Circuit affirmed summary judgment for correctional officials and personnel, finding that a former prison worker who claimed he was not assigned to the position of sewing machine operator because of his disability (not specified) failed to show he was substantially limited in the major life activity of working and, thus, was not disabled as defined by the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.* *See McKay v. Toyota Motor Mfg., U.S.A., Inc.*, 110 F.3d 369, 371 (6th Cir. 1997), 21 MPDLR 336. Further, plaintiff's claim that defendants violated his Eighth Amendment rights by placing medical restrictions on him that precluded his assignment to this position also failed, for he did not show that defendants were deliberately indifferent to his serious medical needs. *See Estelle v. Gamble*, 429 U.S. 97 (1976). ***McKinley v. Bowlen, 2001 WL 493394 (6th Cir. May 1, 2001).***

Title I; Perceived; Leg Injury

The Ninth Circuit reinstated a $237,000 jury verdict on behalf of a former employee with a leg injury who alleged that her employer regarded her as disabled in violation of the Americans with Disabilities Act Title I, 42 U.S.C. §§12111-12117. ***Johnson v. Paradise Valley Unified Sch. Dist., 251 F.3d 1222 (9th Cir. 2001).***

In July 1995, Linda Johnson, a groundskeeper for Paradise Valley Unified School District, sustained a degloving injury to her leg. In February 1996, she was released to work but was restricted from standing or walking for prolonged periods. Johnson alleged that her supervisor told her that she would be terminated if she could not obtain a full release and suggested that she resign, obtain a full release, and then reapply for a job. Johnson resigned and, after obtaining a full release, applied for 13 open maintenance and groundskeeper jobs, but was not hired. The school district marked her applications "'do not process (DNP)'" allegedly because of her attendance problems, although she had never been disciplined for such problems and her evaluations were positive. Johnson sued the school district under Title I. The district court found that a factual issue existed as to whether the school district regarded Johnson as disabled. *See* 42 U.S.C. §12102(2)(C). A jury awarded Johnson $237,000. The district court then granted the school district's judgment as a matter of law.

The Ninth Circuit reversed and remanded to the district court for entry of judgment consistent with the jury verdict. There was sufficient evidence that the school district regarded Johnson as substantially limited in the major life activity of working, that is significantly restricted from a class or broad range of jobs. The school district refused to consider her for 13 different maintenance and groundskeeping jobs. The district court took at face value the explanations for the fact that Johnson's applications were marked DNP. However, there was evidence, including the timing of the first rejection and the history of Johnson's positive job evaluations despite her attendance problems, from which the jury could have concluded that the explanations were pretextual. Moreover, the school district enforced a policy of refusing to accept partial releases for employees in any job category. That policy supported the inference that the school district regarded Johnson as unable to perform any job. *See McGregor v. National R.R. Passenger Corp.*, 187 F.3d 1113, 1116 (9th Cir. 1999) 23 MPDLR 555. In addition, the jury could have reasonably inferred that Johnson's supervisor was trying to induce her to resign when he stated that "maybe you'll get a release, and you can apply for another job" and offered to write Johnson a letter of recommendation. "The district court's conclusion, in short, depended on that court's improper usurpation of the jury's basic fact-finding authority, including the authority to draw inferences from the facts established and to believe some witnesses but not others."

State Law; Perceived; Back Injury

The Sixth Circuit found that a company's requirement that workers be totally recuperated before resuming work constituted evidence that an employer may have perceived an employee with a back injury as substantially limited in the major life activity of working and, thus, disabled under the state anti-discrimination law. ***Henderson v. Ardco, Inc., 247 F.3d 645 (6th Cir. 2001).***

While working as a welder for Ardco, Inc., Dana Henderson injured her back and went on medical leave for several months. Upon returning to work, she submitted a doctor's note stating that she was restricted from bending and lifting more than 25 pounds and Ardco did not allow her to return to work. A plant manager told her that employees have to be "100 percent healed" to work. Henderson later wrote to Ardco asking for any work consistent with her restrictions, but was told no light-duty work was available. She sued Ardco under state law, Ky. Rev. Stat. Ann. §344.040, claiming that the company regarded her as disabled, and that the "100 percent healed" rule was *per se* discriminatory. The district court granted Ardco summary judgment, finding

that Henderson was not regarded as disabled.

The Sixth Circuit reversed and remanded, finding that a question of fact existed as to whether Ardco regarded Henderson's back injury as substantially limiting the major life activity of working. Claims under the state anti-discrimination statute are interpreted the same as claims under the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq. See Brohm v. JH Properties, Inc.*, 149 F.3d 517 (6th Cir. 1998), 22 MPDLR 633. To be substantially limited in the major life activity of working, an individual must be precluded from a substantial class of jobs, not just a particular job. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), 23 MPDLR 510. Here, the plant manager's statement that "there is not a job in the plant that her [Henderson's] restrictions would not bump into" could be interpreted as regarding Henderson as unable to perform a larger class of jobs: factory work. However, Henderson must also show that this larger class of jobs is sufficiently "substantial." The Sixth Circuit recently held that the inability to perform manual tasks associated with assembly line work may qualify as substantial. *See Williams v. Toyota Motor Mfg., Ky., Inc.*, 224 F.3d 840 (6th Cir. 2000), 24 MPDLR 776.

Ardco's "100 percent healed" rule may be interpreted as treating Henderson as incapable of work in a manufacturing operation. Although this rule is impermissible as to persons with disabilities, an individual must first show that he or she is disabled. The importance of the 100 percent rule is its role in determining the threshold issue of perceived disability. Where this rule is applied to mildly impaired persons to exclude them from a broad class of jobs, it may be treating them as disabled even if they are not, thereby qualifying them for protection.

Title I; Disability Defined; Perceived; Knee Injury

The Eighth Circuit held that the city did not regard a former seasonal laborer with knee surgery as substantially limited in the major life activity of working and, thus, he was not disabled under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, or the Minnesota Human Rights Act (MHRA), Minn. Stat. §363.01 *et seq.* ***Somers v. City of Minneapolis, 245 F.3d 782 (8th Cir. 2001).***

In February 1997, during the winter layoff for city seasonal workers, David Somers had knee surgery. In March, he discussed possible job openings in the city's sanitation department and was told he would not be listed for strenuous work based on his injury. The next month, Somers, in discussing his return to work as a seasonal laborer, reported his knee surgery to the Department of Public Works and submitted a medical release stating that he was able to return to work with no restrictions. He was later terminated, however, for failing to report to work. Somers claimed that he had not received the return-to-work notice. He sued the city under Title I, 42 U.S.C. §§12111-12117, and the MHRA, alleging he was fired based on his perceived disability. The trial court granted the city summary judgment.

The Eighth Circuit affirmed, finding the city did not regard Somers as substantially limited in the major life activity of working and, thus, disabled under the ADA and the MHRA. Claims under the MHRA are analyzed the same as claims under the ADA. *See Treanor v. MCI Telecomm. Corp.*, 200 F.3d 570, 574 (8th Cir. 2000), 24 MPDLR 273. It is undisputed that the sanitation department regarded Somers as having a temporary physical impairment that precluded him from jobs requiring the lifting of large compost bins. However, ADA and MHRA claimants must do more than allege they are regarded as having an impairment that prevents them from working a particular job. Rather, they must be regarded as substantially restricted from a broad range or class of jobs. *See Shipley v. City of Univ. City*, 195 F.3d 1020 (8th Cir. 1999), 24 MPDLR 84; *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), 23 MPDLR 510. The sanitation department's requirement that Somer's submit a medical release and be cleared by the city's physician is imposed on all employees who undergo surgery before they return to work.

Title I; Perceived; Back Injury

The Tenth Circuit affirmed summary judgment for the county, finding that a former police lieutenant with a back injury was not disabled as defined by the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.* He failed to show that the county regarded him as substantially limited in the major life activity of working—significantly restricted in his ability to perform either a class of jobs or a broad range of jobs in various classes, *see* 29 C.F.R. §1630.2(j)(3)(i). He failed to present evidence regarding the geographical area to which he has access, or the number and types of jobs demanding similar training from which the county believed he was disqualified. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 492-93 (1999), 23 MPDLR 510; *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 524 (1999), 23 MPDLR 511. ***Lucas v. Miami County, 2001 WL 497372 (10th Cir. May 10, 2001).***

Title I; Perceived; Record; Panic Disorder; Depression

The Seventh Circuit held that factual issues existed

as to whether a hospital who conditioned an anesthesiologist's return to work on monitoring of his panic disorder and depression regarded him as disabled and whether he had a record of disability under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* ***Mattice v. Memorial Hosp. of S. Bend, Ind., 249 F.3d 682 (7th Cir. 2001).***

Dr. Thomas Mattice was hospitalized for a week in January 1995 due to panic disorder and major depression and was prescribed various medications. He took a one-week medical leave of absence during the summer of 1995 due to side effects from the medications. In September 1996, a patient died in the operating room while Dr. Mattice was providing anesthesia care. After initially suspending Dr. Mattice, the hospital revoked the suspension, but conditioned his return to work on monitoring and testing relating to his mental health history. Dr. Mattice sued the hospital under Title I, 42 U.S.C. §§12111-12117, and the district court granted the hospital summary judgment on the ground that Dr. Mattice was not regarded as disabled. *See* 87 F. Supp. 2d 859 (N.D. Ind. 2000), 24 MPDLR 425.

The Seventh Circuit reversed and remanded, finding Dr. Mattice stated a claim under the ADA. *See Homeyer v. Stanley Tulchin Assoc., Inc.*, 91 F.3d 959 (7th Cir. 1996), 20 MPDLR 689; *Duda v. Board of Educ.*, 133 F.3d 1054 (7th Cir. 1998), 22 MPDLR 192. He alleged that the hospital regarded him as substantially limited in the major life activity of cognitive thinking. He also alleged that he has a history or record of a significant impairment of the major life activities of thinking, sleeping, eating, and caring for himself due to his panic disorder and depression. The appeals court distinguished this case from *Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139 (1999), 23 MPDLR 510—ruling that one must be significantly restricted in the ability to perform a broad class of jobs, not just a particular job, to be substantially limited in the major life activity—finding that Dr. Mattice had not alleged that the hospital regarded him as limited in the major life activity of working.

Title I; Record; Actual; Perceived; Depression

An Indiana federal court decided that a former employee with depression failed to show that he had a record of a disability, was disabled, or was regarded as such by his employer, under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* ***Davidson v. United Techs.-Carrier, 2000 WL 33309724 (S.D. Ind. Mar. 15, 2000).***

In January 1989, Willie Davidson, a press room supervisor for a furnace manufacturing company, missed eight to twelve weeks of work while receiving inpatient treatment for depression and stress. Upon returning to work, he allegedly was teased by co-workers and management employees, who called him "Prozac Willie" and "Crazy Willie." Davidson complained to his supervisor, who told him that he should not "make any waves." Davidson never complained to anyone. Sometime in 1995 or 1996, he was promoted to production superintendent. However, in September 1997, he was fired for allegedly making physical threats. Davidson sued the company under Title I, 42 U.S.C. §§12111-12117, alleging he was terminated because of his disability.

The district court granted the employer summary judgment. Davidson failed to show that he was disabled under the ADA. First, a hospital stay, alone, does not establish a record of a mental impairment that substantially limits a major life activity. *See Colwell v. Suffolk County Police Dep't*, 158 F.3d 635 (2d Cir. 1998), 22 MPDLR 745, *cert. denied*, 119 S. Ct. 1253 (1999); *Burch v. Coca-Cola*, 119 F.3d 305 (5th Cir. 1997), 21 MPDLR 620, *cert. denied*, 522 U.S. 1084 (1997); *Byrne v. Board of Educ.*, 979 F.2d 560 (7th Cir. 1992), 17 MPDLR 54. Davidson's depression has remained under control since his stay at the hospital. He has not received any treatment for depression since 1991. Second, Davidson admitted that his depression does not substantially limit a major life activity, including working. He successfully performed his job functions without accommodation and received good performance evaluations and a promotion.

Finally, he was not regarded as having a substantially limiting impairment. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), 23 MPDLR 510. Despite the fact that Davidson had been teased by co-workers and management employees, the record shows that the company believed in Davidson's abilities, as evidenced by his substantial promotion and salary increase. Additionally, the person who investigated the physical confrontation between Davidson and the co-worker did not know Davidson had been treated for depression.

Title I; Perceived; Qualified; Neurological Disorder

An Indiana federal court decide that factual issues existed as to whether a former employee with a knee injury was regarded as substantially limited in the major life activity of working and, thus, disabled under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, and whether he was qualified to perform his essential job functions with or without reasonable accommodation. ***Mack v. Great Dane Trailers, 2000 WL 33309746 (S.D. Ind. Aug. 9, 2000).*** In a second

opinion, the court denied the employer's motion for reconsideration, reaffirming that factual issues precluded summary judgment for the employer. ***Mack v. Great Dane Trailers, 2001 WL 487107 (S.D. Ind. Jan. 9, 2001).***

Mark Mack sued Great Dane Trailers under Title I, 42 U.S.C. §§12111-12117, alleging that the company failed to accommodate him and terminated him because of his disability.

The district court denied Great Dane's motion for summary judgment. A factual issue existed as to whether Great Dane regarded Mack as disabled within the meaning of the ADA. *See* 42 U.S.C. §12102(2). Mack presented evidence that Great Dane refused to meet or communicate with his doctor to actually determine those physical tasks that he could or could not perform. Great Dane was aware of Mack's condition and had reached a decision that he could not return to work, despite his doctor's recommendations, because the company could not accommodate Mack's restrictions.

The court rejected Mack's argument that he had an actual disability. He asserted that his neuropathy substantially limited his ability to perform the major life activities of sitting, standing, walking, and working. However, he only demonstrated that he was limited in the way he sat—with legs crossed. Moreover, Mack admitted that he could work an eight-hour shift without a problem, and that his foot would only become tired after 12 hours. " . . . it is difficult to imagine that an average person would not experience some sort of difficulty after being on their feet for twelve hours." In addition, Mack's restrictions only eliminated 22 percent of the available jobs in the unskilled labor market. Since his termination from Great Dane, he worked in three other jobs.

Finally, a factual issue existed as to what the essential functions of the assistant trailer builder position were and whether Mack could perform these with or without reasonable accommodation. *See* 42 U.S.C. §12112(a). The parties disputed whether squatting, kneeling, and crawling were essential functions.

In the second case, the court found that Mack created a genuine issue of material fact as to whether Great Dane's reason for terminating him—its policy that employees who remain off work for one year are subject to termination—was a pretext for disability-based discrimination. He presented evidence that Great Dane discovered the policy after terminating him. Moreover, three company representatives had previously reported that no written policy existed. In addition, Great Dane terminated Mack on the same day that his doctor reported his permanent work restriction.

Title I; Perceived; Narcolepsy

An Indiana federal court held a school bus driver with narcolepsy who was transferred to another position was not disabled under the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.*, because she was not regarded as substantially limited in the major life activity of working. ***Poindexter v. Mill Creek Cmty. Sch. Corp., 2000 WL 33309375 (S.D. Ind. Mar. 21, 2000).***

After receiving several complaints that Theresa Poindexter had fallen asleep while driving the bus, the school's assistant superintendent conducted an investigation. He later concluded that Poindexter was not adequately controlling her condition, and that she could no longer continue her driving position. Poindexter was offered a transportation assistant position, which entailed assisting children with disabilities on the bus. She rejected the offer on the ground that she could not stay awake while riding the bus. She then accepted a position as an instructional assistant at the same rate of pay as her prior driver position. The next year, however, she was paid at a lower rate, but given credit for her years of experience. Poindexter sued the school district under Title I, 42 U.S.C. §§12111-12117, alleging she was transferred because she was regarded as having a disability. The school district moved for summary judgment.

The district court granted the motion. Poindexter failed to establish that the school district regarded her narcolepsy as substantially limiting the major life activity of working—significantly restricted in her ability to perform a class or broad range of jobs as compared to the average person having comparable training, skills, and abilities. *See* 29 C.F.R. §1630.2(j)(3)(i). *See also Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), 23 MPDLR 510. The school district offered Poindexter two alternative positions as a transportation assistant and an instructional assistant. Although she refused the first position, she accepted the latter position and was still employed at the time she filed suit. While she received a lower rate of pay, the school district paid her at the same rate as her previous position for the first four hours of each day, or the same length of time it would take to complete her bus route, for the remainder of the 1997-98 contract. During the 1998-99 school year, she was credited for her years of experience in the bus driver position during the 1998-99 school year.

State Law; Title I; Perceived; Pretext; Heart Condition

A Missouri federal court held that factual issues existed as to whether (1) an employer regarded an

employee with a heart condition as substantially limited in his ability to work and, thus, disabled under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, and the Missouri Human Right Act (MHRA), Mo. Rev. Stat. §621 *et seq.*, and (2) the employer's reasons for terminating him—poor job performance and sexual harassment—were a pretext for disability discrimination. ***Galambos v. Fairbanks Scales, 144 F. Supp. 2d 1112 (E.D. Mo. 2000).***

In August 1996, Steve Galambos, a service manager for Fairbanks Scales (FS), had a heart attack. He returned to work in September, and was placed on a 90-day performance plan that identified five specific performance goals he would have to meet. In January 1997, Galambos was terminated for poor job performance and sexual harassment. He sued FS under the ADA Title I, 42 U.S.C. §§12111-12117, and the MHRA.

The district court denied FS's motion for summary judgment. Galambos raised a material factual dispute as to whether FS regarded him as substantially limited in the major life activity of working and, thus, disabled under the ADA and the MHRA. The test is whether the employee's impairment, as perceived, would affect his or her ability to find work across the spectrum of same or similar jobs. *See Mastio v. Wausau Serv. Corp.*, 948 F. Supp. 1396, 1415 (E.D. Mo. 1996), 21 MPDLR 207.

Here, Galambos had received a "fully meets expectations" performance review in the months before his heart attack, and none of his supervisors warned him that he was in danger of losing his job if he did not improve his performance. A month after Galambos' heart attack, FS placed him on a 90-day probation plan with demanding requirements. Although he returned to working full time, did not ask for accommodation, and exceeded expectations of sales and profit goals, FS fired him shortly before receiving confirmed figures of Galambos' performance.

Galambos also raised a material factual dispute as to whether FS's reasons for terminating him were a pretext for disability. That Galambos' termination followed so closely after his return from medical leave was sufficient evidence from which a reasonable fact finder could infer that FS intentionally discriminated against him because of the heart attack. *See Ostrowski v. Atlantic Mut. Ins. Co.*, 968 F.2d 171, 183 (2d Cir. 1992).

Title I; State Law; Perceived; Heart Condition

A New York federal court granted an employer's motion to dismiss, finding that a former employee failed to show that the employer regarded him as substantially limited in the major life activity of working and, thus, disabled under the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.*, or the New York State Human Rights Law. The fact that the employer was aware of Williams' heart condition was insufficient to show that the employer regarded him as disabled. *See Kelly v. Drexel Univ.*, 94 F.3d 102, 109 (3d Cir. 1996), 20 MPDLR 63. Moreover, the fact that the employer allowed Williams to work half-days was not sufficient to show that the employer regarded him as significantly restricted in the ability to perform a class or broad range of jobs, *see* 29 C.F.R. §1630.2(j)(3)(i). ***Williams v. Saint-Gobain Corp., 2001 WL 392035 (W.D.N.Y. Apr. 12, 2001).***

Title I; Perceived; Pretext; Respiratory Problems

The Fourth Circuit affirmed that a former employee with respiratory problems failed to show that his employer regarded him as disabled under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, and that the employer's reason for firing him—insubordination—was a pretext for disability discrimination. ***Haulbrook v. Michelin N. Am., Inc., 252 F.3d 696 (4th Cir. 2001).***

While William Haulbrook, a research chemical engineer, was working for Michelin North America at an industrial size mixer in France for Michelin, he was exposed to various chemicals, resulting in respiratory problems. He took a medical leave of absence and returned to United States, where he underwent treatment. Haulbrook's doctor wrote Michelin a letter stating that Haulbrook could return to work if he was not exposed to dust, chemicals, or other irritants. Michelin later requested a meeting with Haulbrook to discuss the possibilities for his return to work. At that time and many times thereafter, the company requested that he contact his supervisors in France regarding his medical condition. Haulbrook failed to respond to these requests and was terminated. He sued under Title I, 42 U.S.C. §§12111-12117, alleging he was terminated because he was regarded as disabled, and in retaliation for requesting reasonable accommodation under the ADA. The district court granted the employer summary judgment.

The Fourth Circuit affirmed, finding that Haulbrook failed to show that Michelin regarded him as substantially limited in the major life activity of working. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), 23 MPDLR 510. Michelin's awareness of his impairment, without more, was insufficient to demonstrate that the company regarded him as disabled. *See Kelly v. Drexel Univ.*, 94 F.3d 102 (3d Cir. 1996). Michelin did not know the extent of Haulbrook's illness

and sought further information regarding the nature of his impairment. The company's repeated and strenuous efforts to have Haulbrook return to some type of work contradict his assertion that they regarded him as substantially precluded from a broad variety of jobs. *See Gupton v. Virgina*, 14 F.3d 203 (4th Cir. 1994). Nor did Michelin regard Haulbrook as substantially limited in the major life activity of breathing. At most, the record establishes that the company regarded him as being under medical evaluation.

Haulbrook also failed to show that Michelin's legitimate, non-discriminatory reason for terminating him—his repeated and intentional refusal to reply to requests seeking information regarding his medical leave—was a pretext for disability discrimination. *See Ross v. Communications Satellite Corp.*, 759 F.2d 355 (4th Cir. 1985). Haulbrook ignored Michelin's repeated requests that he contact his French supervisors. His conduct constitutes insubordination, which is defined as "a wilful or intentional disregard of the lawful and reasonble instructions of the employer. *See Porter v. Pepsi Cola Bottling Co. of Columbia, Inc.*, 147 S.E.2d 620, 621 (S.C. Sup. Ct. 1966). Single-enterprise liability under the ADA does not entitle employees to choose precisely to whom they wish to speak within a large corporation.

State Law; Perceived; MS

The Michigan supreme court held that a worker failed to show that her employer regarded her multiple sclerosis (MS) as substantially limiting her ability to perform a major life activity and, thus, she was not handicapped under the Michigan Handicappers' Civil Rights Act (MHCRA), Mich. Comp. Laws §37.1202 *et seq. **Michalski v. Reuven Bar-Levav, 625 N.W.2d 745 (Mich. Sup. Ct. 2001).***

Claudia Michalski, an executive secretary, told her employer and several co-workers that her physician suspected she had MS. As a result, she was allegedly subjected to harassment. Several months later, Michalski was diagnosed with MS and did not return to work. She and her husband sued the employer, alleging disability discrimination under the MHCRA. The trial court granted the employer summary judgment, but an appeals court reversed.

The state high court reversed the appeals court, finding that Michalski was not handicapped as defined by the MHCRA. She failed to establish that at the time of her employment her employer regarded her as unable to perform basic tasks of ordinary life. In fact, she was physically capable of performing her job duties. At most, Michalski presented evidence that her employer learned of the tentative diagnosis and stated that this might substantially limit her activities in the future.

Title I; Perceived; Ovarian Syndrome

A Texas federal court held that a former employee with polycystic ovarian syndrome failed to show that her employer regarded her as substantially limited in the major life activity of working and, thus, disabled within the meaning of the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq. **Santos v. Prime Hospitality Corp., 2001 WL 585754 (N.D. Tex. May 25, 2001).***

Maribel Santos, an assistant general manager at a hotel operated by Prime Hospitality (PH), was terminated after she refused to accept a demotion to the position of front desk manager on the ground of poor job performance. She sued PH under Title I, 42 U.S.C. §§12111-12117, alleging her supervisor regarded her as disabled, *see* 42 U.S.C. §12102(2), due to her condition.

The district court granted PH summary judgment. Santos failed to present evidence that her supervisor believed that her condition substantially limited the major life activity of working. Santos' evidence only indicated that her supervisor knew of her medical condition. Moreover, the supervisor's statement to Santos that he needed someone who he could "'count on'" was not sufficient to establish that PH regarded Santos as disabled.

Employment: Medical Leave/ Exams/Retaliation

Title I; Retaliation; Refusal to Accommodate Co-Worker; Damages

The Eighth Circuit affirmed a $246,000 jury verdict in an Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-12117, complaint brought by an employee who alleged that she was terminated in retaliation for opposing the removal of a reasonable accommodation for an employee with epilepsy and the employee's termination. ***Foster v. Time Warner Entm't Co., 250 F.3d 1189 (8th Cir. 2001).***

Jane Foster, a customer services representatives for Time Warner Entertainment Company, supervised Kevin Terry, who experiences nocturnal seizures due to epilepsy. She allowed Foster to arrive at work after the regular starting time and to stay later to make up for missed time. The accommodations angered co-workers, who complained to Foster's boss, who, in turn, issued a new sick leave policy prohibiting employees from making up time missed because of illness. After the new sick leave policy was issued, Foster allowed Terry to continue to work a flexible schedule. Foster's boss