College Student; Title III; §504; Disability Defined; Actual; Pretext; Reasonable Accommodation

An Illinois federal court held that a college student with hearing and mobility problems was disabled under the Americans with Disabilities Act (ADA) Title III, 42 U.S.C. §§12181-189, and the Rehabilitation Act §504, 29 U.S.C. §794. Also, her §504 claim sufficiently alleged that she was discriminated against solely on the basis of her disability. Finally, she could pursue her claim that the university failed to provide her with wheelchair accessible accommodations, even though she did not use one. ***Kenny v. Loyola Univ. of Chicago, 2003 WL 503119 (N.D. Ill. Feb. 24, 2003).***

While attending Loyola University, Maureen Kenny had hearing and vision impairments, fibromyalgia, osteoarthritis, hypertension, morbid obesity, edema, carpal tunnel syndrome, and mobility challenges. She requested, as a reasonable accommodation, that Loyola provide transportation from her dorm to her classes for her and her service dog. Loyola refused to allow the service dog on the shuttle, as well as Kenny's other proposed accommodations: a laptop computer with voice recognition software; a visual fire alarm and TTY in her dorm room; an area for rescue assistance in her dorm; a power-assisted door for her dorm room; a wheelchair-accessible bathroom with a tilted mirror, widened toilet stall with grab bars, a soap holder, a 63-inch hose and an ADA compliant showerhead, lever-style faucets, and a tub with a seat and grab bars; cafeteria alterations for wheelchair access; and expedited cafeteria checkout. Loyola later expelled Kenny following an incident in which her dog barked to alert her that someone was at the door. She sued for violations of Title III and §504.

The district court denied Loyola's motion to dismiss. First, Kenny was disabled within the meaning of the ADA and §504. *See* 42 U.S.C. §12102(2); 28 C.F.R. §35.104; *Bragdon v. Abbott*, 118 S. Ct. 2196 (1998), 22 MPDLR 449; *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002), 26 MPDLR 73. She presented evidence showing that she was substantially limited in the major life activities of caring for herself, performing manual tasks, walking, seeing, and learning. She could not walk more than 200 feet without resting, could not pick up a bar of soap in a shower, and needed accommodations to enable her to use the bathroom. In addition, her impairments affected her ability to prepare handwritten notes, type papers, complete homework, listen to lectures, and hear fire alarms outside her dorm room. Her service dog carried her purse and books in a canine backpack, picked up items that Kenny dropped, and helped her access stairs and buses.

The court rejected Loyola's argument that Kenny failed to allege that she was denied treatment *solely* by reason of her handicap, as required by §504. *See* 29 U.S.C. §794(a); *Mallett v. Wisconsin Div. of Vocational Rehab.*, 130 F.3d 1245 (7th Cir. 1997), 22 MPDLR 78. Kenny alleged that the real reason for her expulsion was to avoid providing her with her requested accommodations. Although she did not use "the magic word 'solely,' the court concludes that she alleged that she was denied treatment solely due to her handicap."

Finally, the court also rejected Loyola's argument that Kenny was not entitled to accommodations for wheelchair users, because she did not use one while attending Loyola. "[I]t is entirely reasonable for an individual with a mobility impairment who is nevertheless not limited to a wheelchair to need accommodations such as grab bars by the tub and toilet, a shower with a seat and hand-shower, and lever-style faucets." *See* ADA Compliance Materials, *The Americans With Disabilities Act Accessibility Guidelines Tech Sheet: Toilet Stalls*, ADAAG 2.17 at 5 (1994). The ADA Toilet Stall Compliance Materials specify accommodations for people who use wheelchairs or scooters, as well as for those who have walking, mobility, or balance limitations. "It is simply incorrect to say that only individuals who use a wheelchair or scooter are entitled to handrails, a modified height toilet, and similar accommodations mandates by the ADA and the Rehabilitation Act." "[J]ust because a person does not utilize a wheelchair does not mean that they do not need an accessible bathroom. Without grab-bars or a seat in the tub, Ms. Kenny might well endanger herself. Without her service dog, she might well be precluded from retrieving a dropped bar of soap or a towel."

Employment: Disability Defined

Title I; Perceived; Prescription Drugs; Side Effects

A divided Second Circuit held that a trucking company did not regard applicants as disabled under the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-117, when it chose not to employ over-the-road (OTR) truck drivers who used prescription medications with side effects that might impair driving ability. ***E.E.O.C. v. J.B. Hunt Transport, Inc., 321 F.3d 69 (2d Cir. 2003).***

J.B. Hunt is subject to the U.S. Department of Transportation (DOT) Federal Motor Carrier Safety Act Regulations, which (1) allow a company to require and enforce "more stringent requirements relating to safety of operation and employee safety and health," 29 C.F.R. §390.3(d), and (2) require them to restrict drivers from operating vehicles "while the driver's ability or alertness is so impaired, or is likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle," 49 C.F.R. §392.3. Hunt created a Drug Review List (DRL) of 836 medications known to have side effects that might impair driving based entirely on notations in the *Physician's Desk Reference*. Hunt designated five categories of restrictions: "Rule Out Side [E]ffects," "Not Permitted," "Unsafe [E]ffects," "Heart Condition," and "Disqualifying Condition."

The Equal Employment Opportunity Commission (EEOC) claimed that Hunt improperly rejected 546 applicants in violation of the ADA based on a "blanket" exclusionary policy. Each of these applicants provided Hunt with medical documentation from a treating physician or health care provider certifying that the applicant did not have potentially problematic side effects and could operate a truck safely while taking the drug. A New York federal court granted summary judgment for Hunt, finding that the applicants were not, by virtue of their use of certain medications, disabled under the ADA, and that the EEOC failed to contradict Hunt's assertion that its use of the DRL as a safety measure was reasonable under DOT guidelines. *See* 128 F. Supp. 2d 117 (N.D.N.Y. 2001), 25 MPDLR 405. The EEOC appealed, contending that Hunt regarded the applicants as disabled. The court later granted Hunt's motion for attorneys' fees and expenses. *See* 2001 WL 1217201 (N.D.N.Y. Sept. 27, 2001), 25 MPDLR 910.

The Second Circuit affirmed, holding that the EEOC failed to demonstrate that Hunt regarded the applicants as substantially limited in the major life activity of working—"significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities." *See* 29 C.F.R. §1630.2(j)(3)(i). *See*

also Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999), 23 MPDLR 510. Driving a 40-ton, 18-wheel truck over long distances for extended periods of time was neither a class of job nor a broad range of jobs, but rather a specific job with specific requirements. The Supreme Court has ruled that the inability to perform a single, particular job does not constitute a substantial limitation on working. *See Sutton*, 527 U.S. at 493. "Given these demanding requirements, the fact that one may not be able to perform the specific job of a Hunt OTR driver does not mean that one could not successfully engage in other types of truck driving, let alone other kinds of safety-sensitive work." Like the limitation that United Airlines placed on global airline pilots in *Sutton*, the limitation here was on a particular job within a larger group of jobs. *See Baulos v. Roadway Express, Inc.*, 139 F.3d 1147 (7th Cir. 1998), 22 MPDLR 329.

As for the applicants rejected under the "Disqualifying Condition" and "Heart Condition" categories, they were not disqualified on the basis of the condition supporting their use of the drug, but instead on the basis of the drug that they were using.

A dissent contended that the EEOC had presented a factual issue as to whether Hunt regarded the applicants as substantially limited in the major life activity of working as truck drivers in general. The EEOC produced evidence that the applicants had undergone specialized driver training, earned commercial drivers' licenses, passed road tests, and received medical certifications pursuant to DOT regulations. "The set of jobs that call for these qualifications includes driving various types of small and large trucks, including tractor-trailers, moving trucks, and cargo vans."

Hiring; Title I; Perceived; Qualified; Diabetes

A Tennessee federal court held that factual issues existed under the Americans with Disabilities Act Title I, 42 U.S.C. §§12111-117, as to whether a job applicant with diabetes was regarded as disabled and was qualified for the position. ***E.E.O.C. v. Northwest Airlines, Inc., 246 F. Supp. 2d 916 (W.D. Tenn. 2002).***

Kevin Armstrong applied for a position as an equipment service employee (ESE) with Northwest Airlines. The duties included handling baggage, transporting luggage in and out of aircraft bins and between aircraft and baggage areas of the terminal, guiding planes in and out of their parking spaces, and de-icing planes. The job required operating heavy equipment, working at unprotected heights, and regular heavy lifting. When completing the application form, Armstrong indicated that he was not disabled. Northwest extended him a job offer, conditioned on the satisfactory completion of a pre-placement physical exam. Armstrong completed a medical history, in which he reported that he had diabetes. Northwest asked Armstrong to submit additional medical records as to whether his diabetes was under control. After reviewing the records, Northwest withdrew its offer. Armstrong filed a charge with the Equal Employment Opportunity Commission (EEOC), which sued Northwest for violating Title I.

The district court denied Northwest's motion for summary judgment. A factual issue existed as to whether Northwest mistakenly believed that Armstrong's diabetes substantially limited the major life activity of working. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), 23 MPDLR 510; *Ballard v. Vulcan Materials Co.*, 978 F. Supp. 751 (W.D. Tenn. 1997), 22 MPDLR 58. Armstrong presented evidence that the work restrictions imposed by Northwest—no driving, operating heavy equipment, or working at unprotected heights above five feet—could have precluded him from performing a wide range of jobs. *See* 29 C.F.R. §1630.2(j)(3)(i). Moreover, Northwest's belief that Armstrong was always at risk of sudden death due to the threat of a hypoglycemic coma could disqualify Armstrong from an array of jobs, not to the specific job of an ESE.

A factual issue also existed as to whether Armstrong was qualified for the ESE position. He had held similar jobs at other airlines that involved loading and unloading planes, transferring luggage from one plane to another, and parking planes. During the time that he worked for two other airlines, he missed only one day of work due to his diabetes. Although Northwest asserted the defense of safety as a legitimate, nondiscriminatory reason for not hiring Armstrong, he presented evidence that Northwest did not make an individualized assessment of his ability to perform the ESE job. *See* 29 C.F.R. §1630.2(r). The Northwest physician who found that Armstrong was not qualified did not examine Armstrong, but instead relied on blood levels from lab reports. Nor did the doctor contact Armstrong's treating physician, obtain a complete copy of Armstrong's medical records, or discuss with Armstrong his diabetes-related symptoms. Armstrong's doctor reported that she had written two letters to Armstrong's prospective employers that he could perform jobs similar to the ESE position, and that if Northwest had contacted her, she would have discussed with the company Armstrong's blood sugar levels.

Title I; Actual; Perceived; Diabetes

An Iowa federal court found that a former employee who failed to show that his diabetes substantially limited a major life activity or that his employer perceived him as having a substantially limiting impairment was not disabled under the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-117. ***Bushman v. Electrolux Home Prods., 2003 WL 1524667 (N.D. Iowa Mar. 24, 2003).***

Gerald Bushman managed inbound freight for Electrolux Home Products. In June 2000, he took medical leave for diabetes and had two toes amputated. In September 2000, Bushman returned to work. He wore an open-toed shoe. In order to reach his office, Bushman had to walk across the production floor, where there was heavy motor traffic. Electrolux, in compliance with OSHA regulations, prohibited open-toed shoes. Bushman was sent home and told not to return until he wore the requisite footwear. In November 2000, Bushman returned to work, but was not permitted to resume his old job due to an uncompetitive contract he had signed in April 2000. Instead, Bushman was assigned to a job assisting in the calibration of quality control instruments. He was laid off after a reduction-in-force. Bushman sued Electrolux under Title I.

The district court granted Electrolux summary judgment, holding that Bushman was not disabled under the ADA. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), 23 MPDLR 510; *Toyota Motor Mfg., Ky., Inc. v. Williams*, 122 S. Ct. 681 (2002), 26 MPDLR 73. Bushman had a mild form of diabetes. His condition did not require either the injection of insulin or a regimen of exercise. Bushman conceded that the timely administration of diabetic medicine left him ostensibly no different than a non-disabled individual. He was never hospitalized because of his diabetes, and he had not experienced hypoglycemia or hyperglycemia. During discovery, Bushman conceded that he did not have a substantial impairment to a major life activity. Moreover, the court rejected Bushman's argument that Electrolux perceived him as disabled, *see* 42 U.S.C. §12102(2)(C)

and *Sutton*, because he failed to present a factual issue that his diabetes was perceived as impairing a major life activity.

Hiring; Title I; State Law; Perceived; Chronic; Obesity

A Connecticut federal court found that factual issues existed as to whether McDonald's Restaurant regarded a job applicant who weighed 420 pounds as disabled under the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-117, and whether the applicant had a chronic impairment so as to constitute a disability under the Connecticut Fair Employment Practices Act (CFEPA), Conn. Gen. Stat. §46a-60 *et seq.* ***Connor v. McDonald's Rest., 2003 WL 1343259 (D. Conn. Mar. 17, 2003).***

McDonald's offered Joseph Connor a cook position. Connor told the manager of the McDonald's that his waist size was 54 inches, and the manager replied that he would call Connor in about three days when his uniform arrived. The manager never called, and Connor sued McDonald's under the ADA and the CFEPA.

The district court denied McDonald's motion to dismiss. A factual issue existed as to whether the company regarded Connor as disabled under the ADA. *See* 42 U.S.C. §12102(2). Connor was only required to provide a short and plain statement of his claim showing that he was entitled to relief under the ADA. *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), 26 MPDLR 303. His allegations that McDonald's regarded him as morbidly obese, that morbid obesity may qualify as a physical disability under federal law, and that McDonald's refused to hire him because it perceived him as substantially limited in the major life activity of working constituted a short and plain statement. *See Burch v. Beth Israel Med. Ctr.*, 2003 WL 253177 (S.D.N.Y. Feb. 5, 2003). The complaint detailed that Connor weighed 420 pounds, he was able to perform the essential functions of the desired job, McDonald's refused to hire him, and other individuals were offered jobs. *See Cook v. State of R.I., Dep't of Mental Health, Retardation & Hosps.*, 10 F.3d 17 (1st Cir. 1993), 18 MPDLR 168.

A factual issue also existed as to whether Connor was disabled under the CFEPA. To be disabled, a person must suffer "any chronic physical handicap, infirmity, or impairment." *See* Conn. Gen. Stat. §46a-51(15). Although the act does not define "chronic," a Connecticut court defined the term with "reference to diseases of long duration, or characterized by slowly progressive symptoms; deep seated or obstinate, or threatening a long continuance; distinguished from acute." *See Gilman Bros. v. Connecticut Comm'n on Human Rights & Opportunities*, 1997 WL 275578 (Conn. Super. Ct. May 13, 1997). Connor alleged facts showing that his morbid obesity was a chronic physical impairment.

On-the-Job; State Law; Perceived; Temporary Condition; Foot

A Texas appeals court held that an employer did not perceive an employee with a foot injury as disabled under the Texas Commission on Human Rights Act (TCHRA), Tex. Labor Code Ann. §21.002(6), because her condition was temporary. ***Columbia Plaza Med. Ctr. v. Szurek, 101 S.W.3d 161 (Tex. Ct. App. 2003).***

Carol Szurek, a medical technologist for the Columbia Plaza Medical Center, cross-trained in the hospital hematology department, which required her to work more time on her feet than in the microbiology department. In February 1996, Szurek had foot surgery for heel spurs, and her doctor restricted her to sedentary duties. Columbia assigned Szurek to work only in the microbiology department. By July 1996, Szurek was still only able to perform sedentary work. Because there were no sedentary positions in the microbiology department, Columbia placed Szurek on a three-month leave of absence.

Szurek filed a claim with the Fort Worth Human Relations Commission, alleging that Columbia had discriminated against her based on a perceived disability. The Commission determined that there was no evidence of discrimination. Szurek also filed a discrimination charge with the Equal Employment Opportunity Commission (EEOC), which concluded that there was reasonable cause to believe that Columbia had discriminated against Szurek when it failed to accommodate her perceived disability. She then sued Columbia under the TCHRA. A jury found that Columbia regarded Szurek as having a disability that substantially limited her ability to perform a broad class of jobs and discriminated against her on the basis of her perceived disability. The jury awarded her $72,000 in damages.

The appeals court reversed. At most, Columbia perceived that Szurek was recovering from a temporary impairment. Hospital officials believed that Szurek would be able to return to her normal duties in three months, or when her doctor cleared her for non-sedentary activities. Hospital officials' belief that Szurek's "recovery plateau" prevented her from doing the physical requirements of her job did not show that they regarded her as having a substantially limiting impairment. *See* Tex. Labor Code Ann. §21.002(6) (Vernon 2003); *see also Chevron Corp. v. Redmon*, 745 S.W.2d 314 (Tex. Sup. Ct. 1987). There was no evidence that the hospital believed there would be any long-term or permanent impact. "Because a temporary impairment is not considered a 'substantially limiting impairment,' and because Columbia perceived Szurek's impairment as temporary, there is no evidence that Columbia placed Szurek on the leave of absence because it regarded her as disabled."

In a footnote, the court noted that it would accord no weight to the EEOC's determination, finding that the duty to provide reasonable accommodations arises only when an individual is actually disabled, not regarded as disabled. *See Cannizzaro v. Neiman Marcus, Inc.*, 979 F. Supp. 465 (N.D. Tex. 1997), 21 MPDLR 750. "Because the EEOC's determination was based on an erroneous statement of the law, and because the independent facts at trial show no evidence of a 'perceived disability,' we conclude the EEOC letter does not amount to more than a scintilla of evidence."

§504; Perceived; HIV

An Illinois federal court ruled that a job applicant could pursue his claim that the Village of Westmont regarded him as disabled due to HIV, in violation of the Rehabilitation Act §504, 29 U.S.C. §794, even though the Village's doctor found that he could perform all of the job's required duties. ***Roe v. Village of Westmont, 2003 WL 444508 (N.D. Ill. Feb. 24, 2003).***

Richard Roe applied for a police officer position with the Village. After passing initial screening tests, he placed four out of 15 in a ranking of applicants. A physical exam revealed that Roe was HIV-positive, but the Village's doctor stated that Roe was fully able to perform all duties required of him as a police officer and did not pose a safety or health threat. When the Village did not hire him, Roe sued

under §504.

The district court denied the Village's motion to dismiss. The court rejected the Village's argument that Roe could not be considered disabled because its doctor found him qualified to work as a police officer. Roe presented evidence that the Village had regarded him as disabled despite this opinion.

Title I; Actual; Perceived; Retaliation; Vision

The Second Circuit affirmed a district court's decision (*see* 200 F. Supp. 2d 207 (E.D.N.Y. 2002), 26 MPDLR 683) that an employee with ocular albinism (the ability to see well out of only one eye) whose corrected vision was 20/20 was not substantially limited in the major life activity of seeing and, thus, did not have an actual disability under the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-117. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), 23 MPDLR 510. Also, being certified as disabled under N.Y. Civ. Serv. Law §55-a (McKinney 2003)—authorizing counties to set aside positions for qualified persons with disabilities—and having his employer provide accommodations did not establish that he had a record of a substantially limiting impairment. Showing that a person is classified as disabled under standards other than the ADA is not sufficient. *See Colwell v. Suffolk County Police Dep't*, 158 F.3d 635 (2d Cir. 1998), 22 MPDLR 745. However, the court remanded for the district court to consider whether the numerous references in plaintiff's file to disability and accommodation are sufficient for a jury to find that his employer perceived him as substantially limited in a major life activity. Finally, his retaliation claim failed, because his filing a discrimination complaint did not result in an adverse employment action. ***Manz v. Gaffney, 56 Fed. Appx. 50 (2d Cir. 2003).***

Title I; Qualified; Direct Threat; ADHD

A divided First Circuit ruled that a former employee with attention deficit hyperactivity disorder (ADHD) was not substantially limited in learning or speaking and, thus, was not disabled under the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-117. Also, he was not otherwise qualified for his job due to his threats to employees. ***Calef v. Gillette Co., 322 F.3d 75 (1st Cir. 2003).***

In the early 1990s, Fred Calef, a production manager for Gillette, received warnings after he threatened a co-worker and had to be physically restrained when he angrily exchanged insults and profanity with another co-worker. In September 1995, Gillette issued him a final warning after he harassed another co-worker, which stated "that any single infraction of [Company] policy in the future will result in his termination. . . ." Gillette also referred Calef to its employee assistance program (EAP), where he was diagnosed with ADHD and prescribed Ritalin. In July 1996, Calef was hospitalized for depression, but returned to work "without restriction." In December, Calef had an altercation with supervisors and employees when he became "disgusted" that machines had been run during a meal break. Gillette terminated him for insubordination, lack of cooperation with supervisors, refusal to work a scheduled shift, and irrational behavior. Calef sued Gillette under Title I. The district court granted Gillette summary judgment.

The First Circuit affirmed on the ground that Calef was not disabled under the ADA. *See* 42 U.S.C. §12102(2). Calef was not substantially limited in the major life activity of learning. A 1998 assessment found that his overall learning ability was in the average range, even though he scored significantly below average in solving math problems, visual sequencing, and memorizing complex visual organization and planning, and performing tasks involving the rapid copying of numbers. "More importantly, his life experience shows no substantial limitation on learning as required by *Toyota*." *See Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002), 26 MPDLR 73. Calef had a high school GED, had taken other courses and received on-the-job training, and his history before and after Gillette showed no limitation in his learning ability. He took Ritalin, which he admitted helped control most of the effects of ADHD. *See Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999), 23 MPDLR 510.

Nor was Calef substantially limited in the major life activity of speaking. A medical assessment reported that he was attentive in conversation, and that his language was normal. He satisfactorily spoke with customers, supervisors, and others while employed by Gillette. None of his performance evaluations noted any difficulty in speaking. Further, assuming that the Equal Employment Opportunity Commission (EEOC) regulation is valid, Calef failed to show that he was "significantly restricted" as to the "condition, manner or duration" under which he learned or spoke as compared to the average person in the population. *See* 29 C.F.R. §1630.2(j)(1). As for Calef's argument that his ADHD makes it more difficult for him to respond to stressful situations, many people do not think or speak well in stressful situations. There was no evidence that Calef could not perform some usual activity compared with the general population, or that he had a continuing inability to handle stress at all times, rather than only episodically.

In a footnote, the appeals court rejected Calef's argument that he was "perceived as disabled," concluding "there is not a whiff of proof that the fears of the nurses and supervisors were motivated by stereotypes about the disabled." The reported reactions of Gillette employees were entirely reasonable, and there was no evidence that they were not genuine.

Also, Calef was not qualified to perform the essential function of his job at Gillette either with or without reasonable accommodation. *See* 42 U.S.C. §12111(8). An essential function of a production manager job is the ability to handle stressful situations without making workers feel threatened for their own safety. "This function is both job-related and consistent with business necessity." Gillette consistently disciplined employees who engaged in altercations with supervisors and other employees. Both before and after Calef knew he had ADHD, Gillette applied the same standards to him. "Quite simply, the ADA does not require that an employee whose unacceptable behavior threatens the safety of others be retained, even if the behavior stems from a mental disability." *See EEOC v. Amego, Inc*, 110 F.3d 135 (1st Cir. 1997), 21 MPDLR 346; *Palmer v. Circuit Court of Cook County, Ill.*, 117 F.3d 351 (7th Cir. 1997), 21 MPDLR 622; *Johnson v. New York Hosp.*, 96 F.3d 33 (2d Cir. 1996); *Williams v. Widnall*, 79 F.3d 1003 (10th Cir. 1996), 20 MPDLR 359; *Crawford v. Runyon*, 79 F.3d 743 (8th Cir. 1996), 20 MPDLR 523.

In another footnote, the appeals court found that no reasonable accommodations would have enabled Calef to perform his essential job functions. His uncontrollable anger was episodic and unpredictable. Gillette had tried to accommodate Calef by giving him time off and reducing his work schedule.

A dissenting judge opined that the majority misread the EEOC regulation, 29 C.F.R. §1630.2(j)(1), which defines "'substantially limited' to mean *either*: '(i) unable to perform a major life activity that the average person in the general population can perform; *or* (ii) significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.'" The majority "misconstrues the differences between these two prongs and thereby sows confusion for future litigants . . . by in essence, . . . saying that Calef does not meet the second prong of the EEOC guidelines because he does not meet the first." Moreover, the majority view was confined to only what Calef could and could not do, while the second prong of the EEOC regulation recognizes that a person who accomplishes major life activities can still be substantially limited with respect to condition, manner, or duration. *See Gillen v. Fallon Ambulance Serv., Inc.*, 283 F.3d 11 (1st Cir. 2002), 26 MPDLR 467.

Further, the dissenting judge concluded that the majority made a "subtle but profound expansion of *Toyota's* holding" by examining Calef's speaking and learning both "outside the workplace as well as within." In *Toyota*, the U.S. Supreme Court was concerned with the major life activity of performing manual tasks on the job, and found that "the manual tasks unique to any particular job are not necessarily important parts of most people's lives." *See* 534 U.S. at 201. Here, however, ". . . there is no doubt that speaking and learning are central to most people's daily lives." Consequently, ". . . extending this portion of the Court's holding in *Toyota* to other types of major life activities, such as speaking and learning is unwarranted."

Further, the judge objected to the majority's finding that an essential function of Calef's job was to handle stressful situations, without making co-workers feel threatened. "[I]nfusing the subjective fear of the nurses and Calef's supervisors into the "essential functions" analysis . . . opens the door for employers to fire disabled workers because other employees say they are afraid of their disabled colleagues." There is a separate and distinct analysis to deal with situations where a disabled person presented a "direct threat" to the safety of co-workers. *See* 42 U.S.C. §12113(b). The reason for using a separate analysis is to protect individuals with disabilities from prejudice, stereotypes, and unfounded fear. *See School Bd. of Nassau County, Fla. v. Arline*, 480 U.S. 273 (1987), 10 MPDLR 150. However, this was not a direct threat case, because there was no evidence that Calef was violent or threatened anyone with violence.

State Law; Substantial Limitation; Back

The California supreme court reversed an appeals court's ruling that a former laborer with back problems did not have a covered physical disability under the California Fair Employment and Housing Act (FEHA), Cal. Gov't Code §12926(k)(B)(i) (West 2003). The appeals court erred in finding that the state law required plaintiffs to show that they were substantially limited—as opposed to limited—in their ability to participate in a major life activity. ***Colmenares v. Braemar Country Club, Inc., 130 Cal. Rptr. 2d 662 (Cal. Sup. Ct. 2003).***

After injuring his back in 1981, Francisco Colmenares, a general laborer for the Braemar Country Club (BCC), was assigned light duty until 1997, when he was assigned heavy duty. Unable to do the work, Colmenares was terminated. He sued the BCC for violation of the FEHA, and the trial court granted BCC summary judgment. The appeals court affirmed, finding that Colmenares did not have a covered disability.

The high court reversed and remanded, finding that the FEHA's definition of a disability both before and after the enactment of the Poppink Act on January 1, 2001—which amended the FEHA—requires plaintiffs to show that their physical disability "limits," rather than "substantially limits," a major life activity. In 1992, when the legislature initially amended the FEHA, it defined physical disability as an impairment that merely "[l]imits an individual's ability to participate in major life activities." *See* Stats. 1992, ch. 913, §21.3, p. 4308, amending §12929(k). Subsequently, the Poppink Act, which took effect on January 1, 2001, amended the FEHA's requirement that a physical disease or condition limit "major life activities" to the singular "a major life activity." However, the act retained that "limits" language, explaining that a qualifying disease or condition "limits a major life activity if it makes the achievement" of the activity "difficult." *See* §12926(k)(1)(B)(ii). Consequently, the court here concluded that because both *before* and *after* the enactment of the Poppink Act the legislature used the term "limits," as opposed to "substantially limits," the Poppink Act merely clarified, instead of retrospectively changed, the existing "limits" standard.

Hiring; Title I; State Law; Perceived; Back

An Iowa federal court held that a factual issue existed as to whether a former employee with a back injury who was not rehired by a company that took over his previous employer's business was regarded as substantially limited in the major life activity of working and, thus, was disabled under the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-117, and the Iowa Civil Rights Act (ICRA), Iowa Code ch. 216. ***Wordekemper v. Western Iowa Homes & Equip., Inc., 2003 WL 1222443 (N.D. Iowa Mar. 17, 2003).***

Dean Wordekemper worked as a general laborer for Western Iowa Homes & Equipment (WIH) until it went out of business. A managerial employee of WIH subsequently started a new business, Midwest Homes (MH), on the same site and Wordekemper continued to work for about a week after MH began operations. MH contended that Wordekemper was completing projects for WIH, while Wordekemper asserted that he was never notified that he was employed only by WIH.

Wordekemper sued both WIH and MH for violations of Title I and the ICRA.

The district court denied defendants' summary judgment motion. A factual issue existed as to whether defendants regarded Wordekemper as substantially limited in the major life activity of working and, thus, as disabled. *See* 42 U.S.C. §12102(2)(C); *see also Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), 23 MPDLR 510. A co-worker reported that one of MH's decision-makers commented that Wordekemper came to WIH with a back injury, that he did not feel that Wordekemper could do the work he wanted him to do, and that Wordekemper was "worthless" because of his "back problem." These comments demonstrated discriminatory animus and a perception of a permanent and substantially limiting impairment in the major life activity of working. It was clear that while WIH was closing, MH was starting a separate company employing WIH employees.

§501; Actual; Back

A Connecticut federal court ruled that a former postal employee with a herniated disk failed to show that he was substantially limited in the major life activities of walking, standing, sitting, lifting, carrying, and turning his head and, thus, was not disabled under the Rehabilitation Act §501, 29 U.S.C. §791 *et seq.* ***Banks v. Potter, 2003 WL 1733651 (D. Conn. Mar. 31, 2003).***

On January 8, 1990, William Banks, a letter carrier for the U.S. Postal Service (USPS), was hit by a car while working and suffered a herniated disk. When he returned to work, USPS assigned him to light duty and a reduced schedule. On September 30, 1992, Banks was issued a termination notice based on over 50 unscheduled absences beginning in November 1991. After the Equal Employment Opportunity Commission (EEOC) found no evidence of discrimination, Banks filed suit against the USPS under the Rehabilitation Act.

The district court granted USPS's summary judgment motion, finding that Banks was not disabled under the Rehabilitation Act. *See Heilweil v. Mount Sinai Hosp.*, 32 F.3d 718, 721 (2d Cir. 1994), 18 MPDLR 658, *cert. denied*, 513 U.S. 1147 (1995). The court rejected Banks' argument that his impairment substantially limited his ability to walk, lift, carry, stand, sit for long periods of time, and turn his head. Under the EEOC regulations, "substantially limited" is defined as "significantly restricted . . . as compared to the condition, manner, or duration under which a normal person in the general population can perform the same major life activity." *See* 29 C.F.R. §1630.2(j)(1). *See also Colwell v. Suffolk County Police Dep't*, 158 F.3d 635, 643 (2d Cir. 1998), 22 MPDLR 745, *cert. denied*, 526 U.S. 1018 (1999).

First, as to Banks' claim that he was substantially limited in walking, the evidence showed that he had a full range of motion in his hips, knees, and ankles, with good motor strength, reflexes, and vascular supply to the lower extremities. Second, although he was restricted from standing for more than four hours, this does not amount to a substantial limitation on the major life activity of standing. *Colwell,* 158 F.3d at 643-45. The temporary nature of this restriction weighs against a finding of substantial limitation. Third, despite his restriction on lifting and carrying no more than 10 pounds for a maximum of four hours per day, this does not constitute a severe restriction on his ability to lift or carry as compared with the average person. *Id.* at 644 (evidence that plaintiff could lift only objects of 10 to 20 pounds infrequently was not sufficient to establish a substantial limitation); *Sherrod v. American Airlines*, 132 F.3d 1112, 1120 (5th Cir. 1998), 22 MPDLR 214. Fourth, his restriction from sitting for more than four hours at a time was not evidence that he was severely restricted in sitting as compared to the average person. Finally, Banks had not submitted any evidence as to the severity or duration of his inability to turn his head.

Title I; Actual; Back; Leg; Reasonable Accommodation; Retaliation

A New York federal court determined that a former employee with leg and back injuries was not disabled within the meaning of the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-117; his asking to return to work did not constitute a request for a reasonable accommodation; and his employer did not retaliate against him for asserting an ADA claim by placing him on an extended, unpaid medical leave of absence. ***Chandler v. AMR Am. Eagle Airline, 2003 WL 1339371 (E.D.N.Y. Mar. 14, 2003).***

In March 1999, Kenton Chandler, a part-time clerk for AMR American Eagle Airline, injured his back and leg while he was servicing a plane. Chandler subsequently commenced a short-term, seven-week disability leave. However, in May 1999, he was cleared to return to light duty with a temporary bending and a 15-pound lifting restriction.

On June 6, 1999, AMR reassigned Chandler after a complaint from a female co-worker. On June 7, he filed a charge with the Equal Employment Opportunity Commission (EEOC) against AMR alleging refusal to accommodate and disparate treatment with respect to pay raises. On June 8, 1999, Chandler was placed on an extended, unpaid medical leave of absence after his doctor reported to AMR that Chandler was "totally disabled." After receiving a right-to-sue letter from the EEOC, Chandler sued AMR under Title I.

The district court granted AMR's summary judgment motion. Chandler was not disabled within the meaning of the ADA. *See* 42 U.S.C. §12102(2); *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002), 26 MPDLR 73; *Manz v. Gaffney*, 200 F. Supp. 2d 207 (E.D.N.Y. 2002), 26 MPDLR 683. Chandler contended that his back and leg injuries substantially limited him in the major life activities of walking, sitting, standing, and working. Although Chandler's doctor reported that Chandler was unable to walk, stand, or sit for more than 30 minutes, medical reports in May 1999 made no mention of these limitations and only indicated that Chandler was limited in his ability to engage in heavy lifting, bending, stooping, squatting, pushing, and pulling. Chandler produced no reports that he was unable to sit, stand, or walk when he returned to work in May 1999. Furthermore, these reports did not provide information on the extent of Chandler's impairments, but rather indicated that his restrictions were temporary and could be accommodated by a light duty restriction. "[M]inor and temporary impairments of one's ability to engage in major life activities are not actionable under the ADA." *See Glozman v. Retail, Wholesale & Chain Store Food Employees Union, Local 338*, 204 F. Supp. 2d 615 (S.D.N.Y. 2002), 26 MPDLR 672. Also, Chandler produced no evidence that he was substantially limited in his ability to engage in a broad category of jobs, as is required under the ADA in order to show a substantial limitation on the major life activity of working.

Furthermore, while Chandler alleged that AMR discriminated against him by failing to accommodate his request to return to work in February 2001 and that at that time he was disabled under the ADA, he failed to produced evidence that AMR was on notice of his disability or failed to accommodate it. Chandler's communication with AMR regarding his return to work in February 2001 did not suggest that he required or was requesting an accommodation. He merely advised AMR that he was "ready to return to work at Eagle, immediately." AMR's demand that Chandler submit to a medical exam prior to returning to work could not be construed as a refusal to accommodate his disability.

Finally, the court rejected Chandler's argument that AMR retaliated against him by requiring him to submit to a medical exam before allowing him to return to work in February 2001. Chandler failed to allege any causal connection between his engagement in a protected activity and AMR's requirement that he submit to a medical exam, which occurred almost a year after his lawsuit was filed and was consistent with its return-to-work policy for employees who took extended medical leave.

Title I; Actual; Perceived; Knee

An Iowa federal court held that a former employee with a left knee injury failed to show she was substantially limited in the major life activities of standing, bending, and walking or was perceived as substantially limited in working and, therefore, was not disabled under the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-117. ***Miller v. Wells Dairy, 2003 WL 1564252 (N.D. Iowa Mar. 25, 2003).***

After injuring her left knee, Monica Miller, a quality control lab technician for Wells Dairy, was permanently restricted from stair climbing, kneeling, and squatting. At a meeting to determine accommodations, Miller indicated she could perform functions of 11 of the 14 product lines. Wells assigned her to work four lines, but informed her no elevator would be available. Wells then offered Miller a part-time allergen lab tech job without benefits, which she turned down. When she tried to return to work in April 2000, Wells refused to return her to her old job. Miller sued Wells under Title I.

The district court granted Wells summary judgment, holding that Miller was not disabled under the ADA. *See* 42 U.S.C. §12102(2). Although Miller claimed that she was substantially limited in the major life activities of standing and bending, she did not identify how her knee condition considerably, or to a large degree, affected the condition, manner, or duration under which she could stand or bend. Further, with respect to the major life activity of walking, Miller admitted that she was able to walk and capable of working a full, 10-hour shift at Wells, with the accommodation of an elevator. Also, she was able to climb two or three stairs without difficulty, using a handrail and taking the stairs one at a time. Thus, her limitations on the ability to walk were nothing more than moderate. *See Weber v. Strippit, Inc.*, 186 F.3d 907 (8th Cir. 1999), 23 MPDLR 688; *Taylor v. Nimock's Oil Co.*, 214 F.3d 957 (8th Cir. 2000), 24 MPDLR 779.

The court rejected Miller's argument that Wells perceived her as being substantially limited in the major life activity of working. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), 23 MPDLR 510; *Conant v. City of Hibbing*, 271 F.3d 782 (2001), 26 MPDLR 83. She failed to present sufficient evidence that Wells believed that the nature, severity, duration, and impact of her knee condition precluded her from either a class of jobs, or a broad range of jobs in various classes. *See* 29 C.F.R. §1630.2(j)(2)(i)-(iii). In fact, Wells offered Miller the allergen lab tech job, but she declined.

Title I; Actual; Qualified; Pretext; Knee

An Iowa federal court ruled that a nurse with knee problems presented genuine issues of material fact as to whether she had a protected disability under the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-117, could perform her job without reasonable accommodation, and was fired because of her alleged disability. ***Butt v. Greenbelt Home Care Agency, 2003 WL 685026 (N.D. Iowa Feb. 28, 2003).***

Delores Butt, who has bilateral knee prostheses and hearing loss, was hired as a home health care coordinator by Greenbelt Home Care Agency. Four months later, she was fired allegedly due to ongoing job performance problems. She sued Greenbelt under Title I.

The district court denied Greenbelt's motion for summary judgment. First, Butt presented evidence that raised a genuine issue of material fact as to whether her knee problems substantially limited the major life activity of walking. Butt stated that she had difficulty climbing stairs, walking long distances, walking quickly, stooping, bending to the floor, bending her knees at a 90-degree angle, and getting in and out of smaller vehicles. The court considered the impact of the apparent disparity between Butt's current description of her ability to walk, climb, stoop, and otherwise use her legs and her description of her abilities at the time of her job interview with Greenbelt. An eleventh-hour affidavit that contradicts prior sworn testimony cannot be used to generate a genuine issue of material fact to avoid summary judgment. *See Hog Slat, Inc. v. Ebert*, 104 F. Supp. 2d 1112 (N.D. Iowa 2000). An exception to this rule applies where the affiant explains apparent inconsistencies or demonstrates a plausible reason for a change. *See Richards v. Farner-Bocken Co.*, 145 F. Supp. 2d 978 (N.D. Iowa 2001), 25 MPDLR 629.

Here, Butt admitted telling Greenbelt that her knee prostheses did not limit her functioning, that she did not have "any problems waking," and that she "just was very safe and careful." She told Greenbelt that she "did not do long walking because her knees would just get tired." In her affidavit, Butt clarified that she "cannot run, or walk at a quick pace" and "cannot walk for long distances." These statements are not contradictory. Butt also told Greenbelt that she had been able to get into the bleachers to watch her grandsons participate in sports activities. In her affidavit, she explained that to get into the bleachers, she is unable to walk up the steps, but must "crawl over them one at a time until I get to a seat, because I cannot bend my knees." These statements are not directly contradictory. Rather, it seems Butt minimized her limitations to make a good impression on a prospective employer. Thus, the court did not find that Butt attempted to raise sham issues for purposes of avoiding summary judgment.

The court rejected Butt's claim that her partial hearing loss constituted a disability under the ADA. She offered evidence that her partial hearing loss had been completely corrected by the use of an amplified stethoscope and hearing aids. If a person is taking measures to correct a physical impairment, the effects of those measures must be taken into account when judging whether the person is disabled. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), 23 MPDLR 510. Because Butt's partial hearing loss had been completely mitigated, it did not constitute a disability under the ADA.

Second, Butt presented evidence that she was able to perform her essential job functions without reasonable accommodation. Her alleged disability did not impair her ability to perform adequate nursing assessments. Although she reportedly violated policies during home visits on a couple of occasions, there was no evidence those incidents were in any way related to her claimed disability.

Finally, Butt raised at least an inference that her termination was the result of unlawful discrimination. *See Snow v. Ridgeview Med. Ctr.*, 128 F.3d 1201 (8th Cir. 1997), 22 MPDLR 54. Greenbelt knew about her knee problems, expressed concerns relating directly to those problems, and replaced her with two younger nurses, neither of whom showed any disabilities.

Title I; Actual; Elbow

A Pennsylvania federal court determined that a former custodian with an elbow injury was not disabled under the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-117, because he failed to show that he was substantially limited in a major life activity.

Cella v. Villanova Univ., 2003 WL 329147 (E.D. Pa. Feb. 12, 2003).

Robert Cella, a custodian for Villanova University, injured his elbow at work. When he refused to participate in a program designed to assess his work capabilities, he was fired. He sued Villanova under Title I.

The district court granted Villanova summary judgment. Although Cella's tennis elbow qualifies as an impairment, he failed to show that it prevented or severely restricted him from doing activities that are of central importance to most people's daily lives, such as personal hygiene and household chores, and that its impact was permanent or long term. *See Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002), 26 MPDLR 73. Cella is able to bathe, comb his hair, brush his teeth, drive a car, and straighten his room. Although he may experience some degree of pain while performing these activities, he is not incapable of accomplishing them. Further, there is no indication that Cella's condition is permanent or long-term. Cella's main complaint is that he is unable to lift over 10 pounds or perform repetitive motions with his right arm. These restrictions do not qualify Cella as disabled under the ADA.

State Law; Actual; Pain; Reasonable Accommodation

An Ohio federal court ruled that an employee who failed to support her complaints of back, neck, hip, knee, and feet pain with objective medical evidence showing she was substantially limited in a major life activity was not handicapped under Ohio Rev. Code Ann. §4112.01 *et seq.* (West 2003). Also, she failed to request a reasonable accommodation. ***Clark v. Whirlpool Corp., 2003 WL 1477016 (N.D. Ohio Mar. 18, 2003).***

After an on-the-job accident at Whirlpool Corporation, Patricia Clark returned to work without medical restrictions. Later, Whirlpool's doctor restricted Clark from lifting, pushing, and pulling more than 20 pounds and from bending more than eight times per hour. Following surgery for a herniated disc, Clark went on disability retirement. She then sued Whirlpool for failing to accommodate her handicap.

The district court granted Whirlpool summary judgment. Clark was not handicapped as defined by §4112.01(A)(13), because she failed to show that her pain substantially limited her ability to perform one or more major life activities that the average person in the general population can perform. *See Szalay v. Yellow Freight Sys., Inc.*, 998 F. Supp. 799, 802 (N.D. Ohio 1996). Clark claimed that her pain significantly affected her major life activities of working, lifting, walking, caring for herself, and performing manual tasks. However, the only evidence she presented consisted of her own self-serving and conclusory testimony, which is insufficient to support a handicap claim. Clark's treating neurosurgeon could find no medical reason why she could not work. Nor did he find that she was substantially limited in a major life activity.

Even if Clark were handicapped, she failed to propose a reasonable accommodation that would have allowed her to perform her job. *See Monette v. Electronic Data Sys. Corp.*, 90 F.3d 1173, 1183 (6th Cir. 1996), 20 MPDLR 704. Whirlpool granted Clark the only accommodation she requested—a conveyor. Although Clark claimed that there were other jobs available at Whirlpool that she could have performed, there was no evidence that she had requested a reassignment or that there were available positions for which she was qualified. *See Burns v. Coca-Cola Enters., Inc.*, 222 F.3d 247, 258-59 (6th Cir. 2000), 24 MPDLR 791.

Title I; Actual; Qualified; Reasonable Accommodation; Job Coach; MR

A North Carolina federal court held that a former clerk with moderate mental retardation raised a genuine issue of material fact as to whether she was disabled under the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-117. Also, factual issues existed as to whether she could perform her modified position, and whether a job coach was a reasonable accommodation. ***E.E.O.C. v. Dollar Gen. Corp., 2003 WL 1562101 (M.D.N.C. Mar. 20, 2003).***

Assisted by a job coach, Bobbie Bost, a 45-year-old woman with moderate mental retardation, worked as a clerk for Dollar General Stores. She was terminated for "lack of work" and "payroll." However, Bost's supervisor admitted that she was fired because she was not qualified for the clerk position. After Bost's termination, Dollar General hired someone to fill the clerk position. Bost filed a discrimination charge with the Equal Employment Opportunity Commission (EEOC), which sued Dollar General under Title I.

The district court denied both parties' motions for summary judgment. First, Bost presented evidence that she was substantially limited in the major life activities of thinking, learning, caring for herself, and communication and, thus, was disabled under the ADA. She lived in a group home with 24-hour supervision, and her mother was her legal guardian.

Second, a factual issue existed as to whether Bost was a qualified individual as defined by the ADA. Although her position was labeled "clerk," she held a modified position that did not include all of the functions listed in the "clerk" job description. For example, the job description included operating a cash register, but Dollar General admitted that the store manager "never thought to put" Bost on the cash register. There was evidence that Bost was able to perform all of her assigned duties, and that Bost's supervisor was pleased with her job performance. Dollar General had never counseled or disciplined Bost regarding job performance.

Furthermore, Dollar General never engaged in the interactive process to determine what reasonable accommodations would have enabled Bost to perform any essential job functions that she was allegedly failing to perform. *See* 29 C.F.R. §1620.2(o)(3); *see also Humphrey v. Memorial Hosps. Ass'n*, 239 F.3d 1128 (9th Cir. 2001), 25 MPDLR 245. The accommodation of a job coach would be considered "... reasonable only for as long as necessary to train Ms. Bost to perform her job duties independently and would be unreasonable if she required a job coach on a permanent or indefinite basis." *See Miller v. Santa Clara Library*, 24 Fed. Appx. 762 (9th Cir. 2001), 26 MPDLR 310; *EEOC v. Hertz Corp.*, 1998 WL 5694 (E.D. Mich. Jan. 6, 1998), 22 MPDLR 206.

Title I; Actual; Perceived; Hostile Work Environment; MR

A U.S. Magistrate in Maine recommended that an employee with mild mental retardation be considered disabled under the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-117, and found that a factual issue existed as to whether he stated a hostile work environment claim. ***Farrington v. Bath Iron Works Corp., 2003 WL 278172 (D. Me. Feb. 7, 2003).***

Brian Farrington, a tinsmith for Bath Iron Works (BIW), alleged

that BIW subjected him to a hostile working environment based on his mental disability and/or perceived mental disability. Farrington claimed that he was called "dumb," "stupid," "retard," "loser," and "dummy," and that his supervisors and co-workers teased him about his speech; struck him with painters' sticks and pipes daily, drawing blood; and occasionally knocked him down and kicked him. Farrington also claimed that co-workers posted and disseminated doctored photographs depicting him as abnormal and sub-human. For example, a picture of Farrington kissing a monkey was posted on the company bulletin board. He complained to BIW, which found no evidence of disability discrimination.

The Magistrate recommended that BIW's summary judgment motion be denied. A factual issue existed as to whether Farrington was disabled under the ADA. *See* 42 U.S.C. §12102(2). He presented evidence that his mild mental retardation substantially limited the major life activities of learning, reading, and writing as compared to the average person. Expert reports placed Farrington below the first percentile for broad written language and in the fifth to tenth percentile in reading, and noted his preference for simple, repetitive jobs and his great difficulty learning the task of assembling footboards and headboards. *See* 29 C.F.R. §1630.2(j)(1)(ii). *See also Bartlett v. N.Y. State Bd. of Law Exam'rs*, 226 F.3d 69 (2d Cir. 2000), 24 MPDLR 980; *Gonzales v. National Bd. of Med. Exam'rs*, 225 F.3d 620 (6th Cir. 2000), 24 MPDLR 914. In addition, Farrington presented evidence that he was perceived as disabled, pointing to remarks by co-workers and supervisors that he was "dumb" and a "retard"; the fact the his work station was moved in front of the supervisor's office; and the posting and disseminating of doctored photographs depicting him as abnormal and subhuman by co-workers. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), 23 MPDLR 510.

Another factual issue existed as to whether Farrington was subject to unwelcome harassment based on his actual or perceived disability. He claimed that a reasonable person would find the conduct at his workplace to be sufficiently severe or pervasive to alter the terms and conditions of his employment. *See Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). "Farrington's evidence . . . paints a nightmarish portrait of unremitting, cruel abuse, far beyond anything that reasonably could be considered the 'ordinary tribulations of the workplace.'" Further, he raised a triable issue as to whether BIW failed to exercise reasonable care to prevent and correct promptly any harassing behavior. *Id.* Farrington complained to supervisors to no avail. In fact, one supervisor reportedly encouraged a co-worker to beat Farrington, and another allegedly harassed Farrington.

Title I; Actual; Depression; Anxiety; FMLA; Termination; Leave

A Minnesota federal court held that a former railroad employee with depression and anxiety was not substantially limited in working and, thus, was not disabled under the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-117. However, a factual issue existed as to whether the employer terminated the employee for requesting leave under the Family Medical Leave Act (FMLA), 29 U.S.C. §2601 *et seq.* ***Camp v. Soo Line R.R. Co., 2003 WL 544939 (D. Minn. Feb. 20, 2003).***

After Soo Line Railroad instigated a formal investigation in 1999 into David Camp's attendance problems, he requested and was granted seven months of leave through the employee assistance program (EAP) to address his substance abuse. While on EAP leave, Camp was diagnosed with anxiety. After Camp returned from EAP leave in March 2000, he missed work on May 13, June 18, and June 30. As a result, the railroad sent Camp a notice of investigation and formal hearing regarding those absences. Camp requested FMLA forms and was granted intermittent FMLA leave due to "deep-seeded depression." The railroad terminated Camp, and he sued for Title I and FMLA violations.

The district court granted the railroad summary judgment on the ADA claim. Camp failed to show that he was disabled under the statute. *See* 42 U.S.C. §12102(2); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), 23 MPDLR 510; *Duty v. Norton-Alcoa Proppants*, 293 F.3d 481 (8th Cir. 2002), 26 MPDLR 837. He admitted that, with medication, he was able to do his railroad job. "If plaintiff is able to do his job, even if he needs medication to accomplish it, he does not qualify as disabled under the ADA." The court rejected Camp's argument that because he had to take several days off after beginning medication, he could not in fact do his job even with the medication. Camp's absences occurred when he took himself off medication. Also, he failed to produce evidence that he was unable to work in either a class of jobs or a broad range of jobs, as required by the ADA. *See Heisler v. Metropolitan Council*, 2001 WL 1690052 (D. Minn. Dec. 14, 2001), 26 MPDLR 271.

The court rejected Camp's argument that the railroad "agreed" that he was disabled when it granted his FMLA request. A grant of FMLA leave is not equivalent to a determination that an employee is disabled under the ADA. *See Heisler.* The fact that the railroad acknowledged receipt of Camp's leave request did not mean that it conceded that Camp had a serious health condition under the FMLA. Moreover,

> . . . the standard for "disability" under the ADA requires more than a showing of a "serious health condition"—that serious health condition must substantially impair a major life activity. And where the major life activity is working, the impairment must prevent the individual from working a class of jobs or a broad range of jobs—not just a particular job.

Camp also failed to show that his depression and anxiety constituted permanent or long-term impairments. There was no evidence that Camp would not be able to continue his medication.

However, the court denied the railroad's motion for summary judgment on the FMLA claim. Camp exercised his rights under the FMLA when he requested and was granted intermittent FMLA leave and suffered an adverse employment action—termination. He presented sufficient evidence to raise a factual issue as to whether he was terminated for requesting leave. Camp was terminated two weeks after requesting leave. Only eight days passed between the actual grant of leave and his dismissal. Although the railroad articulated a legitimate, nondiscriminatory reason for firing Camp—his excessive absenteeism—a factual issue existed as to whether employees with worse attendance records than Camp had been allowed to remain working for the railroad.

State Law; Actual; Reasonable Accommodation; Pretext; Migrane; Depression

A Washington appeals court dismissed an employee's failure-to-accommodate claim under state law, ruling that his migraines and depressive disorder did not substantially limit the major life activity

of working, that he did not present evidence that accommodations were medically necessary, and that he failed to show that his employer's proffered reason for terminating him—his threats of violence against a co-worker—was a pretext for discrimination. ***Roeber v. Dowty Aerospace Yakima, 64 P.3d 691 (Wash. Ct. App. 2003).***

Donald Roeber, a manufacturing engineering specialist for Dowty Aerospace Yakima, argued with a co-worker. He admitted stating that "'I was so mad I could have killed him,'" and "'I'll have to take your head off to get you out of the way.'" Roeber denied making a direct threat, and told his supervisor that his depression medication had not been working, and that it scared him that he got mad so quickly. Dowty terminated Roeber on the ground that the company considered it unacceptable for an employee to intimidate or fight another employee. Roeber sued Dowty under the state's anti-discrimination statute, Wash. Rev. Code ch. 49.60. A state trial court granted summary judgment for Dowty.

The appeals court affirmed. In *Pulcino v. Federal Express Corp.*, 9 P.3d 787 (Wash. Sup. Ct. 2000), 24 MPDLR 938, the Washington supreme court held that a disability is a sensory, mental, or physical abnormality that substantially limits the ability to perform a job. Roeber established with treatment records that he has migraine headaches and a depressive disorder. However, in terms of reasonable accommodation, Roeber did not show that these conditions substantially limited his ability to perform his job. His employment records showed consistently satisfactory work with only minor problems in attendance and promptness. Roeber also failed to give Dowty notice of his substantial limitations. The only medication information available to Dowty indicated that Roeber's condition was successfully treated with medication, and he was never hospitalized or otherwise substantially limited in his ability to perform his job.

Furthermore, Roeber did not present evidence that accommodations were medically necessary. Roeber contended that he told Dowty management about his stress levels and asked for a demotion or for an off-hours work shift, but he did not demonstrate that any positions were available that met his needs. "He shows neither that he was qualified for a vacant position nor that Dowty failed to notify him of job opportunities that would accommodate his alleged disability." *See Pulcino*; *Hill v. BCTI Income Fund-I*, 23 P.3d 440 (Wash. Sup. Ct. 2001).

Finally, Dowty presented compelling evidence of a legitimate, nondiscriminatory reason for firing Roeber. His actions constituted unacceptable threats of violence against a co-worker and he failed to provide evidence of pretext.

Title I; Actual; Record; Perceived; Retaliation; Depression; ADD

A Minnesota federal court ruled that a plaintiff who was discharged from an apprenticeship program failed to show that his depression and attention deficit disorder (ADD) substantially limited him in the major life activity of learning and, thus, was not disabled under the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-117. Also, he failed to show that he was discharged from the program because of his requests for reasonable accommodation. ***Ristrom v. Asbestos Workers Local 34 Joint Apprenticeship Comm., 2003 WL 366587 (D. Minn. Feb. 18, 2003).***

Clayton Ristrom was suspended from his union apprentice program due to his failure to achieve passing grades and was required to re-take his third-year courses. He informed the Joint Apprenticeship Committee (JAC) that he might have a learning disability, but psychological tests showed that he performed within the normal range in concentration and attention-sensitive tasks. After Ristrom failed to report for tutoring assistance and missed a week of classes, JAC discharged him from the program. He was later diagnosed with ADD and depression. Ristrom sued JAC for violating Title I.

The district court granted summary judgment for JAC on the ground that Ristrom was not disabled under the ADA. *See* 42 U.S.C. §12102(2); *Fjellestad v. Pizza Hut, Inc.*, 188 F.3d 922, 948 (8th Cir. 1999), 23 MPDLR 512. He failed to show that his depression and ADD substantially limited his ability to learn compared to the average person. Ristrom graduated from high school, passed a vocational sales class, and earned passing grades on his first two years in the apprenticeship program. The psychological tests indicated no attention or concentration deficits. The fact that Ristrom had difficulty with specified, discrete areas of learning did not amount to a substantial impairment. *See Leisen v. City of Shelbyville*, 153 F.3d 805, 808 (7th Cir. 1998), 22 MPDLR 750; *Li v. Intel Corp.*, 35 Fed. Appx. 677 (9th Cir. 2002). Ristrom also failed to show that he had a record of a substantially limiting impairment. Nor did JAC regard Ristrom as substantially limited. Its offer of supplemental instruction and deferment of any action until Ristrom received the results of his psychological tests did not show that JAC regarded his overall ability to learn as substantially impaired. Even if JAC regarded Ristrom as incapable of completing two classes, "perceiving an individual as unable to perform a particular task is not regarding that person as substantially limited in the broader major life activity of which the specific task is a part." *See E.E.O.C. v. Woodbridge Corp.*, 263 F.3d 812, 816 (8th Cir. 2001), 25 MPDLR 75.

Finally, Ristrom's claim that he had been discharged in retaliation for requesting reasonable accommodations failed. *See Palesch v. Missouri Comm'n on Human Rights*, 233 F.3d 560, 570 (8th Cir. 2000), 25 MPDLR 237. Ristrom had initially sought help as far back as November 1997, but was not discharged until February 1999. "Such a time span marked by multiple actions short of canceling Plaintiff's apprenticeship, including holding potential discipline in abeyance until Plaintiff was able to seek the testing he desired, indicates a willingness to assist Plaintiff rather than a reprisal for Plaintiff's request of assistance."

Title I; Actual; Agoraphobia

An Illinois federal court ruled that a general manager with agoraphobia—panic attacks when traveling outside a "safety zone" of a 12-mile radius surrounding her city of employment—was not substantially limited in working and, thus, not disabled within the meaning of the Americans with Disabilities Act Title I, 42 U.S.C. §§12111-117. While many sales jobs require business travel to unfamiliar areas, they are not a broad enough class to constitute a substantial limitation on working. *See Sinkler v. Midwest Prop. Mgmt. Ltd. P'ship*, 209 F.3d 678 (7th Cir. 2000), 24 MPDLR 447; 29 C.F.R. §1630.2(j)(3)(i). Joanne Cote is able to work in a management level job in her safety zone, and she failed to meet her burden of producing some evidence about the number and types of jobs that she could not perform because they require travel outside her safety zone. *See E.E.O.C. v. Rockwell Int'l Corp.*, 243 F.3d 1012 (7th Cir. 2001), 25

MPDLR 404. ***Cote v. MTP, Inc., 2003 WL 1477853 (N.D. Ill. Mar. 21, 2003).***

State Law; Actual; MI

A North Carolina appeals court held that a former employee with a history of a bleeding ulcer, panic disorder with agoraphobia, generalized anxiety disorder, and chronic depression was not disabled under N.C. Gen. Stat. §168A-3 (2003), because he failed to show that these impairments substantially limited a major life activity. As to his mental conditions, they were not permanent. *See* §168A-3(4)(a)(ii)(C). At most, these conditions may have affected his ability to perform his particular job, rather than a broad class of jobs, as required in order to be substantially limited in the major life activity of working. *See Gravitte v. Mitsubishi Semiconductor Am., Inc.*, 428 S.E.2d 254 (N.C. Ct. App. 1993). ***Gillenwater v. North Carolina Dep't of Transp., 576 S.E.2d 142 (N.C. Ct. App. 2003).***

Hiring; State Law; Actual; Record; Perceived; Amputation

A Texas appeals court ruled that a job applicant with an amputated left leg who used a prosthesis was not disabled under the Texas Commission on Human Rights Act (TCHRA), Tex. Lab. Code Ann. §§21.001-.556 (Vernon 2003), because she failed to show that she was substantially limited in the major life activity of walking, that she had a record of such a substantially limiting impairment, or that the Texas Department of Criminal Justice (TDCJ) perceived her as disabled. ***Little v. Texas Dep't of Criminal Justice, 2003 WL 1563739 (Tex. Ct. App. Mar. 27, 2003).***

Evelyn Little applied on 14 separate occasions for a food manager position with various prison units, but was not hired. She sued the TDCJ under the TCHRA. The trial court granted TDCJ summary judgment.

The appeals court affirmed on the ground that Little was not disabled under the TCHRA. *See* Tex. Lab. Code Ann. §21.002(6). *See also McInnis v. Alamo Cmty. Coll. Dist.*, 207 F.3d 276, 280 (5th Cir. 2000). The Equal Employment Opportunity Commission (EEOC) regulations define "substantially limits" to mean the inability to perform a major life activity that the average person in the general population can perform. *See* 29 C.F.R. §1630.2(j)(1). The Fifth Circuit has held that a claimant with a leg deformity who walked with a slight limp did not have a disability that substantially impaired a life activity. *See Talk v. Delta Airlines, Inc.*, 165 F.3d 1021, 1025 (5th Cir. 1999), 23 MPDLR 196. While Little walked with a limp and at a slower pace, she could walk well with the use of her prosthesis. Mitigating and corrective measures are considered when determining whether an individual is disabled under the TCHRA. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482-83 (1999), 23 MPDLR 510.

Nor did Little have a record of a substantially limiting impairment—that is, that she has a history of, or has been classified as having, a substantially limiting impairment. The EEOC has described the type of evidence used to substantiate such a claim as education, medical, or employment records. *See* 29 C.F.R. pt. 1630, App. §1630.2(k). Little contended that she had a record of impairment because it was a year before she was fitted with a prosthesis, and once she got her prosthesis, she needed a cane to walk for some years. However, at the time she applied for the food manager positions over 20 years later, she was able to walk well with the help of her prosthesis.

Finally, the court rejected Little's argument that because her impairment was stated on her application and was "apparent to anyone who saw her walk," TDCJ regarded her as disabled. She failed to present evidence that TDCJ regarded her as having a substantially limiting impairment.

Title I; Actual; Perceived; Retaliation

A Connecticut federal court held that a former employee with injuries to the right side of her body from an auto accident was not disabled under the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-117. Also, her employer did not retaliate against her, because it had no notice that she was requesting an accommodation, and she abandoned her job. ***Munck v. New Haven Sav. Bank, 2003 WL 1224582 (D. Conn. Mar. 17, 2003).***

When bank teller Sharon Munck returned to work after being in a car accident, she asked to be placed at a left-handed teller window as an accommodation. Munck was eventually moved to a left-handed teller window. However, when she reported a potential security violation by her supervisor, she was moved back to a right-handed window. Munck refused the assignment, and she was terminated. Munck sued the bank under Title I.

The district court granted summary judgment for the bank. First, Munck did not have an actual disability under the ADA. *See* 42 U.S.C. §12102(2); *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002), 26 MPDLR 73. She was diagnosed with cervical/thoracic sprain and migraine headaches. She alleged that she could no longer play volleyball for three hours every Monday night, had difficulty performing repetitive motions on the right side of her body, and could not lift more than 20 or 30 pounds without discomfort. Munck admitted that she was able to attend to her own personal hygiene, perform household chores, babysit for young children, shop, and cook. She also admitted that although she needed rest after periods of vacuuming and had difficulty pulling in a line of laundry, she could perform these chores. "As a matter of law the court does not find that the limitations that the plaintiff faced as a result of her impairment fit within the definition of disability under the ADA." *See Colwell v. Suffolk County Police Dep't*, 158 F.3d 635 (2d Cir. 1998), 22 MPDLR 745; *Stein v. Ashcroft*, 284 F.3d 712 (7th Cir. 2002), 26 MPDLR 492; *Thornton v. McClatchy Newspapers, Inc.*, 292 F.3d 1045 (9th Cir. 2002), 26 MPDLR 822.

The court rejected Munck's argument that the bank regarded her as disabled. *See Colwell.* The mere fact that the bank assigned Munck to a left-handed teller window did not permit the inference that she was regarded as substantially limited in her ability to do work. *See Francis v. City of Meriden*, 129 F.3d 281 (2d Cir. 1997), 22 MPDLR 54. The bank believed that Munck was capable of performing right-handed teller window work. There was no evidence that the bank thought that Munck had been limited in life's major activities, or that the bank denied her opportunities based on a perceived limitation. There was also no evidence that the bank perceived Munck as unable to work in a broad class of jobs. *See Ryan v. Grae & Rybicki, P.C.*, 135 F.3d 867 (2d Cir. 1998), 22 MPDLR 195.

The court also rejected Munck's argument that the bank retaliated against her for "protecting her health and standing up for her right to an accommodation under the ADA." *See Weixel v. Board of Educ. of City of N.Y.*, 287 F.3d 138 (2d Cir. 2002), 26 MPDLR 451. Munck

provided little evidence to establish that the bank was aware of her desire to be accommodated at a left-handed teller window. Although the bank knew that Munck had been injured in a car accident and that some accommodation was necessary during her healing process, there was little evidence that the bank believed that Munck's injuries were ongoing. "The defendants cannot be liable for their failure to intuit the need to accommodate the plaintiff. The defendants cannot be said to have retaliated against the plaintiff for engaging in protected activity, when defendants had no notice that she sought an accommodation under the ADA." Alternatively, the bank offered a legitimate, nondiscriminatory reason for firing Munck: She had abandoned her job.

Title I; Actual; Perceived; Due Process; *Ex Post Facto*; Hypertension

The First Circuit affirmed that a former police officer with hypertension was not substantially precluded from general employment and, thus, was not disabled under the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-117. Also, the district court's delay in deciding his case was not an *ex post facto* application of law or a denial of due process. ***Sheehan v. City of Gloucester, 321 F.3d 21 (1st Cir. 2003).***

Previously, the district court granted summary judgment for the City of Gloucester on the ground that Sheehan was not disabled within the meaning of the ADA. The First Circuit remanded in light of the U.S. Supreme Court's decision in *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999), 23 MPDLR 510. *See* 207 F.3d 35 (1st Cir. 2000). On remand, the district court, applying *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002), 26 MPDLR 73, held that Sheehan was not disabled, because there was no evidence that his hypertension rendered him unable to perform a broad range of jobs. *See* 2002 WL 389297 (D. Mass. Mar. 11, 2002), 26 MPDLR 486.

The First Circuit affirmed. Sheehan argued that his hypertension substantially limited his ability to work, and that the city regarded him as substantially limited. However, he failed to demonstrate that he was incapable of performing a broad class of jobs. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), 23 MPDLR 510. After his retirement from the city, Sheehan continued to work for 24-32 hours per week as a security guard. Although the city believed that Sheehan was incapable of performing his duties as a city police officer due to his hypertension and risk of a heart attack, Sheehan failed to show that it regarded him as unable to perform a broad range of jobs. *See Murphy.*

Sheehan also claimed that the district court's delay in rendering its decision and its application of *Toyota*, not *Murphy*, violated his constitutional rights. "A party simply does not suffer any legally cognizable injury when a court applies the intervening precedent of a higher court which decides an issue against that party." Sheehan did not offer any legitimate reason why *Toyota* should not be applied, nor did he dispute that *Toyota* was the "law in effect" at the time his case was decided. He did not distinguish *Toyota* in any substantive manner. As for Sheehan's argument that by applying *Toyota* the district court had *ex post facto* changed the definition and rights provided by the ADA, the court concluded: "It is well settled that the prohibitions against *ex post facto* laws apply only when the statute is criminal or is punitive in nature." This is not the case with the ADA.

Title I; Actual; Latex Allergy

An Illinois federal court held that an orthodontist who was allergic to latex was not disabled under the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-117. ***Kristofor v. Schnibben, 2003 WL 685819 (N.D. Ill. Feb. 26, 2003).***

In June 1996, Colleen Kristofor began working for Dr. Charles Schnibben, but was terminated in February 2001 for frequent absenteeism. Kristofor sued Schnibben under Title I.

The district court granted summary judgment for Schnibben on the ground that Kristofor's allergy was not a disability, as defined by the ADA. *See* 42 U.S.C. §12102(2); *see also Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002), 26 MPDLR 73. Kristofor's allergy precluded her from working in certain positions relating to the field of dentistry, but not from working in a broad class of jobs. Under the ADA, an individual is not substantially limited in working if he or she is unable to perform a specialized job or profession requiring extraordinary skill. *See Webb v. Clyde L. Choate Mental Health & Dev. Ctr.*, 230 F.3d 991, 998 (7th Cir. 2000), 25 MPDLR 73 (citing 29 C.F.R. §1630.2(j)). Moreover, Kristofor's allergy did not prevent her from engaging in major life activities, such as walking, seeing, or reproducing.

Employment: Medical Leave/Exams

FMLA; Sovereign Immunity; Money Damages; ADA Title II

The U.S. Supreme Court in a 6-3 decision—with five separate rationales presented—upheld the Family and Medical Leave Act, 29 U.S.C. §2612(a)(1)(C), as applied to the states, concluding that it did not violate Eleventh Amendment sovereign immunity in providing both monetary and equitable remedies to private individuals. The majority opinion, to which five justices subscribed (three of whom submitted a concurring opinion), reasoned that unlike discrimination based on disability or age, gender discrimination is entitled to heightened equal protection scrutiny. Thus, the FMLA, which addresses gender discrimination in a "narrowly targeted" way, is a congruent and proportional, congressional response under §5 of the Fourteenth Amendment. ***Nevada Dep't of Human Res. v. Hibbs, 2003 WL 21210426 (U.S. Sup. Ct. May 27, 2003).***

William Hibbs, a Nevada Department of Human Resources employee, requested leave under the FMLA to care for his sick wife. Under the act, each eligible employee is entitled to take up to 12 work weeks of unpaid leave annually for any of several reasons, including the onset of a spouse's "serious health condition." Hibbs' request was granted, but eventually he was informed that his leave had expired and that he had to return to work. When he failed to return, he was terminated. Hibbs brought suit in federal court, seeking money damages and equitable relief against the Department. The district court awarded the state defendants summary judgment on the ground that the Eleventh Amendment barred Hibbs' FMLA claim. The Ninth Circuit reversed, 273 F.3d 844 (9th Cir. 2001), 26 MPDLR 283 and the Supreme Court granted *certiorari* to resolve a split in the circuits.

Chief Justice Rehnquist, joined by Justices O'Connor, Souter, Ginsburg, and Breyer, noted that "for over a century" it has been clear that "the Constitution does not provide for federal jurisdiction over suits against nonconsenting States." However, that immunity