

Recent Cases:

The Americans with Disabilities Act

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VII. The Americans with Disabilities Act

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.

Note: This edition of Selected Developments summarizes decisions issued under the ADAAA. Please see previous editions for older ADA cases.

A. Definition of “Disability”

1. Actual Disability

a. Asthma

Kobler v. Illinois Dep't Human Servs., 2012 WL 5995836 (N.D. Ill. Nov. 30, 2012). The plaintiff, a registered nurse at a mental health facility, alleged that the defendants (several Illinois agencies and certain individuals in charge of those agencies) failed to provide a reasonable accommodation for her asthma, which is triggered by strong or offensive perfumes and other fragrances. In its motion to strike portions of the complaint, the defendants argued that the plaintiff's asthma is not substantially limiting if it is only triggered when she is exposed to a fragrance. To support their argument, the defendants cited several cases decided on motions for summary judgment holding that an intermittent flare-up is not enough to render a condition substantially limiting. Rejecting the defendants' argument, the court stated that it was difficult to assess the seriousness and frequency of a condition on a motion to dismiss where the complaint contained only a few short descriptions. The court also was persuaded by the plaintiff's argument that the cases cited by the defendants were decided before the ADAAA expanded the definition of disability and that courts applying the ADAAA have found episodic conditions to be covered if they would substantially limit a major life activity when active.

b. Back/Orthopedic Impairments

Rico v. Xcel Energy, Inc., 2012 WL 4466631 (D.N.M. Sept. 25, 2012). An apprentice utility lineman alleged that his employer failed to reassign him to a vacant position to accommodate medical restrictions that he not lift more than 60 pounds or climb utility poles, following back surgery. Denying the employer's motion to dismiss, the court rejected the employer's reliance on pre-ADAAA cases that held such limitations did not substantially limit any major life activities. Although the employer argued that the cited cases were “valid guidance” because they were not decided on the basic principles set forth in Toyota and Sutton, the court disagreed, stating that the express language of the ADAAA and its interpretative regulations “call into question the continued precedential value of pre-amendment cases, such as those cited by

Defendants, which well might have applied a higher degree of functional limitation than is now permissible under the statute to determine whether lifting restrictions are stringent enough to qualify an individual as disabled.”

Poper v. SCA Ams., Inc., 2012 WL 3288111 (E.D. Pa. Aug. 13, 2012). Granting summary judgment for the employer, the court held that the evidence failed to establish that the plaintiff’s back impairment, which he testified interfered with brushing his teeth, bending, and lifting “more than 30 pounds without really feeling a pain,” substantially limited a major life activity.

Lohf v. Great Plains Mfg., Inc., 2012 WL 2568170 (D. Kan. July 2, 2012). The plaintiff, who has spondylolisthesis, a low back condition, was restricted from frequent or repetitive lifting of more than 25 to 30 pounds, excessive stooping and bending, and prolonged sitting or standing. His employer accommodated these restrictions for a number of years by providing a stool and lifting assistance with certain heavy objects but later terminated him, citing a misconduct issue that the plaintiff alleged was a pretext for disability discrimination. While granting summary judgment to the employer on the merits, the court first ruled that the plaintiff had presented sufficient evidence to create a genuine issue of fact as to whether he was an individual with a disability, stating: “Under the ADA prior to the adoption of the ADAAA, plaintiff’s lifting restrictions may not have sufficed to establish him as disabled. . . . However, under the ADAAA, the definition of disabled has been expanded.”

Mills v. Temple Univ., 869 F. Supp. 2d 609 (E.D. Pa. 2012). A hospital clerical employee experienced pain and difficulty lifting and filing due to a work-related back injury and eventually was diagnosed with disc degeneration, bulging, and kyphosis. In its motion to dismiss the plaintiff’s complaint alleging discriminatory termination and denial of reasonable accommodation, the employer argued that her impairment was not substantially limiting because she continued to perform day-to-day activities such as caring for herself and her daughter, driving, shopping, attending classes, and commuting on the bus or train. Rejecting this argument, the court noted that during the relevant time, the plaintiff took intermittent leave for doctor’s appointments and to recover from epidural injections related to her condition, and although she continued to engage in daily activities and chores, she found them painful and exhausting. Based on the plaintiff’s own testimony that she was restricted from lifting anything weighing more than three pounds, that she consequently changed her manner of performing various activities, and that her doctor indicated on her FMLA application that she was unable to perform filing duties at work, the court held that under the expanded ADAAA definition of disability this evidence could be sufficient to show a substantial limitation in lifting. In reaching this conclusion, the court rejected the employer’s reliance on pre-ADAAA case law and noted that post-ADAAA cases had held lesser lifting restrictions to be substantially limiting.

Molina v. DSI Renal, Inc., 840 F. Supp. 2d 984 (W.D. Tex. 2012). In a case arising under a state antidiscrimination law that by its terms is intended to correlate with corresponding provisions of the ADA, a former certified medical assistant alleged that she was discriminated against based on her back impairments when her employer failed to provide her with a reasonable accommodation and subsequently terminated her. Denying the employer’s motion for summary judgment, the court held that a reasonable juror could find that the plaintiff’s impairments substantially limited her in various major life activities, including lifting and 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 the plaintiff was not disabled because her 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 the 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.

c. Blood Disorders

Johnson v. City of Chicago Health Dep't, 2013 WL 97479 (N.D. Ill. Jan. 4, 2013). A former health aide alleged that she was denied a reasonable accommodation and terminated because of her sickle cell anemia, which, at times, substantially limited her ability to walk and bend. Granting the city's motion to dismiss, the court held that although it was "undisputed" that the plaintiff has sickle cell anemia, "[t]he existence of a medical condition alone . . . does not prove disability under the ADA." The plaintiff testified that she had temporarily used a walker during her sickle cell episode, but she admitted that she could have done her job without using the walker and without accommodation. The court also relied on the doctor's note that the plaintiff submitted to support her request for reasonable accommodation, which indicated that she had "'gait instability,' with anticipated duration of six to nine months," in concluding that the plaintiff's "relatively short-term, temporary impairment, with no long term or permanent impact, [was] not substantially limiting and [did] not render [her] disabled under the ADA."

Thomas v. Bala Nursing & Ret. Ctr., 2012 WL 2581057 (E.D. Pa. July 3, 2012). The plaintiff, a nurse with anemia, alleged that she was substantially limited in standing, walking, concentrating, sleeping, and breathing, because her fatigue limited her ability to stand for a long period of time, caused shortness of breath or fast breathing when she walked quickly, and caused her to sleep for 12 hours a day and have difficulty walking. Denying the employer's motion for summary judgment on claims of discriminatory discharge and denial of accommodation, the court ruled: "We acknowledge Defendant's argument that occasional fatigue does not substantially limit a major life activity. The cases that Defendant cites as support, however, all take place before the ADAAA, and therefore apply a more rigorous interpretation of what counts as a 'substantial limitation.'"

LaPier v. Prince George's Cnty., Md., 2012 WL 1552780 (D. Md. Apr. 27, 2012). The plaintiff, who began training as a student officer at the county police department, passed out during a training run and was subsequently diagnosed with a blood disorder that causes anemia. After permitting the plaintiff to perform one week of light duty, the employer determined that he was unfit for duty and terminated him. The county moved to dismiss, arguing that the plaintiff had failed to allege a substantially limiting impairment. Denying the motion, the court found that it had previously erred in ruling that the ADAAA standard requires more than a "material restriction," 2011 WL 4501372 (D. Md. Sept. 27, 2011). "At a minimum, Plaintiff has suitably asserted that his blood disorder substantially limits the major life activities of breathing, respiration, and/or circulation Plaintiff alleges that he suffers from a chronic blood disorder

that, inter alia, causes decreased oxygen in the blood. Plaintiff maintains that he has experienced ‘bleeding events’ from his adolescence. Plaintiff further avers, and Defendants do not dispute, that Plaintiff lost consciousness during a training activity. In light of these allegations, it is plausible that Plaintiff’s blood disorder limits his ability to engage in major life activities (e.g., breathing) compared to most people in the general population. Anything less would make a mockery of the ADAAA’s mandate that “[t]he definition of disability . . . shall be construed in favor of broad coverage of individuals . . . to the maximum extent permitted”

d. Cancer/Abnormal Cell Growth

Coker v. Enhanced Senior Living, Inc., 2012 WL 4326429 (N.D. Ga. Sept. 18, 2012). Granting summary judgment in the plaintiff’s favor on the issue of disability coverage, the court held that the evidence was sufficient to establish as a matter of law that the plaintiff’s breast disease, which necessitated removal of non-cancerous masses, substantially limited a major life activity. In reaching this conclusion, the court relied on unrebutted affidavit testimony from the plaintiff’s treating physician that the disease was “the result of abnormal cell growth and abnormal endocrine and reproductive functioning.”

Unangst v. Dual Temp Co., 2012 WL 931130 (E.D. Pa. Mar. 19, 2012). The plaintiff was diagnosed with non-Hodgkin’s lymphoma, a form of cancer, and went on paid short-term disability leave during his chemotherapy treatment. After his doctor deemed him “cancer free” with no medical restrictions, the plaintiff returned to work but was terminated allegedly due to the economic downturn. Granting the employer’s motion for summary judgment on the merits, the court first ruled that the plaintiff could establish disability coverage, stating: “The ADA was clearly intended by Congress to protect cancer patients from disability discrimination.” The court further noted that the plaintiff had demonstrated that his chemotherapy treatment substantially limited his ability to perform major life activities, due largely to the fatigue and nausea he experienced. Finally, the court stated that “it is likely that Plaintiff’s cancer, while in remission at the time of the alleged adverse employment actions, would substantially limit a major life activity when active.” Nonetheless, the plaintiff could not prevail because the employer offered “considerable evidence” that the plaintiff’s termination was compelled by an economic downturn and the plaintiff failed to rebut this nondiscriminatory reason.

Katz v. Adecco USA, Inc., 845 F. Supp. 2d 539 (S.D.N.Y. 2012). Analyzing the case under the ADA and broader New York State Human Rights Law, the court held that there was a genuine issue of material fact as to whether the plaintiff, who was not hired after identifying herself to a recruiter as a breast cancer survivor, was an individual with a disability. In reaching this decision, the court cited the 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.

e. Carpal Tunnel

Muhammad v. Wal-Mart Stores E., L.P., 2012 WL 3201668 (W.D.N.Y. Aug. 2, 2012). A former deli stocker alleged that he was denied a reasonable accommodation and terminated because of his carpal tunnel syndrome, which, for a period of three weeks, prevented him from lifting more than 25 pounds and using his hands to perform repetitive tasks. Granting the defendant's motion for summary judgment, the court held that, as a matter of law, the plaintiff's restrictions did not substantially limit him in the major life activity of working.

f. Depression

Dentice v. Farmers Ins. Exch., 2012 WL 2504046 (E.D. Wis. June 28, 2012). A litigation attorney at an insurance company sought and obtained a medical leave of absence for what was later diagnosed as depression, general anxiety disorder, and panic disorder. After nine months, he returned to work and sought accommodations for these conditions, as well as carpal tunnel syndrome, and was subsequently terminated. The plaintiff alleged disability discrimination and denial of accommodation, contending that his impairments substantially limit him in major life activities "including, but not limited to, thinking, concentrating, learning, interacting and communicating with others, caring for oneself, eating, sleeping, performing manual tasks, and marital relations." Denying the employer's motion for summary judgment on the issue of coverage, the court cited the fact that the plaintiff's impairments required a nine-month absence from work, as well as continued medical treatment even after he returned, and evidence that the impairments "affected many facets of his life, including both his work and personal life."

Wright v. Stark Truss Co., 2012 WL 3029638 (D.S.C. May 10, 2012), adopted by 2012 WL 3039092 (D.S.C. July 24, 2012). After several months of periodically visiting doctors to diagnose a variety of physical symptoms including nausea, vomiting, and weight loss, a shipping supervisor/dispatcher began to experience depression and anxiety. During this time, he allegedly threatened his wife, threatened suicide, and was involuntarily committed to a behavioral health clinic for a 72-hour observation, following which he was released without restrictions. When he returned to work one week later, he was terminated. Denying the employer's motion for summary judgment, the court rejected the employer's argument that the plaintiff's impairment was "temporary" and therefore not "substantially limiting," holding that under the ADA's "episodic or in remission" rule, the evidence was sufficient to show that, when active, the plaintiff's depression and anxiety substantially limited him in sleeping, eating, thinking, and concentrating.

g. Flu

Lewis v. Florida Default Law Group, 25 A.D. Cas. (BNA) 204, 2011 WL 4527456 (M.D. Fla. Sept. 16, 2011). A former foreclosure specialist, who was fired when she returned to work after being absent for four days with flu-like symptoms, alleged that she was terminated because she had the H1N1 virus or was perceived as having the virus. According to the plaintiff, during the time she had the flu, she was bedridden, "physically drained," and dizzy and was unable to take care of her children, cook, run errands, or perform household chores. Although noting that the "ADA made clear that an impairment lasting or expecting to last fewer than six months can

be substantially limiting and qualify as a disability under the ADA,” the court held that the plaintiff’s symptoms, which were of short duration, were not “sufficiently severe” to substantially limit any major life activity. The plaintiff also argued that her flu should be treated as a disability because “[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.” Disagreeing, the court stated: “The flu (whether seasonal or H1N1) . . . is different from the more permanent – albeit episodic – conditions like cancer, epilepsy, asthma, bipolar disorder, schizophrenia, hypertension, diabetes, and post-traumatic stress disorder that this provision [29 C.F.R. §1630.2(j)(1)(vii)] was intended to include within the definition of disability.”

h. HIV Infection

Alexiadis v. New York Coll. of Health Professions, 891 F. Supp. 2d 418 (E.D.N.Y. 2012). In a case brought under Title I and Title III of the ADA, a college student alleged that he was discriminated against because of his human immunodeficiency virus (HIV) when he was arrested, suspended, and subsequently dismissed from the college for allegedly stealing hand sanitizer from a wall-mounted dispenser. Denying the defendant’s motion for summary judgment, the court held that a rational factfinder conceivably could conclude that the plaintiff’s evidence concerning his hospitalizations for Staph infections, difficulty recovering from injuries, and his T-cell levels was sufficient to show that his HIV-positive status substantially limits the major life activity of the function of the immune system.

i. Intellectual Disabilities

Moloney v. Home Depot U.S.A., Inc., 2012 WL 1957627 (May 31, 2012). A former sales associate alleged that the defendant failed to accommodate his intellectual disability and discriminatorily terminated him after 10 years. Denying the employer’s motion for summary judgment, the court held that a reasonable factfinder could conclude that the plaintiff was substantially limited in the major life activity of caring for himself based on evidence that he functions at the level of an 8-year-old, his reading skills are that of a 9-year-old, and his writing skills are that of a 7-year-old. In addition, the court cited evidence that the plaintiff’s disability originated long before the age of 18, and that he must rely on care provided by staff at his group home, as well as on support from his parents, to write checks, pay bills, and take care of other day-to-day responsibilities.

j. Kidney Disease

Mallard v. MV Transp., Inc., 2012 WL 642496 (D. Md. Feb. 27, 2012). Rejecting the employer’s reliance on pre-ADAAA case law, the court held that the plaintiff sufficiently alleged a disability, where he stated that he had chronic kidney disease necessitating regular dialysis treatment and that he “has not been able to urinate for the past 20 years.” The court concluded that this was sufficient to allege a substantially limiting impairment since the condition affects bladder function, which is now expressly listed with other major bodily functions in the ADA as a “major life activity.”

k. Pregnancy-Related Complications

Mayorga v. Alorica, Inc., 2012 WL 3043021 (S.D. Fla. July 25, 2012). A former customer service representative alleged that she was terminated based on her pregnancy, which caused her to have premature uterine contractions, an increased heart rate, severe morning sickness, severe back, bone, and abdominal pain, and other pregnancy-related complications. Noting that ADA regulations distinguish “between a healthy pregnancy and a pregnancy-related complication or condition that may qualify as an impairment,” the court held that the facts that the plaintiff’s baby was in a breech position and that she had significant pregnancy-related complications resulting in three emergency room admissions were “sufficient to state a plausible claim of discrimination based on an actual disability under the ADA.”

l. Stroke

Azzam v. Baptist Healthcare Affiliates, Inc., 855 F. Supp. 2d 653 (W.D. Ky. 2012). The plaintiff, a surgical registered nurse, alleged that she was discriminated against based on her stroke when her employer failed to accommodate her restrictions and terminated her. While on vacation, the plaintiff was admitted to the emergency room complaining of “stroke-like” symptoms and was diagnosed with a “probable transient ischemic attack.” The plaintiff’s discharge summary concluded that “[h]er right-sided weakness ha[d] completely resolved, however, she continue[d] to have residual expressive aphasia which need[ed] continuation of outpatient speech therapy . . . and follow up with her primary M.D.” When the plaintiff returned home, she saw her cardiologist, who insisted she see a neurologist before releasing her to return to work without restrictions. After two months of FMLA leave, the plaintiff was cleared to work light duty four hours per day, five days per week, with no nights or weekends (“call” duty), and she 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. Granting the defendant’s motion for summary judgment, the court ruled that there was no evidence to support the 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 the 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.

m. Vision Impairments

Hill v. Southeastern Freight Lines, Inc., 2012 WL 2564903 (M.D.N.C. July 2, 2012), aff’d on other grounds, 2013 WL 1502028 (4th Cir. Apr. 15, 2013) (unpublished). A pick-up and delivery driver with glaucoma alleged that he could not accept the line haul position he was offered in lieu of termination because it was medically inadvisable for him to drive at night. Granting summary judgment for the employer on the plaintiff’s discriminatory termination claim, the court held that the plaintiff could not show that he was substantially limited in the major life activity of working because he still could perform many other driving positions. The court further held that the plaintiff could not show that he was substantially limited in seeing

because there was no evidence regarding his visual acuity, and the evidence submitted indicated he could drive with glasses, read without glasses, and perform other activities.

Knutson v. Schwann's Home Servs., Inc., 870 F. Supp. 2d 865 (D. Minn. 2012), aff'd on other grounds, 2013 WL 1316314 (8th Cir. Apr. 3, 2013). Granting summary judgment for the employer, the court held that the plaintiff could not show that his monocular vision rendered him substantially limited in seeing under the ADAAA standard. Despite evidence that the plaintiff cannot wear corrective lenses because they cause double vision and has anywhere from 20/150 to 20/80 vision in his left eye, the court held that no reasonable jury could find that he was substantially limited in seeing compared to others because his "overall vision is excellent," there was no evidence that he lacks depth perception, and he continues to drive.

n. Other Impairments

Howard v. Steris Corp., 2012 WL 3561965 (M.D. Ala. Aug. 17, 2012). An assembly line worker alleged that he was discriminated against based on his disability (obstructive sleep apnea and Graves' disease) when he was denied an accommodation and terminated for sleeping on the job. Prior to ruling on the merits in the employer's favor because it had no knowledge of the plaintiff's disability, the court noted that, "for better or worse," the expanded list of major life activities "makes a person afflicted with a common, minor condition 'just as disabled as a wheelchair-bound paraplegic – if only for the purposes of disability law.'" Thus, based on the plaintiff's doctors' testimony that the plaintiff's sleep apnea interfered with his ability to sleep and that Graves' disease also can cause difficulty sleeping, the court held that a reasonable jury could conclude that the plaintiff's impairments substantially limited his ability to sleep.

Pearce-Mato v. Shinseki, 2012 WL 2116533 (W.D. Pa. June 11, 2012). A medical center nurse had vocal cord edema brought on by mercury toxicity which, when active, made speaking difficult and painful and intermittently required her to use an electro larynx device while working to vocalize sounds. Denying the employer's motion for summary judgment on the plaintiff's claim of discriminatory discharge and denial of reasonable accommodation, the court ruled that she could be substantially limited in speaking, stating that "[t]he fact that the periods during which an episodic impairment is active and substantially limits a major life activity may be brief or occur infrequently is no longer relevant to determining whether the impairment substantially limits a major life activity."

Brtalik v. South Huntington Union Free Sch. Dist., 2012 WL 748748 (E.D.N.Y. Mar. 8, 2012). Granting summary judgment to the employer on the issue of whether the plaintiff's colonoscopy/polypectomy, which resulted in a two-week light duty medical restriction, was a substantially limiting impairment, the court stated: "[The plaintiff's] attempt to characterize a routine, diagnostic, out-patient procedure, or any related minor discomfort, as a disability within the meaning of the ADA is simply absurd."

Overfield v. H.B. Magruder Mem'l Hosp., Inc., 2012 WL 243341 (N.D. Ohio Jan. 25, 2012). A nurse was on medical leave for a hysterectomy when she developed another medical condition that restricted her from lifting more than 10 pounds with her left arm for 4 to 6 weeks and, thereafter, "had to be careful" with the arm. Granting summary judgment for the employer on

disability coverage, the court, citing the various activities in which the plaintiff could engage, held that she failed to submit sufficient evidence that she was substantially limited in any major life activity.

Klute v. Shinseki, 840 F. Supp. 2d 209 (D.D.C. 2012). The plaintiff, a federal government attorney, alleged that he was denied a reasonable accommodation for his disability (“adjustment disorder” with mixed anxiety and depression) during a period that spanned both before and after the effective date of the ADAAA. Granting summary judgment for the agency, the court determined that, even assuming the ADAAA standards apply, the 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.

2. “Regarded as” Coverage

a. “Regarded as” Coverage Not Satisfied

(1) Action Not Taken “Because of” Impairment

Wurzel v. Whirlpool Corp., 2012 WL 1449683 (6th Cir. Apr. 27, 2012) (unpublished), cert. denied, 133 S. Ct. 339 (2012). Granting summary judgment to the employer, the district court ruled that the plaintiff, a materials handler with Prinzmetal angina who was transferred and then placed on involuntary leave, was not subjected to an action prohibited under the ADA “because of” an actual or perceived physical or mental impairment, since the employer’s decision was motivated by concerns about safety. Affirming on appeal, the Sixth Circuit noted that the EEOC had filed an amicus brief (<http://www.eeoc.gov/eeoc/litigation/briefs/wurzel.txt>) disputing the district court’s ADAAA “regarded as” analysis; however, the Sixth Circuit held that it was unnecessary to address the issue of whether the plaintiff was regarded as an individual with a disability because, even if he was, he posed a direct threat to safety.

Nayak v. St. Vincent Hosp. & Health Care Ctr., Inc., 2013 WL 121838 (S.D. Ind. Jan. 9, 2013). The plaintiff, a third-year medical resident, was not renewed, following a seven-month absence for pregnancy-related and post-partum complications. A letter sent by the Residency Program Director indicated that the plaintiff’s medical residency contract was not renewed “[d]ue to medically complicated pregnancy and significant concerns regarding her academic progress.” While concluding that the plaintiff’s impairments could plausibly be found to substantially limit a major life activity and thus allowing her to proceed with a disability discrimination claim under prong 1, the court granted the employer’s motion to dismiss any claim based on “regarded as” coverage, concluding that the ADA does not permit “mixed motive” claims, and therefore a termination because of both an impairment and problems with academic progress could not meet the “but-for” causation standard required to find that the termination was “because of” disability.

Bellamy v. General Dynamics Corp., 2012 WL 1987171 (D. Conn. June 4, 2012). The plaintiff, a plant foreman, was terminated for alleged violations of the company’s workplace violence policy following an altercation with a coworker. Granting summary judgment for the employer on the plaintiff’s ADA discrimination claim that the real motivation for his termination was his heart attack ten months earlier, the court ruled that the plaintiff could not show that his

termination was “because of” a perceived impairment so as to establish “regarded as” coverage, given that he had conceded that his assertion that his heart attack had played a role in the discharge decision was “merely speculation.”

Jenkins v. Medical Labs. of E. Iowa, 880 F. Supp. 2d 946 (N.D. Iowa 2012), aff’d, 2013 WL 1799851 (8th Cir. Apr. 30, 2013) (summary affirmance). The plaintiff could not show she was “regarded as” an individual with a disability when she was terminated for refusal to attend the EAP program as directed by her employer. Granting summary judgment for the employer, the court ruled that employer-required EAP counseling was not an “action prohibited by” the ADA, nor was there evidence to support the plaintiff’s contention that she was sent to EAP because of a perceived mental impairment.

Sibilla v. Follett Corp., 2012 WL 1077655 (E.D.N.Y. Mar. 30, 2012). The plaintiffs, book store employees who weighed 271 pounds and “in excess of 400 pounds,” alleged that they were discriminated against based on perceived disability when they were hired for lower-paying positions after being interviewed by the new management. Granting summary judgment to the employer on the plaintiffs’ ADA claims, the court held that the plaintiffs could not establish “regarded as” coverage because “even after the passage of the ADAAA,” the “fact that an employer regards an employee as obese or overweight does not necessarily mean that the employer regards the employee as suffering a physical impairment.”

Becker v. Elmwood, 2012 WL 13569 (N.D. Ohio Jan. 4, 2012), aff’d, 2013 WL 1859153 (6th Cir. May 3, 2013). 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, finding that the 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 that, for “regarded as” coverage, the employer have perceived the employee to have had an impairment that substantially limits a major life activity, and ruled instead that “[t]he ADA now includes perceived disabilities ‘whether or not the impairment limits or is perceived to limit a major life activity.’”

Dube v. Texas Health & Human Servs. Comm’n, 2012 WL 2397566 (W.D. Tex. June 25, 2012). The plaintiff alleged that she was discriminated against when she was discharged rather than granted additional leave after having taken an 11-week absence from work for treatment and recuperation from lumbago with facet arthritis. The plaintiff asserted that she was proceeding only under the “regarded as” prong of coverage (and therefore was not entitled to accommodation), yet argued that the employer should have granted her additional leave until she was medically cleared to return to work. Granting summary judgment for the employer, the court ruled that the plaintiff had merely relied on her subjective belief and conclusory statements that she was regarded as disabled.

Harris v. Reston Hosp. Ctr., 2012 WL 1080990 (E.D. Va. Mar. 26, 2012), aff’d, 2013 WL 1749538 (4th Cir. Apr. 24, 2013) (table). Granting summary judgment to the employer on the plaintiff’s claim that she was terminated based on perceived alcoholism or drug addiction, the court held that the plaintiff had not established “regarded as” coverage. The statement by the

plaintiff's supervisor "you're drunk," observations of the plaintiff's being impaired at work, and knowledge that the plaintiff had previously gone to a rehabilitation facility to be treated for depression and a suicide attempt were insufficient to show that management perceived the plaintiff as having an impairment.

(2) Impairment Was "Transitory and Minor"

Selkow v. 7-Eleven, Inc., 115 Fair Empl. Prac. Cas. (BNA) 455, 2012 WL 2054872 (M.D. Fla. June 7, 2012). The plaintiff experienced a weakened back during pregnancy, preventing her from performing heavy lifting at work beginning with the fifth month of her pregnancy. Granting summary judgment for the employer on the plaintiff's ADA discrimination claim, the court ruled that the condition was "transitory" because it "could not possibly last another six months from the time the impairment began," and therefore could not be the basis for "regarded as" coverage. The court did not address whether the condition was also minor. See also Sam-Sekur v. Whitmore Group, Ltd., 2012 WL 2244325 (E.D.N.Y. June 15, 2012) (employer's motion to dismiss granted on plaintiff's ADA claims of discrimination based on pregnancy-related medical conditions).

Robuck v. American Axle & Mfg., 2012 WL 6151988 (W.D. Mich. Dec. 11, 2012). The plaintiff, a new employee at a manufacturing facility, was terminated one day before the expiration of his probationary period and three weeks after his employer learned (due to a workplace accident in which he injured his toe) that he was on strong prescription medications for seizure disorder and chronic pain from a prior back injury. Granting summary judgment for the employer on an ADA disparate treatment claim of discriminatory discharge, the court ruled that the mere fact that several management-level employees knew of the plaintiff's conditions and medication did not establish "regarded as" coverage. In addition, the prior back injury at issue was "transitory and minor." Evidence showed that the plaintiff's earlier 2002 back injury was not chronic, that he was pain-free in 2009, prior to the accident at issue, and that after emergency room treatment for the toe injury, he returned to work the same day without restrictions.

Zurenda v. Cardiology Assocs., P.C., 2012 WL 1801740 (N.D.N.Y. May 16, 2012). The plaintiff, a file clerk/receptionist, alleged that she was terminated based on her six-week leave for a knee injury requiring surgery, her planned additional future surgery, and her past medical leaves for other conditions. Granting summary judgment for the employer, the court found that the plaintiff could not establish that she was "regarded as" an individual with a disability. Although a combination of medical conditions would completely limit the plaintiff's ability to work after her termination, the employer could not have known at the time of termination that the knee impairment was not "transitory and minor." See also Koller v. Riley Riper Hollin & Colagreco, 2012 WL 628009 (E.D. Pa. Feb. 28, 2012) (knee injury (torn ACL) not basis for "regarded as" coverage).

Risco v. McHugh, 868 F. Supp. 2d 75 (S.D.N.Y. 2012). The plaintiff, a probationary guidance counselor intern for the Department of the Army, alleged that she was unlawfully terminated based on disability. Noting that the plaintiff's immediate supervisor testified during the agency EEO investigation that he did not perceive the plaintiff as having an actual mental illness, the

court concluded that she was not “regarded as” an individual with a disability. “Even under the expanded definition of disability set forth in the ADA Amendments Act . . . , Risco’s assertions that [her supervisor] referred to her inability to do a task as a ‘mental thing’ and described her inappropriate behavior as ‘erratic’ . . . do not demonstrate that [the supervisor] regarded Risco as having a mental impairment within the meaning of the statute.”

Zick v. Waterfront Comm’n of N.Y. Harbor, 2012 WL 4785703 (S.D.N.Y. Oct. 4, 2012). The plaintiff, an attorney for a state commission, sustained two broken bones in her right leg requiring a cast and use of crutches, and her doctor recommended that she telework for eight to ten weeks and keep her right leg elevated. The request was granted after having been denied initially, but the plaintiff alleged that during the period when she was teleworking she was unfairly reprimanded, excluded from meetings and phone conferences, and told by coworkers that the executive director did not want her to return. When she subsequently met with him about returning to work, she resigned under threat of termination after having been advised that she had been observed running errands when she had purportedly been working from home. Holding that the plaintiff was not regarded as an individual with a disability, the court ruled that a broken leg with an expected duration of eight to ten weeks was transitory or minor and therefore not covered. (Note: the court did not address whether the plaintiff’s injury was transitory and minor, as required by the ADAAA.)

Hohenstein v. City of Glenpool, 2012 WL 1886510 (N.D. Okla. May 23, 2012). The plaintiff, a public safety dispatcher/jailer, alleged that she was discriminated against based on perceived disability in violation of the ADA when she was terminated following expiration of her FMLA leave for back surgery. Granting summary judgment for the employer, the court ruled that there was insufficient evidence that the employer perceived her impairment to be more than transitory.

b. “Regarded as” Coverage Satisfied

Hilton v. Wright, 673 F.3d 120 (2d Cir. 2012). The plaintiff, a state prison inmate, sued under Title II of the ADA alleging that state prison officials discriminated against him based on the perceived disability of prior drug addiction by conditioning his treatment for Hepatitis C on participation in a substance abuse program. Although the case arose prior to the effective date of the Amendments Act, the court applied the amended definition of “regarded as” and found that coverage could be established. The court noted that “under the old regime” pre-Amendments Act, the plaintiff “could survive summary judgment on his ADA claim only if he could raise a genuine issue of material fact about whether [prison officials] regarded him personally as being substantially limited in a major life activity. The record is devoid of any such evidence.” However, in light of the amendments, “he was only required to raise a genuine issue of material fact about whether [officials] regarded him as having a mental or physical impairment. Hilton was not required to present evidence of how or to what degree they believed the impairment affected him.”

Stahly v. South Bend Transp. Corp., 2013 WL 55830 (N.D. Ind. Jan. 3, 2013). The plaintiff, a bus driver, challenged her termination on various grounds, including perceived disability. Denying the employer’s motion for summary judgment on coverage, the court rejected the employer’s reliance on pre-ADAAA case law, ruling that it could be concluded that the

termination was “because of” a perceived impairment, given that management knew that the plaintiff was taking medication and suffered an anxiety attack for which she was admitted to an emergency room, that she took FMLA leave, and that she was referred by the employee assistance program to a stress recovery center.

LaPier v. Prince George’s Cnty., Md., 2013 WL 497971 (D. Md. Feb. 7, 2013). The plaintiff, a student police officer, alleged that the county discriminated against him when it deemed him physically unfit for duty because of his blood disorder. Although granting the employer’s motion for summary judgment on the merits because the plaintiff was held not to be qualified, the court ruled as a preliminary matter that a reasonable juror could conclude that he was regarded as an individual with a disability, because the employer had medical documentation of his blood disorder and relied on it in concluding that he was unfit for duty. See also LaPier v. Prince George’s Cnty., Md., 2012 WL 1552780 (D. Md. Apr. 27, 2012).

Kiniropoulos v. Northampton Cnty. Child Welfare Serv., 2013 WL 140109 (E.D. Pa. Jan. 11, 2013). The same month that the plaintiff, a county child welfare caseworker, notified his employer of limitations due to a leg injury and requested FMLA leave, he was suspended and subsequently terminated for alleged infractions and misconduct. While granting the employer’s motion to dismiss the plaintiff’s ADA claim on the grounds that he was not “qualified,” the court first ruled that his allegations were sufficient for purposes of “regarded as” coverage. Although the plaintiff did not expressly allege that his injury would last six or more months, it was not apparent on the face of the pleadings that it would not. Moreover, case law permits an inference that an employer’s action was based on disability where there is temporal proximity between the action and the time that the employer learned of the employee’s medical condition.

Wright v. Hyundai Motor Mfg. Ala. L.L.C., 2012 WL 2814153 (M.D. Ala. July 10, 2102). The plaintiff, who held a variety of different weld shop positions, took FMLA leave to undergo surgery after being diagnosed with impingement syndrome of the right shoulder, and after returning to work, he injured his elbow, left shoulder, and right knee. He alleged that, after each injury, the employer refused to allow him to return to work, despite his medical clearance, because he had work restrictions, and he was eventually terminated. Partially denying summary judgment for the employer, the court found that this evidence could be sufficient to show “regarded as” coverage, i.e., that the plaintiff was subjected to an action prohibited by the ADA because of an actual or perceived impairment.

Barlow v. Walgreen, 2012 WL 868807 (M.D. Fla. Mar. 14, 2012). Denying summary judgment for the employer, the court held that the plaintiff, who had several back impairments and related restrictions, might be able to show that she was “regarded as” an individual with a disability, because she presented evidence that a manager specifically told her that she could no longer work for Walgreen because she was disabled and, therefore, was a liability to the company.

Harty v. City of Sanford, 2012 WL 3243282 (M.D. Fla. Aug. 8, 2012). The plaintiff was hired as a welder but was quickly promoted to a “working foreman” position, in which he was required to be able to perform, as needed, any task that his crew members ordinarily performed. After an on-the-job injury and a period of light duty, he was terminated because of continuing medical

restrictions. The court held that he was “regarded as an individual with a disability because he was asked to resign due to his restrictions.”

Snyder v. Livingston, 2012 WL 1493863 (N.D. Ind. Apr. 27, 2012). The plaintiff alleged that because of a perceived mental impairment, she was demoted, which led to her transfer and eventual resignation from her job at a hearing center run by the defendants. Denying the defendants’ motion for summary judgment on the issue of whether the plaintiff could show that she was regarded as an individual with a disability, the court held that “under the amended, more expansive version of the ADA,” the defendants could not rely on pre-ADAAA case law holding that calling a plaintiff an impairment-related epithet was insufficient to establish “regarded as” coverage. Under the new regulations, a court is “not supposed to engage in an extensive analysis” of whether a plaintiff is disabled under the ADA and instead should focus on whether the defendant has complied with its obligations and whether discrimination has occurred. In this case, there was sufficient evidence to create a factual dispute as to whether the defendants regarded the plaintiff as disabled, including evidence that the plaintiff’s supervisor said that the plaintiff was “unstable” and repeated that comment.

Barnes v. Metropolitan Mgmt. Group, L.L.C., 2012 WL 1552799 (D. Md. Apr. 27, 2012). The plaintiff, a maintenance technician, alleged that she was terminated because of her lower lumbar back sprain, which caused her to miss work for over a month. Denying the employer’s motion to dismiss, the court held that, as described in the complaint, the impairment did not fall within the “transitory and minor” exception to “regarded as” coverage. “Considering the ADAAA’s remedial purposes, a physical impairment that allegedly prevents someone from performing a major life activity for well over a month plausibly states that the condition is greater than minor.”

McNamee v. Freeman Decorating Servs., Inc., 2012 WL 1142710 (D. Nev. Apr. 4, 2012). Denying the employer’s motion for summary judgment on the plaintiff’s claim that he was discriminated against when he was not rehired because of a serious workplace injury, the court found that a manager’s comments were sufficient evidence to show that the action was taken because of the impairment, and therefore “regarded as” coverage could be established. The manager’s comments included: “It’s Freeman’s policy not to take people back after they’ve gone through a workman’s comp thing like you” and “You cost Freeman a lot of money.”

Walker v. Venetian Casino Resort, 2012 WL 4794149 (D. Nev. Oct. 9, 2012). A reasonable jury could conclude that the plaintiff was “regarded as” disabled under the ADAAA standard based on evidence that the employer “knew of her disability in the form of communications between [the employer] and [the plaintiff’s] physician,” as well as e-mails exchanged among the employer’s employees discussing the plaintiff’s inability to work.

Davis v. NYC Dep’t of Educ., 2012 WL 139255 (E.D.N.Y. Jan. 18, 2012). The 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 that allegations in the complaint that the plaintiff was “regarded as” disabled during a period when she was on unpaid disability leave were

sufficient. Although the plaintiff's three-month disability period appeared to have been "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.

Wells v. Cincinnati Children's Hosp. Med. Ctr., 25 A.D. Cas. (BNA) 1498, 2012 WL 510913 (S.D. Ohio Feb. 15, 2012). The plaintiff, a hospital nurse who worked in the "critical airway unit" from 2003 to 2009, 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, the plaintiff exhibited instances of erratic behavior in the workplace, including going to the wrong room to start an IV, providing "a jumbled and confused" end-of-shift report, 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. Thereafter, she 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" and in denying her a reasonable accommodation. Denying the hospital's motion for summary judgment, the court found that a reasonable juror could conclude that the plaintiff was "regarded as" an individual with a disability, because she was subjected to an 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 a plaintiff "no longer is required to prove that the employer regarded her impairment as substantially limiting a major life activity." Although both parties had used the burden-shifting analysis under McDonnell Douglas in arguing whether the adverse action was "because of" the plaintiff's perceived impairment, the court held that the hospital's stated reason for not reinstating the plaintiff to the unit – fear she would repeat her past errors or revert to past behaviors – constituted direct evidence that the failure to reinstate was because of the plaintiff's actual or perceived impairment. The remaining issue on the merits of the unit reinstatement claim was whether the 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 that the plaintiff was not entitled to accommodation because she was only proceeding under the "regarded as" prong of the definition of disability.

Hoback v. City of Chattanooga, 2012 WL 3834828 (E.D. Tenn. Sept. 4, 2012). After the plaintiff's National Guard unit was activated and he was deployed to Iraq, he resumed his duties as a police officer. Several years later, the city terminated him after concluding based on a fitness-for-duty psychological evaluation that he could not perform his job safely due to this PTSD. After the plaintiff prevailed at trial on his ADA discriminatory termination claim, the employer moved to set aside the verdict, arguing that the plaintiff was not "regarded as" an individual with a disability, and even if he was, his termination was justified. The court held that, as to the first step in the analysis, terminating someone because of his medical condition constitutes "regarding" the employee as an individual with a disability. The court rejected the employer's argument that it only regarded the plaintiff as incapable of performing the functions

of a police officer, not as substantially limited in any major life activity. “This argument would have been convincing, and perhaps determinative, if the relevant events in the case occurred before January 1, 2009. However, because the events occurred after January 1, 2009, the ADAAA applies to the city’s conduct. . . . A plaintiff must only show that he was ‘subjected to an action prohibited under [the ADA] because of an actual or perceived physical or mental impairment whether or not the impairment limits a major life activity.’” Since a reasonable jury could conclude, and the city even conceded, that the plaintiff was terminated because evaluations indicated he was unfit due to his PTSD, he was “regarded as” an individual with a disability. Turning then to the merits of whether the termination was nevertheless justified due to direct threat to safety, the court upheld the jury’s verdict in the plaintiff’s favor based on testimony by the decisionmaker that he did not consider a second evaluation and on other evidence supporting the conclusion that the plaintiff was fit for duty.

Saley v. Caney Fork, L.L.C., 2012 WL 3286060 (M.D. Tenn. Aug. 10, 2012). The plaintiff, a restaurant manager, was terminated approximately 10 days after having been granted a three-day restriction on lifting more than 10 pounds following an outpatient medical test (liver biopsy) related to his hemochromatosis (a life-threatening disorder of the iron metabolism for which he intermittently underwent phlebotomy treatments during which his blood was drained to lower iron levels). Denying the employer’s motion for summary judgment, the court held that neither the actual impairment nor the perceived condition was “transitory and minor,” given that the employer told the plaintiff’s coworkers that he was fired due to his health problems. The employer also argued that it only knew that the plaintiff had had an outpatient procedure but knew nothing of his diagnosis or prior medical history, and therefore had insufficient knowledge of the impairment to have acted “because of” it and thus “regarded” plaintiff as an individual with a disability. The court found that there was conflicting testimony on this point that precluded summary judgment, given the plaintiff’s testimony that he discussed with the employer that he had been diagnosed with “iron overload,” and had discussed its effects, his liver biopsy, his abnormal blood-iron levels, the potential for his condition to “do damage to the organs,” his restrictions, and the prescribed treatments.

Davis v. Vermont Dep’t of Corr., 868 F. Supp. 2d 313 (D. Vt. 2012). The plaintiff alleged that he was subjected to disability harassment resulting from his hernia condition and surgery. The employer moved to dismiss the complaint on the grounds that the condition was “transitory and minor,” and thus could not form the basis for “regarded as” coverage. Denying the motion, the court held that, given the duration of the alleged harassment, it appeared that the perceived impairment lasted longer than six months. In addition, the defendant could not show from the face of the complaint that the impairment was minor.

B. Definition of “Qualified Individual with a Disability”

1. Essential Functions

a. Employer Judgment

Jones v. Nationwide Life Ins. Co., 696 F.3d 78 (1st Cir. 2012). Affirming summary judgment for the employer, the court held that multiple statements and actions by the employer made clear

that having a registered investment advisor license was an essential function for a sales director. The employer notified the sales staff, including the plaintiff, in February and March 2006 that it would begin offering a new product that would require them to obtain a particular license in order to sell and service the product. Ultimately, the employees had until December 31, 2008, to obtain a license or be transferred or terminated. During this period, the plaintiff had five surgeries and missed nine weeks of work, but he did not raise his medical condition or the need for accommodation until after he had failed the licensing test for a fourth time in late December 2008 and the company terminated him. The court found that sometime between March 2006 and December 2007 the employer made clear that having the license was a job requirement and that failure to obtain one would result in transfer or termination. All other employees in the same position as the plaintiff obtained the license. Although the plaintiff's replacement did not have a license when hired, he was required to obtain one and passed the test at the first opportunity, which was before the plaintiff would have been eligible to take the examination for a fifth time. Finally, the court rejected the plaintiff's argument that since the rest of his team had the license and had strong sales for the product, it was not an essential function for him to have the license. The fact that a function is performed by others does not make it non-essential for a specific employee. Moreover, evidence showed that the plaintiff's supervisor had to perform some of his job functions because the plaintiff lacked a license, such as overseeing and assisting team members who were selling the new product and discussing the product with some of the plaintiff's clients.

Rosebrough v. Buckeye Valley High Sch., 690 F.3d 427 (6th Cir. 2012). Reversing summary judgment for the employer, the court held that having a commercial driver's license was not an essential function of a bus driver trainee. The court acknowledged that having such a license would be an essential function for a bus driver, but at the time of the alleged discrimination the plaintiff had only been accepted for training required to obtain a commercial driver's license and to become a bus driver. Although the employer did not state the essential functions of the plaintiff's training position, it conceded that the plaintiff was qualified to be a trainee and that she was in fact obtaining the training.

EEOC v. Picture People, Inc., 684 F.3d 981 (10th Cir. 2012). Affirming summary judgment for the employer, the court held that verbal communication was an essential function for a "performer" in a photography studio, which required doing customer intake, sales, laboratory work, and photography. The employer hired a profoundly deaf individual, Jessica Chrysler, who mainly communicated through writing notes, gesturing, and miming because she could not read lips and had limited ability to speak. The employer testified that performers must verbally communicate with customers, many of whom are young children; that it was impractical to use notes and gestures when photographing clients because of the inability to develop a rapport with the children and parents, the short attention span of most subjects, and interruption to the flow of the session; and that photography sessions were scheduled for 20 minutes and use of notes and gestures prolonged the sessions. The court noted that lack of verbal skills impeded Chrysler's ability to instruct young children she was photographing, to efficiently register and recruit customers, and to sell photo packages by addressing customer concerns. In contrast, a former performer who was deaf was able to speak and to effectively read lips, and she therefore had a sufficient level of verbal skills to perform her job duties. No evidence supported a finding that written notes, gestures and miming were as effective and efficient as having verbal skills.

Finally, the employer's business model often required scheduling only two employees to work, making it impossible to reassign so many duties that require verbal communication. Since verbal communication was an essential function, the employer was not required to eliminate this function and permit non-verbal means of communication, because such an action would not have been a reasonable accommodation under the ADA. One dissenting judge concluded that, applying proper summary judgment standards, there was sufficient record evidence from which to conclude that verbal communication was not an essential function of the job, but a means of carrying out essential functions, and that Chrysler was able to work effectively in the performer position. For example, Chrysler had conducted 15 to 20 photo shoots (some on her own and some with other employees present) without any indication that her communication skills were inefficient or caused the sessions to take longer; she had made a "huge sale" to a family that ended up purchasing more pictures than it had planned and asked to work with her on a subsequent photo shoot; and her rehabilitation counselor and a vocational expert testified that she could work effectively in the performer position using alternative means of communication.

b. Limited Number of Employees

Robert v. Board of Cnty. Comm'rs, 691 F.3d 1211 (10th Cir. 2012). Affirming summary judgment for the employer, the court held that the ability to make site visits, as part of supervising released felony offenders, was an essential function. In 2004 and 2005 to 2006, the plaintiff took extended medical leave. Initially, she needed surgery for sacroiliac joint dysfunction and had to be excused from site visits for several months. During this period colleagues in the small office assumed the site visits, with the increased workload leading to strain and the resignation of one employee. Colleagues handled the plaintiff's site visits again for more than four months in late 2005, after the plaintiff fell down stairs at work and required more surgery to address her disability. The court stated that the employer's judgment of the necessity of these visits, as well as the job description, established that such visits were a critical component of a job in which the objective is to minimize recidivism, facilitate reentry into society, and protect the community. While the plaintiff contested the employer's claim that site visits accounted for 50% of the time spent performing the job, she conceded that she spent 25% of her time on site visits. In addition, citing the EEOC regulations, the court noted the limited number of employees available to perform the plaintiff's site visits for an extended period. The court rejected the plaintiff's argument that because the employer permitted her to forgo performing site visits, they could not be an essential function. An employer's decision to temporarily permit an employee to avoid performing an essential function because of a disability cannot be used as evidence that the function is non-essential, because that would punish an employer for going beyond the ADA's minimum standards.

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

Jones v. Walgreen Co., 679 F.3d 9 (1st Cir. 2012). Affirming summary judgment for the employer, the court concluded that a permanent knee injury prevented the plaintiff from performing physical tasks required as part of the essential functions of her store manager position. The court found that two requirements listed in the job description – maintaining the condition of the store and implementing guidelines on display of merchandise – encompassed

spending an appreciable amount of time performing physical tasks limited by the plaintiff's knee injury. The plaintiff admitted that before her injury she routinely inspected the sales floor, assisted customers, cleaned and restocked shelves, unloaded delivery trucks, and used a ladder to reach high shelves. Her supervisor added that a store manager, in addition to conducting daily walkthroughs of the store that could take over an hour, had to sweep floors, clean bathrooms, pull stock, and erect display and shelving areas. Two other store managers noted that they spent a lot of time on the sales floor, one saying he spent over six hours a day and another saying she spent two to three hours doing her daily walkthrough. The court stated that the plaintiff's performance review, which was done five months before the employer knew that her work restrictions were permanent, was immaterial to establishing the essential functions. Any modifications made to the job when the employer believed the restrictions were temporary did not dictate the position's essential functions. Furthermore, the fact that certain duties could be delegated to a subordinate did not, alone, render them non-essential.

d. Multiple Factors Considered

Majors v. Gen. Elec. Co., 714 F.3d 527 (7th Cir. 2013). Plaintiff sued defendant under the ADA when she was denied a job as a purchased materials auditor at one of defendant's plants that manufactured refrigerators, even though she was the most senior employee who bid on the position. Affirming summary judgment in favor of the defendant, the court concluded that plaintiff's permanent 20-pound lifting restriction rendered her not qualified for the position. In determining that intermittent movement of heavy objects was an essential function of the job, the court looked to the employer's judgment, the written job description, the time spent performing the function, and the experience of others who worked in the job. A company nurse who initially concluded that plaintiff was not qualified for the job due to her lifting restriction consulted with a labor relations manager and an ergonomic specialist, who weighed objects that employees in the auditor position were expected to lift. The nurse, the labor relations manager, and the ergonomic specialist also spoke with one of the auditors and a supervisor who confirmed that moving objects weighing more than 20 pound was an essential function of the position. The only accommodation plaintiff proposed – having a materials handler move objects weighing more than 20 pounds – was not a reasonable accommodation, since it would have required someone else to perform an essential function of the job.

Knutson v. Schwann's Home Service, Inc., 711 F.3d 911 (8th Cir. 2013). Plaintiff, a depot general manager was not qualified because driving commercial motor vehicles weighing more than 10,000 pounds was an essential function of his job and he did not meet Department of Transportation requirements for driving such vehicles due to his monocular vision. Plaintiff argued driving delivery trucks was not an essential function of his job. The court disagreed, relying on Eighth Circuit precedent that had concluded that driving delivery trucks was an essential function of the general manager's job (previously called a sales manager), as well as considerations such as the employer's judgment, the written job description and the written terms of the offer plaintiff had received, and the experience of other managers. The court noted that all managers are required to make deliveries and to train other drivers. Excusing plaintiff from driving trucks, then, would have affected the company's ability to deliver product and would have required it to change the way that it trains new drivers. Plaintiff claimed he had driven delivery trucks fewer than fifty times between 2007 and the end of 2008 when he lost his

eligibility to drive, but the court countered that the experience and expectations of managers generally, not plaintiff's own experience, was relevant in determining whether the function was essential. Though plaintiff claimed he had heard about managers who were not DOT-qualified, the court discounted this evidence as hearsay. Even if it were not hearsay, plaintiff produced no evidence that there were actually managers who were not DOT-qualified. The fact that defendant had allowed plaintiff to continue as a manager for nine months following his eye injury did not mean riving delivery trucks was not essential, as the defendant claimed it retained him because it was optimistic about his potential recovery. Because driving delivery trucks was an essential function of plaintiff's manager position, defendant was not required to excuse him from doing so as a reasonable accommodation, and it had provided him with accommodations by allowing him to take a 30-day leave of absence during which he could either become DOT-qualified or find a job within the company that did not require him to be.

e. Rotating Among Job Functions

Kallail v. Alliant Energy Corporate Servs., Inc., 691 F.3d 925 (8th Cir. 2012). Affirming summary judgment for the employer, the court held that working a rotating shift was an essential function for an energy distribution coordinator. The rotating schedule caused medical problems for the plaintiff because of her Type I diabetes and need to manage her blood pressure and blood sugar, leading her to request a straight shift as a reasonable accommodation. The court relied on the defendant's testimony that rotating schedules provide better experience and training for coordinators by allowing them to gain familiarity with all geographic territories in the service area. This, in turn, improves the company's ability to handle emergencies more efficiently because any coordinator summoned during an emergency will have had experience working with the geographic area and all of its personnel. Finally shift rotation enhances the non-work life of all coordinators by spreading the less desirable shifts among all of them. The fact that several years earlier the company considered switching to straight shifts did not undermine a finding that rotation is an essential function. The company abandoned its idea to change to straight shifts because employees objected to the method by which employees would be chosen for the less desirable shifts. The employees' reaction reinforced the conclusion that maintaining employee morale by spreading the hardship of certain shifts was a legitimate business consideration that would be undermined if the plaintiff was given a straight shift as that would require coordinators to work additional night and weekend shifts. The plaintiff also argued that since another facility used straight shifts, rotating shifts could not be considered an essential function. Disagreeing, the court noted that the other facility used a different approach to handling emergency situations, one conducive to employing straight shifts. Finally, random statements made by defendant employees during the interactive process about providing the plaintiff with a straight shift showed only that they were willing to consider this possibility, not that a rotating shift was not an essential function.

F. Attendance and Work Schedules

McMillan v. New York, 27 A.D. Cas. (BNA) 929, 2013 WL 779742 (2d Cir. Mar. 4, 2013). Reversing summary judgment for the defendant, the court held that a reasonable juror could find that arrival at work at a specific time was not an essential function for a city case manager. The agency's flex-time policy permitted employees to arrive between 9 and 10:15 a.m. A supervisor

could approve or disapprove a late arrival; if approved, the employee could apply accumulated leave or “banked time” – additional hours worked – to cover the time missed. Due to medication taken for his schizophrenia, the plaintiff was drowsy and sluggish in the morning, often resulting in arrival after 11 a.m. For a period of at least 10 years, the plaintiff’s tardy arrivals were explicitly or implicitly approved, and he was allowed to use banked time to make up for his late arrival. But, in 2008, management decided to stop approving the plaintiff’s late arrivals, prompting the plaintiff to request repeatedly that he be given a later start time. The agency refused, stating that the plaintiff could not work past 6 p.m. without a supervisor present. The agency began disciplining the plaintiff and ultimately issued a 30-day suspension. The appeals court concluded that physical presence at or by a specific time is not, as a matter of law, an essential function for all jobs. Although a specific arrival time would be an essential function for many jobs, the district court had failed to do a “penetrating factual analysis” to determine whether arrival at a specific time was an essential function of the plaintiff’s job. The appeals court observed that for 10 years the agency had routinely approved the plaintiff’s late arrivals and that the agency’s flex-time policy permitted all employees a window of over one hour to arrive at work, suggesting that punctuality might not have been essential. Cases cited by the agency and district court were distinguishable because they involved facts that supported a finding that arrival at a specific time was an essential function. Finally, on remand the district court would be required to consider whether the plaintiff could perform his essential functions by working longer hours on certain days so that he could bank time for days he was tardy and still work 35 hours per week.

White v. Standard Ins. Co., 2013 WL 3242297 (6th Cir. Jun3 28, 2013). Plaintiff, a customer service agent who was unable to work more than four hours per day following her return from leave for sciatica, was not qualified because full-time work was an essential function of her job. The court noted that defendant had never hired a part-time customer service agent, the position description indicated full-time work, and plaintiff admitted in her deposition that she was unable to complete the job’s requirements working four hours a day. Plaintiff also testified in her deposition that other employees were required to work on a rotating basis to complete work associated with her accounts, resulting in those employees working overtime.

Basden v. Professional Transp., Inc., 714 F.3d 1034 (7th Cir. 2013). Plaintiff, a dispatcher for a company that provided round-the-clock transportation of train crews from one location to another, was terminated when she exceeded the employer’s allowable number of absences in a year due to symptoms of a condition she believed to be (and that was subsequently diagnosed as) multiple sclerosis (MS). The Court of Appeals affirmed the district court’s grant of summary judgment in favor of the defendant, finding that, at the time of her termination, plaintiff was not qualified because she had no diagnosis, no prescribed treatment, and no anticipated date by which she could have returned to work had she been given an additional 30 days of leave to obtain a diagnosis and treatment. Plaintiff could say only that she “hoped” she could return once she was diagnosed and received treatment. The court said that the determination of whether an individual with a disability is qualified is made at the time the adverse action is taken; nevertheless, the court did consider evidence that plaintiff did not begin treatment until two months after her termination, the record did not indicate whether the medication she was given for her MS was effective, and she had worked for only a brief time for another employer during which she was absent for two weeks due to her MS.

Feldman v. Olin Corp., 692 F.3d 748 (7th Cir. 2012). Reversing summary judgment for the employer, the court held that disputed facts prevented it from concluding that mandatory overtime was required for certain positions at a metal manufacturing plant. The plaintiff had been excused from overtime for two years as a reasonable accommodation for his fibromyalgia and sleep apnea. Due to “job curtailment,” the plaintiff was transferred to a position requiring overtime, and he requested that he be transferred to another position not requiring overtime. The company declined, and the plaintiff was laid off. The court found evidence of several vacant positions that the plaintiff was otherwise qualified for, but it was unclear whether overtime was required for those positions. Although mandatory overtime was listed on job descriptions for several other positions, it was not listed as a job requirement for these particular positions. The plaintiff also provided data showing that overtime was rarely required for some of the disputed positions. The defendant testified, however, that while overtime might rarely be required, the consequence of exempting the plaintiff from overtime could be dire when all employees are needed to needed to extinguish a fire. Fires occasionally occur, and when they do, all personnel must work as long as necessary to extinguish them, even if that means working overtime.

Samper v. Providence St. Vincent Med. Ctr., 675 F.3d 1233 (9th Cir. 2012). Affirming summary judgment for the employer, the court held that predictable attendance was an essential function of a neo-natal intensive care nurse. The hospital permitted employees a certain number of unplanned absences, but the plaintiff, a part-time employee with fibromyalgia, routinely exceeded that limit. The court first noted that performance of certain jobs, including a neo-natal nurse, requires attendance in the workplace, and that for those jobs irregular attendance necessarily compromises essential functions. Not all jobs require on-site presence, but three aspects of a neo-natal nurse position are commonly found in jobs that require predictable on-site presence: teamwork, face-to-face interaction with clients or customers (in this case, patients and their families), and working with specialized equipment. The plaintiff’s unexpected absences burdened other nurses who had to cover for her. Her job required constant interaction with infants, sometimes on a moment’s notice when an alarm sounded that indicated a baby was in trouble. Also, because neo-natal intensive care nurses require specialized training, it is very difficult to find qualified replacements for an unexpected absence, and understaffing can compromise the care available to patients. Finally, the court rejected the plaintiff’s reliance on Humphrey v. Memorial Hospital Ass’n, 239 F.3d 1128 (2001), because in contrast to the medical transcriptionist position at issue in that case, physical attendance not only is required for a neo-natal intensive nurse to provide critical care, the defendant also needed to staff the unit with nurses who could guarantee some regularity in their attendance.

g. Safety Concerns

Olsen v. Capital Region Med. Ctr., 713 F.3d 1149 (8th Cir. 2013). A mammography technologist who experienced numerous unpredictable seizures at work, some of them while she was assisting patients, was not qualified. The court noted that an essential function of plaintiff’s job was to ensure patient safety, and defendant “need not subject its patients to potential physical and emotional trauma to comply with its duties under . . . the ADA.” Several accommodations that defendant provided to reduce environmental factors that might trigger seizures, such as reducing light, eliminating mold, and routing heavily perfumed patients to other employees, did not work,

and there was no evidence that the accommodation plaintiff proposed – allowing her to rest when seizures occurred – would have enabled her to perform her essential functions.

i. Question for Jury/Factual Issue

Keith v. County of Oakland, 703 F.3d 918 (6th Cir. 2013). Reversing summary judgment for the employer, the court held that genuine issues of material fact existed as to whether hearing was an essential function for a lifeguard at a wave pool and whether the plaintiff was otherwise qualified without the ability to hear. Although the court presumed that communicating was an essential function of the lifeguard position in order to supervise water activities, enforce safety rules, maintain water areas, and teach swim lessons, the plaintiff presented sufficient evidence that hearing might not be necessary to communicate effectively. His most compelling evidence came from experts with knowledge, education, and experience regarding the ability of deaf individuals to be lifeguards. In addition, evidence showed that a purely visual technique is used by lifeguards to scan the area for any distressed swimmers. Several experts testified that such detection is almost completely visually based. Moreover, to obtain his lifeguard certification, the plaintiff had to demonstrate the ability to detect distressed swimmers. With a “modest” modification, he would also be able to communicate with other lifeguards during lifesaving. The defendant itself had proposed a reasonable accommodation that it thought would improve communication generally between lifeguards in signaling an emergency situation. Evidence also showed that verbal enforcement of safety rules is generally impractical in a noisy water park and that most lifeguards use whistles and physical gestures to maintain safety. The defendant also had proposed having the plaintiff carry laminated cards to aid basic communication with the public. (The court suggested that some of this communication was possibly a marginal function because attendants were available throughout the water park to assist patrons with basic needs and questions.

Koessel v. Sublette Cty. Sheriff’s Dept., 717 F.3d 736 (10th Cir. 2013). A county patrol officer who returned to work following a stroke was terminated when the county determined there were no positions available in which plaintiff could avoid high stress situations as recommended by a county neurologist. Plaintiff did not dispute defendant’s characterization of the job’s essential functions, but said that he was able to perform them. He argued that his own doctor had cleared him to return to work, a county neurologist said he saw no physical reason plaintiff could not return to work, the fact that he drove 40 miles to and from work every day, the fact that he had performed 35 traffic stops without incident since returning to work following his stroke, and the results of standard psychological tests that were unchanged since the time he first took them prior to his stroke. Affirming summary judgment in favor of the employer, the court held that at most plaintiff’s evidence demonstrated that he was physically fit for his job. He presented no evidence, according to the court, to contradict the assessments of the county neurologist and county psychologist that plaintiff experienced lingering cognitive and psychological effects of his stroke that could interfere with job performance. The fact that plaintiff had performed several essential duties since returning to work did not undermine the district court’s decision. “Employers may set standards for exceptional situations if the need to perform in an emergency is a realistic component of a job.”

2. Miscellaneous

Keith v. County of Oakland, 703 F.3d 918 (6th Cir. 2013). Reversing summary judgment for the defendant, the court held that genuine issues of material fact existed as to whether the defendant had made an individualized inquiry to determine whether the plaintiff, who was deaf, was qualified to be a lifeguard. At the post-offer medical examination, the doctor declared the plaintiff to be unqualified immediately after realizing the plaintiff was deaf, without doing any type of individualized assessment. The doctor's report stated that the plaintiff could be a lifeguard only with constant accommodation (never identified), and even then, the doctor did not think such accommodation would be adequate. The defendant then contacted aquatic safety consultants, who voiced serious doubt about the plaintiff's qualifications and asserted that, without 100% certainty that accommodations would always be effective, the plaintiff would pose a safety hazard. As a result, the defendant withdrew its job offer. The district court concluded that while the doctor who declared the plaintiff unqualified had not made an individualized inquiry, the ultimate decisionmaker for the defendant had made an individualized assessment of the plaintiff's ability to be a lifeguard because: (1) county staff had observed him while he took the county's lifeguard training program to earn certification; (2) staff developed possible accommodations for the plaintiff; and (3) staff and management had supported his hiring. Although the appeals court agreed with this conclusion, it questioned why the defendant then subsequently withdrew its job offer: did the defendant alter its assessment based on a doctor's report and the advice of the aquatic safety consultants, and if so, did the defendant's individualized inquiry satisfy the ADA? Noting that it appeared "incongruent with the underlying objective of the ADA for an employer to make an individualized inquiry only to defer to the opinions and advice of those who have not," the appeals court remanded the case to the district court to address these issues.

Jones v. Walgreen Co., 679 F.3d 9 (1st Cir. 2012). Affirming summary judgment for the employer, the court concluded that a permanent knee injury prevented the plaintiff from performing physical tasks required as part of the essential functions of her store manager position. Even if the court assumed that for almost a year after her knee injury the plaintiff performed all of her essential functions, that conclusion was foreclosed after her doctor told the defendant about significant permanent physical restrictions, thus making the defendant aware for the first time of the full extent of the plaintiff's physical limitations. These included that the plaintiff could no longer bend, stoop, or reach below her knees. In addition, she could not stand or walk for more than 30 minutes at a time without taking a break, changing positions, or sitting. After a short break, the plaintiff could stand for an additional 30 minutes but could spend no more than four to five hours a day standing, even with frequent breaks. The court noted that store walkthroughs, a crucial part of her essential functions, could not be performed within these restrictions. Nor could the plaintiff bend to get items that had fallen or were requested by customers, use a ladder to reach high shelves, inventory merchandise, arrange displays, or unload delivery trucks. Although the plaintiff might have been able to perform some of the physical tasks associated with her essential functions, her restrictions nevertheless prevented her from performing a sufficient number of these tasks to result in her being unable to perform her essential functions.

Rosebrough v. Buckeye Valley High Sch., 690 F.3d 427 (6th Cir. 2012). Reversing summary judgment for the employer, the court held that determining whether a bus driver trainee is qualified means looking at an individual's qualifications to be a trainee, not a bus driver. While agreeing with both parties that having a commercial driver's license was an essential function for a bus driver, the court found that it was not an essential function for a trainee. Indeed, the purpose of training was to become qualified to obtain a commercial driver's license. The court noted that, in this case, the plaintiff's position as a trainee was at issue and that the plain language of the ADA protects individuals from discrimination during job training required to perform the essential functions of the ultimate position.

Ekstrand v. School Dist., 683 F.3d 826 (7th Cir. 2012). Affirming a jury's verdict in favor of the plaintiff, the court found sufficient evidence for a reasonable jury to have concluded that the plaintiff was qualified to perform the essential functions of her teaching position with the reasonable accommodation of being provided with a classroom with natural light for her seasonal affective disorder. There was sufficient evidence for the jury to have found that the defendant had received medical documentation supporting the requested accommodation, but that it failed to provide a new classroom.

C. Disparate Treatment

1. Generally

Nayak v. St. Vincent Hosp. & Health Care Ctr., 27 A.D. Cas. (BNA) 596, 2013 WL 121838 (S.D. Ind. Jan. 9, 2013). The plaintiff's medical residency contract was not renewed "due to her medically complicated pregnancy and significant concerns regarding her academic progress," approximately two weeks after returning from a leave necessitated by post-partum difficulties that included symphysis pubis dysfunction. After allowing the plaintiff's prong-one (actual disability) claim to proceed, the court dismissed her prong-three regarded-as claim because she did not show that her perceived disability was a but-for cause of the action. In reaching its conclusion, the court relied on Serwatka v. Rockwell Automation, Inc., 591 F.3d 957 (7th Cir. 2010), and rejected the plaintiff's argument that Serwatka was effectively overruled when the ADA's prohibition against discrimination "because of" disability was changed to a prohibition against discrimination "on the basis of" disability by the ADAAA, concluding that this textual change was too small to transform the ADA into a mixed-motives statute.

2. "Sole Cause" Standard in ADA Cases

Lewis v. Humboldt Acquisition Corp., 681 F.3d 312 (6th Cir. 2012) (en banc). The plaintiff, whose medical condition limited her ability to walk, alleged disparate treatment under the ADA when she was fired from her registered nurse position. Consistent with circuit precedent in Maddox v. University of Tennessee, 62 F.3d 843 (6th Cir. 1995), and Monette v. Electronic Data Systems Corp., 90 F.3d 1173 (6th Cir. 1996), the jury was instructed that "[the] plaintiff could prevail only if the fact that the plaintiff is a qualified individual with a disability was the sole reason for the defendant's decision to terminate [the] plaintiff," and it found for the employer. Vacating the judgment and overturning Maddox and Monette, the court held that the instruction was incorrect based on the plain language of the statute and on the fact that Congress has never

decided to import the “sole cause” language, found in the Rehabilitation Act of 1973, into the ADA. The court also found, based on the plain text of the statute and on Gross v. FBL Financial Services, 557 U.S. 167 S. Ct. 2343 (2009), that the ADA requires a plaintiff alleging disparate treatment to show that disability was a but-for cause of the challenged action, rather than a mere motivating factor.

3. Pretext

Pulczynski v. Trinity Structural Towers, Inc., 691 F.3d 996 (8th Cir. 2012). The plaintiff, a lead painter, was terminated for “attempting to cause a work slowdown” after the employer found evidence that he had discouraged his subordinates from working overtime. The plaintiff argued that the proffered reason was pretext for associational discrimination based on his son’s cerebral palsy by offering evidence that the employer subsequently articulated additional reasons for his termination; that no one in the company took responsibility for the decision to terminate him; that the employer’s investigation of his alleged misconduct was inadequate; and that he had not, in fact, discouraged subordinates from working overtime. The court rejected the plaintiff’s first argument because, although a substantial change in an employer’s explanation can be evidence of pretext, “an elaboration generally is not.” It rejected the plaintiff’s second argument because the individual who approved the plaintiff’s termination did not refuse to take responsibility for the action, but rather testified that he did not specifically remember terminating the plaintiff as he was based in a different city and over saw approximately 1,000 employees in five plants. In discussing the last two arguments, the court reaffirmed the Eighth Circuit’s “honest belief rule,” under which a plaintiff alleging pretext must “present sufficient evidence that the employer acted with an intent to discriminate, not merely that the reason stated by the employer was incorrect,” and rejected the Sixth Circuit’s “modified honest belief rule,” according to which an employer wishing to avoid a finding of pretext must show that it reasonably relied on the particularized facts before it at the time the decision was made. Accordingly, because “[a] showing that the employer made a mistaken and unreasonable determination that an employee violated company rules does not prove that the employer was motivated by a known disability,” the court upheld summary judgment for the employer.

Ryan v. Capital Contractors, Inc., 679 F.3d 772 (8th Cir. 2012). The plaintiff, who has an IQ of 56 and speaks with a stutter, was fired from his sandblaster position for violating the employer’s “no fighting” policy. The violation occurred when the plaintiff swung at his supervisor and knocked the breathing device off the supervisor’s respirator after the supervisor grabbed him by the coat with both hands, “kinda picked [him] up” and shook him, and pushed him into a pit. Assuming without deciding that the plaintiff had established his prima facie case, the court found that his evidence of pretext – that his supervisor was not also terminated for his conduct – was insufficient to survive summary judgment. The difference in treatment could be explained by the fact that the plaintiff’s conduct during the altercation constituted an objectively higher “level of physical aggression” than the supervisor’s and the fact that the supervisor was a higher-level employee who possessed superior knowledge of the company.

D. Reasonable Accommodation

1. Notice of the Need for Reasonable Accommodation

Jones v. Nationwide Life Ins. Co., 696 F.3d 78 (1st Cir. 2012). Affirming summary judgment for the employer, the court held that the plaintiff's request for an extension of time to obtain a special license did not constitute a request for reasonable accommodation, because the plaintiff failed to link his request with his claimed disability. Although the plaintiff claimed in litigation that his brachial plexus palsy (BPP) was his disability, his request for accommodation had not mentioned this condition. Instead, it had mentioned only multiple surgeries taken between 2006 and 2008 (for which he had taken a total of nine weeks of leave) and aggressive pain management treatment. His request had not linked any of the medical treatment to the BPP, nor had it included any medical documentation. After his final surgery he had been cleared to return to work without limitations. Any obvious physical characteristics (the plaintiff's left arm was shorter than his right because of his BPP) were insufficient to put the employer on notice of a need for accommodation. Finally, the request came too late, after the plaintiff had failed his fourth attempt to get a license (having been given over 18 months to obtain one) and had known that company policy required his termination as a result.

2. Interactive Process

Keith v. County of Oakland, 703 F.3d 918 (6th Cir. 2013). Reversing summary judgment for the employer, the appeals court instructed the district court on remand to address whether the defendant had failed to engage in an interactive process. The district court did not address this issue because it had found that the plaintiff had failed, as a matter of law, to identify an accommodation that was objectively reasonable, a conclusion the appeals court found was erroneous for summary judgment purposes. The plaintiff, a deaf individual who applied to be a lifeguard at a wave pool, argued that the defendant failed to discuss with him concerns raised by the doctor who conducted the post-offer examination and by aquatic safety consultants. The plaintiff maintained that if the defendant had engaged in an interactive process, it would have learned about his ability to detect loud noises through his cochlear implant. He also could have clarified that he did not need sign language interpreters to perform his essential functions but only for staff meetings and classroom instruction. Finally, the plaintiff could have referred the defendant to individuals with expertise regarding the ability of deaf people to be lifeguards.

Cloe v. City of Indianapolis, 712 F.3d 1171 (7th Cir. 2013). The court affirmed summary judgment in favor of defendant on plaintiff's failure-to-accommodate claim. Plaintiff, a City employee with multiple sclerosis, claimed she needed three accommodations – a parking space closer to her building and her own printer because of difficulty she experienced with walking, and assistance with proofreading because of cognitive limitations that resulted in spelling and grammar errors. As to the requested parking space, the court concluded that defendant provided her with a reasonable accommodation. Although plaintiff originally told her supervisor in April 2008 that she was having difficulty walking from the lot in which she was parked to the building, she did not specifically request a space closer to the building until early July 2008. After that, the City provided her with several accommodations as some of the ones that were attempted proved ineffective. First, defendant obtained a space for plaintiff in a lot closer to the

building; when this proved ineffective, she was given permission to park in a visitor space in the building or next to parking meters on the street at no cost. She was eventually given a permanent employee space in the building when a co-worker retired in the beginning of December 2008. It was also not unreasonable for the City to have taken from two weeks to a month following plaintiff's request before providing plaintiff with her own printer. Plaintiff suggested that the City could have loaned her another printer, but the court said the fact that a printer ultimately had to be taken from another employee suggests that there were not a lot of extra printers available. As to the plaintiff's contention that the City could have purchased another printer, the court said that "a responsible government is entitled to take time to evaluate alternatives before spending taxpayer money." Finally, the court found no evidence that plaintiff had requested assistance with proofreading as an accommodation.

The court found, however, there was sufficient evidence of intent to retaliate against plaintiff for requesting accommodations to withstand summary judgment. The notice of plaintiff's termination, issued in June 2009, did not include the reasons supporting the decision, but instead referred to attached documentation that was not provided. Though the termination was likely based on discipline imposed in May, the discipline related to an event that occurred nearly a month earlier (in contrast to prior discipline of the plaintiff that had occurred almost immediately after whatever infraction plaintiff was supposed to have committed). The basis of Moreover, the discipline on which the termination was probably based occurred only a week after plaintiff's supervisor and another manager allegedly expressed anger at plaintiff for asking to take time off for a medical appointment related to her MS. Finally, there was evidence that both plaintiff's supervisor and the department administrator made statements suggesting that they believed plaintiff's condition was not serious enough to have affected her work.

James v. Hyatt Regency Chicago, 707 F.3d 775 (7th Cir. 2013). Affirming summary judgment for the employer, the court held that the plaintiff's delayed return to work was caused by his failure to clarify the meaning of several doctor's notes indicating an inability to perform the essential functions of his banqueting job, rather than by the employer's refusal to resume providing accommodations given before the plaintiff's use of extended medical leave. The plaintiff had a vision problem that was exacerbated when he developed a retinal detachment requiring corrective surgery. Prior to this, the defendant had provided reasonable accommodation for over 20 years (increasing the print size of his work assignments and schedules). The plaintiff was granted FMLA leave and, when that was exhausted, he received leave under the collective bargaining agreement. After the expiration of the FMLA leave the plaintiff provided notes from his doctor, one of which stated that he would not be able to work until early August (about three weeks after the expiration of the FMLA leave). The plaintiff did not return to work in August but submitted a note from a different doctor in late September saying he could return to work with the restrictions of no heavy lifting or excessive bending. In response, the defendant tried unsuccessfully to obtain more information about the restrictions; the defendant made a second unsuccessful attempt to obtain information in December. In January 2008 the defendant contacted the first doctor to ask about the plaintiff's medical condition and was informed that the plaintiff could return to work. The defendant then met with the plaintiff who sought and was granted two weeks of paid vacation. The plaintiff returned to work in mid-February. The plaintiff alleged several FMLA violations and that the defendant's delay in returning him to work resulted from its wish to avoid providing the reasonable

accommodations he had received for the past two decades. The court concluded that the defendant's refusal to reinstate the plaintiff was unrelated to the need to continue providing reasonable accommodations that it had provided for over 20 years; rather, reinstatement was denied because the plaintiff and his doctors did not provide more specificity about the need for light duty or certain restrictions that would prevent performance of the essential functions of his job.

Jones v. Nationwide Life Ins. Co., 696 F.3d 78 (1st Cir. 2012). Affirming summary judgment for the employer, the court held that the plaintiff's failure to identify a plausible reasonable accommodation that would have permitted him to perform his essential functions defeated his claim that the defendant failed to engage in an interactive process. To find liability for a failure to engage in the interactive process requires first finding that there was a possible reasonable accommodation that would have permitted performance of the plaintiff's essential functions. In this case, the plaintiff's request for a six-month extension of time to take a licensing examination for a fifth time was unreasonable. Moreover, evidence showed that the employer offered the plaintiff a transfer, which he declined.

Jones v. Walgreen Co., 679 F.3d 9 (1st Cir. 2012). Affirming summary judgment for the defendant, the court concluded that the defendant was not required to engage in an interactive process after learning that a store manager had a wide array of permanent restrictions resulting from a knee injury that would preclude her from performing certain essential functions. After being off work following surgery for a knee injury, the plaintiff returned to work but told her supervisor that she could not climb ladders, lift objects over 20 pounds, or work more than eight hours a day. She also told him that she intended to delegate physical tasks to subordinates, to the extent possible. About a year later, she informed her supervisor that she was having difficulty walking around the store and shelving items. At the defendant's request, the plaintiff provided medical documentation, which detailed permanent physical restrictions that clearly would preclude performance of certain essential functions. The defendant therefore terminated the plaintiff. The court stated that the plaintiff had failed to identify any reasonable accommodation that would have permitted her to perform her essential functions consistent with her restrictions, and it rejected her suggestion that she could delegate to subordinates essential functions inconsistent with her physical restrictions. With no indication of any plausible, effective reasonable accommodation, the defendant could not be held liable for failing to engage in an interactive process.

Hoppe v. Lewis Univ., 692 F.3d 833 (7th Cir. 2012). Affirming summary judgment for the employer, the court held that the employer engaged in a good faith interactive process and attempted to provide a reasonable accommodation for the plaintiff where she failed to provide the employer with information it needed to evaluate potential accommodations. The plaintiff, a university professor, had an adjustment disorder and her doctor sent the university a letter requesting that she be moved to a different office. Because the letter failed to identify a more suitable location for the plaintiff's office, the university asked the doctor to clarify the request and explain the factors that were likely to aggravate the plaintiff's condition. Although the doctor's second letter failed to answer the university's questions, the university offered the plaintiff three different offices within her current building. She declined all three. The plaintiff allegedly told a dean that she needed a new office in a different building away from a fellow

professor, but there was no evidence that the defendant was aware that the recommendation had come from the plaintiff's doctor. Several months later the plaintiff's doctor sent another letter requesting that her office be moved and again failed to answer the university's questions. Nonetheless, the university offered the plaintiff a new office in a different building, which she accepted. Under the circumstances, no rational trier of fact could find that the university failed to participate in good faith in the interactive process or that it failed to offer the plaintiff a reasonable accommodation.

Kallail v. Alliant Energy Corporate Servs., Inc., 691 F.3d 925 (8th Cir. 2012). Affirming summary judgment for the employer, the court held that the defendant did not fail to engage in the interactive process where evidence showed that it offered the plaintiff a reassignment and the employer was not required to provide the plaintiff with her requested accommodation of a regular, rather than a rotating, shift.

3. Job Restructuring, Part-Time Work, and Modified Work Schedules

McMillan v. New York, 711 F.3d 120 (2d Cir. 2013). Reversing summary judgment for the employer, the court held that the plaintiff had suggested two plausible reasonable accommodations to address his disability-related tardiness, thereby raising a material factual issue as to whether he could perform the essential functions of a case manager. The employer's flex-time policy permitted employees to arrive between 9 and 10:15 a.m. A supervisor could approve or disapprove a late arrival, and if approved, the employee could apply accumulated leave or "banked time," i.e., to cover the time missed. Employees were required to work 35 hours per week, and they had a mandatory one-hour lunch period in which they were prohibited from working without prior approval. Due to medication taken for his schizophrenia, the plaintiff was drowsy and sluggish in the morning, often resulting in arrival after 11 a.m. For a period of at least 10 years, the plaintiff's tardy arrivals were explicitly or implicitly approved, allowing him to use banked time to make up for his late arrival. But, in 2008, management decided to stop approving the plaintiff's late arrivals, prompting him to request repeatedly that he be given a later start time because of the side effects of his medication. The employer refused, stating that he could not work past 6 p.m. without a supervisor present. The plaintiff noted that he often worked past 7 p.m. and that the office was open until 10 p.m., so that his request to work later would permit him to arrive after 10:15 yet meet his 35-hour requirement and bank extra hours to use when he was tardy. Alternatively, the plaintiff proposed that he be allowed to work through lunch to bank time.

Keith v. County of Oakland, 703 F.3d 918 (6th Cir. 2013). Reversing summary judgment for the employer, the court held that genuine issues of material fact existed as to whether job restructuring, a form of accommodation listed in the statute, would have enabled a deaf individual to perform the essential functions of a wave pool lifeguard. Communicating was an essential function in order to supervise water activities, enforce safety rules, maintain water areas, and teach swim lessons. Evidence showed that several accommodations initially proposed by a defendant official would have allowed the plaintiff to perform the essential function of effectively communicating while on duty, at little or no cost to the defendant. For example, the plaintiff could have carried laminated note cards to communicate with guests in non-emergency situations; he could have used his whistle and gestures to enforce pool rules; and he could have

looked at other lifeguards while visually scanning his zone of the pool to determine if they were entering to assist a swimmer. The defendant official also had suggested modifications to their emergency action plan involving using visual signals that would improve the effectiveness of emergency response for all lifeguards and therefore was to be implemented even if the plaintiff was not working. The court acknowledged testimony by the defendant that other employees may have had to assume extra duties because of the plaintiff's deafness, but this was insufficient to grant summary judgment. Evidence suggested that the duties to be reassigned might have been marginal ones, such as answering general questions from patrons (other employees might have had primary responsibility for this duty), using a megaphone or radio, handling first aid needs, and working at the slide (a popular rotation for other lifeguards).

Regan v. Faurecia Auto. Seating, Inc., 679 F.3d 475 (6th Cir. 2012). The court held that an assembly worker with narcolepsy was not entitled to a modified schedule. When the plant adopted a new work schedule of 7 a.m. to 4 p.m., the plaintiff requested that she either be allowed to continue to work the old schedule of 6 to 3 or to work 7 to 3 without a break. She claimed that she needed one of these schedules to avoid commuting in heavier traffic, which exacerbated the effects of her narcolepsy. However, she presented no evidence that there would be lighter traffic under her proposed schedule. Furthermore, the court seemed persuaded that reasonable accommodation does not generally include accommodations related to commuting, although it seemed to base its decision affirming summary judgment on the facts of this case.

Otto v. Victoria, 685 F.3d 755 (8th Cir. 2012). Affirming summary judgment for the employer, the court held that no reasonable accommodation was possible for a maintenance worker whose back injury permanently restricted him from the serious lifting and standing necessary to perform the essential functions of his job. The plaintiff could occasionally lift weights up to 15 pounds but could seldom lift weights up to 35 pounds. Moreover, his doctor cleared him to perform four hours of sedentary work per day, but his job required him to patch and repair curbs and gutters, mow, trim trees, clean sewers, remove trash, and engage in general maintenance of streets, parks, and buildings. The court rejected the plaintiff's suggested accommodations that all non-sedentary duties be removed from his position or that other employees assist him in carrying out his job, since these would have involved removal of essential functions. Nor did the court find the plaintiff's suggestion that a part-time job be created for him viable, as the ADA does not require that employers take such action as a reasonable accommodation. The court also found no merit in the plaintiff's suggestion that the defendant give him a back brace, as he provided no evidence that it would have addressed his heavy lifting restrictions. Finally, the court stated that the defendant did not have to rely on the plaintiff's claim that he could work, given that his doctor had clearly stated otherwise.

Samper v. Providence St. Vincent Med. Ctr., 675 F.3d 1233 (9th Cir. 2012). Affirming summary judgment for the employer, the court held that a neo-natal intensive care nurse was not entitled to a schedule that permitted her to miss work for as many days as she needed whenever her fibromyalgia flared up. The plaintiff's request to take unlimited leave exceeded the realm of reasonableness by asking for an exemption from the attendance policy. The hospital permitted employees a certain number of unplanned absences, but the plaintiff routinely exceeded that limit, despite all of the accommodations that the hospital granted her from the time she was diagnosed with fibromyalgia: (1) she was allowed to move her shift to another day of the week

when she was having a bad day; (2) beginning the next year she was given a maximum of two non-consecutive day-time shifts a week; and (3) she was given extended medical leaves from 2005 to 2008 that were not counted towards her unplanned attendance limit. Having found regular, predictable attendance to be an essential function of the job, the court rejected the plaintiff's argument that since hospital policy permitted five unscheduled absences, it could accommodate her request for an unspecified number of additional unscheduled absences. The fact that the hospital could work around a certain number of unplanned absences did not mean it could handle an unlimited number of them. Moreover, such an accommodation would gut reasonable attendance policies.

4. Leave

Wilson v. Dollar General Corp., 717 F.3d 337 (4th Cir. 2013). Plaintiff, who had no vision in one eye because of a detached retina, developed an infection in his other eye five months after beginning to work for defendant. He was given eight weeks of leave for treatment and recovery from the condition, and at the end of that time, requested two additional days, which was denied. The court affirmed summary judgment in favor of the employer. First, relying on circuit precedent, the court acknowledged that a leave request is reasonable "so long as it (1) is for a limited, finite period of time; (2) consists of accrued paid leave or unpaid leave; and (3) is shown to be likely to achieve a level of success that will enable the individual to perform the essential functions of the job in question." Plaintiff was required to show that, at the time he would have been scheduled to return from leave, he would have been able to perform the essential functions of his job, and there was no evidence that he was able to do so. The fact that plaintiff may have been able to work again a week or a week-and-a-half after the leave would have ended was irrelevant, as was the fact that several months later, plaintiff experienced another medical setback and was unable to work for nearly a year. Additionally, plaintiff's claim that defendant did not engage in the interactive process failed because he could not offer evidence of a possible accommodation that would have been identified as a result of the process and that would have enabled him to perform the essential functions of his job.

Robert v. Board of Cnty. Comm'rs, 691 F.3d 1211 (10th Cir. 2012). Affirming summary judgment for the employer, the court held that the plaintiff's inability to provide an estimated date when she could resume performance of site visits made a continued leave of absence unreasonable. The plaintiff supervised released felony offenders, and an essential function of that position was to make site visits to their homes, workplaces, and treatment facilities. In 2004, the plaintiff took extended medical leave of several months for surgery for sacroiliac joint dysfunction. She ceased performing site visits before and after her return to work until her mobility improved. In late 2005, the plaintiff fell down stairs at work, and soon thereafter the symptoms of her disability returned, requiring more surgery. Again, colleagues had to handle her site visits before and after the surgery, a period of more than four months. At the time of her termination, the employer knew it could be at least three to four weeks before the plaintiff could walk with a cane. However, this prediction provided no assurance that the plaintiff could resume making site visits at that time since she acknowledged that the hazards sometimes involved in such visits required more than minimal mobility. Thus, the only accommodation would have been indefinite suspension of the essential function of site visits, which the court found to be unreasonable as a matter of law.

5. Reassignment

Koessel v. Sublette Cty. Sheriff's Dept., 717 F.3d 736 (10th Cir. 2013). Plaintiff, a former patrol officer who was terminated when the defendant concluded that effects of a stroke prevented him from performing high stress jobs and there were no other types of jobs available, claimed he had requested, and was denied, reassignment as a reasonable accommodation. The court concluded plaintiff had presented no evidence of a vacant position for which he was qualified, and the one position to which he was temporarily reassigned was not intended to be permanent.

EEOC v. United Airlines, Inc., 693 F.3d 760 (7th Cir. 2012), cert. denied, 133 S. Ct. 2734 (2013). Overruling EEOC v. Humiston-Keeling, 227 F.3d 1024 (2000), and reversing summary judgment, the court held that reasonable accommodation may require reassigning an employee who will lose her current position due to a disability to a vacant position for which she is qualified, provided that such an accommodation would be ordinarily reasonable and would not cause an undue hardship. The court recognized that Humiston-Keeling was inconsistent with the Supreme Court's decision in U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002). See summary at § VII.D.15, at page **Error! Bookmark not defined.**. In Barnett, the Supreme Court had rejected arguments similar to those endorsed in Humiston-Keeling, specifically: (1) the ADA does not require preferential treatment; (2) employers are free to implement neutral rules that may disadvantage employees with disabilities; and (3) reassignment to a vacant position generally will be unreasonable in the run of cases. On remand, the district court should determine if mandatory reassignment is ordinarily reasonable in the facts of this case and, if so, whether it would cause the defendant an undue hardship.

Kallail v. Alliant Energy Corporate Servs., Inc., 691 F.3d 925 (8th Cir. 2012). Affirming summary judgment for the employer, the court held that the employer did not have to promote the plaintiff in order to satisfy the ADA. Furthermore, the plaintiff failed to provide evidence that positions that were offered were inferior to her current position or that a comparable position for which she was qualified was open.

Sanchez v. Vilsack, 695 F.3d 1174 (10th Cir. 2012). In a case of first impression, the court reversed summary judgment for the employer and held that reassignment may be a reasonable accommodation for an employee able to perform the essential functions of her current job when such an accommodation is needed for the purpose of receiving medical care or treatment. In this Rehabilitation Act case, the plaintiff fell at work, which resulted in a brain injury that significantly and permanently affected her vision. She requested reassignment to a different location where she could receive specialized treatment for her condition. The Forest Service refused because the plaintiff's request had nothing to do with an inability to perform her current job. As an initial matter, the court rejected the defendant's argument that reassignment generally is not mandatory. The court reiterated earlier holdings that reasonable accommodation may include reassignment as long as the employee is qualified for the new job and it would not pose an undue hardship. Next, the court noted that EEOC's regulations recognize that reasonable accommodation may be required in situations having nothing to do with an inability to perform an essential function. Furthermore, requiring reasonable accommodation only to enable an individual to perform an essential function would seem inconsistent with case law recognizing

leave to obtain medical care or treatment as a reasonable accommodation. The court remanded the case for a determination of whether the plaintiff actually needed reassignment to obtain treatment and whether the accommodation would result in undue hardship.

6. Modifying Workplace Policies

Jones v. Nationwide Life Ins. Co., 696 F.3d 78 (1st Cir. 2012). Affirming summary judgment for the employer, the court held that the plaintiff's request for a six-month extension of time to obtain a special license was unreasonable on its face because there was no evidence that he would pass the examination after having failed on four previous occasions. The plaintiff did not request accommodation until after he had failed the licensing examination for the fourth time (having been given over 18 months to obtain a license), even though he knew company policy required his termination as a result.

7. Persons Not Entitled to Reasonable Accommodation

Magnus v. St. Mark United Methodist Church, 688 F.3d 331 (7th Cir. 2012). Affirming summary judgment for the employer, the court held that the defendant had no obligation to provide a reasonable accommodation to the plaintiff, whose ADA claim was based on her association with her daughter, who had a mental disability. The crux of the plaintiff's complaint was the church's insistence that she work weekends. Although this requirement presented a hardship for the plaintiff because of her need to care for her daughter, the ADA does not require employers to provide reasonable accommodation to employees based on their relationship with someone with a disability.

8. Sign Language Interpreters

Keith v. County of Oakland, 703 F.3d 918 (6th Cir. 2013). Reversing summary judgment for the employer, the court found sufficient evidence to create a genuine issue of material fact as to whether providing sign language interpreters for staff meetings and further classroom instruction was objectively reasonable for a deaf individual applying for a lifeguard position at a wave pool. The plaintiff never requested sign language interpreters to perform his essential functions, and he presented testimony by several experts that the ability to hear is not necessary for someone to perform the essential functions of a lifeguard. Testimony by the doctor who conducted the post-offer examination and by aquatic safety consultants that full-time interpreters would be necessary to perform the essential functions was insufficient to grant summary judgment, given that these individuals had no direct knowledge, education, or experience regarding deaf individuals serving as lifeguards. The court noted evidence of the plaintiff's successful completion of his lifeguard training courses as demonstrating the effectiveness of providing interpreters for classroom instruction. The court observed that sign language interpreters are listed as a possible form of reasonable accommodation in the statute and concluded that provision of interpreters could easily be deemed reasonable when they would be needed only on occasion, such as for staff meetings and training. Moreover, given the limited situations in which the accommodation would be needed, the benefit of the accommodation would appear to be proportional to its cost. Finally, the defendant had not argued that providing interpreters would pose an undue hardship.

EEOC v. Picture People, Inc., 684 F.3d 981 (10th Cir. 2012). Affirming summary judgment for the employer, the court held that a photography studio did not fail to provide reasonable accommodation when it rejected requests for a sign language interpreter for staff meetings and training sessions. The court already had concluded that a deaf employee was unable to engage in verbal communication with customers, an essential function of her job. Providing an interpreter for staff meetings or training sessions would not have addressed the employee's inability to perform an essential function of her position. The court distinguished EEOC v. UPS Supply Chain Solutions (summarized below) and other cases holding that provision of an interpreter for staff meetings or training is a reasonable accommodation, because in those cases the employees could perform their essential functions without the need for an accommodation.

E. Drug and Alcohol Use

James v. City of Costa Mesa, 700 F.3d 394 (9th Cir. 2012), cert. denied, 133 S. Ct. 2396 (2013). Interpreting 42 U.S.C. § 2210(d)(1), the court held that the exception to exclusion of persons engaged in the "illegal use of drugs" does not include coverage for medical marijuana use, even when authorized by state law and approved by a physician. Therefore, the plaintiffs' medical marijuana use was not protected by the ADA.

F. Defenses

1. Direct Threat

Wurzel v. Whirlpool Corp., 26 A.D. Cas. (BNA) 521, 2012 WL 1449683 (6th Cir. Apr. 27, 2012) (unpublished), cert. denied, 133 S. Ct. 339 (2012). The plaintiff, whose Prinzmetal angina had caused several incapacitating spasms while on the job, was terminated because he posed a direct threat while driving a forklift or working near dangerous machinery, which were primary functions of his materials handling position. The plaintiff alleged that the employer's process for determining that he posed a direct threat was inadequate, because it did not rely on "the most current medical knowledge and the best available objective evidence," and did not "reflect[] an individualized assessment of his abilities"; that the employer's determination was objectively unreasonable; and that he did not, in fact, pose a direct threat. Without deciding who bears the burden of proof on the issue of direct threat, the court upheld summary judgment for the employer. It found that the employer's process for determining that the plaintiff posed a direct threat was adequate because its expert, the plant physician, was familiar with the plaintiff's job duties; examined the plaintiff personally; consulted the plaintiff's medical records; had access to updated information; consulted an independent medical examiner; and followed up with the other doctors to make them aware of his job environment and condition. It further found that the employer's determination was objectively reasonable, because it was based on the ultimate recommendation of the independent medical examiner; it was supported by the plaintiff's extensive history of serious medical episodes while on the job and by the fact that one of his rotations required him to work alone in the presence of dangerous machinery; and it discounted the initial opinion of the independent medical examiner and the opinions of the plaintiff's treating physicians only because they were based on incomplete information. Finally, the court found that the plaintiff did in fact pose a direct threat because his condition was life-long; the

potential harm caused by experiencing a spasm near dangerous machinery or while driving a forklift was great; and the dangerous environment, together with the plaintiff's history of spasms on the job, made the potential harm both likely and imminent.

2. Undue Hardship

McMillan v. New York, 711 F.3d 120 (2d Cir. 2013). Reversing summary judgment for the employer, the court held that the record did not support a finding of undue hardship as a matter of law regarding two possible accommodations to address the plaintiff's disability-related tardiness. The plaintiff, a city case manager, proposed being allowed to work past the normal 6 p.m. quitting time or being given approval to work through his lunch hour in order to "bank" time to use when he was late arriving at the office due to the side effects of medication taken for his schizophrenia. The defendant denied the plaintiff's request to work past 6 p.m., stating that he could not work without a supervisor present. The defendant contended that requiring a supervisor to work past 6 p.m. would be an undue hardship, but the court noted that the record did not address times when it appeared that the defendant had permitted the plaintiff to work unsupervised. The plaintiff claimed that he often worked past 7 p.m., and it seemed that the plaintiff worked unsupervised when he made home visits to clients. Regarding the plaintiff's proposal to work through lunch, the appeals court disagreed with the district court's conclusion, without any analysis, that this would have caused an undue hardship. The court noted the city's policy of permitting supervisors to approve an employee's request to work through lunch and concluded that such pre-approval did not seem to require significant difficulty or expense.

G. Exams and Inquiries

Owusu-Ansah v. The Coca-Cola Co., 715 F.3d 1306 (11th Cir. 2013). Plaintiff, who oversaw the work of customer service representatives, challenged defendant's requirement that he take a psychiatric/psychological fitness-for-duty examination. Affirming summary judgment for the defendant, the court first held that a plaintiff need not be an individual with a disability to challenge a medical examination under the provision of the ADA that prohibits medical examinations of employees unless they are job-related and consistent with business necessity. However, the court found that the required medical examination was job-related and consistent with business necessity based on (1) a report from plaintiff's supervisor that plaintiff became agitated, banged his fist on the table, and said, "someone is going to pay for this" during a meeting at which he claimed he had been subject to harassing behavior by managers and co-workers because he is from Ghana; (2) plaintiff's refusal to discuss his work-related problems with a human resources employee; (3) concerns of defendant's consulting psychologist about plaintiff's mental and emotional stability; and (4) plaintiff's refusal to answer certain questions asked of him by a psychiatrist to whom he had been referred by defendant for evaluation. The court said that the ability to handle "reasonably necessary stress at work reasonably well with others" is an essential part of any job, and there was evidence that plaintiff may have been unstable and a danger to others.

Kroll v. White Lake Ambulance Auth., 691 F.3d 809 (6th Cir. 2012). After the plaintiff, an emergency medical technician, allegedly began a romantic relationship with a married coworker and engaged in several disruptive incidents at work, the defendant requested that she attend

counseling in order to continue working. Because she would have had to pay for the counseling herself, the plaintiff refused to attend and filed suit alleging that the defendant's request violated the ADA's prohibition on unlawful medical examinations. The Sixth Circuit vacated and remanded the district court's grant of summary judgment to the defendant. Noting that the meaning of "medical examination" is an issue of first impression in the Sixth Circuit, the court stated that EEOC's enforcement guidance on disability-related inquiries and medical examinations of employees was the "best interpretive aid." Relying on the guidance's first three factors for determining whether a test or procedure is a medical examination, the court concluded that a reasonable jury could find that the psychological counseling requested by the defendant was a medical examination because it would have been administered and interpreted by a psychologist and was designed to uncover any mental health impairment that the plaintiff might have had. The court also held that an employee does not have to actually submit to the examination to have standing to challenge it. The court acknowledged, however, that on remand the defendant could be entitled to summary judgment if it could show that the requested psychological counseling was job related and consistent with business necessity.

EEOC v. Thrivent Fin. for Lutherans, 700 F.3d 1044 (7th Cir. 2012). When a former temporary programmer had difficulty finding a new job, he learned that the defendant was disclosing his history of migraines to prospective employers. EEOC filed suit alleging that the defendant violated the ADA's confidentiality provisions contained in 42 U.S.C. § 12112(d) by revealing to prospective employers the programmer's confidential medical information obtained from a "medical inquiry." The district court found that because there had been no medical examination or inquiry (defendant learned of the programmer's medical condition when he responded to his supervisor's email inquiring about his absence from work), the confidentiality provision did not apply. Affirming summary judgment to the defendant, the Seventh Circuit stated that the word "inquiries" discussed in section § 12112(d) "does not refer to all generalized inquiries, but instead refers only to medical inquiries." Here, unlike in the cases relied on by the EEOC, there was no evidence in the record suggesting that the defendant should have inferred that the programmer's absence was due to a medical condition and that it was just as likely that it could have assumed that he was absent due to transportation, marital, or weather-related problems or because he simply decided to quit his job. Accordingly, the defendant's email asking why the programmer was not at work did not constitute an unlawful disability-related medical inquiry.

EEOC v. Dillard's Inc., 2012 WL 440887 (S.D. Cal. Feb. 9, 2012). EEOC filed suit arguing that the defendant's policy requiring an employee who has been absent for health-related reasons to submit a doctor's note stating the "condition being treated" constituted a prohibited disability-related inquiry under the ADA. The court noted that the Ninth Circuit has not determined what constitutes an unlawful inquiry under 42 U.S.C. § 12112(d)(4) and that the decisions of the two circuits that have considered the question are in conflict. Compare Conroy v. New York State Dep't of Corr. Servs., 333 F.3d 88 (2d Cir. 2003) (requesting employees to disclose "a brief general diagnosis" constitutes a disability-related inquiry), with Lee v. City of Columbus, 636 F.3d 245 (6th Cir. 2011) (policy requiring returning employees to state the "nature of the illness" was not necessarily a question about whether employee is disabled). Here, the court found that the defendant's policy requiring employees to disclose the "condition being treated" was substantially similar to the policy requiring employees to provide a "brief general diagnosis" that the Second Circuit found to be impermissible in Conroy. Accordingly, the court concluded that

such a policy invites intrusive questioning into an employee's medical condition and tends to elicit information regarding an actual or perceived disability that, absent a showing that the inquiry is job-related and consistent with business necessity, violates the ADA.

H. Confidentiality of Medical Information

EEOC v. Thrivent Fin. for Lutherans, 700 F.3d 1044 (7th Cir. 2012). In response to an email from his supervisor about why he was absent from work, a temporary programmer replied that he had been in bed all day with a severe migraine and explained that he had a history of migraines stemming from head trauma. When he had difficulty finding a new job, he discovered that the defendant was revealing his migraine condition to prospective employers. EEOC filed suit alleging that this disclosure violated the ADA's confidentiality requirement. Affirming summary judgment to the employer, the court held that because the defendant did not learn of the programmer's medical condition through a medical examination or inquiry, it was not obligated to treat the information as a confidential medical record.

J. Association with an Individual with a Disability

Magnus v. St. Mark United Methodist Church, 688 F.3d 331 (7th Cir. 2012). The plaintiff alleged that she was fired from her position as church receptionist and secretary because of her need to take care of her daughter, who had an intellectual disability. The employer contended that the plaintiff was fired because of her unsatisfactory work performance and refusal to work weekends. Upholding summary judgment in favor of the employer, the court found that although the plaintiff was fired the day after arriving late to work because she had to care for her daughter, the fact that the employer had promoted her two years into her employment, despite knowing of the plaintiff's daughter's disability, undercut any inference of discrimination. The employer was not required to accommodate the plaintiff's need to care for her daughter by exempting her from weekend work, and in addition, there was no evidence that the plaintiff improved her work performance after having been notified of the employer's concerns.

Pulczinski v. Trinity Structural Towers, Inc., 691 F.3d 996 (8th Cir. 2012). Affirming summary judgment for the employer, the court found that the employer had proffered a legitimate, nondiscriminatory reason for the plaintiff's termination and that there was insufficient evidence of pretext. Although the employer was aware that the plaintiff's son had cerebral palsy and severe asthma, the employer asserted that the plaintiff was fired because it believed he was attempting to incite a work slowdown. In response, the plaintiff proffered evidence that he was not attempting to incite a work slowdown. The court explained, however, that "[i]t is not our province to determine whether the employer's investigation of alleged employee misconduct reached the correct result, so long as it truly was the reason for the plaintiff's termination." In this case, where it was undisputed that the employer's investigation had developed information from more than one source that the plaintiff was inciting a work slowdown, the evidence supporting the employer's reason was not "so sparse" as to create a genuine issue about the employer's motivation. Thus, even assuming the employer was unreasonable or mistaken in its belief regarding the plaintiff's alleged misconduct, the plaintiff failed to establish that the employer acted with an intent to discriminate.

Barkhorn v. Ports Am. Chesapeake, L.L.C., 26 A.D. Cas. (BNA) 814, 2012 WL 2234358 (D. Md. June 14, 2012). Revising a prior ruling, the court held that associational bias claims are viable under the pre-amendment ADA, despite the inclusion in the ADAAA of a specific amendment to 42 U.S.C. § 12112(a) that seemingly created a cause of action for associational discrimination. The pre-Amendments version of § 12112(a) prohibited discrimination against a qualified individual “with a disability because of the disability of such individual.” The amended version prohibits discrimination against a qualified individual “on the basis of disability.” Notwithstanding this change, which the court found recognized association discrimination against a qualified individual, section 12112(b)(4) of the pre-amendment ADA already defined discrimination to include “excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association.” Based on accepted principles of statutory interpretation and on positions adopted by the EEOC and federal appellate courts recognizing pre-amendment association claims, the court revised its earlier ruling to the contrary and denied the defendant’s motion for summary judgment on the plaintiffs’ association claim. The court also found that, in any case, the amendment to section 12112(a) should be applied retroactively because it is a “clarifying,” as opposed to “substantive,” amendment.