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Office of
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Recent Americans with Disabilities Act Decisions

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Enacted on September 28, 2008, the ADA Amendments Act of 2008 (ADAAA) became effective on January 1, 2009. Final regulations implementing the ADAAA were issued by the EEOC on March 25, 2011 (76 Fed. Reg. 16978). The effect of the ADA Amendments Act and EEOC's final regulations is to make it easier for individuals claiming protection under the law to establish that they have disabilities.

A. Definition of "Disability" Under the ADA Amendments Act (ADAAA)

1. Actual Disability

(a) Plaintiff Is or May Be Substantially Limited

Sickels v. Central Nine Career Center, 2012 WL 266945 (S.D. Ind. Jan. 30, 2012). Plaintiff, who had previously had a **stroke**, began his position as an instructor at a public career and technical school with mobility issues that required him to first use a wheelchair for traveling long distances around the campus and later walk with the assistance of a cane, and had continuing **pain, strength limitations, and neuropathy.** In February 2009, he was hospitalized with **coronary artery disease**, took one month of leave, and returned to work with "even more impaired" mobility and "issues with stamina." Plaintiff challenged his subsequent termination as disability discrimination, alleging that his stroke and heart condition substantially limited his mobility. Although the court ultimately granted summary judgment for the employer on all claims on other grounds, it held plaintiff had a substantially limiting impairment: "Because mobility could impact several major life activities – walking, lifting, standing, and bending – and bearing in mind that [the employer] regarded [plaintiff's] physical impairments as qualifying disabilities for ADA purposes, we conclude that he is 'disabled' within the meaning of the statute."

Katz v. Adecco USA, Inc., 2012 WL 78156 (S.D.N.Y. Jan. 10, 2012). Plaintiff alleged that her prospective employer and its recruitment agency violated both the ADA and the broader New York State Human Rights Law by refusing to hire her for an executive assistant position after she identified herself as a **breast cancer survivor.** Denying defendants' motion for summary judgment, the court cited the ADAAA statutory change that expanded major life activities to include major bodily functions such as "normal cell growth," cases that have applied the "episodic or in remission" provision, and the EEOC's amended ADA regulations explaining that cancer should "easily" be found to be substantially limiting. The court held that there was a genuine issue of material fact as to whether plaintiff was an individual with a disability. "As a result of the amendments to the ADA, it appears not to matter that [plaintiff's] cancer was in remission at the time of the alleged discrimination."

Molina v. DSI Renal, Inc., ___ F. Supp. 2d ___, 2012 WL 29348 (W.D. Tex. Jan. 4, 2012). In a case arising under a state anti-discrimination law that by its terms is intended to correlate with corresponding provision of the ADA, the court applied the ADAAA standards and EEOC's amended ADA regulations. In denying summary judgment on a denial of accommodation claim brought by a certified medical assistant with **lumbar internal disc derangement, lumbar rediculopathy, and lumbago**, the court applied the EEOC's regulations that allow, among other things, for comparing "the condition under which the individual performs the major life activity"

or "the manner in which the individual performs the major life activity," including "pain experienced when performing a major life activity," the court held a reasonable juror could find plaintiff's impairments substantially limited her in various major life activities, including lifting, bending, and the operation of a major bodily function (musculoskeletal) in light of her intermittent pain and other symptoms. Rejecting the employer's argument that plaintiff could not be disabled because his back pain was variable, the court noted that under the revised statute an impairment that is "episodic" is a disability if it "substantially limits a major life activity when active." The court also applied the ADAAA standard for determining substantial limitation without regard to mitigating measures, citing plaintiff's deposition testimony that she took Tylenol for her pain, which if she was experiencing pain on an eight out of ten level would reduce the pain to a five, thereby demonstrating that without the mitigating measure the pain would be experienced at a level of eight out of ten.

Markham v. Boeing Co., 2011 WL 6217117 (D. Kan. Dec. 14, 2011). Plaintiff alleged he was demoted from captain to security officer because of his monocular vision. Without analyzing neurological modifications as a mitigating measure to be disregarded under the ADAAA, the court nevertheless ruled that there were genuine issues of material fact as to whether plaintiff's **monocular vision** rendered him substantially limited in seeing.

EEOC v. Resources for Human Development, Civil Action No. 10-3322 (E.D. La. Dec. 6, 2011). Employer's motion for summary judgment denied in case alleging plaintiff, a Prevention/Intervention Specialist, was terminated because of **morbid obesity**.

Garner v. Chevron Phillips Chemical Co., 2011 WL 5967244 (S.D. Tex. Nov. 29, 2011). Employer did not dispute employee's evidence that her **depression** was a disability under any of the three prongs of the definition of disability as amended.

Estate of Murray v. UHS of Fairmount, Inc., 2011 WL 5449364 (E.D. Pa. Nov. 10, 2011). Denying employer's motion for summary judgment, the court ruled nurse's own testimony of her diagnosis of **depression** was sufficient to establish disability. Viewing her depression, which was diagnosed four years prior to her employment, as chronic, and citing the EEOC's amended regulations as receiving *Chevron* deference, the court found that there was sufficient evidence from which a jury could conclude the depression substantially limited plaintiff in a major life activity in light of her deposition testimony that she experienced not eating, not sleeping, having racing thoughts, and feeling hopeless and helpless. Even though there was no evidence as to the duration or comparative nature of these limitations, the court concluded: "The Court recognizes that the record as to whether Murray's depression substantially limits her major life activities is incredibly sparse. Nevertheless, given the stated intent of the ADAAA, the statute's command to construe 'disability' broadly, and the dearth of post-ADAAA case law opining on the issue, the Court declines to grant summary judgment on the basis of failing to make out a prima facie case of 'disability' under the ADA."

Carbaugh v. Unisoft International, Inc., 2011 WL 5553724 (S.D. Tex. Nov. 15, 2011). Rejecting the pre-ADAAA cases on which the employer relied as having "no precedential weight," the court applied the "episodic or in remission" rule -- and relied exclusively on plaintiff's own description of his symptoms -- to deny the employer's motion for summary

judgment on the issue of whether plaintiff's relapsing, remitting **multiple sclerosis** was a substantially limiting impairment.

Walter v. Wal-Mart Stores, Inc., 2011 WL 4537931 (N.D. Ind. Sept. 28, 2011). Court summarily found, and employer did not dispute, that evidence showed employee's **degenerative neurological condition, Friedreich's Ataxia**, substantially limited his ability, to walk, stand, see, and speak.

Negron v. City of New York, 2011 WL 4737068 (E.D.N.Y. Sept. 14, 2011). Denying the employer's motion to dismiss, the court found sufficient allegations of disability, where plaintiff alleged that **bullet fragments lodged** in her left hand and chest caused pain and inflammation. The court viewed the impairment as episodic and therefore considered whether it was substantially limiting when active -- when the pain and inflammation occurred -- and held that the facts alleged would support the conclusion that the impairment substantially limited plaintiff in the major life activities of performing manual tasks or working, given that during flare ups she was unable to use her left hand for work tasks, and at one point required one month off of work.

Eldredge v. City of St. Paul, ___ F. Supp. 2d ___, 2011 WL 3609399 (D. Minn. Aug. 15, 2011). Denying cross-motions for summary judgment, the court ruled that plaintiff established that he is disabled within the meaning of the ADA due to his **Stargardt's Macular Dystrophy**, a progressive disease causing a small blind spot in the center of his vision, which negatively impacts his central acuity vision. Evidence showed vision scores of 20/200 in plaintiff's left eye, with defendant's expert scoring him 20/200 in both eyes, and while his vision had been deemed stable for several years, it will not reverse itself or improve. The court noted that the disability determination under the ADAAA should be made without regard to the ameliorative effects of the mitigating measures plaintiff used or proposed to use, including a magnifying glass and/or a pocket telescope. Moreover, there was no evidence to suggest that the temporary use of such devices addressed his overall visual impairment in the way in which corrective lenses might resolve nearsightedness.

Medvic v. Compass Sign Co., LLC, 2011 WL 3513499 (E.D. Pa. Aug. 10, 2011). Denying the employer's motion for summary judgment, the court found that plaintiff's **stuttering** could be found to substantially limit him in the major life activity of communicating. Noting that "a medical diagnosis is not enough," and that "plaintiff must produce individualized evidence showing that their limitation has substantially affected them in their *own* experience," the court found plaintiff, a sheet metal mechanic, satisfied this standard based on the deposition testimony of plaintiff, his treating physician, and his coworkers that although he knows what he wants to say, his stuttering can keep him from communicating his thoughts to others for up to minutes at a time, impedes his social life, and is a lifelong impairment that cannot be treated, although its underlying cause can be alleviated with medication. Applying the ADAAA, the court stated: "Our analysis … has been altered by the 2008 ADA Amendments Act of 2008, which rejected the 'permanent' and 'long term' requirement embodied in the original Act and stated that '*episodic* or *in remission* fits within the definition of disability if it would substantially limit when active.' (Emphasis added). Here, there is evidence from which a jury could conclude that when Plaintiff's stutter is active, it substantially limits his ability to communicate, sometimes rendering him totally incapable of communicating at all. This actual impact, which may be

episodic, is also lifelong." Rejecting the employer's argument that plaintiff could not be substantially limited in communicating given that he "sat for his deposition and if necessary would be a witness at a trial," the court held that plaintiff "can still be substantially limited in communicating even if he is able to communicate at times without limitation."

Kinney v. Century Services Corp. II, 2011 WL 3476569 (S.D. Ind. Aug. 9, 2011). "Prior to the passage of the ADAAA, the Seventh Circuit frequently found 'isolated bouts' of **depression** to be temporary impairments and not disabilities as defined by the ADA. *See Brunker v. Schwan's Home Service, Inc.*, 583 F.3d 1004, 1008 (7th Cir.2009) . . . . The ADAAA, however, expressly aimed to expand the definition of disability and to shift the burden to the employer to comply with the regulations of the ADA. Pub.L. 110–325, § 2(b)(1), (2), (4), (5). To that end, the ADAAA includes the provision that 'an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.' 42 U.S.C. § 12102(4)(D). Within the new paradigm of the ADAAA, the Seventh Circuit has not addressed the extent to which intermittent depression, however severe, constitutes a disability. However, a similar issue was decided by the district court in *Hoffman v. Carefirst of Fort Wayne, Inc.*, where the court held an employee with cancer will be considered disabled even if the cancer is in remission at the time of the alleged adverse employment action. 737 F. Supp. 2d 976 (N.D. Ind. 2010). After *Hoffman*, the [EEOC] released regulations that also offer guidance as to the interpretation of the 'episodic or in remission' language of the ADAAA. Comments to the regulations state: 'This provision is intended to reject the reasoning of court decisions that certain individuals with certain conditions—such as epilepsy or post traumatic stress disorder—were not protected by the ADA because their conditions were episodic or intermittent.' 29 C.F.R. § 1630(j)(1)(vii). In this case, although there is no dispute that Ms. Kinney's depression did not impact her work performance following her return to work, [dkt. 38 at 7], there is also no dispute that, before she was hospitalized, Ms. Kinney advised Ms. Ruckman that Ms. Kinney's doctor recommended hospitalization because the depression was severe enough that Ms. Kinney was suicidal. Regardless whether her depression impacted her work when inactive, there is no question that, by its very nature, inpatient treatment substantially impacts (in fact, precludes) work performance and limits major life activities. Given Ms. Kinney's debilitating symptoms when her depression was active, the Court finds that Ms. Kinney's depression at least raises a genuine issue of fact as to whether she is a qualified individual under the ADA."

Gibbs v. ADS Alliance Data Systems, Inc., 2011 WL 3205779 (D. Kan. July 28, 2011). Employer's summary judgment motion denied on disability discrimination and retaliation claims arising out of plaintiff's termination following **carpal tunnel** surgery on her left hand. "[T]he ADAAA was passed in response to decisions by the U.S. Supreme Court that, according to Congress, had 'created an inappropriately high level of limitation necessary to obtain coverage under the ADA,' and was intended to reinstate 'a broad scope of protection ... available under the ADA.' *See Norton v. Assisted Living Concepts, Inc.*, ___ F. Supp.2d ___, 2011 WL 1832952, at *7 (E.D. Tex. May 13, 2011) (citations omitted). While an ADA plaintiff must still show that he or she has a physical or mental impairment that substantially limits a major life activity, 42 U.S.C. § 12102(1)(A), the ADAAA has 'significantly expanded' the terms within that definition in favor of broad coverage. *See Norton*, ___ F. Supp.2d at ___, 2011 WL 1832952, at *7. In expanding the definition of disability, Congress intended to convey 'that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis'

and that the 'primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations.' *See id.* (citations omitted). Consistent with this purpose, the implementing regulations state that the terms 'substantially limiting' and 'major' are not intended to be 'demanding' standards. 29 C.F.R. § 1630.2(i)(2) & (j)(1)(i) (2011). Recognizing, then, that the court must consider the evidence of plaintiff's alleged disability through the lens of the less demanding standard of disability set forth in the ADAAA, defendant's argument in support of its motion for summary judgment on this issue is decidedly brief -- it asserts only that plaintiff has the burden to prove that her impairment substantially limits a major life activity despite the broader reach of the ADAAA. After examining the evidence in the record bearing on this issue (certainly there is some evidence that plaintiff's condition affected her ability to perform manual tasks), and keeping in mind that this inquiry is not meant to be 'extensive' or demanding, the court concludes that genuine issues of material fact exist as to whether plaintiff's carpal tunnel syndrome constitutes a disability within the meaning of the ADA."

Cohen v. CHLN, Inc., 2011 WL 2713737 (E.D. Pa. July 13, 2011). Denying employer's motion for summary judgment, the court ruled that plaintiff's **back impairment (lumbar radiculopathy with spinal and foraminal stenosis)** could be a substantially limiting impairment. Plaintiff, a restaurant manager, needed the assistance of a cane and was only able to walk ten to twenty yards at a time before having to stop and rest. The employer argued that the condition was of too short a duration to qualify as a disability, but the court observed: "[t]he ADAAA mandates no strict durational requirements for plaintiffs alleging an actual disability. Even if it did, plaintiff's evidence could allow a jury to find that his condition was by no means fleeting. Plaintiff's back and leg issues began four months before his termination and were not resolved by the injections recommended by plaintiff's doctor. At the time of the termination, plaintiff's doctor had suggested the possibility of surgery requiring extensive recovery time, with no indication that plaintiff's condition would be resolved permanently. Such a severe, ongoing impairment stands in distinct contrast to those cited by the EEOC as merely minor and temporary, such as the common cold or flu. 29 C.F.R. pt. 1630.2, app. § 1630.2(*l*)."

Patton v. Ecardio Diagnostics LLC, 793 F. Supp. 2d 964 (S.D. Tex. June 9, 2011). FMLA case in which the court discusses "substantially limited" under the ADAAA, finding the standard satisfied where plaintiff, a staff accountant, had **two broken femurs** that necessitated using a wheelchair "for several weeks, if not months" and then walking with a cane, and where after 1 1/2 years she still walked with pain and a limp.

Seim v. Three Eagles Communications, Inc., 2011 WL 2149061 (N.D. Iowa June 1, 2011). Plaintiff, an on-air radio personality employed by a company that operated seven stations, alleged that he was denied accommodation and terminated in violation of the ADA after he informed several members of management at Three Eagles he had a "blood disease" and would require occasional time off, and sought but was denied transfer to one of several available afternoon shifts because side effects of his medication included early-morning drowsiness, confusion, and slurred speech. Seim further alleged that the disease makes standing for prolonged periods painful, but that his request for a chair (broadcasters typically stood during their on-air programs) was also denied. On the question of whether his **Graves' Disease** and the side effects of medications he uses to treat it rendered him an individual with a disability, he

alleged that he was substantially limited in the major life activities of sleeping, standing, speaking, concentrating, thinking, communicating, working, and the functions of his immune, circulatory, and endocrine systems, noting various symptoms of the disease, including rapidly deteriorating vision, weight fluctuation, insomnia, narcolepsy, anxiety, swelling and skin lesions of the lower extremities, and difficulty standing for long periods of time. The Court denied the employer's motion for summary judgment on the issue of whether Seim is an "individual with a disability," ruling under the ADAAA that a reasonable jury could find that Seim was substantially limited in these major life activities.

Meinelt v. P.F. Chang's China Bistro, Inc., __ F. Supp. 2d __, 2011 WL 2118709 (S.D. Tex. May 27, 2011). Plaintiff, a restaurant manager, alleged he was terminated in violation of the ADA when, three days after telling his employer that he had a **brain tumor**, he was fired for the stated reason of improperly adjusting employees' hours. Denying the employer's motion for summary judgment on the question of whether Meinelt is an "individual with a disability," the court ruled: "Under the ADAAA, 'a major life activity also includes the operation of a major bodily function, including but not limited to, . . . normal cell growth ... [and] brain ... functions.' 42 U.S.C. § 12102(2)(B). . . . P.F. Chang's relies on pre-ADAAA cases to argue that Meinelt's brain tumor is not a disability. *See, e.g., Branscomb v. Grp. USA, Inc.*, No. CV 08–1328–PHX–JAT, at *5–6 (D.Ariz. Sept. 23, 2010) (holding that a benign brain tumor requiring three months' leave was not a disability). . . . P.F. Chang's does not, however, explain the relationship between that [pre-ADAAA] case law and the statutory amendments. Nor does P.F. Chang's explain how Piner's knowledge that Meinelt had a brain tumor—an abnormal cell growth—that would require brain surgery is insufficient to create a triable issue as to whether Meinelt was disabled or was regarded as disabled. *See* 42 U.S.C. § 12102(2)(B)."

Fleck v. Wilmac Corp., 2011 WL 1899198 (E.D. Pa. May 19, 2011). Denying employer's motion to dismiss complaint under Rule 12(b)(6), the court ruled that a physical therapist who alleged denial of accommodation and discriminatory termination after surgery for an **ankle injury** could be an individual with a disability using either the pre- or post- ADAAA definition of an impairment that substantially limits a major life activity. The court concluded that plaintiff's pre-surgery use of a "cam boot" to aid her in the amount of standing and walking required at work, and post-surgery inability to stand for more than an hour or walk more than a half mile, could be found to constitute a substantial limitation in the major life activities of standing and walking. Rejecting the employer's citation to pre-ADAAA cases in the same jurisdiction holding such limitations were insufficient, the court noted that those decisions were fact-specific, and factors such as the difficulty sustaining her level of mobility or the speed at which she could walk might distinguish this case even under pre-ADAAA standards. *(See also discussion below of "regarded as" coverage in this case.)*

Norton v. Assisted Living Concepts, Inc., 2011 WL 1832952 (E.D. Tex. May 13, 2011). Denying defendant's motion for summary judgment, the court concluded that the plaintiff's **renal cancer**, while in remission, qualified as a disability under the ADA. The ADAAA expanded the definition of disability to include the operation of "major bodily functions." The EEOC's regulations and interpretive guidance support the conclusion that cancer qualifies as a disability under the ADAAA. "Cancer at any stage" substantially limits the major life activity of normal cell growth.

Feldman v. Law Enforcement Assocs. Corp., 2011 WL 891447 (E.D. N.C. Mar. 10, 2011). The court denied the employer's motion to dismiss the ADA claims of an employee with **multiple sclerosis** and an employee who had been hospitalized for two days and off work for several weeks because of a **transient ischemic attack ("mini-stroke"**). The employer argued that neither employee had a substantially limiting impairment. Although the court did not mention the ADAAA's addition of major bodily functions as major life activities, it applied the new rule for conditions that are "episodic or in remission" to conclude that the employee with MS could state a claim because he might have had an impairment that is substantially limiting when active. As support, the court also cited section (j)(5) of the EEOC's NPRM, which proposed that MS is an impairment that will consistently meet the definition of disability. With respect to the employee who experienced a mini-stroke, the court rejected the employer's argument that the employee could not be substantially limited because he was able to engage in such activities as "leaving the house, going to doctor appointments, and contacting a lawyer." The court found that he might have been substantially limited in working, quoting the NPRM's statement that "[i]n determining whether an individual has a disability, the focus is on how a major life activity is substantially limited, not on what an individual can do in spite of an impairment."

Horgan v. Simmons, 704 F. Supp. 2d 814 (N.D. Ill. 2010). The plaintiff, who had been diagnosed as **HIV-positive** for 10 years but kept his status confidential, had been a sales manager for the employer since 2001. Stating that he was "worried" about the plaintiff, the company president met with the plaintiff in July 2009 and demanded to know whether he was having medical problems. The plaintiff ultimately disclosed his HIV-positive status but stated that it did not affect his ability to do his job. The plaintiff alleged that the president urged him to tell his family about his condition; asked him "how he could ever perform his job with his HIV positive condition and how he could continue to work with a terminal illness"; and told him he did not believe that the plaintiff "could lead if the employees knew about his condition." According to the plaintiff, the president then told him to leave the plant immediately, and he was terminated the next day. The plaintiff sued under the ADA, alleging that he was subjected to both discriminatory termination and an impermissible disability-based inquiry. Moving to dismiss, the employer contended that HIV infection does not always substantially limit a major life activity and that the plaintiff could not meet the definition of disability. Denying the motion, the court noted that the ADAAA makes clear that the function of the immune system is a "major life activity." In adopting the ADAAA, Congress also made clear its intent that "the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations," and thus "the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis." The court concluded that it was "certainly plausible – particularly, under the amended ADA – that Plaintiff's HIV positive status substantially limit[ed] a major life activity: the function of his immune system" and stated that this conclusion was consistent with the EEOC's proposed regulations to implement the ADAAA, which list HIV as an impairment that will "consistently meet the definition of disability."

Hoffman v. Carefirst of Fort Wayne, Inc., 737 F. Supp. 2d 976 (N.D. Ind. 2010). When the plaintiff, a medical equipment service technician, was diagnosed with **stage III renal carcinoma**

in November 2007, he took short-term disability leave for surgery and recovery, and returned to work on January 2, 2008, without restrictions. He did not take any significant time off after his return. In January 2009, in response to a new requirement that all service technicians work overtime (65 to 70 hours per week) and work a night shift once a week, the plaintiff sought accommodation, providing a doctor's note stating that he could "not work more than 8 hours/day, 5 days/week. Dx: Stage III renal cancer." After the employer refused to provide the requested accommodation, the plaintiff filed suit alleging denial of accommodation and unlawful termination. The employer argued that the plaintiff did not have a substantially limiting impairment because at the time in question his cancer was in remission and he had been working for a year without restrictions. Denying the employer's motion for summary judgment, the court held that it was "bound by the clear language of the ADAAA . . . [, which] clearly provides that 'an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active." Because the plaintiff had cancer in remission (and that cancer would have substantially limited a major life activity when it was active), the plaintiff was not required to show that he was substantially limited in a major life activity at the actual time of the alleged adverse employment action. This "conclusion [was] bolstered by EEOC's interpretive guidance" since the Commission's ADAAA regulatory proposal "specifically provides that 'cancer' is an example of 'impairments that are episodic or in remission'" and that cancer is an example of an impairment that will "consistently meet the definition of disability" because it "substantially limits major life activities such as normal cell growth."

Gil v. Vortex, L.L.C., 697 F. Supp. 2d 234 (D. Mass. 2010). The plaintiff, a punch press operator who was **completely blind in one ey**e, brought claims under the ADA challenging his employer's requirement that he provide two doctor's notes and submit to an independent medical examination to verify his ability to work without incident and challenging his subsequent termination due to the employer's fears that he might injure himself. Contending that the plaintiff's allegations were insufficient to plead disability even under the ADAAA standards, the employer moved to dismiss. Denying the motion, the court held that even though the complaint was devoid of any references to "substantial limitations" resulting from the plaintiff's monocular vision, enough had been "pled to satisfy the relaxed disability standard of the Amendments Act." Moreover, with respect to satisfying the new ADAAA "regarded as" standard, the court ruled that the facts established a plausible allegation that the employer believed the plaintiff to be disabled and terminated him as a result. In reaching this conclusion, the court noted that the employer asked the plaintiff for medical verification of his ability to work without incident, that he was terminated when the employer believed he was unable to obtain this verification, and that the plaintiff's supervisor told the plaintiff's daughter that the plaintiff was discharged because of the employer's fears that he would injure himself.

Lowe v. American Eurocopter, L.L.C., 2010 WL 5232523 (N.D. Miss. Dec. 16, 2010). Acknowledging that many pre-ADAAA cases had concluded that **obesity** was not a disability, the court denied the employer's motion to dismiss for lack of coverage, holding that in light of changes made by the ADAAA, the plaintiff's obesity could be covered under prongs 1 or 3 of the amended definition of disability.

(b) Plaintiff Is Not Substantially Limited

Allen v. Southcrest Hospital, ___ F.3d ___, 2011 WL 6394472 (10th Cir. Dec. 21, 2011) (unpublished). Analyzing whether plaintiff could be "substantially limited in working" under the ADAAA standard set forth in the interpretive guidance to the Commission's amended ADA regulations, the court held that plaintiff's **migraines** did not substantially limit her in a "class or broad range of jobs."

Frantz v. Shinseki, 2012 WL 259980 (M.D.N.C. Jan. 27, 2012). Plaintiff, a registered nurse, was employed by the Department of Veterans Affairs at a medical center as Associate Chief Nurse for Acute Care. Following a 2007 investigation finding negligence in her unit, she provided a letter from her physician stating she was unable to do any work of any kind for six months, due to stress, anxiety, and post-traumatic stress disorder. She was subsequently terminated based on the earlier investigation, but was reinstated after a successful administrative challenge. Plaintiff filed suit under the Rehabilitation Act, challenging the agency's actions, including the alleged failure to restore her to her original position, and denial of reasonable accommodation upon ultimately returning to work in January 2009. Granting the employer's motion for summary judgment, the court held -- noting it would reach the same conclusion under the ADAAA -- that notwithstanding her physician's letter, plaintiff "failed to present evidence to even attempt to establish that her stress and anxiety are impairments that substantially limit any major life activity … nor do her affidavits address the extent of her impairment and its impact on her life activities." In reaching this conclusion, the court relied on evidence that after the requested six-month leave, plaintiff's treating physician cleared her to return without restrictions, and an employer fitness-for-duty evaluation concluded she was able to work on a full-time basis but that "alternative reporting relationships or reassignment would be prudent." The court held that "it is well-established that the inability to work with particular co-workers or supervisors does not create a substantial limitation on the major life activity of working."

Clark v. Western Tidewater Regional Jail Authority, 2012 WL 253108 (E.D. Va. Jan. 26, 2012). Plaintiff, a probationary jail officer, was terminated for failure to complete a state-mandated training program after three attempts. Entering summary judgment for the employer on plaintiff's claim of denial of reasonable accommodation, the court held that none of her physical impairments (**torn ACL, left knee sprain, lumbar strain, and post-concussion syndrome**) substantially limited a major life activity. On September 21, 2009, plaintiff's physician restricted her to work that did not involve excessive exercise; on October 14, 2009, she was prohibited from engaging in prolonged standing, which was expressed in an October 15, 2009 form as able to engage in "normal activities" with an "opportunity to rest-sit every hour"; and on November 3, 2009, she was cleared to return to full duty status. "Although the ADAA's implementing regulations indicate that a substantial limitation need not severely restrict an individual's ability to perform a major life activity, 29 C.F.R. § 1630.2(i)(1)(ii), "the phrase 'substantially limits' sets a threshold that excludes minor impairments from coverage…." (citations omitted). "The Court is unable to conclude that a three week restriction on Clark's ability to stand for prolonged periods of time constitutes a substantial limitation on the major life activity of standing." Although the ADAAA seeks to "liberalize the definition of disability . . . courts in this Circuit continue to recognize that temporary impairments generally do not qualify as impairments that substantially limit major life activities."

Klute v. Shinseki, ___ F. Supp. 2d ___, 2012 WL 35599 (D.D.C. Jan. 9, 2012). Plaintiff, a federal government attorney, with **adjustment disorder** alleged denial of accommodation during a period that spanned both before and after the effective date of the ADAAA. Granting summary judgment for the employer, the court determined even assuming the ADAAA standards apply, plaintiff was alleging a substantial limitation in working, which could not be demonstrated because the evidence showed he was merely unable to work for a particular supervisor or in a particular workplace.

Azzam v. Baptist Healthcare Affiliates, Inc., 2012 WL 28117 (W.D. Ky. Jan. 5, 2012). Plaintiff, a surgical registered nurse, experienced either **a stroke** or a cerebrovascular accident while on vacation. At the emergency room, she was diagnosed with a "probable transient ischemic attack versus cerebrovascular accident likely thromboemolic." The discharge summary stated that "CT brain without contrast was negative for intracranial bleed and the patient was thought to have nonhemorrhagic acute cerebrovascuar accident affecting her right side and speech and presumed to be thromboembolic phenomenon from cardiac source." It also stated that "[h]er right-sided weakness has completely resolved, however, she continues to have residual expressive aphasia which needs continuation of outpatient speech therapy … and follow up with her primary M.D." Upon returning home, she saw her cardiologist, who insisted she see a neurologist before releasing her to return to work without restrictions, and the neurologist prescribed medications and neurological exercises. After two months of FMLA leave, she was cleared to work light duty 4 hours per day, 5 days per week, with no nights or weekends ("call" duty), and returned to work with no patient care responsibilities. One month later, she had "shown steady improvement" and was released to perform patient care but still with part-time and "no call" restrictions. Four months later, she was terminated for refusing to resume a normal schedule absent medical clearance. In an ADA suit challenging the termination as disability discrimination and failure to accommodate, the court ruled that there was no evidence to support plaintiff's contention that her impairment substantially limited her in the major life activities of neurological function or concentration. With respect to the major life activity of working, the court ruled that plaintiff failed to demonstrate how her fatigue and inability to work full-time or on weekends (due to fatigue, lack of stamina, and need to take bedtime medications) substantially limited her in performing her job as an RN or a comparable nursing position without "call" responsibilities.

Neumann v. Plastipak Packaging, Inc., 2011 WL 5360705 (N.D. Ohio Oct. 31, 2011). In a case arising after January 1, 2009, the court applied a mix of pre-ADAAA and ADAAA standards in concluding that plaintiff's **back injury** was short-lived and corrected by surgery, and therefore did not substantially limit a major life activity.

Bess v. Cumberland County, N.C., 2011 WL 4809879 (E.D.N.C. Oct. 11, 2011). Plaintiff's mere allegation that he "happens to **stutter**" was insufficient to plead actual disability; employer's motion to dismiss granted. Similarly, an allegation that a county official "wrote about" his disability was held insufficient to plead an employment action taken because of an actual or perceived impairment as would be required for "regarded as" coverage. *See also* Bess v. County of Cumberland, 2011 WL 3055289 (E.D.N.C. July 25, 2011).

McElwee v. County of Orange, 2011 WL 4576123 (S.D.N.Y. Sept. 30, 2011). In a case arising under Title II of the ADA and Section 504 of the Rehabilitation Act involving alleged disability discrimination against an individual with **Asperger's Syndrome** who provided volunteer janitorial and housekeeping duties for a federally funded rehabilitation center, the court granted summary judgment for defendant on the ground that his behavior had warranted termination of his services. On the issue of whether plaintiff was an "individual with a disability," the court held that no rational trier of fact could find plaintiff was substantially limited in "interacting with others" because he "does not lack the basic fundamental ability to communicate with others … but rather his communication is merely 'inappropriate, ineffective, or unsuccessful."

Brandon v. O'Mara, 2011 WL 4478492 (S.D.N.Y. Sept. 28, 2011). Rejecting the employer's argument that plaintiff, a teacher, had to allege that her fatigue from **cancer** treatment was "not temporary" in order to establish a substantially limiting impairment, the court held that "the statutory text makes clear" that the six month "transitory" part of the "transitory and minor" exception applies only to the "regarded as" prong of the definition of disability. However, the court – without mentioning the addition by the ADAAA of major bodily functions such as normal cell growth – granted the employer's motion to dismiss on the ground that the complaint had insufficient detail regarding how limited plaintiff was, given that it only referenced that she would "experience fatigue" and was "not to engage in lifting objects."

LaPier v. Prince George's County, Md., 2011 WL 4501372 (D. Md. Sept. 27, 2011). Granting the employer's motion to dismiss the complaint, the court held that plaintiff's allegations of a **blood disorder** that caused him to lose consciousness on one occasion, necessitating the need for one week of light duty, were insufficient to plead a substantially limiting impairment under the ADAAA (or to establish "regarded as" coverage). In reaching this conclusion, the court read the legislative history of the ADAAA – contrary to the EEOC's regulations – to mean that a "substantial" limitation must be more than a material restriction.

Gesegnet v. J.B. Hunt Transport, Inc., 2011 WL 2119248 (W.D. Ky. May 26, 2011). Record contained no evidence from a medical doctor concerning the precise nature of plaintiff's disability, but rather just two questionnaires on which plaintiff checked the "no" box next to "nervous or psychiatric disorders, e.g., severe depression" yet checked the "yes" box next to the "medication" line. "In difficult cases, a plaintiff usually proves disability through a combination of medical evidence and personal testimony detailing the practical impact of that medical condition. Here, Plaintiff is lacking in each area. The Court finds no medical evidence which precisely defines that extent of Plaintiff's disease and the medical limitations due to it. Without a valid medical opinion, courts cannot simply assume that a disease or diagnosis has disabling consequences. The medical forms fall short of what is necessary." **See also Aguirre v. W.L. Flowers Machine & Welding Co.**, 2011 WL 2672348 (S.D. Tex. July 7, 2011) ("Plaintiff's reference to a 'medical condition' that. limited him to working no more than forty-five hours per week does not adequately allege the existence of a 'disability' as defined by the ADA, as it neither states the nature of the impairment nor the manner in which Plaintiff's major life activities are substantially limited").

Broderick v. Research Found. of State Univ. of N.Y., 2010 WL 3173832 (E.D.N.Y. Aug. 11, 2010). A nurse manager brought an ADA lawsuit alleging denial of accommodation and

discriminatory termination after she **reinjured her left hip**. The court granted a motion to dismiss the claims, with leave to replead, holding that the complaint's reference to an unspecified injury to the plaintiff's hip and lower back without explanation of what major life activity it substantially limited was insufficient to state a claim under the ADAAA standards.

2. Record of a Disability

Behringer v. Lavellle School for the Blind, 2010 WL 5158644 n.10 (S.D.N.Y. Dec. 17, 2010). In this pre-ADAAA case involving a former school principal with **alcoholism**, the court quotes the EEOC's question-and-answer guide on the proposed regulations to support the proposition that "record of" coverage requires a past history of a substantial limitation, not employer reliance on a medical record as such. "The EEOC has explained its interpretation of a 'record' of disability. The EEOC affirms that 'coverage under the 'record of' prong of the definition of 'disability' does not depend on whether an employer relied on a record (*e.g.*, medical, vocational, or other records that list the person as having a disability) in making an employment decision. An employer's knowledge of an individual's past substantially limiting impairment relates to whether the employer engaged in discrimination, not to whether an individual is covered.'"

3. Regarded as Substantially Limited in a Major Life Activity

(a) Employer Regarded or May Have Regarded Plaintiff as Substantially Limited

Wells v. Cincinnati Children's Hospital Medical Center, 2012 WL 510913 (S.D. Ohio Feb. 15, 2012). Plaintiff, a hospital nurse who worked in the "critical airway unit" from 2003-09, developed a **gastrointestinal condition**, underwent **gall bladder removal surgery**, and was prescribed **medications, including morphine, oxycodone, and lotronex**. Due to side effects of the medications, plaintiff exhibited instances of undisputed erratic behavior in the workplace, including going to the wrong room to start an IV and providing "a jumbled and confused" end-of-shift report, as well as being confused for about four hours and having "blacked out" for a period of time. She was suspended without pay pending a series of fitness-for-duty examinations, and thereafter signed a "return-to-work" agreement with various conditions, but sued the hospital claiming disability discrimination in failing to reinstate her to the "critical airway unit," as well as denial of reasonable accommodation. Denying the hospital's motion for summary judgment, the court found that a reasonable juror could conclude plaintiff was "regarded as" an individual with a disability because she was subjected to the adverse employment action (not being reinstated to the "critical airway unit," which resulted in fewer hours, less pay, less distinguished jobs, and less responsibility) because of her actual or perceived impairment. The court noted that unlike the ameliorative effects of mitigating measures, negative side effects of medications used to ameliorate an impairment remain relevant under the ADAAA to determining disability. The court emphasized that under the ADAAA, plaintiff "no longer is required to prove that the employer regarded her impairment as substantially limiting a major life activity," citing 29 C.F.R. § 1630.02(g)(3). Although counsel for both parties had used the burden-shifting analysis for indirect evidence under McDonnell Douglas in arguing the question of whether the adverse

action was "because of" plaintiff's perceived impairment, the court held that the hospital's stated reason for not reinstating plaintiff to the unit -- fear she would repeat her past errors or revert to the past behaviors -- constitutes direct evidence that the failure to reinstate was "because of" plaintiff's actual or perceived impairment. The remaining issue on the merits of the unit reinstatement claim was whether plaintiff was qualified, and if so, whether the hospital could meet its burden to prove any defense, such as direct threat to the health or safety of patients. With respect to the denial of accommodation claim, the court held plaintiff was not entitled to accommodation because she was only proceeding under the "regarded as" prong of the definition of disability.

Davis v. NYC Dept. of Education, 2012 WL 139255 (E.D.N.Y. Jan. 18, 2012). Plaintiff, a teacher diagnosed with **c-spine injury, right shoulder injury, and lumbar back disorder**, alleged that she was discriminated against based on disability when, following a medical leave, she received an unsatisfactory performance rating and a reduction in her bonus. Denying the employer's motion to dismiss, the court held the allegations in the complaint that plaintiff was "regarded as" disabled during a period when she was on unpaid disability leave were sufficient. The court noted that although the plaintiff's three-month disability period appears to be "transitory," it was not apparent from the complaint that the impairment was minor. Thus, the exception to "regarded as" coverage for impairments that are both "transitory" and "minor" did not provide a basis for dismissal. The court also noted that an unsatisfactory performance rating, alone, does not amount to an adverse employment action, but that the reduction in bonus could. Nevertheless, the court did not appear to require that plaintiff identify a prohibited action taken because of her impairment; rather, the court simply found "regarded as" coverage alleged because plaintiff had been granted leave for an impairment that was transitory but not minor.

Becker v. Elmwood, 2012 WL 13569 (N.D. Ohio Jan. 4, 2012). The court granted the defendant school district's motion for summary judgment on a disability discrimination claim brought by a teacher with **obsessive compulsive disorder** (OCD), finding that plaintiff did not suffer an adverse employment action because the circumstances of his resignation did not constitute a constructive discharge. However, in its analysis, the court rejected the defendant's reliance on pre-ADAAA cases requiring for "regarded as" coverage that the employer have perceived the employee to have a disability *that substantially limits a major life activity*, ruling instead that "[t]he ADA now includes perceived disabilities 'whether or not the impairment limits or is perceived to limit a major life activity.' 42 U.S.C.§ 12102(3)(A)."

Gaus v. Norfolk Southern Ry. Co., 2011 WL 4527359 (W.D. Pa. Sept. 28, 2011). Plaintiff alleged employer regarded him as an individual with a disability based on effects of his **chronic pain (related to a variety of impairments)** and his pain medication. With respect to the employer's actions occurring prior to January 1, 2009, the court granted summary judgment for the employer, finding under the pre-ADAAA standard that there was insufficient evidence for a jury to conclude that the employer perceived plaintiff as substantially limited in a major life activity. However, applying the ADAAA definition of "regarded as" to events occurring on or after January 1, 2009, the court denied summary judgment on coverage. Relying on examples in EEOC's revised regulations at 29 C.F.R. § 1630.15(f) and the accompanying appendix, the court noted that an employee is "regarded as" having a disability post-ADAAA even if the employer subjectively believed the impairment was transitory and minor. The court stated that it is

irrelevant under the ADAAA that the employer perceived the impairment as temporary, and denied summary judgment on coverage for the post-ADAAA portion of the claim, holding that there was no evidence that the impairment at issue was objectively both transitory (lasting or expected to last fewer than six months) and minor.

Dube v. Texas Health and Human Services Commission, 2011 WL 3902762 (W.D. Tex. Sept. 6, 2011). Plaintiff alleged that prior to her discharge she had been absent from work for approximately eleven weeks being treated for and attempting to recuperate "from a **serious medical condition** that had disabled her from working during that period," and that the employer concluded she was permanently disabled and decided to discharge her rather than await her return to work despite her assurances to the employer that she would be able to return. Moving to dismiss, the employer argued the allegations in the complaint demonstrated that plaintiff's impairment was "transitory and minor" under 29 U.S.C. § 1630.15(f), an affirmative defense to "regarded as" coverage. Denying the motion, the court held "it is not apparent from the face of the complaint that plaintiff's impairment lasted less than six months or was otherwise 'transitory' and 'minor' as defined by the regulations."

Fleck v. Wilmac Corp., 2011 WL 1899198 (E.D. Pa. May 19, 2011). Denying employer's motion to dismiss complaint under Rule 12(b)(6), the court ruled that a physical therapist who alleged discriminatory termination after surgery for an **ankle injury** could have been "regarded as" an individual with a disability under the amended definition. Quoting the amended statute, the court noted that "[i]n contrast to the pre-amendment ADA, an individual is 'regarded as' disabled under the ADAAA 'whether or not the impairment limits or is perceived to limit a major life activity.'" The court cited plaintiff's allegations that during her employment she wore a plainly visible "cam boot" to aid her in standing and walking, she notified her employer of her need for additional surgery on her ankle and subsequently requested FMLA leave, and that a week before her FMLA leave ended, she advised her supervisor of her continuing medical restrictions. The court concluded these allegations raised a plausible inference that the employer regarded her as an individual with a disability under the amended standard. Since the ADAAA makes clear that individuals covered solely under the "regarded as" provision are not entitled to accommodation, the court noted that it would only consider coverage under this prong with respect to plaintiff's discrimination claims. *(See also discussion above of "substantial limitation" in this case.)*

Chamberlain v. Valley Health System, Inc., 2011 WL 560777 (W.D. Va. Feb. 8, 2011). Plaintiff, a hospital pharmacy technician, alleged that she was placed on involuntary leave and subsequently terminated in violation of the ADA after she began experiencing blurred vision in her right eye and was diagnosed with a **visual field defect** which made fine visual tasks more difficult. The employer moved for summary judgment, contending plaintiff could not be "regarded as" an individual with a disability because the employer believed plaintiff's vision impairment was "transitory and minor." The court denied the motion, ruling, inter alia, that whether the employer believed the impairment was "transitory and minor" was a disputed issue of fact in this case that must be decided by a jury, given plaintiff's contention that the employer's Corporate Director of Pharmacy insisted plaintiff was completely unable to wok at the hospital as a result of her vision problem and required her to apply for disability leave.

Gil v. Vortex, L.L.C., 2010 WL 1131642 (D. Mass. Mar. 25, 2010). (See summary at p.8 - facts established a plausible allegation that the employer believed the plaintiff, who was **blind in one eye**, to be disabled and terminated him as a result).

(b) Employer Did Not Regard Plaintiff as Substantially Limited

White v. Interstate Distributor Co., 2011 WL 3677976 (6th Cir. Aug. 23, 2011). The "transitory and minor" exception was applied to preclude "regarded as" coverage of plaintiff's **leg injury**, because his lifting and other restrictions following motorcycle accident were expected to last for only a month or two.

Wallner, et al. v. MHV Sonics, Inc., 2011 WL 5358749 (M.D. Fla. Nov. 4, 2011). Granting summary judgment for the employer on plaintiffs' ADA claim, the court rejected plaintiffs' assertion that they were "regarded as" individuals with disabilities when they were terminated due to their **perceived fear that their lives were in danger** due to workplace robberies.

Neumann v. Plastipak Packaging, Inc., 2011 WL 5360705 (N.D. Ohio Oct. 31, 2011). The court concluded that plaintiff was not "regarded as" an individual with a disability when he was terminated following alleged failure to submit his FMLA paperwork in timely fashion. The court held that because his surgery and recuperation period following surgery for a **back injury** was only 6-8 weeks, the impairment was transitory and minor, even though his impairment had existed for three years prior and caused pain (though no work limitations) during that time.

Lewis v. Florida Default Law Group, 2011 WL 4527456 (M.D. Fla. Sept. 16, 2011). Plaintiff, a Foreclosure Specialist, alleged that she was terminated because she had the **H1N1 virus** and/or because she was regarded as having it. Granting summary judgment for the employer, the court held that plaintiff was not "regarded as" because her impairment was transitory (lasting 5 to 15 days) and minor ("just ordinary flu").

Dugay v. Complete Skycap Services, Inc., 2011 WL 3159171 (D. Ariz. July 26, 2011). Plaintiff, who was employed by an airport skycap services company, was required to provide a doctor's authorization after a one-day absence for **neck and back injuries** sustained in a car accident. When plaintiff submitted a note from his doctor authorizing return to work, his supervisor stated that the note was too vague and required another doctor's note. The new note plaintiff provided stated that he could return to work on light duty, provided he did not lift over 25 pounds. Plaintiff was then advised that for liability reasons he could not be permitted to return until he had a full release from his doctor. When he subsequently received a full release, he was informed no work was available. Plaintiff claimed he was discriminated against in violation of the ADA when he was placed on involuntary leave due to his neck and back injuries, asserting coverage under the "regarded as" prong of the definition of disability. Granting the employer's motion to dismiss, the court concluded the "transitory and minor" exception barred coverage because the dates identified in the complaint of the plaintiff's car accident and his clearance for return to work indicated the injuries lasted fewer than 6 months.

Powers v. USF Holland, Inc., 2010 WL 1994833 (N.D. Ind. May 13, 2010). While holding that the ADA Amendments Act did not apply retroactively to the claims at issue, the court explained that even if the Amendments Act did apply, the plaintiff, a truck driver, would not be able to prove he was qualified because he argued that he was an "individual with a disability" solely under the "regarded as" prong, yet needed an accommodation in order to be qualified. The ADA as amended, 42 U.S.C. § 12201(h), states: "[a] covered entity . . . need not provide a reasonable accommodation . . . to an individual who meets the definition of disability in section 12102(1) . . . solely under subparagraph (C)." "By excluding the requirement to accommodate individuals who are only regarded as disabled, the ADAAA recognizes the obvious: if an individual is not actually disabled, then he or she does not need the accommodation in the first place. Thus, while an employer may not discriminate against persons it perceives as disabled, the law does not impose a duty on that employer to accommodate what turns out to be a fictional impairment."

Wurzel v. Whirlpool Corp., 2010 WL 1495197 (N.D. Ohio Apr. 14, 2010). The plaintiff, a materials handler whose job entailed driving a tow motor to deliver items throughout the Whirlpool plant, was diagnosed with **prinzmetal angina**, which causes coronary spasms without warning. Because of increasingly frequent episodes of tightness in the chest, shortness of breath, dizziness, left arm numbness, and fatigue, the plaintiff sought help from the employee health center and took intermittent leave. The company doctor concluded that the plaintiff was unqualified to drive the tow motor, and the plaintiff was transferred to a position in the paint department. Based on subsequent medical reviews, the company concluded that the plaintiff also could not safely perform the paint position, as it required working on a low-hanging conveyor line that moved continuously and one rotation required working alone outside of the presence of other employees. He was placed on mandatory sick leave pending either bidding successfully on another position that he could perform safely or being spasm-free for six months. The court granted summary judgment for Whirlpool on the plaintiff's disability discrimination claim challenging the mandatory leave. Applying the ADAAA "regarded as" standard to those actions that occurred on or after the ADAAA's effective date, the court ruled that the plaintiff was not subjected to an action prohibited under the ADA "because of an actual or perceived physical or mental impairment," since he posed a direct threat to safety. "[A] rational jury could only find that concerns with plaintiff's own safety and that of his co-workers promoted Whirlpool's decisions. Actions motivated by bona fide concerns with worker safety cannot be deemed or found to be prohibited under the ADA, as amended or otherwise." The court also stated that it was the consequences of the plaintiff's condition, not the condition itself, which motivated the employer's decision. (An appeal is pending in this case (10-3692 6th Cir.) in which the EEOC has filed and amicus brief (available at www.eeoc.gov) disagreeing with all aspect's of the district court's ruling.)

George v. TJX Cos., 2009 WL 4718840 (E.D.N.Y. Dec. 9, 2009). The plaintiff, a back room associate at a retail store whose position entailed lifting, stacking, and processing approximately 400 to 450 boxes of merchandise per day, was terminated after abandoning his position, in part, according to the plaintiff, because of how he was treated by the company when he sustained a **fractured upper arm**. Granting summary judgment for the employer on the plaintiff's claims of disparate treatment and denial of accommodation, the court found that the ADAAA did not apply retroactively but nevertheless noted that the plaintiff could not even meet the amended definition of "regarded as." The ADAAA "regarded as" prong does "not apply to impairments that are

transitory and minor" and defines "transitory" as an impairment with an actual or expected duration of six months or less. Because the record evidence "overwhelmingly support[ed] the inference that plaintiff's impairment lasted only two months," the plaintiff "presented no evidence to dispute that [the employer] saw him as having a temporary injury without permanent or long-term impact."

B. Definition of "Qualified Individual with a Disability"

Johnson v. Board of Trustees, No. 10-35233, 2011 WL 6091313 (9th Cir. Dec.8, 2011). Plaintiff's depression and bipolar disorder prevented her from renewing her teaching license before its expiration. She alleged that her employer violated the ADA by not granting her a provisional authorization to teach as an accommodation. The court ruled that the first prong of the ADA's "qualified individual" test does not require employers to provide reasonable accommodation to an individual who does not otherwise meet the prerequisites of the position, e.g., a license to teach.

1. Essential Functions

a. Employer Judgment

Jakubowski v. Christ Hosp., Inc, 627 F.3d 195 (6th Cir. 2010). Affirming summary judgment for the employer, the court held that communicating effectively with professional colleagues and patients in ways that ensure patient safety was an essential function of a family practice medical resident.

Gratzl v. Office of the Chief Judges, 601 F.3d 674 (7th Cir. 2010). Affirming summary judgment for the defendant, the court concluded that rotating through courtrooms was an essential function of an official court reporter. When originally hired as a court reporter specialist, the plaintiff worked only in the control room, which allowed her to manage her incontinence without problems. When the defendant abolished her position and required her and all other court reporters to rotate through the control room and courtrooms, the plaintiff asked to be allowed to remain assigned only to the control room as a reasonable accommodation. The court concluded that the defendant had the right to restructure the court reporting jobs and create an essential function that required the ability to rotate. Restructuring was intended to evenly distribute the workload, which varied with each courtroom. The fact that the defendant once had a position whose essential function was to work only in the control room or that other courts still had such positions did not prevent the defendant from choosing to implement a different approach.

b. Time Spent Performing Function/Consequence(s) of Non-Performance

Miller v. Ill. Dep't of Transp., 643 F.3d 190 (7th Cir. 2011). Plaintiff, a highway maintainer on a bridge crew, alleged that his employer refused his request not to work at high heights in exposed positions as reasonable accommodation for his acrophobia. The court reversed and

remanded summary judgment for defendant because there was sufficient evidence that working above 25 feet in an extreme or exposed position was not an essential function for plaintiff "as an individual member of the bridge crew" where the evidence showed that crew members often shifted tasks to compensate for each other's limitations. There was a member who could not weld, another who refused to ride in the snooper bucket, and another whose allergies prevented him from bridge spraying, yard mowing, and debris raking.

Richardson v. Friendly Ice Cream Corp., 594 F.3d 69 (1st Cir. 2010). Plaintiff alleged that her employer violated the ADA when it failed to accommodate her shoulder impingement syndrome and terminated her as assistant manager because of her disability. As an accommodation, plaintiff requested that she be allowed to perform certain manual, repetitious tasks in a modified manner and delegate tasks that involved lifting objects heavier than ten pounds. The court relied on her job description and her testimony to conclude that plaintiff's restaurant job had a "substantial physical component" that was essential to the assistant manager position. The court granted defendant's summary judgment motion because plaintiff's suggested accommodations for performing essential tasks -- modified task performance and delegation to other employees -- were unreasonable as a matter of law since they would remove essential functions from her duties.

Duello v. Buchanan Cnty. Bd. of Supervisors, 628 F.3d 968 (8th Cir. 2010). Affirming summary judgment for the defendant, the court found that a county road department employee was not qualified because, at the time he was fired, he could not perform the essential functions of driving and working around moving machinery. The plaintiff had a seizure, resulting in the loss of his commercial driver's license, and had to remain seizure-free for six months before being eligible to regain his license. The defendant gave him FMLA leave, but when that ended, it denied his request for three additional months and terminated him for being unable to do his job. The plaintiff's claim arose before the effective date of the ADA Amendments Act, and the parties agreed that, under the applicable pre-ADAAA standards, the plaintiff met only the "regarded as" definition of disability and therefore was ineligible for a reasonable accommodation. The plaintiff argued that driving and working around machinery were not essential functions because the defendant had a practice of excusing employees from driving when they were temporarily disabled. Disagreeing, the court noted that the job description for the plaintiff's position (Operator II) required the ability to operate "light and medium heavy equipment." Furthermore, the plaintiff and other employees testified that this position required the plaintiff to drive and to work around moving machinery in order to maintain a specified stretch of road. The plaintiff was terminated at the beginning of winter, a season when almost all employees were required to use machinery to assist in snow removal. Finally, evidence that two employees had been excused from driving on a temporary basis did not affect whether driving and working around moving machinery were essential functions of the plaintiff's position. One of the employees was a surveyor and, unlike the plaintiff, could perform the essential functions of his position by riding to worksites with coworkers. As to the other employee, there was insufficient information to allow a meaningful comparison to the plaintiff. Accordingly, the plaintiff failed to create a genuine factual issue as to whether the defendant had an on-going practice of routinely excusing employees from driving and working around machinery when they were temporarily disabled.

Braheny v. Commonwealth of Pennsylvania, 2012 WL 176186 (E.D. Pa. Jan. 18, 2012). Plaintiff was a corrections officer diagnosed with Lymphocytic Colitis, the main symptom of which is uncontrollable diarrhea. Defendant denied his request to be assigned only to posts with ready access to a bathroom and later argued that because plaintiff could not perform an essential function of his job—the ability to work all posts without advance notice—he was not a "qualified" individual under the ADA. Plaintiff countered that the essential function was the ability to work all posts without advance notice *in the event of emergency*, which he claims he could adequately perform. Plaintiff presented evidence that a modified duty program existed for employees with temporary injuries and that other similar institutions had provided corrections officers with modified duty that did not require working all posts. The court denied summary judgment stating that the employer's judgment of essential functions was not determinative and that the evidence showed genuine issues of material fact as to the proper characterization of this function and whether it was in fact essential.

c. Attendance and Work Schedules

Colon-Fontanez v. Municipality of San Juan, 660 F.3d 17 (1st. Cir. 2011). Plaintiff, an Auction Officer, alleged that defendant failed to reasonably accommodate her fibromyalgia by refusing her request for a reserved parking space near the office's entrance. The court held that plaintiff was not a qualified individual under the ADA because physical attendance was an essential job function that she failed to satisfy given that her absenteeism was long-established and documented well before her diagnosis.

Carmona v. Southwest Airlines Co., 604 F.3d 848 (5th Cir. 2010). Although regular attendance may be an essential function of many jobs, including even the plaintiff's position as a flight attendant, the plaintiff's ability to meet the defendant's "extremely lenient" attendance policy indicated that he was qualified. Because of psoriatic arthritis, the plaintiff spent one-third to one-half of every month unable to move without a great deal of pain, which caused him to miss a substantial amount of work over a seven-year period. He was granted intermittent FMLA leave to cover most of these absences, but was fired when he had exhausted all FMLA leave. Nevertheless, at all times during his employment with the defendant, the plaintiff complied with the employer's attendance policy. Therefore, even if attendance was an essential function, the plaintiff's ability to comply with the attendance policy signaled that he was performing this essential function. In dicta, the court noted that under the FMLA an employee who needs intermittent leave can be transferred to another job, yet the employer never transferred the plaintiff, which suggested that attendance might not have been an essential function of the plaintiff's position.

Azzam v. Baptist Healthcare Affiliates, Inc., 2012 WL 28117 (W.D. Ky. Jan. 5, 2012). Plaintiff was a registered nurse who had "lingering fatigue and [] lack of stamina" ensuing from a stroke with resulting aphasia. She had received the accommodation of working only five hours a day, five days a week, with no call responsibilities for five months. She alleged that her employer violated the ADAAA when it withdrew her accommodation and terminated her. The court held that 8-hour shifts and call responsibilities were essential functions of plaintiff's job as a surgical RN. Because she could not perform them, she was not "qualified" for the position.

Ousley v. New Beginnings C-Star, Inc., 2011 WL 5330300 (E.D.Mo. Nov. 4, 2011). Drug-abuse counselor alleged he was fired because he requested extended medical leave due to a knee injury, which the court assumed, for the purpose of the summary judgment motion, qualified as a disability under the ADA. The court held that plaintiff was not "qualified" under the ADA because he could not maintain consistent and regular attendance, an essential function of his counselor position, and that an indefinite leave of absence was an unreasonable accommodation as a matter of law.

Alastra v. National City Corp., 23 A.D. Cas. 1602, 2010 WL 4739763 (E.D. Mich. Nov. 16, 2010). The court denied the employer's motion for summary judgment, concluding that a reasonable jury could find that the plaintiff was fired because of her disability. The plaintiff, who had medically intractable generalized epilepsy, worked as a part-time bank teller. She typically had four grand-mal seizures a month, and waking up early or otherwise being sleep-deprived triggered her seizures. When hired, she was told that part-time tellers were required to cover for full-time tellers as needed, including in the morning. However, the employer did not submit any evidence to show that the ability to work mornings was an essential job function of a part-time teller. After the plaintiff's eighth absence resulting from seizures, she requested a permanent start time of 10:00 am or later to prevent or reduce her seizures. Despite the plaintiff's making this request three times, the employer never affirmatively denied or granted it. The plaintiff subsequently incurred two more absences due to seizures and was terminated pursuant to the employer's attendance guidelines, which provided that an employee with 10 or more absences in one year should be terminated. The court found that the employer's asserted reliance on its attendance policy could be construed as a pretext for discrimination. The plaintiff provided evidence that another teller (Valdes) was permitted to incur more than 10 absences before being terminated for excessive absenteeism. The employer contended that Valdes was not similarly situated to the plaintiff because she worked in a different branch, had a different supervisor, and did not have the same work experience as the plaintiff. Disagreeing, the court concluded that the plaintiff and Valdes were similarly situated because they were both part-time tellers with the same responsibilities at branches governed by the same attendance policy, and both had 10 absences in a one-year period. Moreover, the fact that the plaintiff was fired while Valdes was given probation demonstrated that the attendance policy was not being applied uniformly.

2. Statements Made in Benefits Proceedings

Solomon v. Vilsack, 628 F.3d 555 (D.C. Cir. 2010). The plaintiff, whose psychiatric disabilities included a long history of depression, applied for Federal Employees Retirement System (FERS) disability retirement benefits after her accommodation requests were denied. Vacating summary

judgment for the U.S. Department of Agriculture, the court held that claims of FERS disability benefits and claims of disability discrimination under the Rehabilitation Act do not "so inherently conflict" that courts should presumptively bar recipients of FERS benefits from asserting Rehabilitation Act claims. Although OPM regulations state that individuals who are able to fulfill the duties of their positions with reasonable accommodation are ineligible for benefits, the FERS system, as actually implemented, does not render such individuals ineligible. A reasonable jury could conclude that statements made by the plaintiff and her doctor in support of the plaintiff's FERS claim were consistent with the claim that the plaintiff was qualified for the job, because the form she signed did not warn her that employees who are able to work with reasonable accommodations are ineligible; there was no evidence that she was otherwise told of the ineligibility; her statements that she "became disabled for [her] position" and that she had "been unable to work" because her medical condition was "in crisis . . . [despite] continued treatment" were consistent with the claim that she could perform her job with reasonable accommodations; and her psychiatrist's supporting statement that "it has become clear that disability retirement is the only viable option" did not take reasonable accommodations into account.

EEOC v. Greater Baltimore Med. Ctr., Inc., 24 A.D. Cas. (BNA) 33, 2011 WL 210049 (D. Md. Jan. 21, 2011). Michael Turner applied for SSDI benefits while on medical leave from his nursing unit secretary position, claiming that he "became unable to work" upon contracting necrotizing fasciitis (flesh-eating disease) and that he was "still disabled" due to his diabetes and a recent stroke. Fourteen months later, Turner's doctor cleared him to return to work full time, but Turner did not notify the SSA. Although the employer agreed that Turner could return to work full time, it concluded that he was not qualified to return to his old position. Turner unsuccessfully applied for other positions and was terminated after exhausting his leave. The EEOC argued that it should not be estopped from claiming that Turner was qualified on the basis of his statements to the SSA, because its right to pursue the case derived not from Turner's rights but rather from its independent enforcement authority. The court disagreed and further held that the EEOC's explanation of the contradiction – that Turner's statements were true when he made them but that he had recovered before his termination – did not succeed because Turner's ongoing acceptance of benefits constituted an implied assertion that he could not work at the time of termination, especially in light of the SSA's clear requirement that he notify them upon regaining the ability to work.

C. Reasonable Accommodation

1. Notice of the Need for Reasonable Accommodation

Kobus v. College of St. Scholastica, Inc., 608 F.3d 1034 (8th Cir. 2010). Because the plaintiff never mentioned that he had depression or that he was taking an antidepressant, he failed to put his employer on notice that he needed leave as a reasonable accommodation. On one occasion, the employer asked the plaintiff if he wanted medical leave under the FMLA after he had stated that he was dealing with "stress and anxiety," but he declined to apply for leave because he did not have a doctor who could fill out the certification form. In affirming summary judgment for the employer, the court rejected the plaintiff's argument that Question 17, Example A, in the

EEOC's Enforcement Guidance on the ADA and Psychiatric Disabilities required the defendant to recognize that his statements about leave – including mentioning headaches and neck pain and a need for mental health leave – constituted a request for reasonable accommodation. The court emphasized that the plaintiff repeatedly declined to identify his diagnosis and failed to request FMLA leave when offered the opportunity. Furthermore, the court did not necessarily agree that the Enforcement Guidance was controlling, but even if it was, the guidance was clear that an employer had a right to obtain documentation confirming the existence of a disability and the need for accommodation. The plaintiff's repeated statements that he did not have a doctor, and therefore had no way to verify his condition or need for leave, meant he would not have been able to meet this requirement.

Garner v. Chevron Phillips Chemical Co., 2011 WL 5967244 (S.D. Tex. Nov. 29, 2011). Plaintiff, a laboratory technician, notified her employer of her panic disorder and agoraphobia diagnoses but never requested any accommodations, stating that "if [the employer] believed that I needed certain accommodations . . . they would come to me and say so." The court granted defendant's summary judgment motion for the denial of reasonable accommodation claim under the ADA, stating that it is the plaintiff's responsibility to request specific accommodations and she failed to do so.

2. Interactive Process

Lowe v. Independent School District, 363 Fed. Appx. 548 (10th Cir. 2010). A teacher alleged that her employer failed to reasonably accommodate her post-polio condition in violation of the ADA. The court noted that the reasonable accommodation process is an interactive process that includes "good-faith communications between the employer and employee." With respect to the process between the plaintiff and defendant, the court reversed summary judgment because "a dispute concerning the status of the interactive process raises a genuine issue of material fact as to whether the [defendant] failed in its duty to reasonably accommodate."

Kinneary v. New York, 601 F.3d 151 (2d Cir. 2010). Reversing a jury verdict for the plaintiff, the court ruled that the defendant provided a reasonable accommodation to a sludge boat captain who failed to take a random drug test mandated by federal law as part of Coast Guard licensing requirements. Due to "shy bladder syndrome," the plaintiff sometimes had difficulty producing sufficient urine for a drug test. After he was required to take a random drug test in December 2001 and was unable to provide a urine sample, he asked if he could take a blood test instead. In response, he was given written instructions for his doctor to follow. The plaintiff's doctor did not provide the information requested in the instructions, which was required under federal regulations, and instead sent a note confirming that the plaintiff had shy bladder syndrome, that he had been prescribed medication for the condition, and that the plaintiff was not a substance abuser. The plaintiff was told the note was unacceptable and cited for misconduct in failing to take the required drug test. Although subsequent blood and hair tests that the plaintiff took on his own initiative and two saliva tests administered by the city were all negative, the plaintiff never successfully took another urine test and refused to acknowledge that he had engaged in misconduct by not taking the urine test in December 2001. Following a proceeding related to the December 2001 test, the Coast Guard suspended the plaintiff's license for one year, and the city discharged him for not having a license. The court found that the city had accommodated the

plaintiff by providing him the opportunity to have his December 2001 drug test cancelled based upon a physician's evaluation. Because the plaintiff's doctor failed to provide the appropriate information, the plaintiff lost his license despite the accommodation, and he was therefore not otherwise qualified under the ADA.

Colwell v. Rite Aid Corp., 602 F.3d 495 (3d Cir. 2010). Because a reasonable jury could conclude that either the plaintiff or the employer failed to engage in the interactive process in good faith, summary judgment for the employer was inappropriate. First, the court determined that the plaintiff's requested accommodation – changing her schedule to day shifts in order to address disability-related difficulties in getting to work – could be an appropriate reasonable accommodation if no undue hardship existed. Then, it examined the interactive process. The plaintiff and her doctor both requested that the plaintiff's glaucoma and subsequent partial blindness be accommodated by allowing her to work only daytime hours, but the supervisor refused. A union representative also sought the accommodation but reported that the supervisor was adamant. Soon thereafter, the plaintiff resigned, complaining of unfair treatment. The court stated that a jury could find that the employer failed to negotiate in good faith about a reasonable accommodation, because at every opportunity the supervisor flatly turned down the requested accommodation and failed to offer any alternatives. A jury could also find that the plaintiff broke off the interactive process prematurely when she resigned. At the time of the plaintiff's resignation, the union representative had told her of his intent to set up another meeting with the supervisor to discuss the requested accommodation.

Jakubowski v. Christ Hosp., Inc., 627 F.3d 195 (6th Cir. 2010). Affirming summary judgment for the employer, the court held that the defendant hospital sufficiently engaged in the interactive process and that the plaintiff, a medical resident, failed to identify an effective reasonable accommodation to address his serious problems communicating with professional colleagues and patients. The plaintiff had exhibited persistent problems with communication, prompting the director of the residency program to suspect that the plaintiff might have Asperger's Disorder. He referred the plaintiff for an examination, which ultimately confirmed this diagnosis. In the meantime the plaintiff's performance continued to be below acceptable levels, and he was informed he was to be terminated. Immediately after the termination, the plaintiff requested that the hospital provide him with "knowledge and understanding" as a reasonable accommodation. The plaintiff asked that his colleagues be informed about his disability and stated that he alone would improve his communication with patients. After discussing the plaintiff's proposal, the director rejected it because the hospital lacked sufficient resources to implement it, but he offered instead to help the plaintiff find a residency in pathology, which would require little or no patient interaction. The court found that the hospital had engaged in a good faith effort in the interactive process, listening to the plaintiff's proposal, explaining why it was unreasonable, and offering to find another residency suited to his limitations. The court rejected the plaintiff's proposal that the hospital establish a remediation program for him as a reasonable accommodation, because he proposed this accommodation only in litigation, not during the interactive process.

EEOC v. UPS Supply Chain Solutions, 620 F.3d 1103 (9th Cir. 2010). Reversing summary judgment for the employer, the court found genuine issues of material fact concerning whether the employer acted in good faith in exploring effective reasonable accommodations for a deaf

employee whose primary language was ASL and who had limited understanding of written English. The employee, a junior accounting clerk, did not need a sign language interpreter to perform his job duties. However, he contended he needed one, or other forms of reasonable accommodation, for staff meetings and job training and to understand the company's sexual harassment policy. The employee repeatedly renewed his request for an interpreter and complained to his supervisor that the agendas, contemporaneous notes, and written summaries of the weekly meetings he was given did not provide him with all the information provided to other employees or allow him to participate in discussions. The court noted that these actions should have signaled to the employer a need to reopen the interactive process to determine if the accommodations it had provided were effective. The court also questioned whether the employer acted in good faith in the interactive process, because it did not consider the length of the meetings or the nature of the information being communicated, but instead seemed to rely on arbitrary considerations, such as deciding to provide an interpreter for monthly meetings but not weekly meetings because "once a month was sufficient." The court found similar questions about a good faith interactive process regarding the employee's request for an interpreter to help him understand on-line Excel training. The employer repeatedly recommended that the employee take this course but waited more than two years to provide him with an interpreter to do so. Similarly, the employer knew, or should have known, that the employee's limited proficiency in written English was insufficient for him to understand the employer's sexual harassment policy without the aid of an interpreter. Instead, the employer repeatedly told the employee to look up in the dictionary words he did not understand

Wilkerson v. Shinseki, 606 F.3d 1256 (10th Cir. 2010). Affirming summary judgment for the Department of Veterans Affairs, the court held that the agency fulfilled its obligation to engage in an interactive process to determine whether there was a reasonable accommodation to permit the plaintiff to remain in his position as a boiler plant operator. The plaintiff was removed from the position after a mandatory medical examination found him to be obese and to have uncontrolled diabetes. Although the plaintiff requested a special ladder as a reasonable accommodation to address his obesity, the lack of a face-to-face meeting between the parties to discuss this request did not signal a defective interactive process. Evidence showed that the agency considered the request but found that it did not address the fact that the plaintiff's uncontrolled diabetes was automatic grounds for exclusion based on established physical requirements for the job. Given these circumstances, the agency acted reasonably in concluding that further dialogue about reasonable accommodation would have been futile because no reasonable accommodation existed that would have permitted the plaintiff to perform the boiler plant operator job.

Mogenhan v. Napolitano, 613 F.3d 1162 (D.C. Cir. 2010). While recognizing that undue delay in conducting an interactive process and providing reasonable accommodation may constitute a violation of the Rehabilitation Act, the court rejected that claim here. The Secret Service agreed to the plaintiff's request during her job interview that she be permitted to go outside for fresh air when her migraines flared up and to take workers' compensation if needed. After being hired, the plaintiff asked her supervisor to cool off her work area "in any manner that he could." In response, the agency conducted two air quality studies, implemented several of the studies' recommendations to increase ventilation, and installed large fans. Finally, the agency moved the plaintiff to an individual office and installed an air conditioner. The court concluded that the

plaintiff "could not even begin to establish that the interactive process took too long" because she provided no evidence as to when she requested that the agency cool her work area. The record also did not show when the large fans were installed. Furthermore, the plaintiff acknowledged that the agency acted reasonably in providing alternative accommodations before moving her to an individual office. The fact that moving her to an individual office was the most effective accommodation in addressing her needs did not mean that the agency violated the Rehabilitation Act by focusing first on other accommodations that appeared to be effective.

3. Job Re-Structuring, Part-Time Work, and Modified Work Schedules

Colwell v. Rite Aid Corp., 602 F.3d 495 (3d Cir. 2010). Reversing summary judgment for the employer, the court held that changing an employee's work schedule to day shifts in order to address disability-related difficulties in getting to work is a type of reasonable accommodation contemplated by the ADA. A cashier who developed retinal vein occlusion and glaucoma in one eye could not safely drive to and from work at night due to partial blindness. There was no dispute that bus service and taxis were not an option. The plaintiff and her doctor both requested that the plaintiff be allowed to work only daytime hours as a reasonable accommodation, but the employer refused. The court concluded that although disability-related difficulties involving commuting to work do not require an employer to assume responsibility for getting the employee to the workplace, there is nothing inherently unreasonable in having an employer provide an otherwise qualified individual with a disability assistance with commuting. Changing an employee's work shift is a modification to a workplace condition that is entirely within the employer's control. Moreover, the ADA expressly includes modified work schedules as a form of reasonable accommodation. Finally, in the legislative history of the ADA, Congress stated that modifying work schedules may be required for individuals with disabilities who depend on a public transportation system that is not fully accessible, indicating that reasonable accommodation is not limited to problems arising in the workplace. Therefore, it was a question of fact for a jury as to whether providing the shift change would cause an undue hardship on other employees or the operations of the business.

Gratzl v. Office of the Chief Judges, 601 F.3d 674 (7th Cir. 2010). Affirming summary judgment for the employer, the court concluded that requiring the defendant to recreate an abolished job was not a reasonable accommodation. When originally hired as a court reporter specialist, the plaintiff worked only in the control room, which allowed her to manage her incontinence. When the courts abolished her position and required her and all other court reporters to rotate through the control room and courtrooms, the plaintiff asked to be allowed to remain assigned only to the control room as a reasonable accommodation. In response to a doctor's letter supporting the plaintiff's request, the defendant offered to assign the plaintiff to only juvenile courtrooms, which did not have jury trials. Ultimately, after receiving additional information from the plaintiff's doctor, the defendant offered to allow the plaintiff to avoid assignment to any courtrooms in which a trial was scheduled, to avoid assignments to courtrooms that were too far from a bathroom, and to establish a hand signal to notify the judge that she needed to take an immediate break. The plaintiff rejected all of these proposals and stated that she would only accept remaining in the control room. The defendant then terminated her employment. The court held that the plaintiff's wish to remain exclusively in the control room was not a reasonable accommodation because that entailed either re-creating an abolished

position or the elimination of an essential function – rotating through the control room and courtrooms. Since the ADA does not require an employer to create a job as a reasonable accommodation, it cannot require that an employer restore a job that it abolished for legitimate reasons. Even if the defendant permitted court reporters to serve temporarily only in the control room, it was not required to allow the plaintiff to remain there permanently. Finally, the court noted in dicta that an employee is not permitted to dictate what accommodation she will accept; an employer is entitled to choose an effective accommodation. The defendant's final offer of accommodation was carefully constructed after consultation with the plaintiff's doctor, yet the plaintiff rejected it without explaining why it was ineffective. The fact that having to publicly request breaks in open court could cause the plaintiff embarrassment did not alter the fact that she was offered effective accommodations.

4. Reassignment

Wilkerson v. Shinseki, 606 F.3d 1256 (10th Cir. 2010). In this Rehabilitation Act case, the court held that the Department of Veterans Affairs met its reasonable accommodation obligation by reassigning an employee to a lower-level position when he was no longer qualified to meet the physical requirements of a boiler plant operator. Affirming summary judgment, the court found that there were no other reasonable accommodations that would have permitted the plaintiff to remain as a boiler plant operator despite his obesity and uncontrolled diabetes. The plaintiff had requested that the defendant purchase a special ladder to accommodate his weight, but the court noted that this accommodation would not have addressed the plaintiff's inability to meet lawful minimum physical requirements of the position, which included automatic exclusion for uncontrolled diabetes.

Duvall v. Georgia-Pacific Consumer Prods., L.P., 607 F.3d 1255 (10th Cir. 2010). The court affirmed summary judgment to the employer where the plaintiff failed to establish the existence of a vacant position to which he could have been reassigned. A position is vacant for the purpose of making a reassignment if it is available to similarly situated nondisabled employees to apply for and obtain. The court stated that its holding was consistent with Congress's purpose in enacting the ADA to place employees with disabilities on an equal footing with their non-disabled coworkers. Here, a paper mill decided to outsource jobs in the department where the plaintiff worked. During a transition period, the employer hired a staffing firm to place temporary workers in these positions while the employer relocated its employees to other jobs. The plaintiff was limited in the other jobs he could take, because he could not be exposed to paper dust due to cystic fibrosis. He wanted to remain in his old job in the shipping department, which had become staffed by temporary workers pending takeover by the outsourcing company. Alternatively, he wanted to be placed in the storeroom department, which was staffed by temporary workers while the employer was considering outsourcing jobs in that department. The plaintiff argued that positions filled by temporary workers were vacant positions. However, because similarly situated nondisabled employees were not eligible to apply for those positions, the employer was not required to reassign the plaintiff to any of them.

McFadden v. Ballard Spahr Andrews & Ingersoll, L.L.P., 611 F.3d 1 (D.C. Cir. 2010). A legal secretary who could no longer perform her job due to Graves' disease, fibromyalgia, depression, and a number of other ailments could not be reassigned to a receptionist position

because it was not vacant or soon to become vacant. At the time that the plaintiff requested she be given the receptionist position, the long-time permanent receptionist was in the second month of a three-month period of medical leave. The employer had a temporary employee filling in, but it expected the permanent receptionist to return. There was no evidence that, at the time the plaintiff requested reassignment, the employer was taking any steps to seek a permanent replacement, such as posting a job listing. The employer hired a permanent replacement only after it became clear that the permanent receptionist would not be returning, which was approximately five months after she had begun her leave and two months after the plaintiff had requested reassignment.

5. Working at Home or from a Remote Location

Gomez-Gonzalez v. Rural Opportunities, Inc., 626 F.3d 654 (1st Cir. 2010). The court affirmed summary judgment for the employer, concluding that the plaintiff failed to show how her request to work from home would enable her to perform her job effectively. Although the plaintiff argued that her request to work from home was similar to an earlier request that had been granted, the court noted that there were significant differences between the two requests to telework. The earlier requested accommodation involved working from home a few days per week whereas the new request would entail her working only one day a week in the office. Also, the plaintiff's new request would include the right to work from home for weeks at a time without any travel, even though her original accommodation did not limit travel.

6. Less Stressful or Stress-Free Job

Lors v. Dean, 595 F.3d 831 (8th Cir. 2010) (per curiam). The plaintiff's contention that his original position provided a low level of stress, which he needed to control his type 1 diabetes, did not require his employer to return him to that position. The plaintiff had been removed as a computer support services team leader because of difficulty getting along with others. After being transferred to provide computer support services in a women's prison, the plaintiff expressed concern that his new position made it harder to control his diabetes, e.g., he might be inside a secure perimeter without his diabetes supplies during a lockdown. In response, the employer transferred him to another building and told him that he could decide how to perform his job in a way that would permit him to best manage his diabetes. Addressing the plaintiff's concerns about managing his diabetes during work emergencies, the employer told the plaintiff that he could ask to have work reassigned to a coworker to ensure that his blood sugar levels remained within an acceptable range. Unsatisfied, the plaintiff demanded that he be transferred back to his original job as it was the only effective accommodation. The court disagreed, affirming summary judgment for the employer by noting that the ADA only requires an employer to provide a reasonable accommodation and not necessarily the one that the employee views as ideal. The court also pointed out that the plaintiff's own medical experts testified that a hypothetical individual similar to the plaintiff in age and general health should be able to manage his diabetes without any accommodations. Nevertheless, the employer provided the plaintiff with several accommodations that permitted flexibility in organizing his work and allowed him to take breaks to test his blood sugar and to treat low levels.

Haynes v. AT&T Mobility, LLC, 2011 WL 532218 (M.D. Pa. Feb. 8, 2011). A customer service representative alleged that his employer failed under the ADA to reasonably accommodate his HIV/AIDS and reassign him to a less stressful job position and environment. The court held that a nebulous request for reassignment to a "less stressful" position, without further explanation, is an unreasonable accommodation as a matter of law.

7. Modifying Workplace Policies

Miller v. Ill. Dep't of Transp., 643 F.3d 190 (7th Cir. 2011). Plaintiff, a highway maintainer on a bridge crew, alleged that his employer refused his request not to work at high heights in exposed positions as reasonable accommodation for his acrophobia. The court reversed and remanded summary judgment on the failure to accommodate claim because the evidence showed that, before plaintiff was diagnosed, the employer had informally provided the requested accommodation by allowing other crew members to perform non-essential tasks when plaintiff could not do so. Further, other crew members were often accommodated and excused from duties. There was a member who could not weld, another who refused to ride in the snooper bucket, and another whose allergies prevented him from bridge spraying, yard mowing, and debris raking.

Sepulveda-Villarini v. Department of Educ., 628 F.3d 25 (1st Cir. 2010). Vacating the dismissal of consolidated cases for failure to state a claim, the court remanded the ADA and Rehabilitation Act claims of two public school teachers alleging denial of reasonable accommodation. For several years the teachers had been provided with smaller class sizes as a reasonable accommodation, one teacher for symptoms following a stroke and heart by-pass surgery and the other for a throat condition known as aphonia, which causes excessive coughing and shortness of breath. These accommodations were revoked with the adoption of a new school policy imposing a minimum class size of 20 students. One teacher's class size increased from 15 to 30 pupils (but he was provided a beginning teacher as an aide); the other teacher's class size increased from 20 to as many as 30 students (with no teacher's aide). Remand was required because the pleadings sufficiently alleged facts that plausibly could show denial of a reasonable accommodation. The school district had granted the initial requests for reasonable accommodation, thereby indicating that it supported the teachers' contentions that a smaller class size would address limitations stemming from their disabilities. Furthermore, the plaintiffs alleged that the withdrawal of the accommodations resulted in a deterioration in their physical and emotional health.

8. Benefits and Privileges of Employment

EEOC v. UPS Supply Chain Solutions, 620 F.3d 1103 (9th Cir. 2010). Reversing summary judgment for the employer, the court found genuine issues of material fact as to whether the employer knew that it had provided ineffective accommodations to a deaf employee whose primary language was ASL and who had limited understanding of written English. The employee, a junior accounting clerk, did not need a sign language interpreter to perform his job duties. However, he contended he needed one, or other forms of reasonable accommodation, for staff meetings and job training and to understand the company's sexual harassment policy. The court found sufficient evidence that providing the employee with agendas, contemporaneous

notes, and written summaries of weekly meetings, which could last up to an hour, may not have provided him with equal access to this benefit and privilege of employment. Similarly, the company's refusal to provide an interpreter, or significant delay in doing so, may have deprived the employee of access to on-line Excel training available to other employees. Finally, the employee's lack of an interpreter may have prevented him from understanding the company's sexual harassment policy.

D. Drug and Alcohol Use

Lopez v. Pacific Mar. Ass'n, 24 A.D. Cas. 385, 2011 WL 711884 (9th Cir. Mar. 2, 2011). Affirming summary judgment for the employer, the court rejected the plaintiff's disparate treatment and disparate impact claims challenging the employer's "one strike" drug test rule. The plaintiff applied for a job as a longshoreman in 1997 and was disqualified after failing a drug test due to drug addiction. He reapplied in 2004, by which time he was rehabilitated, but was rejected pursuant to the employer's rule imposing a permanent ban on hiring any individual who had previously failed its drug test. The employer permanently disqualified any applicants who tested positive because it thought that applicants who could not abstain from using an illegal drug, even after receiving advance notice of an upcoming drug test, showed less responsibility and less interest in the job than applicants who passed the drug test. The court rejected the plaintiff's disparate treatment claim, finding that the "one-strike" rule eliminated candidates on the basis of a failed drug test and not an applicant's drug addiction. Because the rule equally affected recreational users and individuals with past drug addiction, it was adopted without discriminatory purpose, and therefore there was no basis for a disparate treatment claim. The fact that the plaintiff notified the employer of his prior drug addiction did not indicate that the employer's decision was based on a record of disability since the notification came only after he was disqualified. The court also rejected the plaintiff's disparate impact claim because he failed to establish that the rule screened out prior drug addicts at a higher rate than recreational drug users.

Ames v. Home Depot U.S.A. Inc., 629 F. 3d 665 (7th Cir. 2011). The plaintiff alleged that the employer failed to accommodate her disability, alcoholism, and discharged her because of that disability. The plaintiff notified the employer that she had an alcohol problem and sought assistance through the employee assistance program (EAP). The employer placed the plaintiff on paid administrative leave and told her she could return to work after receiving treatment, passing a drug and alcohol test, and obtaining a return-to-work authorization. The plaintiff also signed an EAP agreement subjecting her to periodic drug and alcohol testing for the remainder of her employment. After she was arrested for driving under the influence, and, one month later, reported to work under the influence of alcohol, the employer terminated her for violating its substance abuse policy. Affirming summary judgment for the employer, the court found that even assuming the plaintiff had a disability, the employer had a legitimate, nondiscriminatory reason for the termination, i.e., violating of the EAP agreement and workplace rules.

Budde v. Kane Cnty. Forest Pres., 597 F.3d 860 (7th Cir. 2010). Affirming summary judgment for the employer, the court held that a police chief fired after his driver's license was

suspended following a drunk driving accident was no longer qualified for his job because he could not perform the essential function of driving.

E. Defenses

1. Direct Threat

Hubbard v. Detroit Pub. Sch., 23 A.D. Cas. 316, 2010 WL 1461555 (6th Cir. Apr. 13, 2010) (unpublished). The plaintiff, who had fecal incontinence, was denied permission to return from leave to her middle-school social worker position with "ready access to a bathroom within 20 seconds" and "permi[ssion] to sit at will" as reasonable accommodations. The appeals court held that the trial court did not err by instructing the jury on the direct threat defense as the defendant asserted the defense in its answer and there was testimony that "(1) abruptly leaving school children unattended to use the bathroom would violate school district policy and pose a threat to student safety, and (2) in the event [the plaintiff] had an accident in the presence of students, they could encounter dangerous germs contained in fecal matter." Although the plaintiff contended that she never would have exposed her students to harmful bacteria, the district court did not err by allowing the jury to decide this issue. Moreover, even if, as the plaintiff contended, defense counsel asked her "highly offensive" questions during cross-examination about the possibility that her students would come in contact with fecal matter, the remedy would have been to strike the improper remarks, not to bar the jury from considering the direct threat defense at all.

Gaus v. Norfolk Southern Railway Co., 2011 WL 4527359 (W.D. Pa. Sept. 28, 2011). Plaintiff, a locomotive electrician, alleged that the employer refused to allow him to return to work due to his chronic pain condition. Denying summary judgment, the court held that defendant failed to make out a direct threat defense where it could not identify objective evidence showing that the "likelihood of potential harm was very real" and instead, citing **Wurzel**, stated that the likelihood of potential harm "[i]s not subject to scientific measurement."

EEOC v. Stoughton Trailers, L.L.C., 23 A.D. Cas. (BNA) 929, 2010 WL 2572813 (W.D. Wis. June 23, 2010). The plaintiff, who was deaf, was not hired as a truck assembly-line worker because he was unable to hear warnings of oncoming danger. The employer argued that the plaintiff was unqualified because he was unable to perform the essential function of "hearing bells, alarms, and all verbal communication," and, for the same reason, that he would pose a direct threat to himself and others. Following the Seventh Circuit's approach in cases where the "direct threat" and "qualified" issues overlap, and rejecting the approach taken by the First, Fifth, Tenth, and Eleventh Circuits, which require the employee to show that he was not a direct threat to himself or others, the court held that the defendant bears the burden of demonstrating that the plaintiff posed a direct threat, even though the plaintiff bears the burden of demonstrating that he was qualified for the job. Accordingly, although the employer was not entitled to summary judgment on the direct threat issue, it was entitled to summary judgment on the qualified issue because the plaintiff had not offered sufficient evidence that a reasonable accommodation would have enabled him to perform the essential function of hearing bells, alarms, and verbal communications.

Wurzel v. Whirlpool Corp., 2010 WL 1495197 (N.D. Ohio Apr. 14, 2010). The plaintiff, a materials handler whose job entailed driving a tow motor to deliver items throughout the Whirlpool plant, was diagnosed with prinzmetal angina, which causes coronary spasms without warning. He experienced episodes of tightness in the chest, shortness of breath, dizziness, left arm numbness, and fatigue and was placed on mandatory sick leave pending either bidding successfully on another position that he could perform safely or being spasm-free for six months. Granting summary judgment to the employer, the court held that plaintiff had failed to prove that he did not pose a direct threat.

2. Job-Related and Consistent with Business Necessity

Wilkerson v. Shinseki, 606 F.3d 1256 (10th Cir. 2010). Affirming summary judgment for the Department of Veterans Affairs, the court held that the agency's physical requirements for a boiler plant operator, including automatic exclusion of anyone with uncontrolled or poorly controlled diabetes, were job-related and consistent with business necessity. The plaintiff was removed from his position after a medical examination revealed his uncontrolled diabetes and his obesity. The court found the standards to be job-related, because they described specific duties that operators must be able to perform, including utilization of certain equipment, the ability to climb ladders to perform certain duties, and the ability to assume certain responsibilities during an emergency. The standards met the business necessity test because they outlined minimum physical qualifications to ensure a prompt response in case of an emergency. While acknowledging that the plaintiff had successfully performed the position for two years without incident and that most of his day-to-day duties did not involve responding to emergencies, the court nevertheless concluded that employers are entitled to set reasonable physical qualifications to perform safely and efficiently in an emergency, where that is a realistic component of the job and the safety of others may be at risk.

3. No Knowledge of Disability

Hedberg v. Indiana Bell Tel. Co., 47 F.3d 928 (7th Cir. 1995). The plaintiff, who had primary amyloidosis, was discharged after receiving the following evaluation: "Interpersonal skill problems. Doesn't come to work. Capable but [lacks] work ethic." The plaintiff alleged that these problems stemmed from fatigue caused by his primary amyloidosis, and therefore that he was discharged because of his disability. The court held that, although the employer knew of the plaintiff's "tardiness" and "laziness," which were effects of his disability, it did not know of the disability itself, and therefore could not be held liable for disability discrimination under the ADA. The court nevertheless recognized that, in some cases, "symptoms are so obviously manifestations of an underlying disability that it would be reasonable to infer that an employer actually knew of the disability [on the basis of the symptoms]."

Cannon-Stokes v. Potter, 2010 WL 2166806 (N.D. Ill. May 27, 2010). The plaintiff alleged that the Postal Service violated the Rehabilitation Act by placing her on unpaid leave from her mail delivery position because of her PTSD, depression, and anxiety. Although the defendant admitted that it was aware of the plaintiff's PTSD and that she had requested accommodations, it argued that it had not acted "on the basis of" her disability because it did not know that her PTSD was severe enough to substantially limit a major life activity (sleeping). Rejecting the

argument, the court distinguished the case from Hedberg (summarized above) by noting that the defendant in this case was aware of the plaintiff's medical condition (PTSD), whereas the employer in Hedberg was not. Knowledge of the condition's severity was unnecessary for liability because the Seventh Circuit had never held that "an employer who acts improperly on the basis of a disability need know the extent to which the disability has progressed to be held liable." Ultimately, however, the court granted summary judgment to the defendant because the plaintiff failed to prove that her disability was a "but-for" cause of the employer's action by identifying someone outside her protected class who was treated more favorably.

Paladino v. DHL Express (USA), Inc., 2010 WL 1257786 (E.D.N.Y. Mar. 26, 2010). The plaintiff, a courier, was terminated after explaining a 65-minute gap in his manifest by saying that he was "in the bathroom for the entire hour," experiencing "problems with his stomach and . . . severe hemorrhoids." Because these problems were caused by his Celiac disease, he alleged that he was terminated because of a disability in violation of the New York State Human Rights Law. Awarding summary judgment to the employer, the court held that the employer did not know of the plaintiff's disability, despite knowing that he spent long periods of time in the bathroom with diarrhea and/or constipation, because such symptoms are not "so obviously manifestations of an underlying disability that it would be reasonable to infer that [the] employer actually knew of the disability."

F. Exams and Inquiries

Lee v. City of Columbus, 24 AD Cas. (BNA) 257, 2011 WL 611904 (6th Cir. Feb. 23, 2011). Several plaintiffs filed a class action challenging the city's directive requiring employees returning from more than three days of sick leave, injury leave, or restricted duty to submit a doctor's note to their immediate supervisor stating the "nature of the illness" and whether the employee was capable of returning to regular duty. In concluding that the directive violated the Rehabilitation Act (which incorporates the limitations on disclosure of medical information contained in the ADA), the district court relied heavily on the Second Circuit's decision in Conroy v. New York State Department of Correctional Services, 333 F.3d 88 (2d Cir. 2003), which had held that a similar directive was a prohibited disability-related inquiry under the ADA. Finding no business necessity to justify the inquiry, the Second Circuit had held the directive invalid as applied to employees who were neither identified as abusers of sick leave nor working in safety-sensitive jobs. On appeal in the instant case, the Sixth Circuit disagreed that requiring an employee to provide a general diagnosis ("or in this case, an even less specific statement regarding the 'nature' of an employee's illness") is "tantamount" to an inquiry "as to whether such employee is an individual with a disability or as to the nature or severity of the disability" under the ADA. Finding Conroy too far-reaching and noting that it had not been followed by other courts of appeals, the Sixth Circuit stated that a significant difference between the Rehabilitation Act and the ADA is that the ADA prohibits discrimination "because of disability," while the Rehabilitation Act only prohibits discrimination "solely on the basis of" a disability. Thus, "[t]he mere fact that an employer, pursuant to a sick leave policy, requests a general diagnosis that may tend to lead to information about disabilities falls short of the requisite proof that the employer is discriminating solely on the basis of disability." The court suggested that the result would be no different under the ADA, however, because even if the city's directive constituted a disability-related inquiry, it was a valid "workplace policy applicable to all

employees, disabled or not." Finally, the court noted that EEOC's enforcement guidance on disability-related inquiries and medical examinations of employees (Question 15) endorses an employer's right to request a doctor's note when an employee has used sick leave.

Bates v. Dura Auto. Sys., Inc., 625 F.3d 283 (6th Cir. 2010). Concerned that one of its facilities had a higher rate of workplace accidents than comparable plants and suspecting that this might be caused by either legal or illegal drug use, the employer implemented a policy that prohibited employees from using legal prescription drugs if such use adversely affected safety, company property, or job performance. The policy screened employees for twelve substances including those commonly found in legal prescription drugs, such as Xanax, Lortab, and Oxycodone. Seven former employees, who each tested positive for one of the twelve prohibited substances but had a legal prescription for a drug containing the substance, brought suit alleging that the company's policy violated the ADA. Reversing the district court's holding that an individual need not be disabled to pursue a claim of impermissible medical examination, the appeals court held that although non-disabled individuals may bring claims under some provisions of the ADA, the plain language of the ADA's testing and qualifications standards provision (subsection (b)(6)) only covers qualified individuals with disabilities.

Wisbey v. City of Lincoln, Neb., 612 F.3d 667 (8th Cir. 2010). The plaintiff, an emergency dispatcher who had taken frequent intermittent leave under the FMLA for depression and anxiety, alleged that the city violated the ADA by requiring her to submit to a fitness-for-duty medical examination and terminating her based on the doctor's report that she was not qualified to work. The court concluded that because the plaintiff stated in her application for FMLA leave that she "suffered from conditions affecting her concentration and motivation," the city had reason to believe that she could not perform the essential functions of her position and therefore did not violate the ADA by requiring a fitness-for-duty exam.

Brownfield v. City of Yakima, 612 F.3d 1140 (9th Cir. 2010). The plaintiff, a former police officer for the City of Yakima Police Department (YPD), injured his head in an automobile accident and returned to full duty after recovering from symptoms that included "reduced self-awareness." Years later, following several incidents (e.g., confrontations with other officers, a traffic stop during which the plaintiff reported that he felt "himself losing control," and an argument with his estranged wife who called the police), YPD referred the plaintiff for a fitness-for-duty examination (FFDE). The doctor who conducted the FFDE concluded that the plaintiff had a mood disorder, which manifested itself in "poor judgment, emotional volatility, and irritability" and could be related to his 2000 head injury. Based on the doctor's report that the plaintiff had a permanent disability and was unfit for police duty, YPD transferred him from administrative to FMLA leave. In 2006, based on a report from the plaintiff's primary care physician (who concluded that the officer could perform his physical duties but would not comment on his psychological issues), YPD ordered the plaintiff to undergo another FFDE with a different doctor to determine whether he was fit for duty. The plaintiff went to the initial exam but refused to return to for a follow-up visit and was terminated. Relying on Yin v. California, 95 F.3d 864 (9th Cir. 1996), the plaintiff argued that the defendant could not require him to undergo an FFDE unless it could show that health problems had caused his job performance to decline. Agreeing with the conclusions reached by several district courts, the Ninth Circuit held that "prophylactic psychological examinations can sometimes satisfy the business necessity

standard, particularly when the employer is engaged in dangerous work." While the business necessity standard is "quite high, and is not to be confused with mere expediency," the standard "may be met even before an employee's work performance declines if the employer is faced with significant evidence that could cause a reasonable person to inquire as to whether the employee is still capable of performing his job." An employee's behavior cannot, however, be "merely annoying or inefficient to justify an examination; rather, there must be genuine reason to doubt whether the employee can perform job-related functions."

Horgan v. Simmons, 704 F. Supp. 2d 814 (N.D. 2010). The plaintiff, who had been diagnosed as HIV-positive for 10 years but kept his status confidential, had been a sales manager for the employer since 2001. Stating that he was "worried" about the plaintiff, the company president met with the plaintiff in July 2009 and demanded to know whether the plaintiff was having medical problems. The plaintiff ultimately disclosed his HIV-positive status but stated that it did not affect his ability to do his job. The court held that the supervisor's questions amounted to impermissible disability-related inquiries under the ADA.

Katz v. Adecco USA, 2012 WL 78156 (S.D.N.Y. Jan. 10, 2012). Plaintiff received prospective employer's application for an executive assistant position through a recruitment agency. Plaintiff alleged that the recruitment agency violated the ADA by inquiring about medical history on the form. The recruitment agency argued that it cannot be held liable for a medical inquiry that came from its client, plaintiff's prospective employer. The court held that employment agencies are covered entities under the ADA, regardless of whether the agency is the applicant's prospective employer, and that employment agencies are subject to liability for participating in discriminatory hiring practices under 42 U.S.C. § 12112(a), (b)(2), which prohibit participating in a contractual or other relationship that has the effect of subjecting an individual to disability discrimination. The court further held that when claiming an improper disability-related inquiry in violation of the ADA, a plaintiff is not required to establish an adverse employment action resulting from the inquiry.

G. Confidentiality of Medical Information

EEOC v. C.R. England, Inc., 644 F.3d 1028 (10th Cir. 2011). EEOC and former driver/trainer alleged that defendant violated ADA when it disclosed, and required former driver/trainer to disclose, his HIV diagnosis to trainees. The court rejected plaintiffs' argument that defendant violated ADA's confidentiality provision because this section does not protect voluntarily disclosed information offered outside the context of an authorized employment-related medical examination or inquiry. The court also held that plaintiffs failed to state a claim that the defendant limited, segregated, and classified the driver/trainer because of his disability in a way that adversely affected his opportunities or status. The court reasoned that potentially discouraging trainees from working with plaintiff did not amount to an adverse employment action under the ADA.

Lee v. City of Columbus, 24 A.D. Cas. (BNA) 257, 2011 WL 611904 (6th Cir. Feb. 23, 2011). The court held that it was not a breach of confidentiality under the Rehabilitation Act or the ADA for the city to require an employee returning to work from sick leave to give a note to his

immediate supervisor providing the nature of his or her illness. Contrary to the district court's finding that the city's directive "improperly provide[d] supervisors with otherwise confidential medical information when they ha[d] no reason to possess such knowledge," the appeals court held that the ADA "clearly permits an employer, including by express definition a supervisor (as an 'agent' of the employer)," to make inquiries and receive medical information. Citing EEOC's guidance on reasonable accommodation procedures, the court stated: "The EEOC recognizes that in the context of disability requests, which would likely entail medical information of a more serious nature than a doctor's note furnished for occasional sick leave, that it is appropriate for first-line supervisors to review and approve ADA accommodation requests in the first instance."