SELECTED CASE LAW DEVELOPMENTS
UNDER THE AMERICANS WITH DISABILITIES ACT

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A. Eleventh Amendment Immunity\(^1\)

\(^1\)These materials are adapted from Chapter V of Selected Developments in Title VII,
1. ADA

Board of Trustees of the Univ. of Alabama v. Garrett, 531 U.S. 356 (2001). The Eleventh Amendment of the Constitution protects non-consenting states from individual suits for monetary relief under Title I of the ADA. Although Congress clearly expressed its intention to abrogate state sovereign immunity when it enacted the ADA, it exceeded its authority under section 5 of the Fourteenth Amendment when it applied Title I to the states. Concluding that state laws that disadvantage individuals with disabilities are constitutional as long as they bear a rational relationship to a legitimate state interest, the Court said that Congress had failed to amass a sufficient record of a history and pattern of irrational discrimination against individuals with disabilities by state employers. Additionally, the Court said that Title I=s requirements lacked Acongruence and proportionality@ to the harm they sought to remedy. Specifically, the Court believed that the requirement to provide Areasonable accommodation,@ the obligation to make facilities Areadily accessible to and usable by@ individuals with disabilities, and the prohibition of conduct that unintentionally screens out individuals with disabilities all exceed what would be required of a state as a matter of Equal Protection. Finally, the Court stated in a footnote that although private individuals may not sue state employers for monetary relief under the ADA, the United States may continue to do so, and individuals may sue state officials for purely injunctive relief.

U.S. v. Miss. Dep=t of Pub. Safety, 13 A.D. Cas. (BNA) 1706 (5th Cir. 2003). The federal government is not barred by the Eleventh Amendment from bringing an ADA lawsuit against a state employer on behalf of an individual employee. The bar on direct employee ADA litigation against the state does not affect the government=s ability to bring suit for the benefit of the public generally. States retain no sovereign immunity against lawsuits by the federal government.

Miles v. California, 320 F.3d 986 (9th Cir. 2003). The district court properly assessed court costs against a plaintiff who lost a disability discrimination suit against California, which had sovereign immunity from the lawsuit. The dismissal was based on the affirmative defense of Eleventh Amendment immunity, not lack of subject matter jurisdiction, so it was appropriate to award costs.

ADEA, ADA, and EPA Law (24th Ed.) (Selected Developments@), prepared by the EEOC=s Office of Legal Counsel and published by EEOC=s Office of Field Programs. With a few exceptions, summaries of District Court cases, and summaries of Court of Appeals decisions issued prior to 1998 that appear in Chapter V of Selected Developments are not included in these. Two sections originally published in Selected Developments have been deleted in their entirety, an summaries of a few cases decided after the publication of Selected Developments have been added.
Gibson v. Arkansas Dep’t of Corrs., 265 F.3d 718 (8th Cir. 2001). The ADA’s remedial scheme is not so comprehensive as to exclude the use of the Ex Parte Young theory. Consequently, private individuals can sue state officials in their official capacities under Title I of the ADA for injunctive relief.

Demshki v. Monteith, 255 F.3d 986 (9th Cir. 2001). A retaliation claim under Title V of the ADA was barred by the Eleventh Amendment. The court held that Garrett applies to Title V cases, particularly those predicated on violations of Title I. Additionally, the court stated that there was no evidence of a pattern of discrimination by the states against employees who opposed unlawful discrimination against employees with disabilities, so Congress could not have abrogated the states’ immunity from Title V claims.

2. Rehabilitation Act

Miller v. Texas Tech Univ. Health Sciences Ctr., C F. 3d C, 2003 WL 21058546 (5th Cir. 2003). Defendant could not have waived its sovereign immunity by accepting federal funds prior to the Supreme Court’s decision in University of Alabama v. Garrett. Fifth Circuit precedent prior to Garrett had held that Title I of the ADA, and by implication, Section 504 of the Rehabilitation Act, had validly abrogated state sovereign immunity pursuant to Congress’s authority under Section 5 of the Fourteenth Amendment. Not until Garrett reached a contrary conclusion could the defendant be said to have known that it retained any sovereign immunity to waive by accepting federal funds.

Koslow v. Pennsylvania, 302 F.3d 161 (3d Cir. 2002), cert. denied, 123 S. Ct. 1353 (2003). Pennsylvania waived its Eleventh Amendment immunity for departments receiving federal financial assistance under the State Criminal Alien Assistance Program (i.e., the Department of Corrections). If a state accepts federal funds for a specific department or agency, it voluntarily waives sovereign immunity for Rehabilitation Act claims against that department or agency.

Nihiser v. Ohio E.P.A., 269 F.3d 626 (6th Cir. 2001), cert. denied, 536 U.S. 922 (2002). States waived their immunity from the Eleventh Amendment with regard to Rehabilitation Act claims when they accept federal funds. The court based its conclusion on 42 U.S.C. ’2000d-7, which it states is a valid and unambiguous waiver of immunity. Although the court did not address whether Congress validly abrogated the states’ Eleventh Amendment immunity in enacting the Rehabilitation Act, it recognized that the two circuits that have addressed the issue have found it was a valid waiver.

Douglas v. California Dep’t of Youth Auth., 271 F.3d 812 (9th Cir. 2001), cert. denied, 536 U.S. 924 (2002). California waived its Eleventh Amendment immunity to claims under the Rehabilitation Act by accepting federal Rehabilitation Act funds. The issue remains as to whether the State waived its immunity under Title I of the ADA.
B. Definition of ADisability@

1. Actual Disability

   a. Substantially Limited B Major Life Activities Other Than Working

   Toyota Motor Mfg., Inc. v. Williams, 534 U.S. 184 (2002). In a unanimous decision, the Supreme Court held that a person is substantially limited in the major life activity of performing manual tasks if he or she has an impairment that prevents or significantly restricts [him or her] from doing activities that are of central importance to most people=s daily lives, such as household chores, bathing, and brushing one=s teeth. In reaching this conclusion, the Court found that the Sixth Circuit applied the wrong standard when it determined that Williams, whose carpal tunnel syndrome and tendinitis prevented her from working for extended periods of time with her hands and arms at or above shoulder height, was substantially limited in performing the manual tasks associated with her job as an assembly line worker. The Court further noted that the ADA establishes a demanding standard for establishing that an individual has a disability and that in order to be substantially limiting, an impairment must be severe and either permanent or long-term.

   Bragdon v. Abbott, 524 U.S. 624 (1998). Abbott=s asymptomatic HIV infection constituted a disability. The Court had little difficulty concluding that HIV is an impairment from the moment of infection and that, in Abbott=s case, HIV substantially limited the major life activity of reproduction. Construing major life activities broadly, the Court found that they need not have a public, economic, or daily character and, thus, concluded that reproduction is a major life activity, even though Abbott=s ability to have children had no relationship to the discrimination she had alleged (i.e., Bragdon=s refusal to provide her dental services in his office).

   Calef v. Gillette Co., 14 A.D. Cas. (BNA) 110 (1st Cir. 2003). An employee with Attention Deficit Hyperactivity Disorder (ADHD) failed to prove he was substantially limited in learning. Although he scored Asignificantly below average@ on certain tests measuring concentration and memory, a psychometric assessment found his overall learning ability to be in the average range, and his Alife experience@ shows no substantial limitation in learning because he has a high school GED, has taken other courses, and has received on-the-job training where he learned new job skills. The employee also failed to establish he was substantially limited in speaking where the evidence showed only that the ADHD sometimes caused him to blurt out or interrupt people in conversation, and that in stressful situations or when angry Ahe sometimes loses control and cannot speak or think well.@
Waldrip v. General Elec. Co., 325 F.3d 652 (5th Cir. 2003). Plaintiff=s pancreatitis is a physical impairment, and eating is a major life activity, since it is an activity that is Acentral to most peoples= daily lives@ and Acentral to the life process itself.@ However, the plaintiff failed to demonstrate that he was substantially limited in eating. The court noted that the plaintiff was required to demonstrate substantial limitation with specific evidence of how his particular impairment limited his particular major life activity. Plaintiff offered only the conclusory statement that his pancreatitis substantially limited his major life activities of eating and digestion. As to evidence from plaintiff=s doctor that plaintiff would occasionally have to miss a few days of work when his condition flared up, the court concluded that these incidents were only temporary and did not amount to substantial limitations. Citing Fifth Circuit precedent, the court siadd that Apermanency, not frequency, is the touchstone of a substantially limiting impairment.@

Dyke v. O=Neal Steel, Inc., 2003 WL 21000819 (7th Cir. 2003). Following the holding and of the Ninth=s Circuit decision in EEOC v. United Parcel Service (see below), the court concluded that in order to be substantially limited in seeing, an ADA plaintiff must be prevented or severely restricted in the ability to see as compared to the way that the average person uses eyesight in daily life. Though the plaintiff had only one eye, the court concluded that his monocular vision Aclearly@ did not substantially limit the major life activity of seeing where his only limitations were: (1) that he could not drive at night; (2) that he could not hold his head straight when looking to the left or right; and (3) that he could not engage in some recreational activities.

Fenney v. Dakota, Minnesota & Eastern Railroad, (8th Cir.). The court concluded that the holding in Toyota Motor Mfg. v. Williams applies to all major life activities, not just performing manual tasks. Thus, in order to demonstrate a substantial limitation in the ability to care for self, a plaintiff must show that an impairment Aprevents or severely restricts@ his or her ability to perform this activity as compared to the way unimpaired individuals care for themselves Ain daily life.@ In this case, an on-call locomotive engineer had requested an additional half hour of advance notice when he was going to have to come into work. The company denied this accommodation, and as a result, the plaintiff had to take a lower-paying job that offered him a regular start time. The Eighth Circuit reversed summary judgment in the employer=s favor, holding, inter alia, that plaintiff had presented sufficient evidence that he was substantially limited in caring for himself under the holding in Toyota, although it characterized the evidence as Athin.@ The evidence included a note from his doctor indicating that, because of plaintiff=s missing thumb and permanent hand and arm injuries, he required more time to dress himself in cold weather, and testimony from the plaintiff himself that he required twice as much time as others for activities such as shaving, bathing, preparing a meal, and using the restroom.

Gillen v. Fallon Ambulance Serv., Inc., 283 F.3d 11 (1st Cir. 2002). The applicant for an emergency medical technician (EMT) position was a genetic amputee whose left arm ends
a few inches below the elbow and who eschews the use of a prosthesis. Reversing the district court=s grant of summary judgment for the employer, the court held that there was a factual issue regarding whether or not applicant=s impairment substantially limited her in the major life activity of lifting. Notwithstanding her ability to lift more poundage than many two-handed individuals, Atthe manner in which she lifts and the conditions under which she can lift will be significantly restricted because she only has one available limb.@ The court noted: AThe key question is not whether a handicapped person accomplishes her goals, but whether she encounters significant handicap-related obstacles in doing so.@

_Gagliardo v. Connaught Lab., Inc.,_ 311 F.3d 565 (3d Cir. 2002). A jury could reasonably conclude that the plaintiff was substantially limited in the major life activities of _Aconcentrating and remembering (more generally, cognitive functioning)@ because of the chronic fatigue and resulting forgetfulness caused by her multiple sclerosis.

_Pollard v. High=s of Baltimore, Inc.,_ 281 F.3d 462 (4th Cir.), cert. denied, 123 S. Ct. 122 (2002). An employee=s back injury did not substantially limit her in any major life activities, even though she was on medical leave for nine months while recovering from surgery and post-surgical infection. Although A[t]emporary disabilities present a spectrum of cases and at some point the duration of an impairment could be so long that it cannot properly be characterized as temporary,@ in this case Anothing in the nature or severity of [employee=s] impairment indicated she had anything other than a temporary impairment or that she was not likely to make a full recovery.@ The court noted that all communications from the employee and her doctor to the employer during her absence indicated that her condition was thought to be only temporary, even though her restrictions prohibiting repetitive bending or lifting more than 25 pounds were ongoing.

_Blanks v. Southwestern Bell Communications, Inc.,_ 310 F.3d 398 (5th Cir. 2002). The plaintiff, who was HIV-positive, could not demonstrate that he was Aimpaired@ in major life activity of reproduction, where he and his wife had decided not to have any more children and his wife had undergone a procedure to prevent her from having any more children.

_Mahon v. Crowell_, 295 F.3d 585 (6th Cir. 2002). Although the plaintiff alleged that his back impairment substantially limited him in sitting, standing, bending, stooping, walking, climbing, and lifting, the court concluded, based on the evidence presented, that he was not Aseverely restricted@ in any of them. The plaintiff admitted in his deposition that despite his injury he can still perform household tasks, clean gutters, fix plumbing, walk a mile, and work on his car, and evidence drawn from his personal daily planner also showed that he frequently performed moderately strenuous physical activities.

_Boerst v. General Mills Operations, Inc.,_ 2002 WL 59637 (6th Cir. Jan. 15, 2002), cert. denied, 535 U.S. 1097(2002). Sleeping is a major life activity under the ADA, but concentrating and maintaining stamina are not. Summary judgment for the employer was
affirmed; the plaintiff=s evidence that he only got between two and four hours of sleep per night was insufficient to establish that he was substantially limited in sleeping.

Nawrot v. CPC Int'l, 277 F.3d 896 (7th Cir. 2002). The plaintiff=s diabetes substantially limited him in the major life activity of caring for oneself because he must inject himself with insulin three times per day and test his blood sugar level at least ten times per day. In addition, his diabetes has progressively worsened such that he has suffered early stages of kidney damage and nerve damage in his feet, which is so extensive it has affected his ability to sense feeling. Moreover, he is on a restrictive diet, and depression and mood swings accompany swings in his blood sugar level. He also has lost consciousness and fallen several times. The court also found him substantially limited in thinking because, despite his efforts to control his condition, he nevertheless has unpredictable hypoglycemic episodes in which his ability to think and express his thoughts coherently and to function is significantly impaired.

Thornton v. McClatchy Newspapers, Inc., 292 F.3d 1045 (9th Cir. 2002). A newspaper reporter=s alleged inability to use a keyboard for more than 30 minutes at a time or 60 minutes intermittently per day, or to write for more than five minutes at a time or 60 minutes intermittently per day, did not render her substantially limited in performing manual tasks. The court ruled that Acontinuous keyboarding and handwriting@ are not activities of central importance to most people=s daily lives, reasoning that the plaintiff=s condition did not stop her from either activity, but rather she simply could not pursue them continuously.

EEOC v. United Parcel Serv., Inc., 306 F.3d 794 (9th Cir. 2002). Plaintiffs with monocular vision failed to demonstrate they were substantially limited in the major life activity of seeing. The court held that for an individual with monocular vision to show that his impairment substantially limits his ability to see, there must be evidence that the impairment prevents or severely restricts use of his eyesight as compared to how unimpaired individuals normally used their eyesight in daily life. Even though the plaintiffs had not fully compensated for their loss of near-field vision, the court found that the impairment did not keep either one of them from using his eyesight as most people do for daily life. The court noted that both plaintiffs are able to drive, read, use tools, and play sports.

Whitney v. Greenberg, Rosenblatt, Kull & Bitsoli, P.C., 258 F.3d 30 (1st Cir. 2001). The plaintiff=s chemotherapy-induced dementia did not substantially limit her ability to learn, where three weeks after her discharge from the accounting firm she was hired for a similar job at a bank and did not have trouble with the bank=s computer software conversion.

EEOC v. Sara Lee Corp., 237 F.3d 349 (4th Cir. 2001). The plaintiff, who had one to two seizures a week, was not substantially limited in the major life activities of sleeping, thinking, or caring for herself. With respect to sleeping, the court reasoned that even though the plaintiff did not sleep well every night, her lack of sleep was no worse than the
quality of sleep of the general population. Similarly, the court noted that because many other adults in the general population suffer from a few incidents of forgetfulness a week, the plaintiff was not substantially limited in thinking simply because she forgot the location of her doctor=s office, had to write things down to remember them, and had trouble remembering to take a second dosage of her anti-seizure medication. Finally, the court concluded that the plaintiff was not substantially limited in caring for herself because she continued to perform all sorts of tasks, cared for her son, and drove a car.

EEOC v. J.H. Routh Packing Co., 246 F.3d 850 (6th Cir. 2001). To provide fair notice of an ADA claim, a complaint does not have to identify the major life activity that is substantially limited as long as the complaint notifies defendant of the claimed impairment. Thus, a complaint alleging that former employee took medication for epilepsy and describing frequency and physical effects of his seizures was sufficient to provide employer with fair notice of his ADA claim.

Furnish v. SVI Sys. Inc., 270 F.3d 445 (7th Cir. 2001). A former employee with cirrhosis of the liver caused by hepatitis B did not have a disability within the meaning of the ADA where the only activity alleged to be limited by his condition is his liver function. The court noted that although liver function is a Acharacteristic@ of the impairment, it is not a major life activity under the ADA. Even assuming that liver function is a major life activity, the court found that the plaintiff=s claim would fail because he cannot prove that his disease Asubstantially limited@ the functioning of his liver.

Lawson v. CSX Transp. Inc., 245 F.3d 916 (7th Cir. 2001). The court held that a jury could find an individual with insulin-dependent diabetes substantially limited in the major life activity of eating, even though his physical ability to ingest food is not restricted, where he has difficulties in regulating his blood sugar and metabolizing food. In reaching this conclusion, the court noted that, here, the plaintiff could not eat when and where he wanted or exert himself without concern for the effect the exertion will have on his glucose levels. AInstead,@ the court stated, Ahe must always concern himself with the availability of food, the timing of when he eats, and the type and quantity of the food he eats.@ The court also noted that the plaintiff must Aendure the discomfort@ of multiple blood tests to monitor his glucose levels. It is the severity of these limitations on the plaintiff=s ability to eat that distinguishes the plaintiff=s situation from other individuals who must follow simple Adietary restrictions.@

Humphrey v. Memorial Hosp. Ass=n, 239 F.3d 1128 (9th Cir. 2001), cert. denied, 535 U.S. 1011 (2002). The plaintiff=s obsessive compulsive disorder, which caused her to take significantly more time than the average person to accomplish the basic tasks of washing and dressing, substantially limited her ability to care for herself.
Steele v. Thiokol Corp., 241 F.3d 1248 (10th Cir. 2001). The plaintiff, who has obsessive compulsive disorder, is not substantially limited in the major life activity of sleeping even though he is awake during the night and fatigued during the day, where there is no evidence that his sleep problems made it difficult for him to perform his job or affected his overall health in a severe or permanent manner. The court also found that the plaintiff was not substantially limited in walking or interacting with others. According to the court, to establish that he was substantially limited in getting along with people in general, plaintiff would have to show that his relations with others were characterized on a regular basis by problems such as high levels of hostility, social withdrawal, or failure to communicate when necessary.

Lusk v. Ryder Integrated Logistics, 238 F.3d 1237 (10th Cir. 2001). A former truck driver who has a 40-pound lifting restriction because of a heart condition did not establish that his lifting is substantially limited, where such a restriction is not substantially limiting on its face, he did not describe any substantial limitations on his day-to-day activities, and he did not present any comparative evidence as to the lifting capabilities of the general population.

Chenoweth v. Hillsborough County, 250 F.3d 1328 (11th Cir. 2001), cert. denied, 534 U.S. 1131 (2002). Driving is not a major life activity. Although the list of major life activities enumerated in the EEOC=s regulation is not meant to be exhaustive, driving is Aconspicuously different@ from the other activities enumerated in the regulation because it requires a revocable license, millions of Americans do not drive, and Atthe deprivation of being self-driven to work cannot be sensibly compared to inability to see or to learn.@

Clemente v. Executive Airlines, Inc., 213 F.3d 25 (1st Cir. 2000). A flight attendant with moderate to severe hearing loss in one ear but normal hearing in the other was not substantially limited in hearing. The court also held that although the plaintiff=s tone of voice may have been affected by her hearing impairment, this was insufficient to show a substantial limitation in speaking.

McInnis v. Alamo Cnty. Coll. Dist., 207 F.3d 276 (5th Cir. 2000). There was a factual issue whether the plaintiff, who severely injured her head in an automobile accident, was substantially limited in walking and speaking where she had slurred speech, a limp, a language communication disorder, and partial paralysis.

Hoskins v. Oakland County Sheriff=s Dep=t, 227 F.3d 719 (6th Cir. 2000). Finding that the district court employed an Aexceedingly narrow interpretation of >substantially limits=.@ the court held that a police officer, who fell from a horse and had a 20-pound lifting restriction, may be substantially limited in breathing, moving, and performing manual tasks. Rejecting the lower court=s reasoning that an individual would be disabled within the meaning of the ADA only if he or she can show that he or she has avoided certain major life activities as a result of an impairment, the court concluded that the plaintiff raised a genuine issue of material fact regarding whether her impairment substantially limits one or more of
her major life activities, where she testified that she now must be careful about the way she moves and must sometimes cease for a time performing daily activities because of pain.

**Otting v. J.C. Penney Co.**, 223 F.3d 704 (8th Cir. 2000). Despite medication and surgery, the plaintiff still was substantially limited in the major life activities of seeing, speaking, and walking. The plaintiff had two to three seizures a month, lasting from 30 seconds to two minutes, during which she was unable to see, speak, or walk and felt the effects of the seizures for as long as 36 hours. In reaching its decision, the court considered the factors delineated in EEOC regulations for determining whether an individual is substantially limited in a major life activity: (1) the nature and severity of the impairment; (2) the duration or expected duration of the impairment; and, (3) the permanent or long-term impact or expected permanent or long-term impact of or resulting from the impairment.

**Chanda v. Englehard**, 234 F.3d 1219 (11th Cir. 2000). An engineer who was diagnosed with myositis (an inflammation of the wrist and forearm) was not substantially limited in performing manual tasks, where he stated he could drive, dress, and feed himself, perform household activities, take notes in class, and use a computer. The court held that the plaintiff was only limited in performing a narrow category of tasks, such as typing or cutting foamboard, for extended periods of time.

**Taylor v. Phoenixville Sch. Dist.**, 184 F.3d 296 (3d Cir. 1999). A plaintiff with bipolar disorder may have been substantially limited in thinking where even with lithium, she experienced paranoia and distorted mood and saw a doctor 25 times during the school year; and the side effects of the lithium included concentration and memory problems and nausea. The court stated that an impairment may substantially limit a major life activity where symptoms do not occur every day but may be episodic.

**Weber v. Strippit, Inc.**, 186 F.3d 907 (8th Cir. 1999), cert. denied, 528 U.S. 1078 (2000). Rejecting the plaintiff’s argument that heart disease is a per se disability, the court held that he must show that his impairment substantially limits a major life activity. The court also held that shoveling snow, mowing the lawn, playing tennis, and fishing are not major life activities.

**McAlindin v. County of San Diego**, 192 F.3d 1226 (9th Cir. 1999), cert. denied, 530 U.S. 1243 (2000). The plaintiff, who had anxiety disorders, raised a triable issue as to whether he was substantially limited in a major life activity other than working, where the evidence showed that, despite his use of medication, he was incapacitated once a month, frequently unable to sleep, and impotent.

**Pack v. KMart Corp.**, 166 F.3d 1300 (10th Cir.), cert. denied, 528 U.S. 811 (1999). Sleeping is a major life activity, but the plaintiff’s depression did not substantially limit her
ability to sleep. The court also concluded that concentration is not a major life activity, though it may be part of other activities (such as working) that are major life activities.

**Lowe v. Angelo's Italian Foods**, 87 F.3d 1170 (10th Cir. 1996). The plaintiff created a genuine issue of fact regarding whether she was substantially limited in lifting given that she is unable to lift more than 15 pounds.

**b. Substantially Limited in Working**

**Sheehan v. City of Gloucester**, 321 F.3d 21 (1st Cir. 2003). A police lieutenant who was forced to take involuntary retirement because of his hypertension did not show that he was incapable of performing a substantial class of jobs, given that he continued to work 24-32 hours per week as a security guard.

**Bailey v. Georgia-Pacific Corp.**, 306 F.3d 1162 (1st Cir. 2002). An alcoholic employee failed to establish he was substantially limited in working where he experienced isolated difficulties in a single job when he was occasionally unable to accept overtime shifts and was sent home on one occasion for having allegedly consumed alcohol before his shift. A proof that one is limited in the ability to perform either a class or broad range of jobs would usually entail evidence concerning the accessible geographic area, the numbers and types of jobs in the area foreclosed due to the impairment, and the types of training, skills, and abilities required by the jobs.

**Gonzalez v. El Dia, Inc.**, 304 F.3d 63 (1st Cir. 2002). Summary judgment was proper where the plaintiff, even assuming her orthopedic problems met the physical impairment requirement, failed to provide sufficient evidence that she was substantially limited in working. The plaintiff attested that her impairment made it difficult to walk and impossible to sit for extended periods of time, and her physician, having diagnosed her with diabetes and obesity, provided highly conclusory testimony simply parroting the definition of substantially limited in working from the EEOC regulation. Moreover, the plaintiff tendered no evidence that her impairments rendered her unable to perform a broad range of jobs, as distinguished from the job she held with defendant immediately prior to her termination, nor did she adduce any evidence as to the employment demographics in the relevant geographic area from which a fact finder might rationally assess the criteria set forth in 29 C.F.R. ‘1630.2(j)(3). The court found this latter evidentiary omission especially serious given that the plaintiff subsequently obtained another job and there was no evidence as to whether she requested or received any reasonable accommodation, information that could be relevant in determining whether she was restricted from or unable to work in a class or broad range of jobs.

**Black v. Roadway Express, Inc.**, 297 F.3d 445 (6th Cir. 2002). The plaintiff, an over-the-road truck driver, failed to demonstrate his knee injury substantially limited him in the major
life activity of working. His vocational expert=s affidavit and report concluding that the plaintiff was disqualified from both a class of jobs and a broad range of jobs in various classes was conclusory and based on medical evidence that was contradicted by the record. The court noted, however, that although it agreed with the district court=s conclusion, the district court had erred in its analysis by taking into account the accommodation of the plaintiff=s impairment by other trucking companies (by providing trucks with cruise control) in determining whether the plaintiff=s impairment disqualified him from a class or broad range of jobs. As we understand the ADA, workplace accommodation of an individual=s impairment cannot be taken into account in assessing whether that individual is substantially limited in the major life activity of working. @

Mahon v. Crowell, 295 F.3d 585 (6th Cir. 2002). Injured steamfitter was not substantially limited in working where vocational counselor/disability analyst found that employee had suffered 47 percent loss of access to his job market, so he was still qualified for over half the jobs he was qualified for before his injury, and where he had continued to work as steamfitter, albeit with restrictions, after his injury.

Boerst v. General Mills Operations, Inc., 2002 WL 59637 (6th Cir. Jan. 15, 2002), cert. denied, 535 U.S. 1097 (2002). While working is a major life activity, the plaintiff failed to show he was substantially limited when his impairment only prevented him from working more than eight hours per day.

Ogborn v. United Food and Commercial Workers Union, Local No. 881, 305 F.3d 763 (7th Cir. 2002). Evidence that the plaintiff=s depression prevented him from working for just over eight weeks was insufficient to show that he was substantially limited in working.

Whitney v. Greenberg, Rosenblatt, Kull & Bitsoli, 258 F.3d 30 (1st Cir. 2001). A former executive assistant with chemotherapy-induced dementia did not show that she was substantially limited in working. She presented no evidence of labor market statistics or testimony from a vocational expert, and she performed similar administrative duties at two subsequent jobs.

Lebron-Torres v. Whitehall Robins Labs., 251 F.3d 236 (1st Cir. 2001). A manufacturing operator did not establish that her back injury substantially limited her ability to work where there was no evidence about the kinds of jobs that her injury prevents her from doing, she worked without restriction for more than a year after her return from medical leave, and she subsequently worked full time as a hair stylist. Evidence that she received compensation for a 20 percent disability and had received treatment for physical limitations and pain while working for the employer suggests the possibility of disability but is insufficient to establish that she was precluded from a class of jobs or broad range of jobs in various classes.
Gelabert-Ladenheim v. American Airlines, Inc., 252 F.3d 54 (1st Cir. 2001). Whether an individual is substantially limited in working involves a multi-level analysis, starting with the skills of the plaintiff herself and moving to the nature of the jobs she was prevented from performing as well as those she was not. An airline passenger services agent did not establish that her carpal tunnel syndrome substantially limited her ability to work where she produced only generic evidence of her work restrictions and did not show how those restrictions limited her ability to work in her geographic area in light of her skills, training, education, abilities, and employment experience.

Aldrup v. Caldera, 274 F.3d 282 (5th Cir. 2001). A firefighter=s assertion that he has depression caused by stress from working with certain employees shows only that he cannot perform jobs at one specific location and does not establish that he is substantially limited in working.

Emerson v. Northern States Power Co., 256 F.3d 506 (7th Cir. 2001). A factual issue exists whether customer information associate with anxiety disorder is substantially limited in working where a vocational rehabilitation specialist concluded that she is foreclosed from 47 percent of all occupations.

Webner v. Titan Distrib., Inc., 267 F.3d 828 (8th Cir. 2001). A reasonable jury could conclude that a former assembly line worker=s back injury substantially limited his ability to work, where physicians had placed restrictions on his ability to walk, stand for long periods, twist, and bend at the waist. The plaintiff was also limited to lifting no more than fifty pounds occasionally which, according to a vocational expert, precluded him from performing jobs in the A heavy@ and Avery heavy@ industrial classifications. The court noted that, A[w]hile a lifting restriction standing alone is insufficient to demonstrate that [the plaintiff] was substantially limited in the life activity of working, the inability to lift heavy objects can translate across a broad spectrum of physically demanding jobs.@

Brunko v. Mercy Hosp., 260 F.3d 939 (8th Cir. 2001). A staff nurse whose back injury resulted in a 40-pound lifting restriction was not substantially limited in working. Although she could not meet the hospital=s 75-pound lifting requirement, she worked in several nursing positions for nursing companies after leaving the hospital. The nurse, therefore, was precluded from only a narrow range of jobs.

Duncan v. WMATA, 240 F.3d 1110 (D.C. Cir.) (en banc), cert. denied, 534 U.S. 818 (2001). A custodian/parts runner who had limited education and was unskilled did not establish that his degenerative disc disease, which resulted in a 20-pound lifting restriction, substantially limited his ability to work. Since he did not show the number and types of jobs available in his local job market, including the jobs he could perform, he could not establish that his impairment prevented him from working in a class or broad range of jobs. While the court did not specify precisely what type of evidence would be sufficient, it said the
evidentiary burden is not onerous; government job statistics might be sufficient. Expert vocational testimony, although perhaps persuasive, is not necessarily required.

**Clemente v. Executive Airlines, Inc.**, 213 F.3d 25 (1st Cir. 2000). A flight attendant with a temporary hearing loss was not substantially limited in working where her impairment did not interfere with her ability to perform flight-attendant duties. Even if the impairment had precluded work in non-pressurized cabins, the plaintiff offered no evidence of the number of flight-attendant positions requiring unpressurized flight. In addition, the plaintiff was qualified for several ground positions at the airline.

**Marinelli v. City of Erie**, 216 F.3d 354 (3d Cir. 2000). A street crew worker whose residual arm pain prevented him from driving large snow plows was not substantially limited in working.

**Burns v. Coca-Cola Enters., Inc.**, 222 F.3d 247 (6th Cir. 2000). An employee with a 23-pound lifting restriction was substantially limited in working where his impairment prevented him from doing fifty percent of the jobs that he was qualified to perform in light of his limited education and work experience.

**Webb v. Clyde L. Choate Mental Health & Dev. Ctr.**, 230 F.3d 991 (7th Cir. 2000). A psychologist whose asthma, osteoporosis, and weakened immune system precluded interaction with violent or infectious patients did not show that he was prevented from performing a class of jobs, since he could still perform psychology jobs generally.

**Sinkler v. Midwest Prop. Mgt. Ltd. P=ship**, 209 F.3d 678 (7th Cir. 2000). A sales manager whose phobia prevents her from driving anywhere unfamiliar to her did not establish that she was substantially limited in working. Although the sales manager was precluded from taking jobs that required frequent car travel to unfamiliar places, such jobs did not constitute a class of jobs.

**Schneiker v. Fortis Ins. Co.**, 200 F.3d 1055 (7th Cir. 2000). A former employee did not establish that her depression substantially limited her in working where she produced no evidence that her inability to work in stressful situations precluded her from a class of jobs or a broad range of jobs in various classes. A personality conflict between an employee and a supervisor is not substantially limiting if the employee can perform the job under a different supervisor.

**Kellogg v. Union Pacific R.R.**, 233 F.3d 1083 (8th Cir. 2000). A senior manager whose major depression and anxiety prevented him from working more than 40 hours per week was not substantially limited in working.

**Mullins v. Crowell**, 228 F.3d 1305 (11th Cir. 2000). The plaintiffs might be substantially limited in working even though they could perform jobs that were tailored to their physical
restrictions. Expert vocational evidence is instructive but not necessary in determining whether a person is substantially limited in working.

Quint v. A.E. Staley Mfg. Co., 172 F.3d 1 (1st Cir. 1999). A former warehouse worker established that her carpal tunnel syndrome, which resulted in a ten-pound lifting restriction and limited her ability to perform repetitive manual tasks, substantially limited her ability to work. She produced competent medical testimony that her decision to limit her lifting was to avoid placing her at imminent risk of physical injury. She also produced evidence that her restrictions precluded work in physical labor jobs, that such jobs were the economic mainstay in her geographical area, that she previously had held a variety of such jobs, and that her training, knowledge, and skills restricted her to such jobs.

EEOC v. R.J. Gallagher Co., 181 F.3d 645 (5th Cir. 1999). A company president who was demoted to vice president of sales after treatment for cancer was not substantially limited in working where his doctor cleared him to return to work and he could maintain a full work load while following his treatment schedule.

Talk v. Delta Airlines, Inc., 165 F.3d 1021 (5th Cir. 1999). An airline customer service agent whose foot impairment prevented her from wearing steel-toed shoes was not substantially limited in working. The impairment prevented her from performing only a narrow range of jobs: those in the airline=s cargo area, where steel-toed shoes were required.

Doren v. Battle Creek Health Sys., 187 F.3d 595 (6th Cir. 1999). A pediatric nurse with recurrent tendinitis in multiple joints, pain in knees and feet, and a back impairment was not substantially limited in working. Although her impairments prevented her from performing nursing duties on an adult floor, her position did not require her to work with adult patients and she presented no evidence concerning the number of pediatric nursing jobs from which she was excluded.

Fjellestad v. Pizza Hut, 188 F.3d 944 (8th Cir. 1999). A former unit manager created a factual issue whether her car-crash injuries substantially limited her ability to work. Her entire training and experience had been in restaurant management, her injuries limited her to working 35-40 hours per week with no more than three consecutive days of work, and an occupational specialist stated that her injuries left her eligible for only 1,300 of the 28,000 jobs that fit her vocational profile.

Berg v. Norand Corp., 169 F.3d 1140 (8th Cir.), cert. denied, 528 U.S. 872 (1999). A discharged tax-department manager whose diabetes prevented her from working more than 40-50 hours per week was not substantially limited in working. The plaintiff had opened her own tax and accounting practice since her discharge, had become the chief financial officer of a construction company, and acknowledged that she had never been
unemployed. See also Muthler v. Ann Arbor Mach., Inc., 18 F. Supp. 2d 722 (E.D. Mich. 1998) (former machine assembly manager whose heart impairment prevented him from working more than 40 hours per week was not substantially limited in working).

Wellington v. Lyon County Sch. Dist., 187 F.3d 1150 (9th Cir. 1999). A former maintenance worker whose education was limited to a high school degree and trade school certification created a factual issue whether his carpal tunnel syndrome substantially limited his ability to work. His work experience was limited to manufacturing, construction, heavy maintenance, and plumbing, and his doctor stated that he could not perform work involving metal fabrication, welding, heavy activities, carpentry, and the use of a variety of tools.

c. Substantially Limited B Effect of Mitigating Measures

Sutton v. United Airlines, Inc., 527 U.S. 471 (1999). The determination of whether an individual is disabled should be made with reference to measures that mitigate the individual=s impairment. The Supreme Court reasoned that because the plaintiffs= severe myopia was correctable with lenses, they were not individuals with disabilities. The Court emphasized, however, that disability should be assessed by looking at the actual limitations faced by an individual at the time of the discrimination and that courts and employers also should consider whether the mitigating measures have any negative side effects in determining whether an individual is a person with a disability.

Murphy v. United Parcel Serv., Inc., 527 U.S. 516 (1999). Applying the principles concerning mitigating measures set forth in Sutton, the Supreme Court ruled that because medication reduced the plaintiff=s blood pressure to a level that did not significantly restrict his major life activities, he was not a person with a disability.

Albertson=s, Inc. v. Kirkingburg, 527 U.S. 555 (1999). The Ninth Circuit erred in concluding that the plaintiff, who had monocular vision (vision in only one eye) was disabled merely because he sees in a different manner than persons who have vision in both eyes. While monocular vision Ainevitably leads to some loss of horizontal field of vision and depth perception@ and will Aordinarily@ constitute a disability, the ADA requires individuals to prove, on a case-by-case basis, that their limitations are Asubstantial.@ Extending the range of mitigating measures that must be considered, the Court held that, in addition to artificial aids such as corrective devices and medication, employers and courts must consider the individual=s physical ability to compensate for the impairment.

Nawrot v. CPC Int=I, 277 F.3d 896 (7th Cir. 2002). When considering the effects of mitigating measures, the court Aconsider[s] only the measures actually taken and consequences that actually follow.@ A warehouse supervisor with Type I diabetes who has hypoglycemic episodes and must inject insulin three times per day and test his blood sugar ten times per day is substantially limited in thinking and caring for himself.
Orr v. Wal-Mart Stores, Inc., 297 F.3d 720 (8th Cir. 2002). Examining the plaintiff=s present condition, including taking into account the impact of the mitigating measures used for his diabetes, i.e., insulin injections and diet, the court found that the plaintiff failed to present any evidence regarding how his diabetes substantially affected his major life activities or the duration and frequency of any limitations.

Swanson v. Univ. of Cincinnati, 268 F.3d 307 (6th Cir. 2001). A surgical resident with major depression was not substantially limited in sleeping and communicating where medication corrected his restrictions.

Lawson v. CSX Transp., Inc., 245 F.3d 916 (7th Cir. 2001). A jury could find that an individual with Type I insulin-dependent diabetes was substantially limited in eating where, even when taking insulin, his ability to regulate his blood sugar and metabolize food is difficult and he must adhere to a demanding regimen. In addition, the insulin itself may cause debilitating symptoms that may have life threatening consequences.

Hein v. All American Plywood Co., 232 F.3d 482 (6th Cir. 2000). Affirming summary judgment, the court held that the plaintiff was not substantially limited in any major life activity because of his voluntary failure to maintain his supply of blood pressure medicine to treat his hypertension. The court noted that the plaintiff admittedly was functional when taking the medication.

EEOC v. Sears, Roebuck & Co., 233 F.3d 432 (7th Cir. 2000). Reversing summary judgment for the defendant, the court held that a rational jury could conclude that a woman with neuropathy (nerve damage) was substantially limited in walking even when using a cane, where the cane did not mitigate the neuropathy but instead provided her with an alternative means to travel longer distances without having to lean against a wall to keep from falling.

Ivy v. Jones, 192 F. 3d 514 (5th Cir. 1999). In light of Sutton, the court vacated and remanded the lower court=s decision for the plaintiff, holding that it should have examined her hearing impairment as corrected when determining whether she is a person with a disability. Here, audiological test data indicated that the plaintiff=s hearing could be corrected to 92 percent with one hearing aid and to 96 percent with two hearing aids. The court also noted that the plaintiff testified that she Adoes not consider herself disabled@ and does not have much trouble functioning in the workplace despite her impairment.

Belk v. Southwestern Bell Tel. Co., 194 F.3d 946 (8th Cir. 1999). Citing Sutton, the court stated that the mere use of a corrective device does not mean a plaintiff loses coverage under the ADA. Here, the plaintiff, who used a full-length brace because of the effects of polio, was substantially limited in walking because his brace limited the full range of motion in his leg and his gait was hampered by a pronounced limp.
Spades v. Walnut Ridge, 186 F.3d 897 (8th Cir. 1999). A police officer with depression was not an individual with a disability where medication and counseling allowed him to function without limitation.

2. Record of Disability

Hernandez v. Hughes Missile Sys. Co., 292 F.3d 1038, as amended, 298 F.3d 1030 (9th Cir. 2002), cert. granted sub nom. Raytheon Co. v. Hernandez, 123 S. Ct. 1255 (2003). Reversing summary judgment, the court found that genuine issues of material fact existed as to whether the employer discriminated against an applicant based on his record of his past drug addiction. In 1991, the plaintiff resigned in lieu of termination because he tested positive for cocaine. He reapplied for a job in 1994 following successful rehabilitation, but was rejected, according to Hughes, because of its unwritten policy against rehiring employees terminated for misconduct (or employees who resigned in lieu of termination). Although the individual who made the decision not to rehire the plaintiff testified that she did not know of the plaintiff=s history of drug addiction or reason for his resignation, she had seen a letter from his Alcoholics Anonymous counselor (indicating that he was a recovering alcoholic) and she testified that she pulled his entire personnel file (which included the drug test results and his resignation in lieu of termination).

Rakity v. Dillon Cos., Inc., 302 F.3d 1152 (10th Cir. 2002). Evidence of temporary and non-severe injuries, as well as a record of minor limitations at various times, do not rise to the level necessary to prove a record of disability under the ADA. The plaintiff argued that he had a record of substantial limitations in the major life activities of performing manual tasks, lifting, reaching, and working. The court found he only provided evidence of short-term lifting restrictions, the severity and long-term impact of his reaching restrictions were only minor, and his restrictions in manual tasks were specific to his job (shelving groceries) and not central to daily life. And even though the plaintiff missed work due to surgery, short hospital stays, and rehabilitation, the court found this insufficient to establish a record of a substantial limitation in working, especially because evidence showed that he maintained a second job during his period of rehabilitation.

Lawson v. CSX Transp., Inc., 245 F.3d 916 (7th Cir. 2001). The plaintiff with insulin-dependent diabetes provided enough evidence for a jury to find that a record of a disability existed. The court relied upon the plaintiff=s receipt of Social Security Disability Insurance (SSDI) for nearly twelve years prior to applying for work with the defendant, evidence that he had numerous recurring medical conditions related to the diabetes, and the plaintiff=s inability to maintain significant employment because of his condition. The court recognized that receipt of SSDI is not a dispositive factor but is relevant evidence to establish a disability.
McKenzie v. Dovala, 242 F.3d 967 (10th Cir. 2001). The court distinguished Sorenson (see below), and held that the plaintiff provided enough evidence upon which a jury could conclude that she had a record of a disability. Reversing the district court=s grant of summary judgment for the employer, the Tenth Circuit based its decision on the plaintiff=s complete inability to work prior to her resignation, at least one hospital admission, a physician=s reports indicating a psychological problem during the year prior to her resignation, the extended duration of her mental illness, and her recent release to return to work. Additionally, evidence indicated that the plaintiff=s employer=s decision not to rehire her was based on her past medical history not her current ability to perform her job.

Taylor v. Nimcock=s Oil Co., 214 F.3d 957 (8th Cir. 2000). The head cashier, who was released to return to work with restrictions two months after a heart attack and without restrictions four months after heart attack, did not have a record of a substantially limiting impairment.

EEOC v. R.J. Gallagher Co., 181 F.3d 645 (5th Cir. 1999). The court reversed the district court=s grant of summary judgment to the defendant on the issue of whether a former company president who was demoted following his treatment for blood cancer, had a record of a disability. The court concluded that evidence of the plaintiff=s visual limitation associated with his condition and his thirty-day hospitalization and chemotherapy treatments, during which time he was isolated from others because of a weakened immune system, may have constituted a record of a substantial limitation in the major life activity of working and perhaps other major life activities as well. The court declined to decide which major life activities may have actually been limited and the degree of their limitation, finding that this issue was for the district court to decide. The court faulted the district court, however, for concluding that the charging party did not have a record of a disability based solely on his affirmative response to a question about whether, during his hospitalization and treatment, he was able to see, hear, speak, breathe, lift, or learn.

Sorensen v. Univ. of Utah Hosp., 194 F.3d 1084 (10th Cir. 1999). The plaintiff, who was discharged from her job as a Aflight nurse@ because of her multiple sclerosis, did not have a record of a disability. The court acknowledged that plaintiff could not perform any major life activities during her five-day hospitalization immediately following her diagnosis and her eight days of recovery following her hospitalization. It found, however, the duration of the limitations, coupled with an apparent lack of long-term effects, insufficient to constitute a substantial limitation. Of particular importance to the court were statements from the plaintiff=s doctors that she remained qualified to perform the flight nurse position.

Hilburn v. Murata Elec. N. Am., Inc., 181 F.3d 1220 (11th Cir. 1999). The court ruled that the plaintiff, who had coronary heart disease, did not have a record of a disability. Focusing first on the Aresidual effects@ of the plaintiff=s condition, rather than on her limitations during thirty-eight days of absence from work to recover from her heart attack, the court
concluded that the plaintiff’s own deposition testimony contradicted her doctor’s assertions that she was limited in her ability to run and to perform manual tasks. While the court apparently acknowledged the limitations on the plaintiff’s ability to lift (i.e., that she could lift no more than ten pounds), the court found this evidence insufficient to establish that the plaintiff had an actual disability or a record of a disability, since defendant took no discriminatory action against her because of her lifting restriction. The court also found that a 38-day absence from work related to the plaintiff’s heart attack and coronary heart disease was insufficient to establish that she had a record of a substantial limitation in working.

3. Regarded as Substantially Limited in a Major Life Activity

Sutton v. United Airlines, Inc., 527 U.S. 471 (1999). The allegation that the employer has a vision requirement does not establish, by itself, a claim that the employer regards the plaintiffs as substantially limited in working. The ADA allows employers to prefer some physical attributes over others, to establish physical criteria, and to decide that some limiting but not substantially limiting impairments make individuals less than ideally suited for a job. An employer only violates the ADA when it makes an employment decision based on a physical or mental impairment that is regarded as substantially limiting a major life activity. This means, at a minimum, that the plaintiffs must allege they were regarded as unable to work in a broad class of jobs, not merely in one type of job, a specialized job, or a particular job of choice. The plaintiffs here alleged only that the employer regarded their poor vision as precluding them from positions as global airline pilots, which does not constitute a class of jobs.

Murphy v. United Parcel Serv., Inc., 527 U.S. 516 (1999). The plaintiff failed to demonstrate a genuine issue of material fact as to whether UPS regarded him as disabled. The plaintiff was fired from the position of UPS mechanic because he has a physical impairment B hypertension B that is regarded as preventing him from obtaining a DOT health certification. This is not sufficient to show that UPS regarded him as unable to perform a class of jobs utilizing his skills. The plaintiff has shown that he is regarded as unable only to perform mechanic jobs that require driving a commercial motor vehicle of a type used on a highway in interstate commerce, not mechanic jobs generally.

Sheehan v. City of Gloucester, 321 F.3d 21 (1st Cir. 2003). Evidence that the plaintiff, a police lieutenant, was involuntarily retired from the police department because of his hypertension and risk of heart attack did not establish that the employer regarded him as unable to perform a broad range of jobs and thus substantially limited in the major life activity of working.

EEOC v. J.B. Hunt Transp., Inc., 321 F.3d 69 (2d Cir. 2003). Applicants for over-the-road truck driver position who were not hired because they used certain prescription medications
were not regarded by the employer as substantially limited in working. The evidence suggested the employer found these applicants unsuited for long-distance driving of its 40-ton trucks on irregular, stressful schedules, but the evidence did not indicate that it perceived these applicants to be more broadly limited, e.g., unqualified for any driving position at all. In fact, the plaintiffs were employed by other trucking companies while taking the same medications. The employer excluded the applicants based on its own safety requirements, which went beyond the Department of Transportation=s industry-wide standards.

Peters v. Baldwin Union Free Sch. Dist., 320 F.3d 164 (2d Cir. 2003). The plaintiff was regarded by her employer as substantially limited in her ability to care for herself because the employer viewed her as suicidal and in imminent danger of taking her life due to her mental illness. AA mental illness that impels one to suicide can be viewed as a paradigmatic instance of inability to care for oneself.@

Dyke v. O=Neal Steel, Inc., 2003 WL 21000819 (7th Cir. 2003): The plaintiff was excluded from a job as a warehouse worker in a steel plant because the company required vision in both eyes. The court found that the existence of the vision standard alone did not establish that the company regarded plaintiff as substantially limited as compared to the way most people use seeing in their daily lives. The court did find, however, the fact that the plaintiff was terminated without having been given the vision test and because the human resources employee who rejected him thought he Alooked odd@ and that he might have Asome problem,@ was sufficient to create a factual issue on plaintiff=s Aregarded as@ claim.

Buskirk v. Apollo Metals, 307 F.3d 160 (3d Cir. 2002). An employee with a back injury established that his employer regarded him as substantially limited in working based on a letter from human resources to the employee=s union representative stating that, notwithstanding improvement of the employee=s condition, concern still existed about his ability to perform any of the vacant positions because the job classifications contained lifting requirements and general physical activity.

Rinehimer v. Cemcolift, Inc., 292 F.3d 375 (3d Cir. 2002). Although there was evidence of various statements by managers about their perceptions that the plaintiff was sick, wheezing, and had difficulty breathing, this was insufficient to establish that the employer regarded the plaintiff as substantially limited in the major life activity of breathing. AThe awareness that an employee is sick combined with some change in his work assignments is not enough to satisfy the >regarded as= prong of the ADA.@

Blanks v. Southwestern Bell Communications, Inc., 310 F.3d 398 (5th Cir. 2002). The plaintiff, an HIV-positive employee, did not create factual issue as to whether employer regarded him as substantially limited in working where the only proof the plaintiff offered
was a statement by the company coordinator that the plaintiff Ahad a permanent disability that would never allow [the plaintiff] to work as a customer service representative at Southwestern Bell.@ The court held that this evidence did not indicate the coordinator regarded the plaintiff as unable to perform a broad range of jobs, but rather only the particular job of customer service representative.

**Cotter v. Ajilon Serv., Inc.**, 287 F.3d 593 (6th Cir. 2002). The plaintiff, who was terminated by a temporary service, failed to create a factual issue as to whether his employer regarded him as substantially limited in working, even though a determination of employer=s perceptions of an employee generally is a jury question. Evidence that the employer attempted to market the plaintiff to a client shortly before he was terminated mitigates against a finding that the employer regarded him as substantially limited in working. Moreover, the employer offered evidence that it let 31 other employees go in the same time frame because it failed to find them placements. The court noted Athe steep challenge a plaintiff faces in proving that his employer regarded him as substantially limited in working.@

**Mack v. Great Dane Trailers**, 308 F.3d 776 (7th Cir. 2002). The plaintiff claimed that his employer regarded him as substantially limited in lifting and discharged him based on his Adrop foot@ condition, even though he had been medically cleared to return to work with restrictions. The court held that Awhile [the Supreme Court in Toyota v. Williams] did not address a claim that the employee was regarded as disabled, its analysis still controls in this case@ and, as a result, it reversed the jury verdict in favor of the employee. The court found that no reasonable jury could conclude that the employer regarded the employee as disabled within the meaning of the ADA given the lack of evidence as to the employer=s belief about the extent of the employee=s limitations in tasks central to his daily life. While there may be cases in which, because of the nature of the impairment, one could infer a broader limitation on a major life activity from the work restriction alone, the squatting or lifting restrictions at issue here were the type of occupation-specific limitations at issue in Toyota.

**Brown v. Lester E. Cox Med. Ctr.**, 286 F.3d 1040 (8th Cir. 2002). The employer regarded the plaintiff, a hospital nurse with Arelapsing remitting@ multiple sclerosis, as substantially limited in her ability to perform the major life activity of thinking. Although supervisors professed belief that the nurse had difficulty dealing with Astressful situations,@ there was little evidence to support that she actually had such difficulties, whereas there was ample evidence that the supervisors used her alleged difficulties with stress as an excuse to transfer her from surgical duties to clerical duties.

**Rakity v. Dillon Cos.**, 302 F.3d 1152 (10th Cir. 2002). Evidence that the employer believed its employee possessed the lifting restrictions reflected in his medical and employment records did not establish that the employer mistakenly regarded him as substantially limited
in lifting. The employer did not substitute its own judgment about how much the employee could lift, nor was its perception based on speculation, stereotype, or myth. Rather, the employer=s perception was based on a doctor=s written evaluations of the plaintiff=s actual condition.

Giordano v. City of New York, 274 F.3d 740 (2d Cir. 2001). A former police officer who took anti-coagulant medication following aortic valve replacement surgery was not regarded as disabled, even though he was discharged because he was regarded as unable to work as a city police officer. The court found that at most he was regarded as unable to work in police or investigative or security position that involved substantial risk of physical confrontation.

Tice v. Centre Area Transp. Auth., 247 F.3d 506 (3d Cir. 2001). An employer=s request that an employee submit to a medical examination is insufficient by itself to establish that the employer regards the employee as disabled. In this case, the defendant=s request that the plaintiff submit to an independent medical examination when he sought to return to work as a bus driver following a period of extended leave related to a back injury was permissible under the ADA. The request for the examination, moreover, at most was evidence that the employer harbored doubts about the plaintiff=s ability to perform the job of bus driver. The court acknowledged, however, that a request for an independent medical examination, whether proper or improper, may be probative of whether the employer regards an individual as disabled, when considered in light of other facts and circumstances surrounding the request. This might be the case, for example, where the examination becomes a Awide-ranging assessment of mental or physical debilitation@ rather than focusing on the impairments that occasioned the examination in the first place, or where there is no reasonable basis for doubting the employee=s ability to perform his or her job when the exam is requested.

Haulbrook v. Michelin N. Am., Inc., 252 F.3d 696 (4th Cir. 2001). Evidence that the employer was considering assigning the chemical engineer/plaintiff to a different building with less chemical exposure upon his return from sick leave for breathing difficulties did not show that the employer regarded the employee as disabled in the major life activity of working, where the employer intended to assign the engineer to the same job. Further, the ADA does not allow employees who are not, in fact, substantially limited in any major life activity, to refuse reasonable requests by their supervisors for information relating to their condition and then claim that their employer regarded them as disabled.

Rhoads v. Federal Deposit Ins. Corp., 257 F.3d 373 (4th Cir. 2001), cert. denied, 535 U.S. 933 (2002). A former financial analyst with tobacco smoke-induced asthma and migraine headaches was not regarded as disabled where her employer thought she was able to perform her job in a smoke-free environment and doubted the severity of her condition.
Swanson v. Univ. of Cincinnati, 268 F.3d 307 (6th Cir. 2001). A surgical resident who was terminated from training program because of his major depression was not regarded as substantially limited in working where supervising physicians believed he could work in other areas of the medical profession and encouraged him to shift to another area of practice.

Ross v. Campbell Soup Co., 237 F.3d 701 (6th Cir. 2001). The plaintiff, an employee with numerous back injuries, may have been regarded as substantially limited in working where his supervisor referred to him in a memo as a “Problem person” with a “back case,” his performance evaluations dropped, and he was invited to retire.

EEOC v. Rockwell Int’l Corp., 243 F.3d 1012 (7th Cir. 2001). The district court found that the defendant did not regard the claimants as substantially limited in working when it rejected them because of abnormal nerve conduction test results. It was not enough for the claimants to show that the defendant viewed them as substantially limited in working because it considered them unable to perform jobs requiring continuing repetitive motions or use of vibratory tools, believing that they would develop carpal tunnel syndrome or cumulative trauma disorder, and that it perceived them as being unable to perform 90 percent of defendant’s jobs. On appeal, the circuit court agreed, holding that the EEOC could not prove that the defendant believed the claimants were substantially limited in working. Although the EEOC was not required to calculate an exact percentage of jobs from which defendant perceived as foreclosed to the claimants, it could not survive summary judgment having presented no demographic evidence from the relevant labor market.

Amadio v. Ford Motor Co., 238 F.3d 919 (7th Cir 2001). The plaintiff, an auto assembly worker with a chronic condition leading to blindness, an upper respiratory infection, Hepatitis B, high blood pressure, and a liver disorder, was not regarded by his employer as having a disability because he never told his employer that he was disabled.

Mattice v. Mem’l Hosp. of S. Bend, Inc., 249 F.3d 682 (7th Cir. 2001). Allegation by former anesthesiologist with history of depression and panic disorder that he was regarded as substantially limited in the major life activity of cognitive thinking is sufficient to state an ADA claim. His allegation of perceived limitation in cognitive thinking does not translate into claim based on perceived limitation on ability to work merely because he linked his perceived disability to the workplace.

EEOC v. Woodbridge Corp., 263 F.3d 812 (8th Cir. 2001). Applicants who were not hired for foam production line positions at a manufacturing plant after pre-employment tests showed that they were likely to develop carpal tunnel syndrome were not regarded as substantially limited in working. The court said that an inability to perform a single job does not constitute substantial limitation, tests were specifically designed for activities required
for particular foam production job at the specific plant, and the employer did not regard the applicants as unable to perform any other job requiring repetitive motion, noting that it employed some of the applicants in positions other than on the foam production line.

_Lusk v. Ryder Integrated Logistics_, 238 F.3d 1237 (10th Cir. 2001). Evidence showing that the employer acknowledged and acted on the plaintiff=s lifting permanent restriction B no more than forty pounds B did not establish that the employer regarded him as disabled within the meaning of the ADA, absent evidence that the employer misperceived the extent of the plaintiff=s limitation.

_McKenzie v. Dovala_, 242 F.3d 967 (10th Cir. 2001). The court found a genuine issue for trial as to whether the plaintiff=s employer (the Sheriff) regarded her as substantially limited in working. That the Sheriff refused to consider employing the plaintiff in a less sensitive post within the Office, such as in the civil division responsible for serving papers and subpoenas, the records division, the administrative division, or the jail division, suggested that he regarded her as substantially limited in her ability to work in an entire class of jobs, not merely in the particular job of patrol officer. Additionally, by seeking to have the plaintiff decertified as a _Apeace officer_@ because he Adidn=t feel that [she] should be a law enforcement officer any longer, the Sheriff effectively sought to bar the plaintiff from taking a job as a campus police officer, an investigator for hunting and fishing outfitters, an inspector of livestock, a park superintendent or assistant park superintendent, a park ranger, or any other post that in Wyoming falls within the definition of _Apeace officer_@. Significantly, the Sheriff also testified that his staff rejected the plaintiff=s request to reapply because A[t]hey thought that she would be better off in some other field. The court said that these statements constituted persuasive evidence that the Sheriff regarded the plaintiff as unable to work in a class of jobs because of a psychological impairment. It said further that by refusing to consider the plaintiff for a job in her former workplace despite ten years of successful service, the Sheriff treated her as significantly restricted _Aas compared to the average person having comparable training, skills and abilities.@

_Steele v. Thiokol Corp._, 241 F.3d 1248 (10th Cir. 2001). The employer=s awareness of the plaintiff=s obsessive compulsive disorder, the medications he was taking for it, and evidence that one of his supervisors evinced concern about his mood swings and asked the company nurse if these mood swings could be a side effect of employee=s medication, was not enough to raise a triable issue that the employer regarded the plaintiff as substantially limited in his ability to sleep, walk, or interact with others.

_Clemente v. Executive Airlines, Inc._, 213 F.3d 25 (1st Cir. 2000). A flight attendant could not prove that she was regarded as having a disability based on her employer-appointed physician=s comments about her ability to fly in light of her symptoms, and the personnel director=s comment about her adaptation to hearing loss after she was transferred to a ground position.
McInnis v. Alamo Cmty. Coll., 207 F.3d 276 (5th Cir. 2000). An employee may be regarded as disabled where an employer=s ADA coordinator said she could tell from his file that he might be disabled and a letter stated that his transfer was an accommodation for his handicap.

Wright v. Illinois Dep=t of Corrs., 204 F.3d 727 (7th Cir. 2000). The plaintiff with an alleged ankle impairment was not regarded as disabled, even though his employer answered Yes to an interrogatory asking whether it considered him to be disabled, because it did not regard his condition as one that substantially limited a major life activity.

Krocka v. City of Chicago, 203 F.3d 507 (7th Cir. 2000) A police officer who took Prozac for depression did not show that the Chicago Police Department=s (CPD) regarded him as substantially limited in working. The decision to place him in a program generally meant for poor performers for the purpose of monitoring his behavior shows that it regarded him as having an impairment that is substantially more limiting than it truly was. It was apparent, however, that the CPD did not consider him substantially limited in his ability to work because it allowed him to continue to perform the job of police officer.

Taylor v. Nimock=s Oil Co., 214 F.3d 957 (8th Cir. 2000). The employer did not regard the plaintiff, who had heart disease, as disabled. The court stated that knowing that an employee may be having medical difficulties and expressing concern, whether through an offer of medical leave or, as here sending a >get well= card, does not amount to treating the employee as if she has a permanent disability that substantially limits her life activities.

Shipley v. City of University City, 195 F.3d 1020 (8th Cir. 2000). A plaintiff must do more than allege that he is regarded as having an impairment that prevents him from working at a particular job to show that he is regarded as substantially limited in working. He must demonstrate that he is regarded as precluded from a broad class of jobs. The plaintiff failed to do so because he only showed that the defendant regarded him as unable to perform the job of firefighter.

Cash v. Smith, 231 F.3d 1301 (11th Cir. 2000). The employer did not regard the plaintiff with chronic seizure disorder as substantially limited in working. To establish that the employer regarded her as substantially limited in her ability to work, the plaintiff must prove that the employer considered her as Asignificantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities.@ The plaintiff failed to identify the broad range of jobs from which she would have been precluded as the result of her not being allowed to drive the company car. Further, there was no evidence that the employer
viewed the plaintiff=s restriction on driving a company car as limiting her in the performance of her duties in any way.

**Lessard v. Osram Sylvania, Inc.,** 175 F.3d 193 (1st Cir. 1999). The court rejected the plaintiff=s argument that the defendant regarded him as substantially limited in working because it perceived him as being unable to perform any repetitive motion work. The defendant only rejected the plaintiff from jobs in one department and there is no evidence that defendant had any other positions available that required repetitive motion.

**Heyman v. Queens Vill. Comm*n,** 198 F.3d 68 (2d Cir. 1999). A reasonable trier of fact could conclude that the defendants regarded the plaintiff, who had lymphoma but was asymptomatic at the time he was fired from his position of medical unit administrator, as having an impairment that significantly restricted his ability to work. The defendant=s experience with a former employee who had died from lymphoma not being able to perform all of his duties led it to conclude that the plaintiff would likewise be unable to function fully. The evidence for this was an extemporaneous report expressing concern about the Alevel of time and commitment@ the plaintiff would have to devote to his job.

**Taylor v. Pathmark Stores,** 177 F.3d 180 (3d Cir. 1999). The plaintiff had a viable claim that the defendant regarded him as substantially limited in working where it determined that he could not perform any of its jobs, even though the determination was innocently based on a misinterpretation of medical information from the plaintiff=s doctor. The court said further that if an employer regards a plaintiff as disabled based on a mistake in an individualized determination of the employee=s actual condition, then the employer will have a defense if the employee unreasonably failed to inform the employer of the actual situation.

**EEOC v. R.J. Gallagher Co.,** 181 F.3d 645 (5th Cir. 1999). The defendant=s offer of another position, tied to a 50 percent reduction in salary, does not defeat the plaintiff=s claim that the defendant regarded him as substantially limited in working if it was designed to force him to resign because it would show that the defendant regarded him as incapable of performing his job.

**Gorbitz v. Corvilla, Inc.,** 196 F.3d 879 (7th Cir. 1999). The plaintiff failed to prove that the defendant regarded her as substantially limited in working simply because it was aware of her numerous doctors appointments following a car accident and because of her supervisor=s memorandum acknowledging her numerous doctors appointments and instructing her to make them after 3:00 p.m. Medical appointments, in and of themselves, do not signal the existence of a disability; doctors frequently prescribe physical therapy for those without any substantial limitations in a major life activity.
Sanchez v. Henderson, 188 F.3d 740 (7th Cir. 1999), cert. denied, 528 U.S. 1173 (2000). The plaintiff did not establish that the defendant regarded him as substantially limited in working simply because it required him to have a fitness-for-duty examination and because the examiner recommended that he stop carrying mail. The plaintiff=s supervisor only required the examination after the plaintiff refused to return to work for medical reasons and it is undisputed that the supervisor knew the plaintiff could perform other tasks like sorting mail or answering telephones.

Sorenson v. Univ. of Utah Hosp., 194 F.3d 1084 (10th Cir. 1999). A flight nurse with multiple sclerosis who was provided with numerous other opportunities to work as a nurse was not substantially limited in working.

Richards v. City of Topeka, 173 F.3d 1247 (10th Cir. 1999). The plaintiff=s pregnancy was not substantially limiting and she could show that the defendant perceived her pregnancy as a substantially limiting impairment. The defendant=s use of the term @temporary disability@ to describe pregnancy in the collective bargaining agreement does not establish that she had a disability under the ADA.

Sutton v. Lader, 185 F.3d 1203 (11th Cir. 1999). The plaintiff did not show that he had a disability under the Aregarded as@ prong since the Small Business Administration (SBA) perceived him only as having a temporary incapacity to perform the essential functions of his job as a construction analyst because of his heart attack. The SBA=s refusal to return Sutton to work until he submitted a valid medical release does not show that it regarded him as having a disability, since SBA offered him work when his doctor released him.

C. Definition of Qualified Individual with a Disability

1. Essential Functions

Peters v. Mauston, 311 F.3d 835 (7th Cir. 2002). Heavy lifting is an essential function of a city construction operator based on the employer=s judgment that operators must be able to perform all of the daily operational and construction tasks. The court refused to second-guess the employer=s judgment, and noted that the plaintiff conceded that heavy lifting is required at times.

Dropinski v. Douglas County, 298 F.3d 704 (8th Cir. 2002). The ability to perform general labor functions was essential for an equipment operator, despite his contention that he had not performed these functions in the past five years. The court ruled that the employee=s personal experience was of no consequence in determining whether these were essential functions. Rather, the court relied on evidence showing that these duties were included in the job description, the consequences of not performing these functions, and the work experience of other operators.
Spangler v. Fed. Home Loan Bank of Des Moines, 278 F.3d 847 (8th Cir. 2002). Taking daily phone calls, answering inquiries from other banks regarding cash services and meeting their cash needs, and completing transactions in a timely manner were essential functions of a bank employee.

Phelps v. Optima Health, Inc., 251 F.3d 21 (1st Cir. 2001). Lifting 50 pounds is an essential function of a clinical nurse position. After a back injury, the plaintiff became unable to lift over 50 pounds, and her supervisor informally changed her job to accommodate that limitation. This included giving her new duties that did not involve lifting or having other nurses help her when lifting was required. The court found, however, that the ability to lift 50 pounds without the aid of other nurses remained an essential function of the job, noting that the human resources department never knew or agreed to the supervisor=s changes to the plaintiff=s position. The court emphasized the informal nature of the changes and the absence of written confirmation. The court expressed concern that a contrary ruling would discourage employers from going beyond the requirements of the ADA in order to keep a disabled employee working.

Lovejoy-Wilson v. NOCO Motor Fuel, Inc., 263 F.3d 208 (2d Cir. 2001). Depositing store receipts in a safe and timely manner is an essential function of an assistant manager=s position, but the ability to drive to the bank to deposit the receipts is not. Thus, a person whose disability prevents her from driving is qualified if she can perform this essential function with a reasonable accommodation, such as having someone else drive her to the bank.

Skerski v. Time Warner Cable Co., 257 F.3d 273 (3d Cir. 2001). Applying the regulatory factors to determine an essential function, the court concluded that climbing may not be an essential function of a cable installer position, where (1) the job description identifies climbing as a requirement, but not an essential function, thus suggesting that climbing is one method for performing an essential function; (2) installers were not hired solely to climb or because of their climbing expertise; and (3) conflicting evidence existed as to whether excusing an employee from climbing created administrative or other difficulties for the employer. The court noted that for three years after being diagnosed with a panic disorder and anxiety attacks, the plaintiff=s supervisors had little difficulty in directing assignments involving climbing to other workers, even though there were a limited number of employees. He continued to work full-time, with consistently high performance ratings, while performing virtually no overhead work. Moreover, the court noted that the employer=s alleged difficulties with the plaintiff began with the arrival of a new supervisor. While an employer=s judgment is entitled to some deference, the plaintiff offered Aconsiderable@ evidence that climbing was not an essential function, thus making it appropriate for a jury to decide this fact-intensive question.
Kiphart v. Saturn Corp., 251 F.3d 573 (6th Cir. 2001). A reasonable jury could conclude that the ability to rotate through all tasks was not an essential function. While numerous employees testified that the company adopted a policy of full rotation, in practice that did not happen. The court also noted that: (1) team members swapped tasks among themselves to satisfy personal preferences, with management=s knowledge; (2) not all job announcements listed the ability to rotate through all assignments as a necessary qualification; (3) employees testified that teams that did not rotate still accomplished all of their assigned tasks; and (4) the labor agreements did not require full rotation. Finally, the court found no evidence to support Saturn=s claims that it would suffer serious harm without its full rotation system, noting that the only time Saturn adhered to its full rotation policy was when it placed employees with medical restrictions.

Basith v. Cook County, 241 F.3d 919 (7th Cir. 2001). The employer added Adelivery of medication@ to the written job description after hiring the plaintiff. Despite this, the court found that it is an essential function of a pharmacy technician position because it was written prior to the plaintiff=s first injury. Furthermore, the function was included on an AEssential Job Function@ form filled out by six pharmacy technicians, reflecting the work experience of current and past incumbents of the job. The needs of hospital patients to have medication delivered in a timely manner outweighed the fact that delivery took only one hour to perform out of an eight-hour shift. Also, even though another employee could perform this function did not render it non-essential. Similarly, delivery is not a marginal function solely because the hospital created a new position for the plaintiff that did not involve performing that function. Employers can go beyond the requirements of the ADA and remove an essential function, but doing so does not convert an essential function into a marginal one. Finally, a plaintiff needs to offer sufficient evidence to show that the employer=s understanding of the essential functions is incorrect, and the court found that testimony by Basith and a coworker were insufficient to meet this standard.

EEOC v. Yellow Freight Sys. Inc., 253 F.3d 943 (7th Cir. 2001) (en banc). Reviewing an employee=s substantial absences over a four-year period, the court concluded that attendance was an essential function for a full-time dockworker. The court found that the employee could perform his duties only in the workplace (as opposed to working at home), and the job description listed good attendance and the ability to work shifts and overtime as minimum qualifications. The court noted that absence, by itself, does not signify an inability to do the job, but rather the excessive frequency of absences can result in an employee becoming Aunqualified.@

Emerson v. Northern States Power Co., 256 F.3d 506 (7th Cir. 2001). Although handling safety-sensitive calls from customers (e.g., reporting gas leaks) comprises only five percent of a customer service consultant=s job, it nonetheless is an essential function because of the potentially dangerous consequences if such calls are handled poorly. Ability to route these calls to another consultant does not make the function marginal.
Winfrey v. City of Chicago, 259 F.3d 610 (7th Cir. 2001). A modified version of a clerk=s job, created to meet the needs of an employee who became blind, does not reflect the essential functions of the unmodified clerk position. The modified version of the job removed various essential functions, and the plaintiff had argued that their removal indicated that they were not essential. But the court disagreed, pointing out that the employer went beyond the requirements of the ADA in removing the essential functions. Furthermore, the failure of other clerks to perform all of the essential functions at a particular time does not make those functions non-essential if the employer can show that they may be required to perform them at any time.

Maziarka v. Mills Fleet Farm, Inc., 245 F.3d 675 (8th Cir. 2001). Regular attendance is an essential function of a receiving clerk=s position because there were a limited number of employees trained to perform the essential functions of that position. An employee had request unscheduled, unpaid leave when his irritable bowel syndrome flared up. The job description indicated the need for the employee=s presence in order to perform the essential functions, and the seriousness with which the employer had treated the plaintiff absences indicate that attendance was critical to this position.

Cripe v. City of San Jose, 261 F.3d 877 (9th Cir. 2001). The court reversed summary judgment, finding a factual dispute as to whether the ability to make forcible arrests is an essential function of all specialized police assignment positions. While the court acknowledged that the job description for all police officer positions lists forcible arrests as an essential function, the court found conflicting evidence as to the accuracy of that description in practice. The court also noted evidence challenging the city=s contention that all officers must be able to make forcible arrests in emergency situations even if they do not do so on a routine basis.

Lowe v. Alabama Power Co., 244 F.3d 1305 (11th Cir. 2001). The court found a factual issue as to whether working at unprotected heights is an essential function of a mechanic position.

Ward v. Mass. Health Research Inst., Inc., 209 F.3d 29 (1st Cir. 2000). A set schedule was not an essential function for a lab/data entry clerk whose arthritis made it difficult to get to work by 9 a.m. While regular and reliable attendance may be an essential function of most positions, the evidence showed that the employer already allowed employees to come to work anytime between 7 and 9 a.m., as long as they worked 7.5 hours each day. Moreover, the employer=s requirement that all employees to be at work by 9:00 did not persuade the court that this attendance requirement was an essential function of the plaintiff=s job. Nothing in the evidence showed that the nature of the plaintiff=s work required that he work during specific hours. The plaintiff was only required to complete work on a certain day, not at a particular time of day. The court also rejected the
employer=s contention that attendance at the required hours was essential because the plaintiff needed supervision. Under the employer=s flexible arrival policy, the plaintiff could choose to come to work regardless of whether his supervisor was there. Finally, the court noted that it is the employer=s burden to prove that a specific function is essential.

Hoskins v. Oakland Sheriff=s Dept., 227 F.3d 719 (6th Cir. 2000). Physically restraining inmates is an essential function of a deputy sheriff position because the job description lists the function, the chief of staff testified that the function was fundamental to the position, and although infrequently performed, the consequences of not requiring the deputy sheriff to perform this function could pose a serious threat to security. Since restraining inmates is an essential function, the court concluded that it would not be a reasonable accommodation to provide the plaintiff with assistance since that would constitute shifting an essential function to other employees.

Webb v. Choate Mental Health Ctr., 230 F.3d 991 (7th Cir. 2000). A psychologist with asthma and a weakened immune system was not a qualified individual with a disability, where he could not perform the essential job function of having direct interaction with potentially violent and/or infectious patients at a residential facility for developmentally disabled patients.

Lenker v. Methodist Hosp., 210 F.3d 792 (7th Cir. 2000). The court affirmed a jury=s finding that lifting was an essential function of a nurse=s position. The function was listed in the plaintiff=s job description and evidence showed that while nurses could sometimes rely on lifting devices or other nurses to assist, staff shortages or emergencies could necessitate that the plaintiff be able to lift a patient on his own.

Summerville v. Trans World Airlines, Inc., 219 F.3d 855 (8th Cir. 2000), cert. denied, 532 U.S. 1019 (2001). Lifting bags and passengers in wheelchairs were essential functions of a customer service agent working overtime or holidays. Limited staff availability during these periods made these functions essential.

Wells v. Shalala, 228 F.3d 1137 (10th Cir. 2000). In this Rehabilitation Act case, the court determined that travel is an essential function of an auditor=s position. The plaintiff=s statement that offices could send their records to him for review, rather than requiring that he travel to the audit sites, was self-serving. The court was persuaded that effective auditing requires auditors to have access to both the records and employees at the audited site. If the plaintiff did not travel to the audited site, another auditor would have to do it in order to do a complete audit.

Earl v. Mervyns, Inc., 207 F.3d 1361 (11th Cir. 2000). The essential functions of a management employee at a retail store, who has obsessive compulsive disorder, required that she arrive on time for work. While the court recognized that some jobs can be
performed without regard to a specific schedule, the plaintiff=s job required her to prepare her department for the store=s opening each morning, which included obtaining cash for the registers, stocking merchandise, and arranging displays. She was the only employee scheduled to perform these duties at that time. The employer did not have to show that Earl=s excessive tardiness (over 40 times in a 12-month period) resulted in lost sales, lost profits, disruption of store operations, or increased theft to support its claim that punctuality was part of the essential function of preparing her department for the store=s opening. Finally, the court noted that the employer placed a high priority on punctuality by emphasizing its importance in the employee handbook and implementing a comprehensive system of warnings and reprimands for violations of the policy.

**Davis v. Florida Power & Light Co.,** 205 F.3d 1301 (11th Cir. 2000). Mandatory overtime was an essential function of a electric utility employee=s position. The court agreed with the employer that the unique nature of the electric industry and the company=s policy to provide same-day service required overtime. Furthermore, the application for the plaintiff=s job noted that overtime was a condition of employment and the employer showed that it actually required all employees in the plaintiff=s job to do a substantial amount of overtime. Finally, the court emphasized that the employer=s collective bargaining agreement noted its right to require involuntary overtime. Although plaintiff=s job description did not mention overtime, this was not significant to the court given all of the other evidence supporting a conclusion that overtime was essential. The court also rejected the argument that overtime could not be considered an essential function, stating that this argument narrowly equates Afunction@ with a task to be performed. But, the court pointed out that mandatory overtime is the means by which the employer implements its Asame-day@ service policy and thus is an integral part of the plaintiff=s position.

**Tardie v. Rehab. Hosp. of Rhode Island,** 168 F.3d 538 (1st Cir. 1999). The plaintiff was not qualified where she could not work more than 40 hours a week and working 50-70 hours per week was an essential function of the job.

**Hamlin v. Charter Township of Flint,** 165 F.3d 426 (6th Cir. 1999). An assistant fire chief with heart problems was qualified because he could perform the essential functions of his job, which consisted mainly of administrative duties, even though he could not perform active firefighting duties.

**Buckles v. First Data Res., Inc.,** 176 F.3d 1098 (8th Cir. 1999). Regular and reliable attendance is an essential function of most jobs, supported by an employer=s detailed attendance policies and procedures.

**Anderson v. Coors Brewing Co.,** 181 F.3d 1171 (10th Cir. 1999). Finding that the plaintiff had been hired for a position that required her to perform the functions of different positions throughout the plant on an Aas needed@ basis, the court refused to find that her essential
functions consisted only of the position in which she had spent the majority of time. The plaintiff argued that she was Aqualified@ if she could perform the essential functions of the can sorter position, but the court found that in the sixteen days that she worked, the plaintiff worked in five different areas and performed a variety of tasks. The employer required this type of temporary worker to perform numerous tasks, and just because she had been primarily assigned to the can sorting position did not mean that the employer had changed her position from the one for which she had been hired. The court emphasized that an employer can create a multiple-duty job that requires the ability to perform a variety of essential functions if such a position serves a legitimate business purpose. While acknowledging that certain people with disabilities might not be able to perform such jobs because of the wide range of essential functions required, nevertheless it is the employer=s right to define the job and the functions required to perform it.

**Swanks v. WMATA**, 179 F.3d 929 (D.C. Cir. 1999). The plaintiff was a qualified individual with a disability even though his special police officer commission had expired, where maintenance and possession of commission was not a prerequisite to being hired or an essential job requirement.

2. **Statements made in Benefits Proceedings**

**Cleveland v. Policy Mgmt. Sys. Corp.**, 526 U.S. 795 (1999). Courts should not judicially estop or apply a strong presumption against a plaintiff=s ADA case because he or she applies for social security disability insurance (SSDI) benefits. In order to survive a motion for summary judgment, however, a plaintiff must explain why a statement in an application for SSDI benefits that he or she is unable to work can be reconciled with a contention that he or she is a qualified individual with a disability within the meaning of the ADA. The Court suggested at least three possible explanations. First, a determination whether someone is entitled to SSDI benefits does not take into account whether reasonable accommodation would enable the individual to perform a particular job. Thus, an ADA plaintiff might be Aqualified@ within the meaning of the ADA because he or she can work with reasonable accommodation but might, nevertheless, still be considered Aunable to work@ for purposes of receiving SSDI benefits. Second, an ADA plaintiff who is able to work, might show that he or she has a condition considered presumptively disabling within the meaning of the social security laws. Finally, an ADA plaintiff might be able to show that although statements about the inability to work were true when the application for SSDI benefits was made, they were not true at the time the alleged employment discrimination occurred.

**Gilmore v. AT&T**, 319 F.3d 1042 (7th Cir. 2003). In her Social Security benefits application and in her deposition testimony, the plaintiff conceded that she could not perform the essential functions of her job, even with reasonable accommodation. While statements made to secure disability benefits do not automatically preclude a successful suit under the ADA, a plaintiff who has sworn to her inability to work must reconcile these seemingly
contradictory statements. In this case, the plaintiff neither claimed that her statements were inaccurate, nor has she provided any evidence to reconcile her asserted inability to perform the essential functions of her job with her claim under the ADA.

Holtzclaw v. DSC Communications Corp., 255 F.3d 254 (5th Cir. 2001). A former employee with chronic idiopathic pancreatitis, who reapplied for a job while he continued to receive long-term disability and social security disability benefits, did not offer a sufficient explanation for the contradiction between his disability applications (on which he stated that he was ‘unable to function in the real world’) and his claim that he could have worked even without reasonable accommodation.

Giles v. General Elec. Co., 245 F.3d 474 (5th Cir. 2001). Upholding a jury award of $590,000 to the plaintiff, the court held that the assertions the plaintiff made in applying for social security and long-term disability benefits did not bar his ADA claim that he was qualified to work with an accommodation. The court noted that the plaintiff never was awarded social security disability or long-term disability benefits and he believed that he could do his job with a reasonable accommodation. Accordingly, the court concluded that the plaintiff sufficiently explained the perceived inconsistencies in his benefits applications and in his ADA complaint.

DeVito v. Chicago Park Dist., 270 F.3d 532 (7th Cir. 2001). Noting that the doctrine of judicial estoppel is not strictly applicable in this case, the court nevertheless held that a former laborer with a back injury is estopped from claiming that he would have been able to work full-time with a reasonable accommodation, where he explicitly stated to his employer that his condition had not improved since his original injury.

Lane v. BFI Waste Sys., 257 F.3d 766 (8th Cir. 2001). A route auditor with a back injury cannot show that he is qualified for a dispatcher’s position, where he represented in his application for SSDI benefits that he could not engage in any substantial work.

DiSanto v. McGraw-Hill, Inc., 220 F.3d 61 (2d Cir. 2000). Overturning a $1.2 million verdict for the plaintiff, the court held that he was not a qualified individual with a disability under the ADA where he failed to explain his unqualified statement to the Social Security Administration that he was completely disabled before his discharge.

Reed v. Petroleum Helicopters, Inc., 218 F.3d 477 (5th Cir. 2000). Sworn statements in an application for social security disability benefits (that she could not sit for extended periods of time and that her back problems made her ‘totally unpredictable’) negated the plaintiff’s subsequent claim that she could perform the essential function of her job (flying helicopters). In reaching this decision, the court noted that the plaintiff’s explanation that English is not her first language was insufficient to reconcile her contradictory statements.
Pals v. Schepel Buick & GMC Truck, Inc., 220 F.3d 495 (7th Cir. 2000). The court affirmed the jury=s award of more than $1 million to a plaintiff with muscular dystrophy whose requests to return to work were denied. Although when filling out an application for long-term disability benefits, the plaintiff answered Aall of them@ in response to a question about what tasks he was unable to perform, the court took into consideration the plaintiff=s completion of his application two days after learning that he would not be welcomed back to work. The court further noted that even though the plaintiff=s explanation that he thought he was being asked what tasks he was able to perform was weak, it was not so weak that a jury was obligated to disbelieve it.

Mitchell v. Washingtonville Sch. Dist., 190 F.3d 1 (2d Cir. 1999). Citing the Supreme Court=s decision in Cleveland, the court held that a former school custodian, whose leg had been amputated and who had represented to his state workers= compensation board and to the Social Security Administration that he was unable to work because he could not stand or walk was judicially estopped from asserting that he was a qualified individual with a disability under the ADA.

Motley v. New Jersey State Police, 196 F.3d 160 (3d Cir. 1999), cert. denied, 529 U.S. 1087 (2000). Even taking into account the different standards used in the plaintiff=s disability hearing and under the ADA, the court ruled that the plaintiff was not a qualified individual with a disability based on his statements that he was permanently and totally disabled in his application for disability benefits.

Feldman v. American Mem=I Life Ins. Co., 196 F.3d 783 (7th Cir. 1999). Even though the plaintiff=s prior application for social security disability benefits does not, by itself, estop her from asserting that she is a qualified individual with a disability, she presented no explanation for her statement in her SSDI application that she was completely and totally disabled and her statement in her ADA complaint that she was able to perform the essential functions of her job with or without accommodation.

Hill v. Kansas City Transp. Auth., 181 F.3d 891 (8th Cir. 1999), cert. denied, 528 U.S. 1137 (2000). Citing Cleveland, the court held that the plaintiff=s application for and receipt of social security disability benefits does not preclude her from proving that she can perform the essential functions of her job with reasonable accommodation.

Lujan v. Pacific Maritime Assn., 165 F.3d 738 (9th Cir. 1999). The court reversed summary judgment for the employer and remanded the issue of whether the plaintiff was qualified. The plaintiff=s statement at his social security hearing that he was Aunable to work@ is not per se inconsistent with his assertion that he is qualified for his position.

Norris v. Sysco Corp., 191 F.3d 1043 (9th Cir. 1999), cert. denied, 528 U.S. 1182 (2000). The plaintiff, who had received disability benefits from his insurance carrier and from the
state, was not judicially estopped from pursuing his ADA claim. In reaching its decision, the court noted that even after a trial on the merits, the record does not demonstrate that the definition of disability under the ADA and the definition of disability under the plaintiff=s disability plan were the same.

D. Blanket Exclusions

**EEOC v. J.B. Hunt Transp., Inc.**, 321 F.3d 69 (2d Cir. 2003). The employer had a policy of banning all applicants who use certain prescription drugs from over-the-road truck driver positions. The court held that applicants who were perceived as unfit for these positions because of the prescription medications they were taking were not perceived as substantially limited in a major life activity, and accordingly were not considered disabled under the ADA. The employer did not exclude them from all truck driving positions, only the specific job of long-distance, freight-carrying, tractor trailer driving.

**Kapche v. City of San Antonio**, 304 F.3d 493 (5th Cir. 2002). In Kapche I, the Fifth Circuit decided to reevaluate its previous per se holdings that allowed the police department to exclude all insulin-dependent diabetics from police officer positions. Accordingly, the court remanded the case for a determination of whether there now exists new or improved technology that would allow individuals with insulin-dependent diabetes to drive safely. On remand, the district court granted summary judgment for the city. In this appeal, the Fifth Circuit stated that the district court misinterpreted its directives in Kapche I and remanded the case for an individualized inquiry as to plaintiff=s ability to perform the job safely.

**EEOC v. United Parcel Serv. Inc.**, 306 F.3d 794, as amended, 311 F.3d 1132 (9th Cir. 2002). UPS imposed a blanket exclusion on people with monocular vision from positions driving small trucks and vans. The court remanded the case to determine if employer regarded such applicants as substantially limited in seeing. The court concluded that the applicants were not substantially limited in seeing because they failed to show that their monocular vision prevented or severely restricted their use of eyesight as compared to how unimpaired individuals normally use their eyesight in daily life.

**Hernandez v. Hughes Missile Sys. Co.**, 292 F.3d 1038, as amended, 298 F.3d 1030 (9th Cir. 2002), cert. granted sub nom., Raytheon v. Hernandez, 123 S. Ct. 1255 (2003). An employer violates the ADA when it applies its blanket exclusion prohibiting rehire of former employees who were terminated (or resigned in lieu of termination) for violation of misconduct rules to employees with the disability of drug addiction who are now rehabilitated and whose only work-related offense was testing positive for drug use.

**Morton v. United Parcel Servs. Inc.**, 272 F.3d 1249 (9th Cir. 2001), cert. denied, 535 U.S. 1054 (2002). Summary judgment for an employer that refused to hire hearing impaired drivers for trucks not subject to Department of Transportation regulation was not
appropriate where the employer had not independently studied the appropriateness of applying DOT hearing standards to non-DOT vehicles.

**EEOC v. Exxon Corp.**, 203 F.3d 871 (5th Cir. 2000). The business necessity defense applies to a safety-based qualification standard while the direct threat defense applies to an individual safety risk that is not addressed by a qualification standard.

**McGregor v. National R.R. Passenger Corp.**, 187 F.3d 1113 (9th Cir. 1999). Policies prohibiting employees from returning to work unless they are A100 percent healed@ or Afully healed@ are per se violations of the ADA because they do not permit individualized assessments of whether employees can perform essential functions with or without reasonable accommodation.

### E. Disparate Treatment

**Patten v. Wal-Mart Stores East, Inc.**, 300 F.3d 21 (1st Cir. 2002), petition for cert. filed, 71 U.S.L.W. 3366 (Nov. 12, 2002) (No. 02-712). The supervisors’ alleged comments that A[w]e know [the employee] has a disability, but we=re just tired of this,@ and A[w]e understand that you are disabled, but we don=t want you working in this store,@ did not constitute direct evidence of disability discrimination warranting a mixed motive analysis.

**Gillen v. Fallon Ambulance Serv., Inc.**, 283 F.3d 11 (1st Cir. 2002). The court rejected summary judgment, finding genuine issues of material fact as to whether an applicant, who was a genetic amputee (missing part of her left arm), could perform the essential functions of an emergency medical technician (EMT) position. The court questioned whether the employer’s refusal to hire the plaintiff was based on objective medical evidence as opposed to stereotypes about the assumed impact of a missing limb. For example, the employer=s doctor made no inquiries about her lifting abilities. Also, the court noted that the plaintiff, after her rejection by the defendant, soon found employment as an EMT and has performed all her duties without incident.

**Moysis v. DTG Datanet**, 278 F.3d 819 (8th Cir. 2002). The court upheld the jury=s verdict finding disability discrimination where the plaintiff was terminated from his position as a systems administrator following a brain injury sustained in an automobile accident. Although the employer contended that the termination was based on customer and co-worker complaints about plaintiff, the court held that a jury could reasonably infer from the evidence of Asuspicious timing@ that the plaintiff was fired due to his disability. The plaintiff had received a merit raise one week after the date on which the employer had allegedly decided to terminate him, and the actual termination occurred just one week after a meeting a which the defendant=s co-owner expressed his fear of the plaintiff returning to work following his brain injury.
Brown v. Lester E. Cox Med. Ctr., 286 F.3d 1040 (8th Cir. 2002). The hospital=s transfer of a nurse with multiple sclerosis from surgical duties in the operating room to clerical duties in a temporary supply room position constituted an adverse employment action. The employer regarded her as an individual with a disability and therefore unqualified to remain in her original job. While a transfer from one job to another is not an adverse employment action if it involves only minor changes in the employee=s working conditions, the evidence viewed in the light most favorable to the jury verdict in this case showed a significant, detrimental change in plaintiff=s working conditions.

Snead v. Metro. Prop. & Cas. Ins. Co., 237 F.3d 1080 (9th Cir. 2001), cert. denied, 534 U.S. 888 (2001). The plaintiff sued her former employer in state court for disability discrimination under Oregon law. The defendant removed the action to federal court, invoking diversity jurisdiction. The court held that in adjudicating this state law claim, it would apply the McDonnell Douglas burden-shifting analysis, rather than Oregon=s rule that a plaintiff is required only to adduce a prima facie case of discrimination to defeat the defendant=s motion for summary judgment in discrimination action because the McDonnell Douglas burden-shifting method of proof is federal procedural rule under the Erie doctrine.

Monette v. Elec. Data Sys., 90 F.3d 1173 (6th Cir. 1996). A plaintiff may show that an employer is liable for discriminatory treatment by presenting direct evidence that the employer relied on his or her disability in making its employment decision. A plaintiff also may show indirect evidence of discrimination, thereby shifting the burden to the employer to articulate a non-discriminatory reason for its actions. Where direct evidence of the employer=s discrimination exists, a plaintiff need not show that he or she was replaced by a person outside the protected class because application of the McDonnell Douglas burden-shifting framework is inappropriate.

McNely v. Ocala Star-Banner Corp., 99 F.3d 1068 (11th Cir. 1996), cert. denied, 520 U.S. 1228 (1997). The plain language of the ADA and the legislative history show that Congress intended that Title I would impose liability on an employer if disability was at least a factor in the employer=s decision, as long as it made a difference in the decision. The Asole cause@ standard of liability imposed by the Rehabilitation Act does not apply to the ADA.

F. Reasonable Accommodation

1. Notice of the Need for Reasonable Accommodation

Ballard v. Rubin, 284 F.3d 957 (8th Cir. 2002). An employee=s memo could not be construed as a request for reasonable accommodation because it contained contradictory statements on whether the employee wished to have a reasonable accommodation. The court also refused to find that the employee later requested reasonable accommodation when he attached the memo to a federal EEO complaint alleging failure to promote. Even
if the court were willing to construe the contents of the memo as a request, its inclusion as evidence in a complaint alleging failure to promote would not have put the employer on notice that the employee was making a new request for reasonable accommodation.

Smith v. Diffee Ford-Lincoln-Mercury, Inc., 298 F.3d 955 (10th Cir. 2002). The court found a factual issue as to whether an employee=s request for leave under the Family and Medical Leave Act also constituted a request for reasonable accommodation. Summary judgment was inappropriate because a court could not conclude, as a matter of law, that the employee=s length of leave was unreasonable or would cause an undue hardship on the employer.

Reed v. LePage Bakeries, Inc., 244 F.3d 254 (1st Cir. 2001). An employee had problems dealing with conflicts in the workplace, but she never informed her employer that she has bi-polar disorder. The employer thus had no obligation to provide her with reasonable accommodation to deal with such conflicts. The employee had gotten into an altercation at work, became upset, left, and was immediately hospitalized for several days with depression. After returning to work, her manager brought up the incident, suggesting that she walk away from such situations and seek help from the managers. She agreed and offered to bring a note from her therapist, but was told that was unnecessary. The employee=s offer to bring a note from her therapist did not constitute notice that she has a disability requiring reasonable accommodation. She never disclosed that she had bipolar disorder, that the disorder affected her ability to handle conflict, or that she needed to be hospitalized after the altercation at work. Furthermore, the court noted that the manager was offering good advice, not a reasonable accommodation, in suggesting that Reed walk away from a possible altercation and seek help from the managers.

Jovanovic v. In-Sink-Erator Div. of Emerson Elec. Co., 201 F.3d 894 (7th Cir. 2000). As a general rule, an employee with a disability must request a reasonable accommodation in order for an employer to be found liable for failure to provide one. The court found no liability because the plaintiff was repeatedly warned about excessive absenteeism, and finally was fired, yet he never requested reasonable accommodation.

Allen v. Interior Constr. Servs., Ltd., 214 F.3d 978 (8th Cir. 2000). Reasonable accommodation does not require a construction firm to alert an unemployed carpenter with a back disability that it is hiring. The company=s policy was to require that carpenters call to inquire about work, and the plaintiff=s disability did not prevent him from making such a call.

Taylor v. Phoenixville Sch. Dist., 184 F.3d 296 (3d Cir. 1999). A request for reasonable accommodation must make clear that the employee needs accommodation because of a disability. A request does not have to be in writing, does not need to use the term areasonable accommodation,a and may come from a third party, such as a family member. The precise information contained in the request will depend on what the
employer already knows. Here, the employer knew that: (1) Taylor had a psychotic episode at work, (2) she was immediately hospitalized for three weeks, (3) the hospital had contacted the School District and offered to provide information on Taylor=s condition, and (4) Taylor had to take lithium for her condition. The School District=s knowledge that Taylor might have a disability, and Taylor=s son request for accommodation one week before his mother was due to return to work, satisfied the requirements for a valid request for reasonable accommodation. A request for reasonable accommodation does not need to identify a specific accommodation. While such information would be helpful, an employer can request it during the interactive process. Similarly, there is a valid request for reasonable accommodation even if the specific accommodation requested is not feasible because the interactive process requires that the employer help to identify an appropriate accommodation. A request for reasonable accommodation does not have to go to an employee=s immediate supervisor; the interactive process is triggered if the request is received by an appropriate agent of the employer, such as the School District=s administrative assistant for personnel. Finally, the court rejected the School District=s argument that Taylor=s request was invalid because it did not know the specific name of her condition. The court found that the School District was aware she might have a disability because of the serious psychiatric problems Taylor exhibited in the workplace and that those problems required a three-week hospitalization. The School District was entitled to know the precise name and nature of Taylor=s medical condition, but it was responsible for requesting such information through the interactive process.

Hill v. Kansas City Area Transp. Auth., 181 F.3d 891 (8th Cir. 1999). A request for reasonable accommodation is too late when it is made after an employee has committed a violation warranting termination. Here, a bus driver twice fell asleep on the job; only after the employer confronted her about this violation did she request reasonable accommodation. Furthermore, the employer did not have to monitor the plaintiff=s medications because providing reasonable accommodation does not include acting as a doctor or pharmacist. The plaintiff could have discussed at any time with her doctor the drowsiness brought on by her combination of medications but instead chose not to address this problem until her work performance warranted discharge.

Mole v. Buckhorn Rubber Prods., Inc., 165 F.3d 1212 (8th Cir.), cert. denied, 528 U.S. 821 (1999). An employer cannot be held liable for failing to provide a reasonable accommodation if the employee with a disability fails to request one. Here, the employer had provided the plaintiff with several accommodations, including leave and breaks, after learning she had multiple sclerosis (MS). But, the plaintiff never informed her supervisor that she needed additional accommodations, despite a meeting with her supervisor regarding on-going job performance problems. The court rejected the plaintiff=s argument that the employer should have learned more about MS and how to accommodate it by reading MS pamphlets. The ADA does not require this type of proactive intervention by an employer. The court also rejected the plaintiff=s argument that she did request additional
accommodations because that request was delivered on the day her termination became effective, which was too late.

**Davoll v. Webb**, 194 F.3d 1116 (10th Cir. 1999). While people with disabilities generally have the obligation to initiate the interactive process by requesting reasonable accommodation, an employer that adopts a policy announcing its refusal to provide a form of reasonable accommodation has foreclosed the interactive process and may be held liable for failure to provide the accommodation. Thus, employees with disabilities who knew that their employer had a policy prohibiting reassignment did not have to request this form of reasonable accommodation because it would amount to a futile gesture. The court emphasized that an employee=s subjective belief about requesting reasonable accommodation is insufficient to relieve him/her from making a request. Rather, the court relied on the employee=s knowledge of their employer=s policy refusing to reassign police to Career Service positions. Since reassignment was the only form of reasonable accommodation available to the plaintiffs, this policy effectively cut off the interactive process before it could begin.

**Gaston v. Bellingrath Gardens & Home, Inc.**, 167 F.3d 1361 (11th Cir. 1999). An employer cannot be held liable for failing to provide a reasonable accommodation if the individual with a disability never requested one. Here, the employer informed the plaintiff of new job requirements that involved lifting and bending, which she could not do because of her disability. Several weeks later she resigned. The plaintiff never requested reasonable accommodation after being informed of the new requirements.

### 2. Interactive Process

**Mays v. Principi**, 301 F.3d 866 (7th Cir. 2002). If an individual with a disability shows that a reasonable accommodation existed, he or she did not receive it, and there was no interactive process, the burden shifts to the employer to show that even if there was no interactive process the employer offered a reasonable accommodation and that the individual rejected it. If no reasonable accommodation is possible, then the failure to engage in the interactive process is harmless.

**Dropinski v. Douglas County**, 298 F.3d 704 (8th Cir. 2002). The court found no need to address allegations that the employer failed to engage in the interactive process after having found no evidence that a reasonable accommodation existed that would have enabled the employee to perform the essential functions of his position without causing the employer undue hardship.

**Zivkovic v. S. Cal. Edison Co.**, 302 F.3d 1080 (9th Cir. 2002). The court vacated a bench trial verdict in favor of the employer, finding that the lower court failed to make factual findings as to whether the employer engaged in the interactive process. The parties gave
conflicting evidence of what happened after the plaintiff requested a sign language interpreter for a job interview, with the plaintiff claiming that the employer did not: (1) directly communicate with him (but communicated only with his mother), (2) explore reasonable accommodations, (3) allow him to read interview questions, and (4) offer an interpreter.

Kvorjak v. Maine, 259 F.3d 48 (1st Cir. 2001). An employer=s failure to engage in the interactive process is meaningful only if a plaintiff can show that an effective form of reasonable accommodation existed. Furthermore, during the interactive process an employee must make clear all the limitations that necessitate accommodation in order for the employer to be able to evaluate whether a specific accommodation would be effective. The plaintiff, who has spina bifida, requested that he be allowed to work at home because of the physical difficulties he would face with a three-hour commute once his office moved to a new location. By informing the employer only about the problems with commuting, and failing to mention that he faced additional physical difficulties working in the office, the employer reasonably concluded that commuting alone was the problem, and rejected accommodation on that basis.

EEOC v. United Parcel Serv., Inc., 249 F.3d 557 (6th Cir. 2001), cert. denied, 535 U.S. 904 (2002). The court reversed summary judgment, finding genuine issues of material fact as to whether UPS had engaged in the interactive process and provided an effective accommodation. EEOC alleged that UPS, in response to a request for reassignment to a facility in another state, failed to engage in the interactive process. Instead, UPS advised the employee to resign his position and move to the other state, where he would then be rehired. When the employee did this, however, he was not rehired.

EEOC v. Yellow Freight Sys., Inc., 253 F.3d 943 (7th Cir. 2001) (en banc). When an employee makes a request for an accommodation that is unreasonable (unlimited sick leave, without being penalized), and the employer counters with an offer of a reasonable accommodation that the employee summarily rejects without explanation, the employer has fulfilled its role in the interactive process. The employer offered a 90-day leave of absence, and asked the employee to fill out a two-page Accommodation Form. The employee refused to fill out the form and repeated his desire for unlimited sick leave. The employee had a four-year record of substantial absences prior to diagnosis of his disability and need for leave as reasonable accommodation. In light of this poor attendance record and the employee=s rejection of Yellow Freight=s counteroffer, the court believed Yellow Freight had sufficiently engaged in the interactive process.

Humphrey v. Mem=l Hosp. Ass=n, 239 F.3d 1128 (9th Cir. 2001). Summary judgment was inappropriate because there were factual issues as to whether the employer=s failure to continue engaging in the interactive process resulted in denial of an effective accommodation. MHA had responded to Humphrey=s requests for accommodation by
allowing her a flexible work schedule, but it soon became clear to both parties that the accommodation was not working. Humphrey requested another accommodation, but MHA rejected that proposal and made clear that it was not going to consider further accommodations. The court stated that the employer’s obligation to engage in the interactive process extends beyond one attempt at accommodation because the ADA’s reasonable accommodation process envisions a cooperative approach to problem-solving that would be undermined if the employer’s obligation was limited to trying one possible accommodation. Moreover, such a limitation would encourage employees to seek the most drastic and burdensome accommodation out of fear that if a lesser accommodation proved ineffective, the employer would not have to try anything else. Since MHA knew about two plausible alternatives (a leave of absence and working at home), and other possibilities might have come up through the interactive process, there was a genuine issue of fact as to whether Humphrey would have been qualified with an effective accommodation.

**Donahue v. Consol. Rail Corp.**, 224 F.3d 226 (3d Cir. 2000). An employer’s failure to engage in the interactive process does not preclude summary judgment in a reassignment case if a plaintiff fails to make a facial showing that an appropriate vacant position existed for which he or she was qualified. The court also distinguished this case from **Taylor v. Phoenixville Sch. Dist.** (see below). The court stated that Taylor stands for the proposition that if a plaintiff has identified several reasonable accommodations that could be effective, and the evidence shows that the employer failed to engage in an interactive process, then a court will not decide on summary judgment that reasonable accommodation was not possible. In this case, however, the plaintiff failed to identify any reasonable accommodation that would have been effective—namely, an appropriate vacant position for which he would have been qualified. Therefore, the employer’s failure to engage in the interactive process was irrelevant.

**EEOC v. Humiston-Keeling, Inc.**, 227 F.3d 1024 (7th Cir. 2000). An employer cannot be deemed liable for failure to provide reasonable accommodation solely on the basis that it tried, in good faith, to provide a reasonable accommodation that ultimately was ineffective. Where there was no clear evidence that the chosen accommodation would be ineffective, experimentation might be required to find an appropriate accommodation. Where the experiment fails, however, the court assumed that the employer was required to determine if any other reasonable accommodations would be effective.

**Rehling v. City of Chicago**, 207 F.3d 1009 (7th Cir. 2000). A plaintiff cannot base a reasonable accommodation claim solely on a showing that an employer failed to engage in the interactive process because that process is not an end in itself. Rather, a plaintiff must show that an inadequate interactive process resulted in an employer’s failure to provide a reasonable accommodation. In this case, the employer did identify two appropriate reasonable accommodations, which the plaintiff rejected.
Cravens v. Blue Cross & Blue Shield of Kansas City, 214 F.3d 1011 (8th Cir. 2000). An employer=s failure to engage in the interactive process is prima facie evidence of bad faith and therefore makes summary judgment in the employer=s favor inappropriate on the issue of reasonable accommodation. Here, the court found that the plaintiff created a genuine issue of material fact as to whether the employer failed to provide a reasonable accommodation. They were aware of her continued inability to perform the essential functions of her current job because of a disability and the plaintiff had specifically asked for help in finding another job. In response, however, the employer only gave the plaintiff a general notice about vacant jobs and told her how to apply for one. Evidence suggested that the plaintiff=s repeated requests for more assistance were ignored. The court noted the importance of the employer=s working with an employee to identify appropriate vacancies, especially in a large company such as this employer.

Barnett v. U.S. Air, Inc., 228 F.3d 1105 (9th Cir. 2000) (en banc), vacated on other grounds, 535 U.S. 391 (2002). The interactive process is mandatory for employers and this obligation is triggered by an employee or his or her representative requesting accommodation. In addition, if an individual is unable to make a request for accommodation, and the employer knows of the existence of the individual=s disability, then the employer must initiate the interactive process. Employers who fail to engage in the interactive process in good faith face liability if a reasonable accommodation would have been possible. Moreover, an employer cannot prevail on summary judgment if there is a genuine dispute as to whether it engaged in good faith in the interactive process. Employers can show good faith by cooperative behavior which promotes identification of appropriate accommodations. The court found that the evidence showed bad faith in that the employer never seriously considered the plaintiff=s suggested accommodations, failed to have any direct discussions with him, and rejected all of his proposed accommodations without offering any practical alternatives. The court also cited as evidence of bad faith that the employer told the plaintiff to bid on other jobs, a right he already had, and took five months to deny his request. The court found that the plaintiff had provided sufficient evidence of some possible effective accommodations and remanded for trial on other accommodations in which there was a genuine factual dispute.

Wells v. Shalala, 228 F.3d 1137 (10th Cir. 2000). In this Rehabilitation Act case, the court upheld summary judgment for the employer, finding that the employee consistently failed to engage in an interactive process to identify an effective reasonable accommodation. Initially, the employer provided every accommodation the employee requested. The court upheld the employer=s refusal, however, to remove traveling, an essential function, from the employee=s position because removal of an essential function is not required by the ADA. The court also found that the employer offered a number of alternative reasonable accommodations that would have been effective in meeting the employee=s limitations and allow him to travel. But, the employee maintained that removal of traveling was the only accommodation he would accept. When the employee=s doctor submitted a note stating
that the employee could not travel under any circumstances, the agency proposed reassignment, which the employee also rejected. The court concluded that the employee failed to identify any appropriate accommodations and rejected effective ones that were offered.

**Taylor v. Phoenixville Sch. Dist.,** 184 F.3d 296 (3d Cir. 1999). To show that an employer=s failure to engage in the interactive process in good faith resulted in a failure to provide a reasonable accommodation, an individual with a disability must show: (1) the employer knew about the individual=s disability, (2) the individual requested accommodation or assistance for her disability, (3) the employer did not make a good faith effort to assist the employee in seeking a reasonable accommodation, and (4) a reasonable accommodation exists that would enable the employee to perform the essential functions of her position. The court found a number of ways in which employers can show good faith in participating in the interactive process, including: (1) meeting with the employee, (2) requesting information about the employee=s condition and what limitations it causes, (3) asking the employee what she wants as an accommodation, (4) showing some sign of having considered the employee=s request, and (5) offering and discussing alternative forms of reasonable accommodation when the employee=s suggestion is too burdensome. Where good faith is an issue, it would be difficult on summary judgment to determine whether reasonable accommodation was possible. The court emphasized that when a disability is heavily stigmatized, such as psychiatric disabilities, courts should be cautious about deciding whether an employee could perform the essential functions with a reasonable accommodation, or how much the employer=s bad faith may have hindered the process of finding a reasonable accommodation. Here, the court found a genuine issue of material fact as to whether the School District was responsible for the breakdown in the interactive process given its failure to provide any reasonable accommodation or to assist in finding one. The court found that there might have been a number of Amodest and fairly obvious@ reasonable accommodations for Taylor, including increasing her responsibilities more slowly when she returned from medical leave, giving her more time to learn to use the computer, and engaging in more interactive communication about work problems rather than giving her formal, written reprimands.

**Loulseged v. Akzo Nobel, Inc.,** 178 F.3d 731 (5th Cir. 1999). An employee who has ample opportunity to tell an employer that proposed changes in assignments will cause problems related to her disability, but never requests accommodation was responsible for the breakdown in the interactive reasonable accommodation process. The plaintiff, a laboratory technician, shared responsibility on a rotating basis for lifting and transporting 30-50 pound containers of solvents. After injuring her back, she no longer could perform this function, so Akzo arranged for contract workers to do it. When the employer decided to require that she resume transporting the solvents, it informed her of this decision and told her she would be given a smaller container to make transport easier. One week before she was due to transport the solvents, the plaintiff quit but made no mention of accommodation
and disability in her resignation letter. Finding the plaintiff responsible for the breakdown in the interactive process, the court concluded that the employer did not fail to provide her with a reasonable accommodation. The court rejected the plaintiff=s argument that the employer was responsible for the breakdown in the interactive process by failing to present her with a complete proposal for an alternative accommodation when it told her that the contract workers were being withdrawn. Noting the Ainformal@ nature of the interactive process, the court found that the employer had engaged in reasonable preliminary steps in determining an effective accommodation by offering her a smaller container and informing her that it was considering providing a Atricycle@ to address problems with pushing and pulling. The court found no requirement that an employer move with Amaximum speed@ through the interactive process; the ADA permits the employer to move at whatever pace it chooses as long as the problem that requires a reasonable accommodation is not imminent. Finally, the court rejected the plaintiff=s assessment that it would have been futile to engage in the interactive process because she believed the offer of the small containers was a final offer. The employer had not created a Areasonably objective perception@ that it would not engage in the interactive process. While the employer did not appear open to resuming use of the contract workers, that still left two possible accommodations open for discussion, and perhaps others.

Fjellestad v. Pizza Hut, 188 F.3d 944 (8th Cir. 1999). Summary judgment is inappropriate where an employee has requested reasonable accommodation, provided sufficient evidence that a vacant position existed for reassignment, and offered evidence that she was qualified for the position. Furthermore, while there is no per se liability for an employer=s failure to engage in the interactive process, evidence of such a failure generally makes it inappropriate to grant summary judgment. The court disagreed with Pizza Hut=s argument that Fjellestad, in requesting reasonable accommodation, rejected reassignment by stating that she did not want a demotion. Fjellestad=s Ageneral@ comment on demotion did not relieve Pizza Hut from discussing with her available accommodations, since Fjellestad might have changed her mind if Pizza Hut had engaged in the interactive process and informed her that reassignment to a lower position might be the only possible form of reasonable accommodation available. Also, an employer cannot escape its duty to engage in the interactive process because the individual did not request a specific type of reasonable accommodation that would prevail in litigation. The point of an interactive process is for the parties to share information and explore what options exist for reasonable accommodation and any problems providing specific accommodations.

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

Mays v. Principi, 301 F.3d 866 (7th Cir. 2002). A hospital was not required to provide additional staff assistance to a nurse who cannot lift over 10 pounds because such assistance would amount to having two people perform the same job.
Watson v. Lithonia Lighting and Nat=I Serv. Indus., Inc., 304 F.3d 749 (7th Cir. 2002), cert. denied, 123 S. Ct. 1286 (2003). The court rejected the plaintiff=s request that she be exempted from mandatory rotation through all assembly line positions, due to repetitive motion restrictions, because she failed to show this would be a reasonable accommodation. Her affidavit stated such an exception was made for two employees, but this failed to create a factual issue because she did not explain the source of her information and it was not based on personal knowledge. The plaintiff conceded that the rotation system served a business purpose B reducing the risk of injury and qualifying every worker to do every job in case of emergency. The court also held that the ADA does not require an employer who sets aside light duty positions for injured employees while they recover to make those positions available indefinitely to an employee with a disability whose condition is stable.

Dropinski v. Douglas County, 298 F.3d 704 (8th Cir. 2002). The court found that job-restructuring was not possible for an equipment operator who was unable to bend, twist, squat, or lift anything over 50 pounds. All of the accommodations the plaintiff identified B short breaks, receiving assistance lifting anything over 50 pounds, and alternating crew responsibilities consistent with his physical restrictions B would have entailed removal of an essential function.

Breen v. Dept of Transp., 282 F.3d 839 (D.C. Cir. 2002). The court reversed summary judgment in this Rehabilitation Act case on the issue of whether an alternative work schedule was a reasonable accommodation. The plaintiff requested to work one extra hour for eight days in exchange for one day off every two weeks because her obsessive-compulsive disorder made it difficult to handle interruptions and prevented her from completing her filing duties. She believed the new schedule would resolve those problems by allowing uninterrupted work time after business hours. The agency disagreed, stating that the new schedule did not increase the number of hours she would work; uninterrupted time had been set aside for her without improvement in her job performance; and she was needed in the office every day. The court found a factual dispute because the plaintiff presented evidence that she needed uninterrupted time to complete her duties, not necessarily additional time; the employer had not provided uninterrupted time as promised; and the agency allowed many other employees, with similar jobs, to work alternative schedules.

Phelps v. Optima Health, Inc., 251 F.3d 21 (1st Cir. 2001). Having determined that lifting 50 pounds is an essential function of a clinical nurse position, the court held that a hospital did not have to allow other nurses to assist a nurse with a back impairment who could not lift patients alone. Past assistance with patient lifting did not mean that the hospital was obligated to continue providing that assistance. Nor did it matter that a former supervisor had informally eliminated certain essential functions and substituted others, because that created a new job for Phelps that exceeded the requirements of the ADA.
Lovejoy-Wilson v. NOCO Motor Fuel, Inc., 263 F.3d 208 (2d Cir. 2001). Depositing store receipts in a safe and timely manner is an essential function of an assistant manager=s position, but the ability to drive to the bank to deposit the receipts is not. Thus, a person whose disability prevents her from driving is qualified if she can perform this essential function with a reasonable accommodation, such as having someone else drive her. Furthermore, the defendant could not satisfy its reasonable accommodation obligation by promoting the employee to a store where driving was not an issue. If the plaintiff, like a non-disabled employee, was eligible for promotion to the store of her choice, then that choice could not be denied by the employer because it did not wish to provide a reasonable accommodation that would enable her to make the bank deposits.

Skerski v. Time Warner Cable Co., 257 F.3d 273 (3d Cir. 2001). An employer=s statement that restructuring a job would have been Aincconvenient@ is insufficient to excuse the employer from providing that accommodation. An employee with a panic disorder had been excused from climbing for three years when a new supervisor arrived who told him he had to resume climbing or possibly face termination. The employer rejected the employee=s request to use a bucket truck so he could work at heights without climbing. At the employer=s insistence, and under duress, the employee agreed to a reassignment. The employer argued that the reassignment fulfilled its reasonable accommodation obligation, but the court disagreed, noting that the ADA requires accommodation in an employee=s current job and that reassignment should be used only as a last resort. Moreover, the ADA requires employers to Alook deeper and more creatively@ into possibilities for providing accommodation, and the only defense for failure to provide an accommodation is to show Aundue hardship.@ Noting there was conflicting evidence on the viability of the bucket truck as a reasonable accommodation, the court concluded that it was best left for a jury to decide if this would have been an effective accommodation.

Basith v. Cook County, 241 F.3d 919 (7th Cir. 2001). An employee=s testimony that he could perform the essential function of delivering medication if the employer had given him a motorized wheelchair is sheer speculation and therefore insufficient to survive summary judgment. Basith provided no evidence that a wheelchair had ever been used in performing this function and how it would have enabled him to surmount various hurdles, such as pushing delivery carts and trucks up a 15 percent grade on ball casters. Moreover, he provided no evidence of whether use of a wheelchair would allow delivery of medication within a reasonable amount of time.

Hoffman v. Caterpillar, Inc., 256 F.3d 568 (7th Cir. 2001). An employer can reassign a marginal function to another employee rather than provide a reasonable accommodation to allow a disabled employee to perform that marginal function.
Hatchett v. Philander Smith Coll., 251 F.3d 670 (8th Cir. 2001). Although a part-time schedule may be a reasonable accommodation in appropriate circumstances, the court concluded that a four-hour work day was inappropriate for a business manager because she could not complete her essential functions in that time period.

Heaser v. Toro Co., 247 F.3d 826 (8th Cir. 2001). The employer was not required to make overall changes in its manner of conducting business to accommodate the needs of an employee with multiple chemical sensitivity who could not work with carbonless paper. The plaintiff claimed she could perform the essential function of handling marketing orders if the employer switched all of its orders to a computerized system, thus avoiding use of carbonless paper. The court rejected that suggestion, stating that while restructuring an employee=s job may be a reasonable accommodation, changing the method of work throughout the business is not.

Ward v. Mass. Health Research Inst., Inc., 209 F.3d 29 (1st Cir. 2000). The ADA, while listing job restructuring and modified or part-time work schedules as reasonable accommodations, does not explicitly require that such schedules be regular or predictable. In this case, an employee with arthritis requested a flexible schedule, rather than meeting the employee=s policy to be at work by 9:00 a.m., because his arthritis made it very difficult to move in the morning. The court rejected the employer=s general arguments against a flexible schedule because it would eliminate the employer=s control over the workplace and its ability to maintain standards and avoid the provision of any form of reasonable accommodation. The court held that the employer must produce evidence that an open-ended schedule would be an undue hardship, such as showing that it would need to keep the lab open indefinitely at significant cost or that the plaintiff=s duties would need to be assumed by a coworker. The court rejected the employer=s suggestion that it would be a hardship to require the employee=s supervisor to work to the employee=s schedule was not persuasive since there was no evidence that the employer required supervisors to do this.

Parker v. Columbia Pictures Indus., 204 F.3d 326 (2d Cir. 2000). The court found a genuine issue of material fact as to whether the employee could have performed the essential functions of his position with the reasonable accommodation of a part-time schedule. To prevail, the plaintiff will have to show that he could perform the essential functions of his position while working part-time. The court also held that it is an ADA violation to terminate an employee who could perform the essential functions of his position but who cannot return to work after medical leave because the employer denied his request for reasonable accommodation. An employer cannot find an employee unqualified because he lacks a reasonable accommodation that the employer refuses to provide.

Jay v. Intermet Wagner, Inc., 233 F.3d 1014 (7th Cir. 2000). The employer did not have to restructure a millwright=s job so that he only worked at ground level. The court found that the plaintiff=s position required that he climb stairs and ladders. While the court noted
evidence that two other millwrights worked only at ground level, this did not require the employer to restructure the essential functions of the plaintiff’s position so that he could avoid working at heights. Also, the employer did not have to bump one of the ground level employees to create a job opening for the plaintiff.

**Treanor v. MCI Telecomm. Corp.,** 200 F.3d 570 (8th Cir. 2000). Although part-time work is a form of reasonable accommodation, an employer does not have to create a new part-time position where none existed. After a lengthy medical leave, the employee had requested that she be allowed to return to her job on a part-time basis, but the employer rejected this request because it was not feasible.

**Earl v. Mervyns, Inc.,** 207 F.3d 1361 (11th Cir. 2000). The plaintiff failed to identify an effective reasonable accommodation that would enable her to perform an essential function of her position. The court determined that punctuality was essential for a store area coordinator and that plaintiff, because of her disability, was regularly late for work. The plaintiff admitted that she could not arrive on time and her psychiatrist testified that there was nothing the store could have done to help her arrive on time. Furthermore, given the time sensitivity of her essential functions, the court rejected plaintiff’s requested accommodation that she be allowed to arrive whenever she could, without reprimand, and that she make up the time at the end of the shift.

**Fjellestad v. Pizza Hut,** 188 F.3d 944 (8th Cir. 1999). In reviewing types of reasonable accommodations, the court stated that an employer is not required to remove an essential function, hire or transfer employees to perform an essential function for a disabled employee, or convert a temporary job into a permanent one.

**Anderson v. Coors Brewing Co.,** 181 F.3d 1171 (10th Cir. 1999). Finding that the plaintiff had been hired for a position that required her to perform the functions of different positions throughout the plant on an Aas needed@ basis, the court refused to find that it was a reasonable accommodation to assign her only to those positions she could perform with her disability. In essence, Anderson requested that a multiple-duty job be converted into a single-duty job, and the court found such an accommodation would be unreasonable because it would fundamentally alter the nature of the position. An employer does not have to create a position for an employee as a reasonable accommodation, nor does it have to require that other employees perform the demanding functions while the employee only has to perform the light tasks.

**Martinson v. Kinney Shoe Corp.,** 104 F.3d 683 (4th Cir. 1997). Allowing an employee to take breaks during brief periods of incapacitation because of a disability may be a form of reasonable accommodation, but the facts of each case must be scrutinized to determine if temporary incapacitation renders the employee unqualified. In this case, an employee who
has epileptic seizures was not a qualified individual with a disability because, on occasion, he was alone in the public areas and solely responsible for maintaining store security.

Holbrook v. City of Alpharetta, 112 F.3d 1522 (11th Cir. 1997). A police department exceeded the requirements to provide a reasonable accommodation when it excused a detective from performing an essential function of his position (collecting evidence at a crime scene). Although the court acknowledged that this arrangement resulted in relatively minor disruption and inconvenience, nonetheless it did not constitute a reasonable accommodation and thus the department could cancel this arrangement at any time.

Carr v. Reno, 23 F.3d 525 (D.C. Cir. 1994). An employer had provided reasonable accommodation to an employee who had Meniere=s disease, which causes periodic dizziness and nausea, by offering her a sofa to use during workday attacks. Her excessive absenteeism continued for several years until the employer discharged her. The employee's requested accommodations, including working when able, job restructuring to remove time-sensitive job functions, and not having to provide doctor's reports, were not required by the ADA.

4. Leave

Smith v. Diffee Ford-Lincoln-Mercury, Inc., 298 F.3d 955 (10th Cir. 2002). Summary judgment was inappropriate where sufficient evidence suggested that an employer fired an employee who needed leave as a reasonable accommodation.

EEOC v. Yellow Freight Sys. Inc., 253 F.3d 943 (7th Cir. 2001) (en banc). A request for unlimited sick leave without being penalized is unreasonable as a matter of law. The employer offered the employee a 90-day leave of absence, which he refused, and instead he repeated his request for unlimited leave without penalty.

Maziarka v. Mills Fleet Farm, Inc., 245 F.3d 675 (8th Cir. 2001). A receiving clerk=s suggestion that he be granted unscheduled leave of a day or two, and allowed to make up the time later, was not a form of reasonable accommodation. The clerk needed such leave because of flare-ups of his irritable bowel syndrome. But the unpredictable nature of the flare-ups meant the employer could not plan ahead for coverage to receive and process merchandise if the employee did not show up.

Pickens v. Soo Line R.R., 264 F.3d 773 (8th Cir. 2001). While acknowledging that leave is a form of reasonable accommodation, the court found it Aexcessive@ that an employee took leave 29 times in a 10-month period, thus failing to show any regularity in his attendance. The court rejected the employee=s request that be allowed to work when he wanted as unreasonable as a matter of law.
Garcia-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638 (1st Cir. 2000). An employee=s request for extended medical leave does not mean that the employee cannot perform the essential functions of her position. The court found that the plaintiff=s request for a two-month extension of leave was a request for reasonable accommodation even though she had already taken 15 months of medical leave. An employer cannot simply rely on a medical leave policy and automatically deny a request for an extension beyond the enumerated period without making an individualized assessment as to whether it would cause an undue hardship. Furthermore, an employee=s inability to give a precise date of return does not necessarily mean that the employee is requesting indefinite leave. Under the facts of this case, the plaintiff=s doctor indicated that she could return to work on July 30, but as it turned out she was released to work on August 22. The court did not find this discrepancy converted the plaintiff=s initial request into a request for indefinite leave. While the court acknowledged that under certain facts a request for extended medical leave could be too long to be considered a "reasonable accommodation," that was not the situation in this case and the employer had the burden of showing undue hardship to justify its denial of the leave.

Parker v. Columbia Pictures Indus., 204 F.3d 326 (2d Cir. 2000). An employer violates the ADA if it terminates an employee who could perform the essential functions of his position but who cannot return to work after medical leave because the employer denied his request for reasonable accommodation. The court found evidence that the employer summarily rejected the employee=s request to return to work on a part-time schedule, did nothing to ascertain his ability to work, and instead fired the employee when he had exhausted his leave benefits. The court emphasized that the ADA does not require an employer to hold open an employee=s job indefinitely while he is on medical leave, but if an employee on medical leave requests reasonable accommodation to return to work, then the employer must engage in the interactive process and determine if accommodation is possible.

Walsh v. United Parcel Serv., Inc., 201 F.3d 718 (6th Cir. 2000). When an employer has already provided a substantial amount of medical leave, any additional leave of significant duration, with no clear prospects for recovery, is not a reasonable accommodation. Walsh had been on medical leave for almost 18 months when he requested another 90 days to get further medical evaluations. The court noted, however, that Walsh had 18 months in which to get such evaluations and he provided no credible evidence of why this period was insufficient. Moreover, Walsh=s own medical evidence indicated that he would need at least another one-to-three years before he could return to his old job, and the evidence provided no information on whether he could perform other types of work. The court found that Walsh, in effect, was requesting indefinite leave, which UPS did not have to provide.

Nunes v. Wal-Mart Stores, Inc., 164 F.3d 1243 (9th Cir. 1999). Since unpaid medical leave, extended medical leave, or an extension of an existing leave period may all be forms of reasonable accommodation, an employee cannot be found "unqualified."
because he or she cannot work during the period of leave. The court reversed summary judgment against Nunes, finding that she presented sufficient evidence that her nine-month leave, which would extend into the Christmas season, was a reasonable accommodation that would enable her to return to work and perform her essential functions. Moreover, the court found a genuine issue of material fact as to whether undue hardship existed because Wal-Mart had a policy of granting unpaid medical leave for one year and it had a regular practice of hiring temporary help during the holiday season. The court emphasized that determination of whether a reasonable accommodation is appropriate and would impose an undue hardship requires a fact-specific, individualized inquiry.

Taylor v. Pepsi-Cola Co., 196 F.3d 1106 (10th Cir. 1999). An indefinite period of leave is not a reasonable accommodation. At the time of his termination, Taylor had been on medical leave for over a year, had told his employer he could never return to his old job due to his disability, and could provide no information on when he would be able to return to work and in what capacity.

5. Reassignment

[See Section XI, Seniority Systems and Collective Bargaining Agreements, for cases involving reassignment, seniority, and collective bargaining agreements.]

Shapiro v. Township of Lakewood, 292 F.3d 356 (3d Cir. 2002). Applying the framework outlined by the Supreme Court in U.S. Airways, Inc. v. Barnett (see Section V.F.13), the court held that when an employer claims that a reassignment would violate a disability-neutral rule, the employee must show that the reassignment is a type of accommodation that is reasonable in the run of cases. If shown to be reasonable, then the burden shifts to the employer to show that the accommodation would pose an undue hardship under the particular circumstances of the case. If, however, the accommodation is not shown to be of the type that is reasonable in the run of cases, the employee can still prevail if he or she shows special circumstances that warrant finding the accommodation reasonable under the facts of the specific case. Here, the employer argued that it had a disability-neutral policy requiring employees to apply and interview for job transfers, and the plaintiff did not follow that policy. He did request, however, reassignment as a reasonable accommodation. The court reversed summary judgment for the employer and remanded for a review consistent with the framework outlined by the court.

Mays v. Principi, 301 F.3d 866 (7th Cir. 2002). An employer does not have to reassign an employee with a disability to a position for which the employer has more qualified applicants.

Dilley v. SuperValu, Inc., 296 F.3d 958 (10th Cir. 2002). Upholding a jury=s finding of discrimination, the court concluded that the positions chosen by the employer for a
reassignment failed to fulfill its reasonable accommodation obligation. In providing a reassignment, an employer should first consider lateral moves to positions that are regarded as equivalent to the employee=s current position. The court found evidence that there were such vacant positions, but the employer instead offered him one position that would have required a substantial cut in pay while another proffered position was not currently vacant.

Skerski v. Time Warner Cable Co., 257 F.3d 273 (3d Cir. 2001). An employee with a panic disorder had been excused from climbing for three years when a new supervisor arrived who told him he had to resume climbing or possibly face termination. At the employer=s insistence, and under duress, the employee agreed to a reassignment. The employer argued that the reassignment fulfilled its reasonable accommodation obligation, but the court disagreed, noting that the ADA requires accommodation in an employee=s current job and that reassignment should be used only as a last resort.

EEOC v. United Parcel Serv., Inc., 249 F.3d 557 (6th Cir. 2001). The EEOC presented genuine issues of material fact as to whether UPS had engaged in the interactive process and provided an effective accommodation. EEOC alleged that UPS, in response to a request for reassignment to a facility in another state, failed to engage in the interactive process. Instead, UPS advised the employee to resign his position and move to the other state, where he would then be rehired. When the employee did this, however, he was not rehired.

Kiphart v. Saturn Corp., 251 F.3d 573 (6th Cir. 2001). Saturn failed to provide reassignment when it improperly insisted that the plaintiff be able to rotate through all of the job assignments. Saturn had a policy of refusing to place injured workers in jobs unless they were able to perform all of the tasks required on a rotating basis, even though it acquiesced to the widespread noncompliance with the rotation system throughout its plant. Since a reasonable jury could have concluded that rotation was not an essential function of the position, it then could have determined that the plaintiff=s ability to perform all but one or two of the tasks made him qualified for the job. Furthermore, given the widespread noncompliance with the rotation system, it would not appear to have been an undue hardship for Saturn to excuse the plaintiff from those tasks.

Ozlowski v. Henderson, 237 F.3d 837 (7th Cir. 2001). An employee=s conclusory and self-serving statements that there were vacant positions that he was qualified to perform are insufficient evidence to avoid summary judgment. The court also stated that a position is not Avacant@ if the employer has determined, for reasons unrelated to the employee=s disability, not to fill that position. Here, the Postal Service refused to fill a vacancy pending the installation of a new computer system which could change or reduce the job requirements. Finally, an employer=s removal of an essential function for one employee does not require the employer to do the same for a second employee.
Tyler v. Ispat Inland, Inc., 245 F.3d 969 (7th Cir. 2001). The employer reassigned the plaintiff because he believed his coworkers were harassing him due to delusions of persecution and paranoia caused by a mental illness. The plaintiff later became suspicious of his new coworkers and asked to be reassigned back to his original job. The company refused, and the court upheld the employer=s decision, finding that it was appropriate to make the original transfer. Nor did the reassignment amount to segregation since the plaintiff was fully integrated into the work force after his transfer. The court rejected his contention that the company should have investigated his concerns rather than reassign him; since the company knew about his delusions, it would have been a waste of resources to mount an investigation. Finally, the court found that the company was justified in refusing the plaintiff=s request to return to his old job because he refused to provide medical information explaining why he would not again feel persecuted.

Williams v. United Ins. Co. of America, 253 F.3d 280 (7th Cir.), cert. denied, 534 U.S. 1025 (2001). An employer does not have to promote an employee as a reassignment. Nor does an employer have an obligation to provide training so that the employee attains the qualifications necessary to perform a new job.

Boykin v. ATC/Vancom of Colorado, 247 F.3d 1061 (10th Cir. 2001). A bus driver who was terminated after turning down the only appropriate vacant position was not entitled to reassignment to the dispatcher position he desired when it became vacant six months after he was terminated. The employer notified the plaintiff when the dispatcher job became available and invited him to apply, but he was turned down. The court rejected the plaintiff=s argument that he should have been put on indefinite leave and allowed to wait until the dispatcher job opened because: (1) indefinite leave is not required, and (2) although at the time of the plaintiff=s termination the employer was negotiating a contract that might mean more dispatcher jobs, the success of the negotiations and the creation of such jobs was speculative.

Lucas v. W.W. Grainger, Inc., 257 F.3d 1249 (11th Cir. 2001). To survive summary judgment, an employee must show that he or she would have been able to perform the essential functions, with or without reasonable accommodation, of a vacant position. It is insufficient to show only that a vacancy existed. Also, reassignment does not require that an employer: (1) bump an employee to create a vacancy, (2) promote an employee, (3) change a temporary position into a permanent one, or (4) remove an essential function of a position.

Jackan v. New York State Dep=t of Labor, 205 F.3d 562 (2d Cir. 2000). An employee with a disability meets the ADA definition of qualified if he or she could perform the essential functions of the new position. The court rejected, as contrary to the ADA=s plain language, the employer=s argument that only a person who is able to perform the essential functions of his or her current position is entitled to a reassignment. The court also held that a plaintiff bears the burden of production and persuasion in litigation to show that an
appropriate vacancy was available for a reassignment. Mere speculation that an appropriate vacancy might exist is insufficient.

**Donahue v. Consol. Rail Corp.,** 224 F.3d 226 (3d Cir. 2000). An employer=s failure to engage in the interactive process does not preclude summary judgment in a reassignment case if a plaintiff fails to make a facial showing that a vacant position existed for which he or she was qualified. Here, the court found sufficient evidence in the summary judgment record that the plaintiff was not qualified for reassignment to a train dispatcher position because he would pose a direct threat, and the plaintiff offered no evidence that any appropriate vacant positions existed for which he would have been qualified without posing a direct threat. The court emphasized that a plaintiff can request a continuance to permit discovery of such evidence.

**Hoskins v. Oakland Sheriff=s Dep=t**, 227 F.3d 719 (6th Cir. 2000). A position created over one year after an employee=s termination does not have to be given to that employee as a reassignment. Nor did the defendant have to convert a rotating or relief position into a permanent one in order to make a reassignment. Under the facts of this case, conversion of a rotating job would constitute creation of a new job and that was not required under the ADA.

**Burns v. Coca-Cola Enters., Inc.** 222 F.3d 247 (6th Cir. 2000). When an employer knows that an employee, because of a disability, can no longer perform the essential functions of his or her position with or without reasonable accommodation, then the employer must consider whether it can reassign the employee to an appropriate vacant position. The court held that this obligation does not require that an employer violate employees= rights under a collective bargaining agreement or other legitimate, non-discriminatory policy. The court upheld the employer=s requirement that an employee with a disability who wanted a reassignment must apply for a transfer pursuant to the company=s transfer policy. Although Burns requested reassignment, and reviewed a list of vacant jobs that the employer posted, he failed to follow the transfer policy requirement of requesting that he be considered for specific jobs on the vacancy list. The court emphasized that its ruling did not mean that companies could adopt Ano transfer@ policies to avoid having to make a reassignment under the ADA.

**Jay v. Intermet Wagner, Inc.** 233 F.3d 1014 (7th Cir. 2000). The court upheld summary judgment for the employer, holding that although it took 20 months to reassign an employee, the employer reassigned him when the first appropriate vacancy was available. A millwright could not return to his original job because work restrictions made him unable to perform the essential functions. The employer kept the employee on medical leave while it checked once a week for any vacancies that met the plaintiff=s work restrictions and for which the plaintiff=s seniority would have qualified him, and it offered him the first appropriate vacancy that became available.
EEOC v. Humiston-Keeling, Inc. 227 F.3d 1024 (7th Cir. 2000). An employer does not have to give a qualified employee with a disability a reassignment to a vacant position if there is another candidate for that job who is more qualified than the employee with the disability. Such a preference does not violate the ADA as long as the employer has a consistent policy of hiring the best applicant for a position rather than the first qualified applicant it sees. In dicta, the court discussed whether office jobs would be superior to the employee=s current warehouse job, and thus be considered a promotion and not required as a reassignment. Finding no clear evidence on this issue, the court declined to rule whether the vacant office jobs would have constituted a promotion for the plaintiff.

Gile v. United Airlines, Inc., 213 F.3d 365 (7th Cir. 2000). Affirming an award of compensatory damages, the court found sufficient evidence for a jury to conclude that the plaintiff could have performed the essential functions of her job if she had been given a reassignment. The court noted that the plaintiff presented an endless stream of documentation from her licensed clinical social worker about her psychological symptoms and the need for a transfer to a daytime shift. The social worker testified about how working the night shift was exacerbating the plaintiff=s symptoms and preventing her from performing her job, and how a day shift would remedy that situation. The court also rejected United=s claim that Gile obstructed the interactive process because she failed to use her seniority to get a day shift. The ADA requires an employer to do more than rely on its bidding process as part of providing a reasonable accommodation. United had simply refused Gile=s repeated requests for a transfer and failed to engage in any type of interactive process with her. Finally, the court rejected United=s argument that providing Gile with a reassignment, when she could have used the bidding process to get another job, amounted to affirmative action. See also Gile v. United Airlines, Inc., 95 F.3d 492 (7th Cir. 1996) (holding that an employer has an obligation to provide reassignment to a vacant position to an individual who no longer can perform the essential functions of her current position because of a disability, and that an employer must look beyond the employee=s particular department to locate an appropriate vacant position).

Rehling v. City of Chicago, 207 F.3d 1009 (7th Cir. 2000). The city met its reassignment obligation by offering appropriate vacant positions to the plaintiff even though they were not at the location the plaintiff preferred. The plaintiff, a police officer, could not return to his patrol position and had requested reassignment within his district. He could not show the court, however, that there were any appropriate vacancies available in his district. The court rejected the plaintiff=s claim that the city should have reassigned him to a citations clerk position. He sought a permanent position and the citations clerk was only temporary, and the ADA does not require that such a position be converted into a permanent one.

Cravens v. Blue Cross & Blue Shield of Kansas City, 214 F.3d 1011 (8th Cir. 2000). An employee with a disability meets the ADA definition of qualified if he or she, with a reassignment, could perform the essential functions of the job. The court rejected the
employer=s argument that only a person who is able to perform the essential functions of his or her current position is entitled to a reassignment, pointing out that under that interpretation only employees who do not need a reassignment would be entitled to one. Furthermore, the court stated that the employer=s argument was contradicted by the plain language of the ADA. The court also rejected the employer=s argument that it need only Aconsider@ whether to reassign; the statute requires that an employer reassign an employee to a vacant position if he or she can no longer perform the essential functions of his or her current position, with or without reasonable accommodation, and is qualified for the new position. Finally, the court found that the plaintiff had presented sufficient evidence to create a genuine issue of material fact as to whether appropriate vacancies existed for which she was qualified. She showed that nine vacancies existed and she presented evidence that she met the qualification standards for them and could perform their essential functions.

**Barnett v. U.S. Air, Inc.,** 228 F.3d 1105 (9th Cir. 2000) (en banc), vacated on other grounds, 535 U.S. 391 (2002). The court held that reassignment requires an employer to give an appropriate vacant job to a qualified employee with a disability rather than merely requiring that the employee compete for the job, and that the relevant job for determining whether an individual is Aqualified@ is the job to which the individual is seeking a reassignment, not his or her current job.

**Reed v. Heil Co.,** 206 F.3d 1055 (11th Cir. 2000). The plaintiff was not entitled to reassignment because he failed to provide evidence that he was qualified for any of the vacant positions. For those vacancies where his physical disability made performance of essential functions problematic, the plaintiff did not suggest any reasonable accommodations that would enable him to perform the essential functions.

**Norville v. Staten Island Univ. Hosp.,** 196 F.3d 89 (2d Cir. 1999). An employer does not fulfill its obligation to provide a reassignment when there is a vacant position comparable to the employee=s current job, but the employer instead transfers the employee to a position that involves significant diminution in salary, benefits, seniority, or other advantages of the current job.

**Burch v. Nacogdoches,** 174 F.3d 615 (5th Cir. 1999). The city did not fail to provide the plaintiff with a reassignment since he never let the city know that he wanted one. While the plaintiff let the city know that he did not want to retire, the court found no evidence that he took the next step of informing the city that he wanted to find another job. Even if there was some evidence that the plaintiff informed the city of his desire for reassignment, he provided no evidence that he was qualified to perform any of the vacant jobs available. Such evidence has to be more than a plaintiff=s Aself-serving testimony@ that he was qualified. Here, the evidence showed that the plaintiff=s doctor never released him to perform light duty work which undermines any contention that he was qualified for the vacant jobs.
Wellington v. Lyon County Sch. Dist., 187 F.3d 1150 (9th Cir. 1999). There was a question of fact as to whether the school district had already created a permanent job to which the plaintiff could have been reassigned, or whether it was creating a job for the sole purpose of reassigning him, which would not have been required under the ADA.

Davoll v. Webb, 194 F.3d 1116 (10th Cir. 1999). Since the ADA lists reassignment as a form of reasonable accommodation, an employer must provide it if the employee is qualified for the position in question, with or without reasonable accommodation, and reassignment does not pose an undue hardship.

Smith v. Midland Brake, Inc., 180 F.3d 1154 (10th Cir. 1999). An employee with a disability who can no longer perform the essential functions of his or her position, even with a reasonable accommodation, may be entitled to reassignment. Reassignment requires that an employer offer a job to a qualified employee with a disability, rather than merely consider the employee along with other qualified applicants. The court also disputed that reassignment amounts to affirmative action by noting that the statute defines failure to provide reasonable accommodation, including reassignment, as a form of discrimination. The court discussed the parameters of reassignment and the interactive process, emphasizing that the employee must be qualified for the new position. An employee with a disability must convey to an employer that he or she wishes to remain with the company despite the limitations imposed by the disability, either as part of the request for reasonable accommodation or during the interactive process. There must be an existing, vacant position; an employer does not have to bump someone from a job. A vacant position includes one that the employer knows will become vacant in the immediate future. A position is not considered vacant, however, if another employee has a vested priority right to the position under the terms of a collective bargaining agreement or a well-entrenched seniority system. The court reiterated that reassignment does not require giving an employee a promotion but only transfer to an equivalent position, or if necessary, a lower position.

6. Working at Home

Rauen v. U.S. Tobacco Mfg. Ltd., 319 F.3d 891 (7th Cir. 2003). The court found that the plaintiff=s request to work at home almost full-time, and that she would decide when it was necessary to come to the workplace, was not reasonable. The plaintiff rejected all other possible accommodations suggested by her employer, including that she come to the office once a week. The court emphasized that the central components of her job required her to be at the office, including the need for immediate resolution of certain problems, without any showing of how they could be accomplished from her home. Finally, while the court specifically stated it would not decide the general issue of whether an accommodation is reasonable for a person who can perform all essential functions without accommodation, it
noted that the plaintiff=s ability to perform the essential functions in the workplace strongly suggested that it was unreasonable to grant her request to work at home.

_**Kvorjak v. Maine,** 259 F.3d 48 (1st Cir. 2001)._ An employee who requested to work at home full time was not entitled to this accommodation because he failed to show that he could perform all of the essential functions of his job outside the office. While some of the essential functions could be performed at home, the court noted that the position requires an employee to conduct training and participate in on-the-spot collaborative efforts. That these functions were a minimal part of the plaintiff=s original job was irrelevant. After the agency consolidated its offices, the essential functions of the position changed, and the plaintiff provided no evidence challenging the agency=s evidence that the training, technical assistance, and advisory functions had become essential components of the plaintiff=s job. Finally, the court rejected the plaintiff=s evidence that two other employees were allowed to work at home, noting that they were allowed to do so only for a short period of time and they both held different jobs from the plaintiff.

_**Heaser v. Toro Co.,** 247 F.3d 826 (8th Cir. 2001)._ The court upheld summary judgment for the employer because there was no evidence that working at home would enable the employee to perform the essential functions of her position. The plaintiff argued that she could do most of her work on a computer at home, but the company provided evidence that the computer software necessary for his position could not be used through remote access. While the plaintiff provided some evidence that the company was investigating a more advanced computerized system of order entry that would allow remote access, there is no evidence that such a change was feasible or that it had occurred. The court also rejected the plaintiff=s allegations that the employer could have made the computer system work because she provided no evidence to support her claim.

7. **Changing Supervisors**

_**Kennedy v. Dresser Rand Co.,** 193 F.3d 120 (2d Cir. 1999), cert. denied, 528 U.S. 1190 (2000)._ Contrary to EEOC=s reasonable accommodation guidance, it is not _per se_ unreasonable to change an employee=s supervisor. But, there is a presumption that such an accommodation is unreasonable and the plaintiff bears the burden of showing otherwise. In this case, the court found that the plaintiff failed to present evidence that changing supervisors could be done without excessive organizational costs. Furthermore, the plaintiff=s request was not just for a new supervisor but to have no contact with her current supervisor. The court found that would be impossible given the responsibilities of both individuals.

8. **Stress-Free Job**
Gaul v. Lucent Tech., Inc., 134 F.3d 576 (3d Cir. 1998). Reassigning an employee to a position free of prolonged and inordinate stress did not constitute a reasonable accommodation. No employer could meet such a requirement. Here, the plaintiff=s stress level would fluctuate depending on an infinite number of variables, few of which would be within the employer=s control. Furthermore, the plaintiff failed to present a prima facie case because he did not show that the administrative costs associated with his proposed accommodation were not clearly disproportionate to the benefits. The court found the plaintiff=s request would place extraordinary administrative burdens on the employer by requiring too much oversight when assigning work, shifting coworkers, changing working locations, or planning social events to ensure they did not produce a high stress level for the plaintiff. Finally, the court rejected the notion that reasonable accommodation requires transferring an employee with a disability away from other employees who cause him high stress because such a requirement would intrude on an employer=s ability to make personnel decisions.

9. Workplace Free of Chemical Irritants

Selenke v. Med. Imaging of Colorado, 248 F.3d 1249 (10th Cir. 2001). The employer properly had modified the work environment as a reasonable accommodation for a radiology technician with chronic sinusitis. The accommodations included hiring consultants to evaluate the workplace and implementing their recommendations to install vents and a more powerful motor to remove fumes. The court rejected the plaintiff=s argument that the employer=s delay in implementing these changes amounted to a failure to accommodate her, noting that the employer=s good faith reliance on a contractor=s incorrect information led to the delay in installing new vents. Moreover, the employer provided the plaintiff with a respirator mask during this period, granted all of her requests for leave, and offered her a different position in another office.

Buckles v. First Data Res., Inc., 176 F.3d 1098 (8th Cir. 1999). The court rejected the employee=s argument that his employer should have provided him with a workplace free of irritants and unlimited leave, finding that this would impose an undue financial and administrative hardship on the employer. The employer provided several reasonable accommodations to the employee to address his acute recurrent rhinosinusitis, including prohibiting use of nail polish, moving him into a different work area with better ventilation, and permitting him, if he sensed an irritant, to notify his supervisor that he was temporarily leaving the area. The employer=s reasonable accommodations attempted to limit his exposure to irritants and to allow him temporarily to leave his work area if exposed to an irritant. Reasonable accommodation does not require creation of a "bubble environment."

10. Monitoring Medication and Effects of Disability
Robertson v. Neuromedical Ctr., 161 F.3d 292 (5th Cir. 1998), cert. denied, 526 U.S. 1098 (1999). An employee=s decision on whether to take medication for treatment of a disability is a personal decision and not something within the employer=s control so it cannot be a type of reasonable accommodation.

Siefken v. Village of Arlington Heights, 65 F.3d 664 (7th Cir. 1995). A policeman who had a diabetic reaction while on duty in his squad car could not challenge his termination under the ADA because the cause of his predicament was his own failure to monitor his condition. Reasonable accommodation does not Aallow for another chance to allow him to change his monitoring technique.@

11. Benefits and Privileges of Employment

Vollmert v. Wisconsin Dep=t of Transp., 197 F.3d 293 (7th Cir. 1999). The court reversed summary judgment, finding that the employer may have failed to provide specialized training as a reasonable accommodation for an employee with a learning disability who had difficulty learning how to use a new computer system. The employer had provided her with only limited training and eventually transferred her to a less desirable job. A vocational rehabilitation expert created a factual issue as to whether she could learn the system with proper training.

Majtan v. Weck, 11 A.D. Cas. (BNA) 80 (E.D. Pa. 2000). There was a genuine issue of material fact as to whether an employer failed to provide sign language interpreters for company and department meetings as a reasonable accommodation. The court rejected as irrelevant the employer=s argument that it need not provide reasonable accommodation for these meetings because the employee did not need reasonable accommodation to perform the essential functions of his position. The court noted that reasonable accommodation also must be provided if an employee with a disability needs it in order to have equal access to the benefits and privileges of employment. Finally, the defendant offered no evidence that providing interpreters would have caused an undue hardship.

12. Burdens of Proof

U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002). A plaintiff Aneed only show that an accommodation= seems reasonable on its face, i.e., ordinarily or in the run of cases,@ to defeat a defendant=s motion for summary judgment with respect to whether an accommodation is Areasonable.@ Once the plaintiff has made this showing, the defendant retains the burden of demonstrating undue hardship on the facts of the particular case.

Shapiro v. Township of Lakewood, 292 F.3d 356 (3d Cir. 2002). Applying the framework outlined by the Supreme Court in U.S. Airways, Inc. v. Barnett (see above), the court held that when an employer claims that a reassignment would violate a disability-neutral rule,
the employee must show that the reassignment is a type of accommodation that is reasonable in the run of cases. If shown to be reasonable, then the burden shifts to the employer to show that the accommodation would pose an undue hardship under the particular circumstances of the case. If, however, the accommodation is not shown to be of the type that is reasonable in the run of cases, the employee can still prevail if he or she shows special circumstances that warrant finding the accommodation reasonable under the facts of the specific case.

Reed v. LePage Bakeries, Inc., 244 F.3d 254 (1st Cir. 2001). In a case involving the ability to perform the essential functions of a position, an employee’s prima facie case must show that a proposed accommodation would allow her to perform those functions and that the accommodation is feasible for the employer under the circumstances. If the plaintiff succeeds in carrying this burden, then the employer can try to show undue hardship, e.g., that the proposed accommodation entails further costs or difficulties not fully appreciated by the plaintiff. The court noted that in some instances B where the costs of an accommodation are obvious B the burdens on the plaintiff and defendant would be identical. But, in other situations, an accommodation could appear facially reasonable B e.g., a request to modify a work area B but the employer might be able to show that limitations on its financial resources, or hidden costs, impose an undue hardship. The court emphasized that the dividing line between Areasonable accommodation@ and Aundue hardship@ is inexact and therefore counseled parties to err on the side of offering proof beyond what their burdens require. The court noted that many ADA summary judgment decisions were based on one party’s failure to provide any significant evidence in favor of its position.

Parker v. Sony Pictures Entm’t, Inc., 260 F.3d 100 (2d Cir. 2001). In cases alleging that an employer’s failure to provide reasonable accommodation led to an employee’s termination, a plaintiff’s burden of proof includes showing a causal connection between the employer’s failure to provide accommodation and the discharge. The denial of accommodation does not need to be the sole cause of the termination, but it must be shown to be a motivating factor.

Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252 (1st Cir. 1999). The McDonnell Douglas burden-shifting scheme, designed to determine discriminatory animus, is unnecessary in an ADA case alleging failure to provide a reasonable accommodation since denial of an accommodation is always Abecause of a disability.@ To survive summary judgment, a plaintiff must offer significantly probative evidence that the employer failed to provide a reasonable accommodation, despite its knowledge of the individual’s need for one, and that the individual was Aqualified.@ Here, the court pointed to evidence that Higgins had requested two accommodations to make changes in the working environment to increase the effectiveness of his hearing aid. Although the employer may point to evidence that it provided some form of reasonable accommodation, summary judgment is
not available because the proffered accommodation might have been insufficient to fulfill the employer=s legal obligation.

Cannice v. Norwest Bank Iowa N.A., 189 F.3d 723 (8th Cir. 1999), cert. denied, 529 U.S. 1019 (2000). In order to show that an employer failed to provide a reasonable accommodation, a plaintiff must show that a specific form of reasonable accommodation would permit him to perform his job. Here, the court found ample evidence that the plaintiff notified the company about his disability and his need for a reasonable accommodation. He told a human resources manager about his impairment and requested an unmonitored phone line so that he could talk to his doctor or family if he had a panic attack. The court found that the plaintiff provided no evidence that a private phone line or any other form of reasonable accommodation would have permitted him to continue working. While acknowledging that the plaintiff=s condition deteriorated while working for Norwest, the court concluded that no reasonable jury could have found that this deterioration was due to the company=s failure to provide a reasonable accommodation. The court noted that the plaintiff rejected the company=s alternative accommodation to use a phone in the conference room, stating it would be ineffective. But, the plaintiff offered no evidence either that he experienced a panic attack after requesting an accommodation or that any attempts to use the phone in the conference room proved ineffective. Finally, the court stated that providing an "aggravation-free environment" is not a form of reasonable accommodation.

Buckles v. First Data Res., Inc., 176 F.3d 1098 (8th Cir. 1999). An individual with a disability has the burden of showing that a reasonable accommodation exists that would permit him to perform the essential functions of his position. The court reversed a jury verdict for the employee and granted judgment to the employer as a matter of law because the employee failed to identify a reasonable accommodation that would enable him to work. The court found that the unfettered ability to leave work at any time is not a reasonable accommodation. Thus, an employee who had frequent and unpredictable absences from work, in spite of the employer=s numerous workplace accommodations for his acute recurrent rhinosinusitis, was not a qualified individual with a disability within the meaning of the ADA.
13. **Seniority Systems and Collective Bargaining Agreements**

**U.S. Airways, Inc. v. Barnett**, 535 U.S. 391 (2002). Ordinarily, a reassignment will be an *unreasonable* accommodation if it conflicts with the terms of a seniority system. A plaintiff can defeat, however, the employer’s demand for summary judgment if he or she shows *special circumstances* why a particular reassignment is *reasonable*. In such a case, the employer would then have the opportunity to show why the reassignment, while being *reasonable*, would pose an undue hardship. In reaching this holding, the Court emphasized that seniority systems provide important employee benefits by creating and fulfilling expectations of fair, uniform treatment. The Court offered two non-exhaustive examples of special circumstances: (1) the employer, having retained the right to change the seniority system unilaterally, exercises that right fairly frequently, and (2) the seniority system contains exceptions such that one further exception is unlikely to matter. In both of these examples, the Court stressed that employees would already have reduced expectations about the seniority system so that making a reassignment would not seriously undermine the purpose of the seniority system.

**Dilley v. SuperValu, Inc.**, 296 F.3d 958 (10th Cir. 2002). Upholding a jury’s finding of discrimination, the court found that the employer failed to provide the plaintiff with a reassignment to a truck driving position that accommodated his lifting restriction. The employer argued that if it reassigned the plaintiff now, and in the future he was bumped pursuant to the seniority system, the company at that point would have to violate the collective bargaining agreement to keep him in his desired position. Noting that *U.S. Airways, Inc. v. Barnett* (see above) applies when a reassignment will cause a direct violation of a seniority system, the court found no such violation here but only speculation about what may happen in the future. Currently, the plaintiff had the most seniority for the positions he desired as a reassignment, and even if a more senior employee bumped him in the future, the court found that the employer would not violate the seniority system by refusing to remove the plaintiff until other routes or positions became available.

**Pond v. Michelin N. Am., Inc.**, 183 F.3d 592 (7th Cir. 1999). A position is not deemed *vacant* because a CBA might allow a senior employee to bump a less senior employee from the position. The ADA does not require that any employee, regardless of seniority, be bumped from a position to create a vacancy.

**McGregor v. National R.R. Passenger Corp.**, 187 F.3d 1113 (9th Cir. 1999). The court found a genuine issue of material fact as to whether appropriate vacant positions existed for a reassignment. Amtrak=s expert stated there were vacancies for which the plaintiff was qualified despite her disability, and Amtrak had acknowledged that she could be accommodated by reassignment under its CBA. The court found that the plaintiff had sufficient seniority to bid on some of the jobs in question.
14. Persons Not Entitled To Reasonable Accommodation

Kaplan v. City of North Las Vegas, 323 F.3d 1226 (9th Cir. 2003). Individuals covered only under the Aregarded as@ prong of the definition of Adisability@ are not eneitlted to reasonable accommodation.

Weber v. Strippit, Inc., 186 F.3d 907 (8th Cir. 1999), cert. denied, 528 U.S. 1078 (2000). Individuals who are Aregarded as@ having a disability are not entitled to reasonable accommodation. Unlike those who have Aactual@ disabilities, where the impairment itself necessitates a reasonable accommodation, in the Aregarded as@ context it would be the employer=s perception of an individual=s medical condition that would trigger the obligation. The court reasoned that it made little sense to require reasonable accommodations based on an employer=s perception of an impairment rather than on the actual needs arising from the impairment. If the employer=s perception triggers the reasonable accommodation obligation, then there could be different results for two individuals with the same impairment and identical limitations who do not have Aactual@ disabilities. If the employer regards the first individual as having a disability, then he or she is entitled to reasonable accommodation. But, the second individual would not be entitled to reasonable accommodation as long as his or her employer does not regard the impairment as a Adisability.@

Den Hartog v. Wasatch Acad., 129 F.3d 1076 (10th Cir. 1997). The ADA does not require an employer provide reasonable accommodation to non-disabled employees who have a relationship or association with a person with a disability.

15. Reasonable Accommodation and Termination

Roberts v. Progressive Indep., Inc., 183 F.3d 1215 (10th Cir. 1999). An employee=s reasonable accommodation claim does not become moot because an employer=s termination is found to be lawful. In this Rehabilitation Act case, the plaintiff requested reasonable accommodation for a business trip and was terminated when he protested that the proposed accommodation would be ineffective. The plaintiff=s termination before he took the business trip did not eliminate the employer=s potential liability for failure to provide a reasonable accommodation because the duty to provide reasonable accommodation arose while the plaintiff was an employee. The court upheld a jury verdict for the plaintiff, finding sufficient evidence that the employer=s proposed accommodation was ineffective. Finally, the court reversed summary judgment for the employer on the wrongful termination, finding sufficient evidence that the plaintiff was terminated solely because he rejected the proposed accommodation as ineffective. Since there was a genuine issue of material fact as to the sufficiency of the proposed accommodation, summary judgment on the wrongful termination claim was inappropriate.
16. Miscellaneous

Felix v. New York City Transit Authority, 324 F.3d 102 (2d cir. 2003). The defendant id not need to accommodate a subway employee with post-traumatic stress disorder (PTSD) by reassigning her to a vacant position above ground, since her need for accommodation was not Abecause of@ her disability. The employee had demonstrated that insomnia resulting from her PTSD substantially limited the major life activity of sleeping. However, the court did not accept the argument that the insomnia and the fear of working underground resulted from the same disability. Rather, it viewed the two limitations as resulting from the same Acause,@ in much the same way as a single accident might result in different impairments. The court acknowledged that A[i]n cases involving conditions like AIDS that are discrete diseases with pervasive effects, it will frequently be obvious that the lesser impairment is caused by the disability.@ but that Ain situations like plaintiff's where it is not clear that a single, particular medical condition is responsible for both the disability and the lesser impairment, the plaintiff must show a causal connection between the specific condition which impairs a major life activity and the accommodation.@

Peters v. City of Mauston, 311 F.3d 835 (7th Cir. 2002). An employee=s proposal to be allowed to Atry and see@ if he could perform his job, despite his lifting restrictions, was unreasonable. Absent any other request for reasonable accommodation, an employer need not incur additional liability by allowing an employee to try to perform his job after the employer has determined that he or she cannot safely perform the essential functions because of permanent lifting restrictions imposed by the employee=s doctor.

Marcano-Rivera v. Pueblo Int=l, Inc., 232 F.3d 245 (1st Cir. 2000). The employer failed to provide a reasonable accommodation to an employee who used a wheelchair. The court rejected the employer=s argument that it never discriminated against the employee because it had treated her like all other employees. The employer=s argument missed the point of reasonable accommodation B i.e., that an employee with a disability cannot always be treated identically with those who do not have the disability. Reasonable accommodation recognizes that in certain circumstances a person with a disability must be accommodated in order that the person truly receive equal opportunities in the workplace.

G. Drug and Alcohol Use

Bailey v. Georgia-Pacific Corp., 306 F.3d 1162 (1st Cir. 2002). The court rejected the plaintiff=s contention that his alcoholism met all three definitions of Adisability@ under the ADA. He failed to show that he was substantially limited in working in a class or broad range of jobs because his evidence demonstrated only that he had isolated, minor difficulties in one job. Moreover, to the extent his alcohol-related incarceration prevented him from working, it was only for a short period. The court also found no evidence of records indicating that Bailey=s alcoholism substantially limited performance of any major
life activity in the past. Finally, the court found no evidence to support the plaintiff=s claim that the employer regarded him as substantially limited in working. The employer believed, accurately, that he was unable to meet the requirements of his job because he was incarcerated and therefore unable to come to work.

Hernandez v. Hughes Missile Sys. Co., 292 F.3d 1038, as amended, 298 F.3d 1030 (9th Cir. 2002), cert. granted sub nom. Raytheon Co. v. Hernandez, 123 S. Ct. 1255 (Feb. 24, 2003) (No. 02-749). An employer=s policy against rehiring former employees who were discharged for any violation of misconduct rules violates the ADA as applied to former drug addicts whose only work-related offense was testing positive because of their addiction. If an employee is no longer using drugs and has been successfully rehabilitated, he or she may not be denied re-employment solely because of the past failure to pass the employer=s drug test.

Smith v. Davis, 248 F.3d 249 (3d Cir. 2001). The court found a genuine issue of material fact as to whether the stated reason for firing a probation enforcement officer B absenteeism B was pretextual since he was told he was being fired for violating the county=s drug and alcohol policy. The court noted that the plaintiff=s supervisors never mentioned anything about absenteeism when terminating Smith nor specified what aspect of the policy the plaintiff violated. Furthermore, the policy does not address absenteeism. Finally, evidence showed that the plaintiff performed his duties satisfactorily for over six years, carrying a caseload substantially higher than his coworkers.

Griel v. Franklin Med. Ctr., 234 F.3d 731 (1st Cir. 2000). When the Center hired the plaintiff, it knew she was a recovering drug addict who had been terminated from a previous job for diverting narcotics. After the plaintiff injured herself, and needed prescribed narcotics to control the pain, a coworker and acting supervisor noted that the plaintiff=s patients were receiving narcotics too readily and in excessive amounts. The plaintiff was briefly suspended and then allowed to return with restrictions. She was asked to take a drug test after she was seen rummaging through discarded medication bottles; the test was negative. Finally, the plaintiff was terminated as posing an unacceptable risk to patient safety after two incidents in which she violated protocol in administering narcotics. The court found that the Center=s reason for termination was legitimate and not a pretext for disability discrimination. Evidence showed that the Center took similar action when confronting violations by other nurses as serious as those committed by the plaintiff. Furthermore, the court found support for the Center=s action by noting the relatively short period of time in which the violations occurred and the plaintiff=s initial denial of any wrongdoing.

EEOC v. Exxon Corp., 203 F.3d 871 (5th Cir. 2000). The employer adopted a policy that permanently removed any employee who had undergone substance abuse treatment from certain safety-sensitive positions. The court held that when an employer has implemented
a safety-based qualification standard, and applies it uniformly, the employer does not have to defend itself by showing direct threat when it uses the standard to screen out a person with a disability. Instead, an employer only has to show that the standard is job-related and consistent with business necessity. The direct threat defense applies in cases where an employer does not have an existing qualification standard to address an individual=s alleged safety risk. The court stated that an assessment of business necessity must take into account both the magnitude of possible harm as well as the probability of occurrence. On remand, the district court was instructed to assess whether the rate of recidivism among recovering substance abusers constitutes a safety risk sufficient for business necessity.

Martin v. Barnesville Sch. Dist., 209 F.3d 931 (6th Cir. 2000). The employer did not have to hire as a school bus driver a person who had been disciplined three years earlier, when he worked as a custodian, for drinking beer on the job in violation of the employer=s policy. The court found the employer=s reason for refusing to hire the plaintiff B concern that he may again drink on the job and have an accident while driving school children B was legitimate and non-discriminatory.

Parry v. Mohawk Motors of Michigan, Inc., 236 F.3d 299 (6th Cir. 2000), cert. denied, 533 U.S. 951 (2001). While the ADA provides protection for persons who are erroneously regarded as currently engaging in the illegal use of drugs, the mere fact that an employee is ordered to undergo a random drug test is insufficient to claim Aregarded as@ status. A person must show that an employer regards her as having a substantially limiting impairment B i.e., drug addiction B and taking a random drug test does not show any such belief on the part of the employer.

Bekker v. Humana Health Plan, Inc., 229 F.3d 662 (7th Cir. 2000). An employer did not violate the ADA when it fired a physician for treating patients while under the influence of alcohol.

Shafer v. Preston Mem=I Hosp. Corp., 107 F.3d 274 (4th Cir. 1997). A hospital nurse became addicted to a narcotic analgesic that she acquired from the hospital pharmacy. After discovering that the nurse was stealing the drug from the pharmacy, the hospital placed her on a medical leave of absence and assisted her in enrolling in a drug rehabilitation facility. On the day the nurse completed the in-patient portion of her drug rehabilitation program, she was fired. The nurse sued, contending she had been discriminated against on the basis of her drug addiction. The nurse argued that, at the time of her discharge, she was not Acurrently@ engaging in the illegal use of drugs, and noted that, at the time of discharge, she was participating in a drug rehabilitation program. The court held that Acurrently@ means a periodic or ongoing activity in which a person engages that has not yet permanently ended. The court sustained the nurse=s termination, stating that Aan employee illegally using drugs in a periodic fashion during the weeks and months prior to discharge is >currently engaging in the illegal use of drugs,= . . . even if the
employee is participating in a drug rehabilitation program and is drug-free on the day she is fired.@

**Burch v. Coca-Cola, Co.,** 119 F.3d 305 (5th Cir. 1997). A plaintiff who alleged he drank ten beers a night, came to work with a hangover, and ultimately was required to admit himself into a rehabilitation program, but who also claimed his ability to perform his job was not affected by his off-duty drinking, was held not to have an ADA disability.@ The court held that, even assuming the truthfulness of plaintiff=s testimony that he abused alcohol and was an alcoholic, plaintiff failed to establish that his alcoholism substantially limited a major life activity, including working. The ADA requires an individualized inquiry beyond the mere existence of a hospital stay.@

**Mararri v. WCI Steel, Inc.,** 130 F.3d 1180 (6th Cir. 1997). Current use of alcohol does not remove an alcoholic from protection of the ADA. Here, however, the plaintiff was terminated for good cause and not in violation of the ADA. Pursuant to a last chance agreement, in which the plaintiff earlier agreed that the employer could terminate him if he failed a future test for alcohol use, the employer terminated him when he in fact failed just such a test.

**Miners v. Cargill Communications, Inc.,** 113 F.3d 820 (8th Cir. 1997). A radio station promotion director, who was observed drinking at a bar with clients, was given a treatment or termination@ ultimatum by her employer. Denying that she was an alcoholic, the employee refused treatment. The company terminated her, claiming she had violated the company=s prohibition against the use of alcohol while working at company events. The employee sued, claiming she was regarded as an alcoholic and was fired on that basis. The court reversed the trial court=s grant of summary judgment for the defendant, finding that the employee was a qualified individual with a disability in that she was regarded as an alcoholic and could perform the essential functions of her job. The court held that the treatment or termination@ ultimatum was not a reasonable accommodation because the company made no effort to determine first whether the employee actually was an alcoholic.

**Roe v. Cheyenne Mountain Conf. Resort,** 124 F.3d 1221 (10th Cir. 1997). The employer=s prohibition against employee prescription drug use without prior company approval was found to violate the ADA. The company failed to establish that the ban on prescription drug use was job-related and consistent with business necessity.

**Johnson v. New York Hosp.,** 96 F.3d 33 (2d Cir. 1996). A nurse was fired because, while on vacation, he came to the hospital drunk, engaged in a violent scuffle with security guards, and then blacked out. The nurse alleged that he was terminated because of his alcoholism. The court held that the nurse=s off-duty conduct is relevant to whether his employment may pose a threat to the safety of others,@ including patients, especially given his tendency to become belligerent when intoxicated.
Newland v. Dalton, 81 F.3d 904 (9th Cir. 1996). An alcoholic federal employee was terminated after attempting to fire an assault rifle at people in a bar. At the time of the incident, the employee was intoxicated. The court held that the Rehabilitation Act does not immunize an employee from the consequences of a drunken rampage. The employee=s behavior was the kind of egregious and criminal conduct that employees are responsible for regardless of any disability.

Williams v. Widnall, 79 F.3d 1003 (10th Cir. 1996). The employer fired an alcoholic employee who had made threats against his supervisor and coworkers. The employee contended that the threats were a direct result of his alcoholism. The court held that although alcoholism is a covered disability, the employee constituted a direct threat and thus was not protected by the Rehabilitation Act, even though the misconduct may have been a result of alcoholism. An employer may hold an alcoholic employee to the same behavioral standards to which other employees are held, even if unsatisfactory behavior is related to alcoholism.

Maddox v. Univ. of Tennessee, 62 F.3d 843 (6th Cir. 1995). A university did not violate the ADA when it fired an assistant football coach after he was arrested for drunk driving. Although alcoholism may have compelled the coach to drink it did not force him to drive or engage in other inappropriate conduct.

Collings v. Longview Fibre Co., 63 F.3d 828 (9th Cir. 1995). The defendant fired a number of employees for using illegal drugs while at work. Seven of eight employees said they were undergoing rehabilitation at the time of discharge and thus were not Acurrent@ users. The court held that the employer did not violate the ADA when it fired them. ACurrent@ use does not mean a certain number of days or weeks, but means that the use occurred Arecently enough.@ The employees were properly considered current users even though they had entered a rehabilitation program.

Little v. F.B.I., 1 F.3d 255 (4th Cir. 1993). The court barred the Rehabilitation Act claim of an FBI agent who relapsed into alcoholism after completion of a treatment program and was intoxicated while on duty. The discharge was triggered by the employee=s misconduct rather than by his disability.
H. Conduct Standards

Hernandez v. Hughes Missile Sys. Co., 292 F.3d 1038, as amended, 298 F.3d 1030 (9th Cir. 2002), cert. granted sub nom. Raytheon Co. v. Hernandez, 123 S. Ct. 1255 (Feb. 24, 2003) (No. 02-749). An employer=s unwritten policy against rehiring former employees who were terminated for any violation of its misconduct rules violated the ADA as applied to former drug addicts whose only work-related offense was testing positive because of their addiction. The court found that if plaintiff is in fact no longer using drugs and has been successfully rehabilitated he may not be denied re-employment simply because of his past record of drug addiction.

Pernice v. Chicago, 237 F.3d 783 (7th Cir. 2001). A city employee arrested for off-duty disorderly conduct and possession of cocaine was properly discharged where city personnel rules prohibit possession of controlled substances and conduct unbecoming a public employee. The ADA Aprovides no bar to discipline for employee misconduct.@

Leonberger v. Martin Marietta Materials, Inc., 231 F.3d 396 (7th Cir. 2000). A yard load operator with sleep apnea whose duties included welding and operating heavy machinery at a rock quarry and who often fell asleep on the job was not a qualified individual with a disability. An employee who is not fully alert could harm himself and others if he is operating heavy equipment. The plaintiff=s assertion that he chose to fall asleep and that his impairment did not cause him to do so only reinforced the employer=s assertion that it discharged the plaintiff because of performance problems and not because of discriminatory animus.

Jones v. American Postal Workers Union, 192 F.3d 417 (4th Cir. 1999). An employer properly discharged an employee with schizophreniform disorder and post traumatic stress syndrome who had threatened the life of his supervisor. The ADA does not require an employer to ignore such egregious misconduct, even if it is caused by a disability.

I. Defenses

1. Direct Threat

Chevron U.S.A., Inc. v. Echazabal, 536 U.S. 73 (2002). An EEOC regulation at 29 C.F.R. ' 1630.15(b)(2), which permits employers to exclude an individual because his performance on the job would endanger his own health or safety because of a disability, did not exceed the scope of permissible rulemaking under the ADA. The statute=s reference to Adirect threat to others@ did not preclude the EEOC regulation from also applying the direct threat defense to cases where an employer can show that a person=s disability poses a significant risk of substantial harm to self. The court, quoting the EEOC regulation, found that the direct threat defense must be Abased on a reasonable medical judgment that relies

on the most current medical knowledge and/or the best available objective evidence, @ and
upon an Aindividualized assessment of the individual's present ability to safely perform the
essential functions of the job, @ reached after considering, among other things, the
imminence of the risk and the severity of the harm.

plaintiff's termination did not violate that ADA because his threats of physical violence
against other employees posed a direct threat to the safety of others. He informed his wife,
his therapist, his physician, and hospital personnel that he had thoughts of killing his
supervisors. After voluntarily admitting himself to a hospital, he left the hospital against
the doctor's advice and without his approval, whereupon the hospital staff notified the employer
of plaintiff's threats. Once notified, the employer investigated the validity of the information
and received confirmation from the hospital that the threats had been made, and the doctor
recommenced the employer call the police.

summary judgment granted in favor of the employer on the direct threat defense. The
plaintiff, due to epilepsy, had periodic seizures which Ausually last a few minutes or less, @
and she sustained only one minor injury (to her elbow) during her employment. The
plaintiff's neurologist concluded that she did not pose a threat to herself or others and that
she was capable of accepting a promotion to become the assistant convenience store
manager. The employer's physician suggested that the plaintiff be examined by a
qualified neurologist and that she not work at heights above ground level, operate heavy
machinery, or work in isolated areas where she would be alone for significant periods of
time. The court found that none of this indicated that the plaintiff posed a significant risk of
harm to herself or others.

information associate with an anxiety disorder posed a direct threat where she
had had two panic attacks at work, her duties included handling emergencies such as gas
leaks, she needed Aunpredictable breaks of indeterminate time, @ and her condition might
never improve.

Hutton v. Elf Atochem N. Am., Inc., 273 F.3d 884 (9th Cir. 2001). A chlorine finishing
operator with Type I diabetes posed a direct threat where he experienced several diabetic
episodes on the job, his rotating shifts and prolonged hours made it difficult for him to
monitor his diabetes adequately, a physical or mental lapse resulting from an episode could
result in substantial harm to others, the risk exists as long as he is a chlorine finishing
operator, the likelihood of potential harm is small but whether it will occur cannot be
predicted, and the imminence of the harm is unknown because of the unpredictability of his
condition.
Morton v. United Parcel Serv., Inc., 272 F.3d 1249 (9th Cir. 2001), cert. denied, 535 U.S. 1054 (2002). Summary judgment for an employer that refused to hire hearing impaired drivers for trucks not subject to Department of Transportation regulation was not appropriate where the employer had not independently studied the appropriateness of applying DOT hearing standards to non-DOT vehicles. The direct threat defense applies only when the danger that the individual poses to others in the workplace is unrelated to the individual=s job performance; the employee=s mere presence in the workplace poses the danger. The business necessity defense thus applies not only to neutral criteria but also to a qualification standard that a person with a disability by definition cannot meet and to across-the-board safety standards.

Waddell v. Valley Forge Dental Assocs., Inc., 276 F.3d 1275 (11th Cir. 2001), cert. denied, 535 U.S. 1096 (2002). A dental hygienist who was HIV-positive posed a direct threat to others. There was a significant risk of HIV transmission to his patients, the risk was of indefinite duration, and the potential harm was eventual death. Although the risk of transmission is small, it theoretically could happen.

Lowe v. Alabama Power Co., 244 F.3d 1305 (11th Cir. 2001). The lower court improperly granted summary judgment to an employer that denied a mechanic position to an employee because of a good-faith belief that the employee, whose legs were amputated, would have posed a direct threat to others. Rather than determine the employee=s actual capabilities, the employer relied on the opinion of a doctor who had conducted a cursory examination of the employee seventeen months earlier and had assumed that all people with double amputations have the same limitations.

Donohue v. Consolidated Rail Corp., 224 F.3d 226 (3d Cir. 2000). A train dispatcher with a heart condition that causes him to lose consciousness poses a direct threat.

Rizzo v. Children=s World Learning Ctrs., 213 F.3d 209 (5th Cir.), cert. denied, 531 U.S. 958 (2000). A school van driver with a hearing impairment did not pose a direct threat where she had a safe driving history, she supervised children adequately, and she used the van=s mirrors to keep order on the van.

EEOC v. Exxon Corp., 203 F.3d 871 (5th Cir. 2000). The business necessity defense applies to a safety-based qualification standard while the direct threat defense applies to an individual safety risk that is not addressed by a qualification standard.

Leonberger v. Martin Marietta Materials, Inc., 231 F.3d 396 (7th Cir. 2000). A yard load operator with sleep apnea whose duties included welding and operating heavy machinery at a rock quarry and who often fell asleep on the job was not a qualified individual with a disability. An employee who is not fully alert could harm himself and others if he is operating heavy equipment. The plaintiff=s assertion that he chose to fall asleep and that
his impairment did not cause him to do so only reinforced the employer=s assertion that it discharged the plaintiff because of performance problems and not because of discriminatory animus.

Palesch v. Missouri Comm=n on Human Rights, 233 F.3d 560 (8th Cir. 2000). A civil rights investigator with depression who told a coworker that she took time off because, if she Ahad come in Friday, [she] could have shot somebody@ was properly fired as a direct threat to others.

Borigialli v. Thunder Basin Coal Co., 235 F.3d 1284 (10th Cir. 2000). A mine blaster posed a direct threat to others where he threatened suicide and Aperhaps injury to others,@ bore a grudge against his supervisor, and worked in an inherently dangerous job.

Estate of Mauro v. Borgess Med. Ctr., 137 F.3d 398 (6th Cir.), cert. denied, 525 U.S. 815 (1998). Upholding a grant of summary judgment for the defendant, the court ruled that employment of a surgical technician who was HIV positive posed a direct threat where the technician=s duties required him to place his hands into the surgical incision, he had incurred a needle stick or minor laceration in the past, and his bleeding into a body cavity could result in Anear certainty of death.@ The dissent, asserting that there was an issue of fact whether the technician=s duties involved exposure-prone procedures, argued that the district court had failed to consider Athe actual probability of harm.@

2. Undue Hardship

Garcia-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638 (1st Cir. 2000). An employer failed to show undue hardship in denying a request for an extension of long-term medical leave. The court found that the additional leave would be unpaid and that the employee=s job functions were being performed by temporary workers. There was no evidence that these workers were paid more than the plaintiff or were less effective at performing the essential functions of her job. The court noted that temporary workers might not be available or suitable to fill in for every employee, or that such workers might cause an employer significant expense, but that was not the situation here. The court also opined that an employer might show the need for a permanent employee rather than continued reliance on temporary workers. There was no evidence, however, of any pressure for the employer to have a permanent employee in the plaintiff=s position and after terminating her, the employer failed to replace her, which also called into question the employer=s claim that the continued leave would cause an undue hardship.

Ward v. Mass. Health Research Inst., Inc., 209 F.3d 29 (1st Cir. 2000). An employer must submit evidence of undue hardship if it wishes to deny an employee=s request for a modified or part-time schedule. In this case, an employee with arthritis requested a flexible schedule, rather than meeting the employee=s policy to be at work by 9:00 a.m., because
his arthritis made it very difficult to move in the morning. The court rejected the employer=s general arguments against a flexible schedule B it would eliminate the employer=s control over the workplace and its ability to maintain standards B as being broad enough to defeat the provision of any form of reasonable accommodation. The employer must produce evidence that an open-ended schedule would be a hardship, such as showing that it would need to keep the lab open indefinitely at significant cost or that the plaintiff=s duties would need to be assumed by a coworker. The employer=s suggestion that it would be a hardship to require the employee=s supervisor to work the employee=s schedule was not persuasive since there was no evidence that the employer required supervisors to do this.

Buckles v. First Data Res., Inc., 176 F.3d 1098 (8th Cir. 1999). The court reversed a jury verdict for the plaintiff and granted judgment to the employer as a matter of law because the plaintiff failed to identify a reasonable accommodation that would enable him to work. The court rejected the plaintiff=s argument that the employer should have provided him with a workplace free of irritants and unlimited leave, finding that they would impose an undue financial and administrative hardship on the employer. The court found that the plaintiff, in essence, was requesting a Abubble environment,@ which amounted to an undue hardship.

Nunes v. Wal-Mart Stores, 164 F.3d 1243 (9th Cir. 1999). The court found that the plaintiff presented sufficient evidence that her nine-month leave, which would extend into the Christmas season, was a reasonable accommodation that would enable her to return to work and perform her essential functions. Moreover, the court found a genuine issue of material fact as to whether undue hardship existed because Wal-Mart had a policy of granting unpaid medical leave for one year and it had a regular practice of hiring temporary help during the holiday season. The court emphasized that determination of whether a reasonable accommodation is appropriate and would impose an undue hardship requires a fact-specific, individualized inquiry.

3. Job-Related and Consistent with Business Necessity

Morton v. United Parcel Serv., Inc., 272 F.3d 1249 (9th Cir. 2001), cert. denied, 535 U.S. 1054 (2002). An employer that refused to hire hearing impaired drivers for trucks not subject to Department of Transportation regulation was not entitled to summary judgment where the employer had not independently studied the appropriateness of applying DOT hearing standards to these trucks. The business necessity defense is available where an employer=s qualification standard requires a physical or mental capacity that a person cannot meet because of a disability. The job-relatedness aspect of the business necessity defense pertains to essential functions of the job. To justify an across-the-board safety standard, an employer must Ademonstrat[e] the correlation between the qualification standard and safe job performance and . . . prov[e] the difficulty of using less restrictive alternatives.@ Further, the reasonable accommodation aspect of the business necessity defense permits an employer to use an across-the-board safety standard that screens out
on the basis of disability only if the standard accurately measures an individual=s actual ability to do a job. A criterion is an accurate measure of ability if the employer can show that all persons screened out Apresent an unacceptable risk of danger@ or that it is Ahighly impractical@ to determine which individuals present such a risk.

**Cripe v. City of San Jose**, 261 F.3d 877 (9th Cir. 2001). A policy requiring all police officers given desirable, specialized assignments to have served as patrol officers in the preceding year screened out officers whose neck and back injuries prevented them from being patrol officers. Although the City asserted an undue hardship defense, the proper issue is whether the policy is job-related and consistent with business necessity. The business necessity standard is more stringent than the undue hardship defense. Since the City=s reasons for the policy did not meet the undue hardship standard, the City also failed to demonstrate business necessity. Business necessity requires that the employer demonstrate that the standard at issue substantially promotes the business= needs. Furthermore, the employer must demonstrate that the qualification standard is necessary and related to Athe specific skills and physical requirements of the sought-after position.@ Other employees= resentment is not a basis for business necessity.

**Tate v. Farmland Indus., Inc.**, 268 F.3d 989 (10th Cir. 2001). An employer may rely on DOT=s Medical Advisory Criteria, which are advisory and nonbinding, as long as it does so consistently and uniformly. The Criteria Aundoubtedly are job-related and consistent with [the employer=s] safety and liability concerns.@ Accordingly, a truck driver who took medication to control focal seizures was not a qualified individual with a disability.

**EEOC v. Exxon Corp.**, 203 F.3d 871 (5th Cir. 2000). The business necessity defense applies to a safety-based qualification standard while the direct threat defense applies to an individual safety risk that is not addressed by a qualification standard.

**Bay v. Cassens Transp. Co.**, 212 F.3d 969 (7th Cir. 2000). The employer was not required to permit a truck driver to return to work where the driver did not have the required DOT certification. An employer is required to return a driver to work only after resolution of a certification dispute.

**Belk v. Southwestern Bell Tel. Co.**, 194 F.3d 946 (8th Cir. 1999). The trial court erroneously refused the defendant=s request for a jury instruction on the business necessity defense in a case involving an alleged denial of accommodation during a physical performance test. The defendant was entitled to the instruction so that the jury could appreciate the purpose and value of the test developer=s testimony.

### 4. Other Federal Laws
Albertson=s, Inc. v. Kirkingburg, 527 U.S. 555 (1999). A plaintiff with monocular vision (vision in only one eye) was not qualified because he did not satisfy the Department of Transportation=s visual acuity standard, which required interstate truck drivers to have corrected vision of 20/40 in both eyes. Although the plaintiff had obtained a waiver from the DOT, the court reasoned that the employer was not required to accept the waiver because the waiver program was experimental and had not been enacted based on a finding that its standards were consistent with public safety. The court further held that the employer could rely on the vision standard to exclude the plaintiff and did not have to conduct an individualized analysis of particular drivers who obtained waivers to determine whether they posed a direct threat.\(^\text{1}\)

Morton v. United Parcel Serv., Inc., 272 F.3d 1249 (9th Cir. 2001), cert. denied, 535 U.S. 1054 (2002). An employer that refused to hire hearing impaired drivers for trucks not subject to Department of Transportation regulation was not entitled to summary judgment where the employer had not independently studied the appropriateness of applying DOT hearing standards to non-DOT vehicles. The Albertson=s, Inc. v. Kirkingburg rationale does not apply to the application of government safety standards beyond their intended scope.\(^\text{2}\)

Tate v. Farmland Indus., Inc., 268 F.3d 989 (10th Cir. 2001). An employer may rely on DOT=s Medical Advisory Criteria, which are advisory and nonbinding, as long as it does so consistently and uniformly. The Criteria Aundoubtedly are job-related and consistent with [the employer=s] safety and liability concerns.\(^\text{3}\) Accordingly, a truck driver who took medication to control focal seizures was not a qualified individual with a disability.
5. Miscellaneous Defenses

a. Employee Misconduct

Smith v. Davis, 248 F.3d 249 (3d Cir. 2001). A factual issue exists whether a probation officer was fired for violating a drug and alcohol policy where the record does not disclose which aspect of the policy the employee violated.

Pernice v. City of Chicago, 237 F.3d 783 (7th Cir. 2001). The city properly discharged an employee arrested for off-duty disorderly conduct and possession of cocaine where city personnel rules prohibit possession of controlled substances and conduct unbecoming a public employee. The ADA provides no bar to discipline for employee misconduct.

Brown v. Lucky Stores Inc., 246 F.3d 1182 (9th Cir. 2001). The employer did not violate the ADA when it discharged an employee who missed work because she was incarcerated for driving under the influence of intoxicants. The ADA clearly states that an employer may hold individuals who use drugs illegally or are alcoholics to the same performance and behavior standards to which it holds other employees.

Griel v. Franklin Med. Ctr., 234 F.3d 731 (1st Cir. 2000). A hospital nurse who was recovering from drug addiction posed an unacceptable risk to patient safety where she failed to follow protocols for administration of narcotics to patients. Although other nurses had not been discharged for individual mistakes, no other nurse had committed a series of protocol mistakes similar to those committed by the plaintiff. Accordingly, no reasonable jury could doubt that the hospital=s motive for firing the plaintiff was a genuine concern for patient safety.

Leonberger v. Martin Marietta Materials, Inc., 231 F.3d 396 (7th Cir. 2000). A yard load operator with sleep apnea whose duties included welding and operating heavy machinery at a rock quarry and who often fell asleep on the job was not a qualified individual with a disability. An employee who is not fully alert could harm himself and others if he is operating heavy equipment. The plaintiff=s assertion that he chose to fall asleep and that his impairment did not cause him to do so only reinforced the employer=s assertion that it discharged the plaintiff because of performance problems and not because of discriminatory animus.

b. No Knowledge of Disability

J. Exams and Inquiries

Fuzy v. S & B Engineers and Contractors, Ltd., C F.3d C, 2003 WL 21205368 (5th Cir. 2003). Plaintiff claimed he was refused a job as a pipefitter in violation of the ADA when he
failed to pass a test requiring him to lift up to 100 pounds. The court found that plaintiff did not meet the ADA definition of disability, and then considered whether use of the test amounted to an unlawful medical examination. Finding it unnecessary to decide whether non-disabled individuals have a cause of action to challenge unlawful disability-related questions and medical examinations, the court concluded that the test was job-related and consistent with business necessity for the pipefitter position, and therefore was permissible.

Gillen v. Fallon Ambulance Serv., Inc., 283 F.3d 11 (1st Cir. 2002). While a medical opinion is often cogent evidence of nondiscriminatory intent, and may in some instances be enough to justify summary judgment, the mere obtaining of such an opinion does not automatically absolve the employer from liability under the ADA. An employer cannot slavishly defer to a physician=s opinion without first pausing to assess the objective reasonableness of the physician=s conclusions.

O=Neal v. City of New Albany, 293 F.3d 998 (7th Cir. 2002). A medical examination required by the city as condition for employment as a police officer was valid post-offer medical examination. The conditional job offer was a real offer because the employer had evaluated all relevant non-medical information that it reasonably could have obtained and analyzed prior to giving the offer. Moreover, the post-offer examination was given to all future police officers.

Garrison v. Baker Hughes Oilfield Operations, Inc., 287 F.3d 955 (10th Cir. 2002). The court upheld a jury=s finding that the employer violated the ADA where it misused the results of a post-offer medical examination by withdrawing a conditional offer of employment for reasons that were not job-related and consistent with business necessity. Based on the evidence including statements by the human resources manager expressing concerns about the number of injuries the plaintiff sustained in a short period of time and the risk of possible future injuries, the jury could have reasonably concluded that the job offer was withdrawn because of unsubstantiated speculation about future risks from a perceived disability.

Williams v. Motorola, Inc., 303 F.3d 1284 (11th Cir. 2002). The employee=s discharge did not violate the ADA because, contrary to her contention, she was not discharged for failure to submit to a medical examination but rather because of her inability to work with others, her insubordination, and her threats of violence. Given her behavior and threats, the employer could have properly required a medical examination.

Tice v. Centre Area Transp. Auth., 247 F.3d 506 (3d Cir. 2001). An employer=s request that a former bus driver with back injuries submit to a medical examination was consistent with business necessity, where the employee constantly complained of severe pain requiring narcotic medication and indicated that he experienced spasms that interfered with his driving. The employer was justified in not relying exclusively on the opinion of the
employee=s doctor, which was based largely on the employee=s own evaluation of his abilities.

Kennedy v. Superior Printing Co., 215 F.3d 650 (6th Cir. 2000). For several years, certain employees, including the plaintiff, worked through their lunch periods in order to leave work one-half hour early every day. Following a change in management, however, employees were told that they could no longer leave work early and had to take their lunches at the scheduled time. Eventually, all employees complied, except for the plaintiff, who submitted a note from his doctor stating: APatient to benefit by not stopping for lunch. Appropriate treatment for this problem is to allow him to work through lunch.@ Although the note did not state the nature of the plaintiff=s Aproblem,@ his impairment arose when his foot was injured several years earlier in an industrial accident. After allowing the plaintiff to continue working through lunch for more than a year, the defendant requested that he submit further medical documentation demonstrating his need for an accommodation. The plaintiff continuously refused these requests and disciplinary action was instituted. Finally, the defendant sent the plaintiff a letter informing him that he was expected to work his regularly scheduled shift or submit to a medical examination for which it would pay. After twice refusing to show up for a medical examination, the plaintiff was terminated. The court held that the plaintiff failed to produce any evidence showing that the defendant did anything other than attempt to confirm his disability and his alleged need for a reasonable accommodation.

Krocka v. City of Chicago, 203 F.3d 507 (7th Cir. 2000). The court held that it was Aentirely reasonable@ for the police department to evaluate the plaintiff=s fitness for duty when it learned that he was experiencing difficulties with his mental health.

Harris v. Harris & Hart, Inc., 206 F.3d 838 (9th Cir. 2000). The employer did not violate the ADA when it requested a former employee with carpal tunnel syndrome to provide a medical release before returning to work. Citing Grenier v. Cyanamid Plastics, Inc., 70 F.3d 667 (1st Cir. 1995), the court stated that, being on notice of the plaintiff=s disability, it would be Aboth logical and legal@ for the employer to attempt to determine what accommodation, if any, would be required and to request a medical release from the returning employee=s treating physician. Accordingly, the court reasoned that the employer did not violate the ADA=s prohibition on pre-employment medical examinations and inquiries.

Sullivan v. River Valley Sch. Dist., 197 F.3d 804 (6th Cir. 1999), cert. denied, 530 U.S. 1262 (2000). Evidence of a teacher=s misconduct and insubordination justified the school district=s request that he undergo a psychological examination to determine whether he was competent to teach, particularly where prior to requesting the examination, the school district sought input from a psychologist who suggested that a further examination was in order.
Fredenburg v. Contra County Dep’t of Human Servs., 172 F.3d 1176 (9th Cir. 1999). The plaintiffs need not prove that they are qualified individuals with a disability to bring claims challenging the scope of medical examinations under the ADA.

EEOC v. Wal-Mart Stores, Inc., 202 F.3d 281 (10th Cir. 1999) (Table) (Text in WESTLAW, No. 99-6144). The employer violated the ADA’s prohibition on pre-employment disability-related inquiries by asking the plaintiff at the application stage: “What current or past medical problems might limit your ability to do a job?”

Martin v. Kansas, 190 F.3d 1120 (10th Cir. 1999). A correction officer failed to prove that the state’s disability disclosure policy was an impermissible medical inquiry under the ADA.

Watson v. City of Miami Beach, 177 F.3d 932 (11th Cir. 1999). The court held that, assuming the ADA’s prohibitions against certain medical inquiries and examinations apply to persons with and without disabilities, the city’s requirement that police officers undergo fitness for duty examinations (including tuberculosis/HIV testing) was job related and consistent with business necessity.

Armstrong v. Turner Indus., Inc., 141 F.3d 554 (5th Cir. 1998). The plaintiff had no standing under the ADA to challenge an unlawful preemployment disability-related inquiry. Damages liability under ADA section 102(d)(2)(a) (42 U.S.C. ’ 12112(d)(2)(a)) must be based on something more than a mere violation of the provision. There must be some cognizable injury in fact of which the violation is a legal and proximate cause. In this case, the court concluded that the plaintiff had failed to show any injuries resulting from the defendant’s allegedly unlawful inquiries, but specifically left open the question of whether a non-disabled individual, such as the plaintiff, has a cause of action under the ADA for unlawful disability-related inquiries and medical examinations.

EEOC v. Prevo’s Family Mkt., Inc., 135 F.3d 1089 (6th Cir. 1998). The employer was justified in requiring an HIV-positive produce clerk to undergo a medical examination to determine whether he posed a direct threat.

Duda v. Board of Educ., 133 F.3d 1054 (7th Cir. 1998). A custodian with manic depression raised a valid ADA claim when he challenged the school district’s requirement that he supply information about his medication and counseling as a condition of employment.

Hunter v. Habegger Corp., 139 F.3d 901 (7th Cir. 1998). The court reasoned that it seems clear that in order to assert that one has been discriminated against because of an improper inquiry, that person must also have been otherwise qualified.
Hennenfent v. Mid Dakota Clinic, P.C., 164 F.3d 419 (8th Cir. 1998). A hospital=s request that a physician submit to an independent medical evaluation to determine how to accommodate his most recent disability was job-related and consistent with business necessity.

Norman-Bloodsaw v. Lawrence Berkeley Labs., 135 F.3d 1260 (9th Cir. 1998). The court affirmed the district court=s dismissal of the plaintiffs= ADA claim that the defendant unlawfully used their blood/urine samples, obtained in a post-offer medical examination, to test for sickle cell trait, pregnancy, and syphilis, holding that post-offer medical examinations need not be job-related and consistent with business necessity. The court did find, however, that such examinations violated the Fourth Amendment of the Constitution prohibiting unreasonable searches and seizures.

Griffin v. Steeltek, Inc., 160 F.3d 591 (10th Cir. 1998), cert. denied, 526 U.S. 1065 (1999). A job applicant, who was not hired after he provided answers to impermissible questions regarding his workers= compensation history and whether he had any disabilities, had standing to challenge the employer=s questions under ADA section 102(d)(2) without showing that he actually is an individual with a disability or was regarded as having a disability.

Porter v. United States Alumoweld, Inc., 125 F.3d 243 (4th Cir. 1997). The employer=s requirement that an employee submit to a fitness-for-duty medical examination, as a precondition to returning to work following a back injury, was job-related and consistent with business necessity and, therefore, did not violate the ADA.

Roe v. Cheyenne Mountain Conf. Resort, 124 F.3d 1221 (10th Cir. 1997). The employer=s policy of requiring employees to report their prescription drug use was not job-related and consistent with business necessity and, therefore, violated the ADA, and any employee has standing to challenge an alleged unlawful disability-related inquiry. The court agreed with the district court=s reasoning that it makes little sense to require an employee to demonstrate that he has a disability to prevent his employer from inquiring as to whether he has a disability. See also Gonzales v. Sandoval, 2 F. Supp. 2d 1442 (D.N.M. 1998).

Yin v. California, 95 F.3d 864 (9th Cir. 1996), cert. denied, 519 U.S. 1114 (1997). Where an employee missed an inordinate number of days from work and her job performance declined, the employer=s request for a physical examination was job-related and consistent with business necessity.

K. Confidentiality of Medical Information

Doe v. U.S. Postal Serv., 317 F.3d 339 (D.C. Cir. 2003). Reversing summary judgment, the court found genuine issues of fact as to whether a supervisor told Doe=s co-workers
about his HIV status, and whether the supervisor learned of Doe=s HIV from an FMLA leave form. The court found that the FMLA leave form was subject to the Rehabilitation Act=s confidentiality requirements because it was submitted in response to an employer inquiry about Doe=s condition rather than voluntarily provided.

**Tice v. Centre Area Transp. Auth.,** 247 F.3d 506 (3d Cir. 2001). A former employee cannot maintain a suit for an employer=s violation of ADA confidentiality provisions where the plaintiff suffered no injury as a result of the violation, although the employer conceded that it improperly commingled medical records of employees with non-confidential files.

**Cash v. Smith,** 231 F.3d 1301 (11th Cir. 2000). The plaintiff=s manager did not violate ADA=s confidentiality provisions when she told other employees that the plaintiff had diabetes. The confidentiality provisions did not apply because the information was not gathered during an employer medical examination. Rather, the plaintiff had voluntarily disclosed the information to the person who disseminated it.

**Cossette v. Minnesota Power & Light Co.,** 188 F.3d 964 (8th Cir. 1999). The ADA protects an employee, whether disabled or not, from unauthorized disclosure of confidential medical information.

**Fredenburg v. Contra Costa County Dep=t of Health Servs.,** 172 F.3d 1176 (9th Cir. 1999). A plaintiff does not need to be disabled to state an ADA claim for unauthorized disclosure of confidential medical information.

**Griffin v. Steeltek, Inc.,** 160 F.3d 591 (10th Cir. 1998), cert. denied, 526 U.S. 1065 (1999). A plaintiff does not need to be disabled to state an ADA claim for unauthorized disclosure of confidential medical information.

**Rohan v. Network Presentations, LLC,** 175 F. Supp. 2d 806 (D. Md 2001). Medical information voluntarily disclosed by an employee does not have to be kept confidential by his or her employer, unless it was revealed to the employer as part of an employee health program available to the employee at the work site.

**Ballard v. Healthsouth Corp.,** 147 F. Supp. 2d 529 (N.D. Tex. 2001). ADA confidentiality protections do not apply to a plaintiff who voluntarily disclosed his HIV-positive status to his employer because that medical information was not obtained through a job-related medical examination and the employer did not inquire about plaintiff=s health.

**Fritsch v. City of Chula Vista,** 11 A.D. Cas. (BNA) 273 (S.D. Cal. 2000). The plaintiff worked as an attorney in the City Attorney=s Office. After the plaintiff had a verbal altercation with an opposing attorney in court, her supervisor, the City Attorney, called the City=s psychiatrist about her behavior, which he found to be odd. The court held that the
City did not violate ADA=s confidentiality provisions when it disseminated the plaintiff=s medical information to its psychiatrist because that information was not gathered during the course of an employer=s medical examination.

Scott v. Leavenworth Unified Sch. Dist., 78 F. Supp. 2d 1198 (D. Kan. 1999). The plaintiff alleged that the defendant gave three co-workers reasonable accommodations for emotional conditions but that it failed to provide her with similar accommodations. The plaintiff asked the defendant for records pertaining to those employees in order to support her claim. The court disagreed with the defendant=s argument that the ADA=s confidentiality provisions prohibited the disclosure of the requested information, holding that the ADA does not protect employees= medical information from discovery in a co-worker=s lawsuit. The court stated further that the ADA=s confidentiality provisions do not amount to a Aprivilege@ that protects the requested documents from disclosure, if those documents could lead to admissible evidence in the co-worker=s case.

Downs v. Mass. Bay Transp. Auth., 13 F. Supp. 2d 130 (D. Mass 1998). The employer violated the ADA when it gave its workers= compensation claims representative access to plaintiff=s medical file containing information about previous injuries. The medical information revealed did not fit any of the ADA=s exceptions to confidentiality, nor was it allowed by a limited release of medical information signed by plaintiff regarding a 1994 injury. The release explicitly authorized defendant to obtain information and facts regarding the injury, but this information was only to be used for the purpose of evaluating his injury claim.