

**REPORT OF THE HEALTH, DISABILITY AND LEAVES OF ABSENCE  
SUBCOMMITTEE**

**OF THE**

**EMPLOYMENT RIGHTS & RESPONSIBILITIES COMMITTEE  
SECTION OF LABOR AND EMPLOYMENT LAW**

**AMERICAN BAR ASSOCIATION**

**MARCH 2004  
MID-WINTER MEETING  
RANCHO MIRAGE, CALIFORNIA**

**Management Co-Chair:  
Raymond E. Morales  
Morales & Dávila  
San Juan, Puerto Rico**

**Plaintiff Co-Chair:  
Glen Savits  
Green & Savits, LLC  
Morristown, New Jersey**

**SUBCOMMITTEE REPORT AUTHORS**

**David T. Barton  
Quarles & Brady Streich  
Lang LLP  
One Renaissance Square  
Two North Central Ave.  
Phoenix, AZ 85004-2391  
(602) 230-5526  
[dbarton@quarles.com](mailto:dbarton@quarles.com)**

**David B. Calzone  
Vercruysse Murray & Calzone  
Suite 200, 31780 Telegraph Rd.  
Bingham Farms, MI 48025  
(248)540-7030  
[dcalzone@vmclaw.com](mailto:dcalzone@vmclaw.com)**

**Eric W. Iskra  
Spilman Thomas & Battle,  
PLLC  
Spilman Center  
300 Kanawha Boulevard E.  
Charleston, WV 25321  
(304)340-3800  
[eiskra@spilmanlaw.com](mailto:eiskra@spilmanlaw.com)**

**Jane Makela  
Carrington, Coleman,  
Sloman & Blumenthal, LLP  
200 Crescent Court, Suite  
1500  
Dallas, Texas 75201  
(214)855-3000  
[jmakela@ccsb.com](mailto:jmakela@ccsb.com)**

**Myriam E. Matos  
Sosa Llorens, Cruz Neris &  
Associates  
Centro Internacional de  
Mercadeo, Tower I Suite 605  
Guaynabo, PR 00968  
(787)782-3400  
[shulin@centennialpr.net](mailto:shulin@centennialpr.net)**

**J. Timothy McDonald  
Rogers & Hardin LLP  
2700 International Tower  
229 Peachtree St., NE  
Ste. 1000  
Atlanta, GA 30303  
(404) 420-4621  
[jtm@rh-law.com](mailto:jtm@rh-law.com)**

**Raymond E. Morales**  
**Morales & Dávila**  
**Home Mortgage Plaza**  
**Suite 1104**  
**268 Ponce de León Ave.**  
**San Juan, PR 00918**  
**(787) 753-5000**  
**remorales@usa.net**

**Edward J. Reeves**  
**Stoel Rives LLP**  
**2600 Standard Insurance**  
**Center**  
**900 SW 5th Avenue**  
**Portland, OR 97204-1268**  
**(503) 294-9260**  
**[ejreeves@stoel.com](mailto:ejreeves@stoel.com)**

**Paul Pautler**  
**Blackwell Sanders Peper**  
**Martin, LLP**  
**2300 Main St., Suite 1000**  
**Kansas City, MO 64108**  
**(816) 983-8259**  
**ppautler@blackwellsanders.com**

**Rebeca F. Rojas**  
**Law Offices of Rebeca F.**  
**Rojas**  
**Coral Beach I, Suite 319**  
**Isla Verde Avenue**  
**Carolina, PR 00979-5709**  
**(787) 253-1152**  
**Redsi@prtc.net**

**David H. Raizman**  
**Sara A Ferdig**  
**Bryan Cave LLP**  
**120 Broadway, Suite 300**  
**Santa Monica, CA 90401**  
**(310) 576-2120**  
**dhraizman@bryancave.com**

**Glen Savits**  
**Green & Savits, LLC.**  
**35 Airport Road**  
**Morristown, NJ 07960**  
**(973) 695-7777**  
**savits@greensavits.com**

**SUPREME COURT**

**Clackamas Gastroenterology Associates v. Wells**, 538 U.S. 440; 123 S. Ct. 1673; 155 L. Ed. 2d 615 (2003).

**Facts:** Former employee sued under the ADA for discrimination on the basis of her disability. The employer, a clinic where physicians engaged in a medical practice as shareholders and directors of a professional corporation, moved for summary judgment before the district court, alleging that they did not have the minimum of 15 employees required for coverage under the statute. If the four doctors who owned the professional corporation and constituted its Board of Directors were counted as employees, then the statutory minimum would be met. The district court granted the motion for summary judgment, ruling that the doctors were analogous to partners in a partnership and therefore not employees under the ADA. The 9<sup>th</sup> Circuit Court of Appeals reversed, finding that the corporations could not reap the tax and civil liability advantages of being a corporation and at the same time avoid liability for job discrimination by arguing that it was like a partnership. The Supreme Court granted certiorari to resolve the conflict in the circuits regarding the meaning of “employee” under the ADA.

**Holding:** Relying on common-law principles, as urged by the EEOC’s *amici* brief, the 7-2 Supreme Court majority held that the element of control in the principal guidepost that should be followed in determining whether the shareholders are employees for ADA purposes. The critical question is whether shareholder-directors operate independently and manage the business or instead are subject to the firm’s control. The six relevant factors relevant to this inquiry, lifted from the EEOC’s compliance manual, are: (1) whether the organization can hire or fire the individual or set the rules and regulations of the individual’s work; (2) whether and, if so, to what extent the organization supervises the individual’s work; (3) whether the individual reports to someone higher in the organization; (4) whether and, if so, to what extent the individual is able to influence the organization; (5) whether the parties intended that the individual be an employee, as expressed in written agreements or contracts; and (6) whether the individual shares in the profits, losses, and liabilities of the organization. In the instant case the physicians appear not to be employees because they apparently control the operation of the clinic, share the profits, and are personally liable for malpractice claims. However, the court reversed and remanded for further consideration of this issue. The dissent by Ginsburg and Breyer agreed with the majority that common-law agency principles applied, but pointed out that the relationship between the doctors and the clinic appeared to fit the common law definition of a master/servant relationship, and that the doctors had embraced the designation of employees for various purposes under federal and state law.

**Raytheon Company v. Hernandez**, 124 S. Ct. 513; 157 L. Ed. 2d 357 (2003).

**Facts:** Employee was allowed to resign after testing positive for cocaine, and a note was placed on his file that he “quit in lieu of discharge.” Three years later he applied for rehiring, stating that he had been an employee before and attaching a letter from his pastor and his AA counselor. The hiring official pulled the former employee’s file and rejected him allegedly because the employer had a policy against rehiring employees terminated for workplace misconduct. The official testified that she did not know that the employee was a former drug addict and did not see anything in his record that would constitute a record of addiction. The former employee sued under the ADA alleging that his application was rejected because of his record of drug addiction and/or because he was regarded as being a drug addict. The employer filed for summary judgment, and in response the employee for the first time argued that if the company really did apply a neutral no-rehire policy in his case, such a policy had a disparate impact on individuals with a disability. The district court granted the employer’s summary judgment motion on the disparate treatment claim, and refused to consider the disparate impact claim as untimely. The Ninth Circuit Court of Appeals agreed with the district court on the disparate impact claim, but overruled the summary judgment on the disparate treatment claim, finding that although the no-rehire rule was lawful on its face, it was unlawful as applied to former drug addicts whose only work-related offense was testing positive because of their addiction.

**Holding:** In a 7-0 decision (two members abstained), the Supreme Court vacated and remanded the appellate court decision, finding that it had improperly applied a disparate-impact analysis in a disparate-treatment case. The court affirmed the lower courts’ ruling that the disparate-impact claim was untimely and should not be considered. Applying the correct analysis to the disparate-impact claim, a neutral no-rehire policy is, by definition, a legitimate nondiscriminatory reason not to rehire the employee. Thus, the employee would have had to offer sufficient evidence that the stated explanation for his rejection was not the true reason for his rejection, but rather a pretext for discrimination. The court vacated and remanded for further consideration of this issue.

## DISTRICT OF COLUMBIA CIRCUIT

**John Doe v. United States Postal Service**, 317 F.3d 339 (D.C. Cir. 2003).

**Facts:** John Doe is a HIV positive postal worker that was requested by his direct supervisor to submit a Postal Service administrative form and a medical certificate explaining the nature of the illness, after missing several weeks of work in March and April of 1998, and before returning to work. Doe was advised that failure to submit the forms could result in potential disciplinary actions for being absent without leave. He was also advised that he could submit a FMLA Labor Form WH 380 in case he understood his leave qualified under the FMLA. Doe chose to fill the FMLA 380 form instead. At the time, nobody at work had knowledge of Doe's condition. Instead of submitting the form to his immediate supervisor, Doe submitted it to the Postal Service administrative assistance. When Doe returned to work, he learned his HIV status had become common knowledge. He filed a Rehabilitation Act complaint with the EEOC under the ADA based on its confidentiality provision. He later later withdrew the EEOC claim to avoid the tolling of the Privacy Act of 1974, 5 USC § 552a, which forbids federal agencies from disclosing any record to another person or agency except with written consent from the individual. He filed suit in federal court alleging that the Postal Service disclosed medical information obtained through a FMLA certificate form in violation of both the Privacy Act and the Rehabilitation Act. Doe alleged that it was the management level supervisor who had become the source of information. The District Court granted summary judgment in favor of defendant on both claims on the grounds that (1) there was no material fact as to whether a postal service employee had improperly disclosed information that had been retrieved from his medical record in violation of the Privacy Act; and (2) the FMLA for was not an employer inquiry subject to the ADA's medical confidentiality agreement.

**Holding:** The ruling of the district court was reversed as the Court of Appeals found that plaintiff had raised a genuine issue of material fact as to (1) whether a postal service official had disclosed information retrieved from his leave request form; and, (2) that the form constituted an employer inquiry subject to the Rehabilitation Act's confidentiality requirements. As to the Privacy Claim, the court understood that plaintiff had produced sufficient evidence through the depositions of various coworkers, that the management level supervisor had told workers of the HIV status after plaintiff had filed the FMLA form and that said supervisor had had access to the confidential information, even when the evidence of retrieval was purely circumstantial. The court was emphatic in stating that requiring an employee to produce direct evidence of disclosure of confidential information from the part of the government would eviscerate the protections of the Privacy Act because employees could rarely produce said evidence. As to whether the FMLA amounted to an inquiry into plaintiff's medical condition, the court ruled that the submission of medical information had not been voluntary, but a condition to avoid facing disciplinary proceedings due to plaintiff's prolonged absence, making it an employer inquiry as to whether plaintiff was able to work within the meaning of ADA/Rehabilitation Act.

**American Federation of Government Employees v. Donald Rumsfeld, Secretary of Defense**, 321 F.3d 139 (D.C. Cir. 2003).

**Facts:** Plaintiff, the American Federation of Government Employees, first filed an Unfair Labor Practice Charge against the Red Stone Arsenal Army installation, and later filed suit, alleging that defendant had failed to adhere to instructions, directives, and regulations promulgated by the Department of Defense, Department of the Army, and Office of Personnel Management, pursuant to OSHA and its requirement that federal agencies establish and maintain an effective and comprehensive safety and health program. In particular, plaintiffs alleged that the structures where they worked were extra hazardous and therefore, defendant was not in compliance with the applicable health and safety instructions, directives and regulations. Also alleged was that the hiring of term employees, such as firefighters, constituted a risk to permanent firefighters. The district court dismissed all claims on the grounds that plaintiffs lacked standing, and that in any event, the case was not ripe for review.

**Holding:** The ruling of the district court was affirmed. Congress did not intend to permit the suit since plaintiff's interests were so marginally related to, or inconsistent with the implicit purposes of OSHA. That is, plaintiffs did not have a private right of action for breach due to OSHA violations. The court relied on OSHA wording, which states that nothing in the law is to be construed to supersede or in any manner affect any workmen's compensation law or to diminish or affect in any manner common statutory rights, duties or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.

**Carolyn Taylor v. Lawrence M. Small, Secretary of the Smithsonian Institution**, 350 F.3d 1286 (D.C. Cir. 2003).

**Facts:** Plaintiff filed an EEOC complaint against her employer, the Smithsonian Institution alleging race discrimination for erroneous low performances, failure to promote, hostile work environment and retaliation under Title VII of the Civil Rights Act; and, discrimination on the basis of excessive weight under §504 of the Vocational Rehabilitation Act. Defendant filed a motion for summary judgment on various grounds. As it pertained to the violation of the Rehabilitation Act, defendant alleged plaintiff was not entitled to bring a claim of employment discrimination pursuant to §504. The district court agreed with defendant.

**Holding:** The ruling was upheld. The court indicated that §504 did not apply to federal employees but to programs or activities receiving federal assistance or under any program or activity conducted by any Executive agency. As such, it ruled in accordance with the majority of the courts that §504 did not provide federal employees with an alternative route for relief under the Rehabilitation Act. The court further stated that plaintiff would have had a claim under § 501, which provides a private cause of action to federal employees on the basis of handicap, but she failed to amend the complaint to

properly alleged such claim, even when she was given notice to that effect by the motion for summary judgment. Nevertheless the court ruled that since administrative appeal rights had not been exhausted, the lower court would not have had jurisdiction to entertain the claim under §501. (The lower court's ruling dismissing on summary judgment the race discrimination allegation was also upheld.)

### FIRST CIRCUIT

**Calef v. The Gillette Company**, 322 F. 3d 75 (1st Cir. 2003).

**Facts:** Calef worked as a production mechanic at Gillette for approximately seven years. During the early years of his employment, he had several incidents and confrontations with co-workers and supervisors. The incidents included heated arguments, threats, fights, and insults to co-workers and group leaders. These incidents led to Calef being warned in writing that his conduct would not be tolerated and that future actions of the sort could lead to his termination. These warnings were issued during the years 1991 and 1992. On September, 1995, Calef was involved in another incident with an employee which resulted in a final warning. On that occasion, Gillette referred Calef to its Employee Assistance Program (EAP). In lieu of EAP counseling, Calef started therapy. The therapist diagnosed Calef as having Attention Deficit Hyperactivity Disorder (ADHD). He continued to receive counseling and obtained medication. Calef admitted that his ADHD symptoms significantly improved with the medication, to the point where they almost disappeared. However, despite the counseling and medication, his problems with threatening others continued. In March, 1996, Calef submitted a medical certificate to support a request for FMLA leave. Over 40 days of leave were given him between May and December of that year. On July, 1996, Calef was hospitalized for depression and after being released, received medical clearance from the hospital to return to work "without restrictions". However, at Calef's request, Gillette permitted him to work half days for several weeks between July and August, 1996. Calef's therapist reported good progress at work and in family from then on. Nonetheless, on December, 1996 there was another incident where Calef became extremely upset at the fact that certain machines were run without his "authorization" during his meal break. Also, on that same day he refused to work on a Sunday shift he had already volunteered for. This situation led to heated discussions with two of his supervisors, who described his behavior as "irrational, belligerent and out of control". His supervisors indicated that plaintiff's behavior made them concerned for their safety and that of other employees. These incidents led to Calef's termination. The reasons given by Gillette for his termination were his unacceptable and irrational behavior, insubordination and lack of cooperation with his supervisors. Calef filed a claim alleging Gillette had violated the ADA by terminating him, failing to reasonably accommodate him and harrassing him. Summary judgment was entered for Gillete on all claims.

**Holding:** Calef fails to meet the burden of establishing that he was disabled under the terms of the ADA. He claims he was substantially limited in his ability to learn and speak, but the record does not support such conclusion. Neither the tests and

assessments or evidence of his life experience demonstrate a substantial limitation in these major life activities. The Court directly rejected Calef's argument that ADHD made it more difficult for him to respond to stressful situations and control his anger, because there was no evidence that ADHD made him angry. The plaintiff failed to make the individualized showing about his particular limitations that Toyota Motor Manufacturing requires. Merely pointing to an ADHD diagnosis is inadequate. Also, even if Calef would arguably be disabled, he was not otherwise qualified. It is an essential function of a job that an employee be able to handle stressful situations without making others feel threatened for their own safety. This function is both job-related and consistent with business necessity. The Court concluded that the ADA does not require unacceptable behavior from an employee to threaten the safety of others, even if this behavior stems from a mental disability. Such an employee would not be qualified. The district court's judgment was affirmed.

**Dudley v. Hannaford Bros. Co.**, 333 F. 3d 299 (1st Cir. 2003).

**Facts:** Due to massive trauma from an automobile accident, the plaintiff lived with a severe physical condition that included severely impaired speech, a pronounced loss of muscular control, an inability to take even breaths, and a tendency toward impulsive mood swings. His speech was awkward and often very difficult to comprehend, and his bodily movements were severely affected. On February, 1999, after moving to a new city in the state of Maine, the plaintiff drove to a Gardiner Shop 'n Save Supermarket to buy alcoholic beverages. Upon observing plaintiff's demeanor at the store while shopping, the store shift leader jumped to the conclusion that he was intoxicated and instructed the cashier not to sell him any alcoholic beverages. When Dudley took the beverages he wanted to purchase to the cashier to pay, the cashier told him he would not be sold any alcoholic beverages because he was intoxicated. The plaintiff became upset and tried to explain that he was not intoxicated, but that he had a disability due to injuries from a car wreck. The cashier and the shift leader, nonetheless, decided not to change their decision. Dudley then asked to speak to the person in charge. The evening manager responded and again, he explained he was an individual with a disability, and that was not intoxication. He even encouraged the manager to call the police to submit him to a breathalyzer test and prove conclusively that he was not intoxicated. The manager refused to sell him the alcoholic beverages based on the store's policy that management would not revisit a cashier's refusal to purvey alcoholic beverages to a customer. Dudley left the store empty-handed and since that evening did not attempt to purchase alcoholic beverages at the Gardiner Shop 'n Save or at any of its other Hannaford locations. For its part, Hannaford did not change any of its policies or practices regarding the sale of alcoholic beverages. Dudley filed a charge of discrimination with the Maine Human Rights Commission (MHRC) under the ADA and the Maine Human Rights Act (MHRA). The district court found as a fact that at the Gardiner store it is an unwritten rule that once a cashier refuses to sell alcohol to a customer, the cashier's supervisors will rarely, if ever, reverse that decision. The court concluded that the store's actions and policies violated Dudley's rights under the ADA and the MHRA.

**Holding:** The court affirmed the district court's conclusion that Dudley's single visit to the Gardiner store is sufficient, in the circumstances of this case, to state a claim under 42 U.S.C. § 12188(a)(1). It concluded that the store's rigid "refusal to reconsider" its policy offends Title III of the ADA. However, the court makes note that it rules only that the ADA proscribes the use by a place of public accommodation of an inflexible policy that forecloses any attempt by an individual with an intoxication-mimicking disability to show that a clerk has mistaken his disability for drunkenness (and, thus, mistakenly refused him access to alcoholic beverages). The Court was careful to emphasize that although it was striking down Hannaford's "refusal to reconsider" policy, it does so believing that the ADA leaves significant room for merchants to devise alternative, ADA-compliant strategies to ensure the safe sale of alcoholic beverages.

**Goldstein v. Harvard University**, 77 Fed. Appx. 534, 2003 U.S.App. LEXIS 20894 (unpublished).

**Facts:** Six years after a forced withdrawal from graduate studies, Jennifer Goldstein, a Harvard University student, filed a pro se lawsuit alleging violation of Title III of the ADA. She was forced to withdraw following her failure to take a general examination at the end of the last year. Goldstein alleged that (1) Harvard discriminated against her for a perceived mental disability by subjecting her to a more rigorous examination schedule than other students, and (2) Harvard failed to accommodate her asthma disability by rescheduling the exam outside of "asthma season". The district court granted summary judgment on the grounds that Goldstein's lawsuit was filed outside the statute of limitations and, in the alternative, that it failed on the merits. The applicable statute of limitations in this case is three years (most analogous state statute of limitations - Massachusetts's statute of limitations for personal injuries.)

**Holding:** The district court's decision was affirmed. On appeal, Goldstein raised an equitable tolling argument based on a claim that she did not learn she was perceived as mentally disabled until four years after she withdrew from graduate studies. Because Goldstein failed to make this equitable tolling argument in her opposition to Harvard's motion for summary judgment, she forfeited it. The court added that in any event, the evidence on the record failed to create a material issue of fact regarding the perceived disability claim. Regarding the asthma claim, the court concluded that it fails on the merits -she did not notify Harvard that she had a disability that required accommodation-

**Hillstrom v. Best Western TLC Hotel**, 354 F.3d 27 (1<sup>st</sup> Cir. 2003).

**Facts:** Hillstrom was terminated from his job at the Best Western TLC Hotel in April 2002 when he was 42 years old. The employer claimed it was for poor job performance but Hillstrom sued alleging he had been discriminated against because of his age and gender, and also claimed that Best Western violated the FMLA by changing his employment position when he returned to work from a medical leave due to an

aneurysm (he returned in the first week of March 1999). Even though his duties and responsibilities did not change, his position title changed slightly and started reporting to a recently hired hotel manager and not upper management, as he did before. Also, Hillstrom's office was being used by the new general manager and he was moved to a smaller office. His salary and benefits remained unchanged. Tension began to grow between Hillstrom and the new general manager to the point where he began expressing dissatisfaction with Hillstrom's work performance because he was not implementing new policies and procedures. On March 27, 2000, Hillstrom was put on a probationary period by the general manager due to poor performance. Hillstrom complained to Human Resources. One month later, Hillstrom was terminated. As stated, Hillstrom sued alleging age and gender discrimination, and also claimed that Best Western violated the FMLA by changing his employment position when he returned to work from FMLA leave. The district court entered summary judgment for Best Western on all claims. With respect to the FMLA claim, the district court held that Hillstrom's FMLA claim was not barred by the its two-year statute of limitations because it interpreted his claim to include a second argument under the statute: that he was ultimately fired in April 2000 in retaliation for his taking medical leave under the FMLA approximately a year earlier. Because the FMLA's two-year statute of limitations begins to run only after the date of the last event constituting the alleged violation for which the action is brought, the district court held that this second FMLA argument, premised on actions occurring only a year before the suit was filed, rendered the FMLA claim timely. On the merits, the district court ruled that the job to which Hillstrom returned was substantially similar and as such dismissed the FMLA claim.

**Holding:** The First Circuit affirmed. In doing so, regarding the FMLA claim, it decided an issue of first impression for this circuit: the standard for determining whether a violation is "willful" for purposes of the FMLA three-year statute of limitations. Hillstrom sought review insisting on the argument that Best Western violated its obligations under the FMLA by not restoring him to the same or an equivalent position on his return from medical leave. However, the First Circuit did not even reach that issue because it found that Hillstrom's FMLA claim was time-barred. On appeal, Hillstrom made no claim that his ultimate termination from Best Western constituted retaliation nor he relied on the district court's reasoning regarding this issue. Instead, he pressed the FMLA claim based solely on Best Western's alleged failure to restore him to a substantially similar position upon his return from medical leave. On its face, considering that the lawsuit was presented in April 2001 and his return from leave was on March 1999, the retaliation claim had accrued. Hillstrom then argued that his FMLA claim was timely because Best Western's failure to return him to his original position was a "willful" violation of the FMLA because it was done "either as a result of his taking leave or in retaliation for his taking leave". The First Circuit held that in order to establish a willful violation under the FMLA, a plaintiff must show that "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." In doing so, the First Circuit applied the FLSA standard of willfulness to FMLA claims. The First Circuit Court found that Hillstrom's arguments fell short of the willful violation standard and thus concluded that the FMLA claim was time-barred.

**Leavitt v. Wal-Mart Stores, Inc.**, 74 Fed. Appx. 66, 2003 U.S. App. LEXIS 17948 (unpublished).

**Facts:** Anna Leavitt brought suit against Wal-Mart alleging that it failed to reasonably accommodate her disability, leading to a constructive discharge. The plaintiff asserted that she became disabled due to health problems associated with a heart attack (difficulty breathing and walking, increased fatigue and occasional panic attacks). Her physician recommended certain work restrictions, such as limiting work hours and the amount of weight she can lift. These were notified to Wal-Mart and the company transferred her to a position that would require less physical exertion. Because the plaintiff still struggled with her duties, Wal-Mart proposed a second transfer to another position that required even less physical exertion. This second position had an evening shift. The company did not reduce her hourly wage. Leavitt asserted that the evening shift exacerbated her breathing and walking problems and made requests to be moved to a day shift. Also, the plaintiff requested a transfer to a store that would be closer to her home. None of these two last requests were approved. Leavitt also claims she experienced hostile reactions to her disability from shift managers (demanding to know why she left early, not allowing her to use the handicapped parking until she got a handicapped parking permit, comments that she was not really disabled, making her work longer hours than her medical restrictions). Finally, her supervisor denied her a shift change (to a day shift) that had been previously notified to her and gave it to a new, non-disabled employee. This was in direct contradiction with Wal-Mart's stated scheduling policy. Frustrated, the plaintiff resigned. The district court concluded that the treatment she received was not severe enough to establish a constructive discharge claim. Because the plaintiff was not seeking damages beyond the constructive discharge claim, judgment was entered for Wal-Mart.

**Holding:** The Court affirmed the district court's grant of summary judgment on the constructive discharge claim because there is no evidence that plaintiff's transfers were anything other than a desired accommodation. Her claims that Wal-Mart did not give her a day shift and a transfer to a location closer to home are not so severe and do not produce conditions so unpleasant that staying in the job would have been intolerable. Regarding her reasonable accommodation claim, the district court's judgment was vacated and remanded. The Court disagreed with the conclusion that the plaintiff had failed to raise a reasonable accommodation claim in the district court proceedings.

**McInnis-Misenor v. Maine Medical Center**, 319 F. 3d 63 (1st Cir. 2003).

**Facts:** The plaintiff suffers from juvenile rheumatoid arthritis and uses a wheelchair. She and her husband were attempting to have a second child, but at all relevant times to this action, she was not pregnant. Anticipating a pregnancy, she filed a claim alleging that the Maine Medical Center (MMC) was in violation of the architectural barrier provisions of Title III. The MMC is her nearest hospital that handles high risk deliveries-

as hers would be-. The plaintiff sought an injunction to force MMC to move walls in the Family Center to make the bathrooms wheelchair accessible. The Family Center is an after-birth recovery area of rooms usually used, when available, by newly delivered mothers. If such rooms are not available, the mothers remain in the newer Birth Center rooms, where delivery actually takes place. A magistrate judge, acting on MMC's Rule 12 (b)(6) motion, recommended the action to be dismissed because the plaintiff did not, at that time, have standing to bring her claims.

**Holding:** The plaintiff's claim involves a threat of future injury. The constitutional standing inquiry requires plaintiffs to show that the threatened injury is impending and concrete, sufficient to constitute "injury in fact". Also, the remedies and procedures set forth by section 204 of the Civil Rights Act of 1964 are available to persons who are being subjected to discrimination due to a disability or have reasonable grounds to believe they are about to be. Because the plaintiff is not "being subjected to discrimination" her claim must rest on whether she has reasonable grounds to believe she is about to be subjected to discrimination. The court declined to determine whether constitutional standing was present and resolved the case on the prudential aspects of the standing and ripeness doctrines. The Court concluded that the case is not fit for determination because it is contingent mainly on whether the plaintiff becomes pregnant, as well as other aspects related to her pregnancy and delivery, which may alter her right or ability to use the Family Center of the MMC. Also, the court concluded that the plaintiff did not make a sufficient showing of hardship and the district court could timely resolve a case if the plaintiff eventually becomes pregnant. The district court's order was affirmed.

**Rocarfort v. IBM Corporation**, 334 F. 3d 115 (1st Cir. 2003).

**Facts:** Rocafort worked in the marketing department of IBM's Puerto Rico office. In 1992 he began to suffer from episodes of anxiety and panic attacks. In 1994 IBM announced plans to eliminate jobs. When Rocafort learned of these plans, he had a severe panic attack at work. He was diagnosed with a panic disorder and his doctor recommended the taking of a leave of absence. He was out of work for four months, at the end of which his doctor released him to return to work as long as he was confronted with the same kind of stress to which he had become accustomed. Upon returning to work, IBM assigned him to a new marketing job. Rocafort soon suffered from more panic attacks and had to take another leave of absence of two weeks. On or about six months later, Rocafort received a negative performance evaluation, the first in all his years as an IBM employee. This ensued another panic attack and another leave of absence of approximately a week. Upon his return to work, he was transferred to yet another new job. For this new job assigned, IBM assigned him a mentor and offered a 90-day training period. Before this training period expired, his supervisor threatened to fire him if he did not produce results. This provoked another panic attack and leave of absence of one month. During this particular leave of absence, Rocafort's doctor told a member of IBM's medical staff that the plaintiff needed support and reassurance that the company was not going to terminate his job. Upon his return to work, Rocafort met with

a supervisor who reassured him of his employee status at IBM and offered to extend his training period and pay him full salary during this time to reduce the pressure on him to make sales and earn commissions. That same day, the supervisor wrote Rocafort an e-mail indicating that the purpose of the meeting was to “clarify any misunderstandings you could have on your status in IBM.” In response, Rocafort expressed his gratitude replying and thanking him for “the courteous and honest discussion we had this morning”, and “the concern you demonstrated regarding the situation”. Shortly thereafter, a letter that originated from Rocafort’s computer was found on an IBM printer. This letter was addressed to a local news reporter and contained confidential IBM information. IBM found a draft copy of the letter in Rocafort’s computer. The plaintiff was informed of this situation and that he could be fired if it was determined that he wrote the letter. Rocafort denied writing the letter. IBM offered Rocafort a separation package and told him that if he did not accept it, an investigation would be conducted regarding the letter. Rocafort rejected the separation package and took an extended leave of absence of four months because of stress. When he returned to work, a supervisor met with him to discuss his extended training and full salary during this period. IBM also provided him with a flexible work schedule to avoid heavy commuter traffic. Rocafort was also required to meet with an IBM investigator to discuss the letter incident. After the meeting with the investigator, Rocafort took sick leave and never returned to work. Eventually, he applied for benefits under IBM’s Long Term Disability Plan and was approved. Rocafort filed a complaint alleging discrimination under the ADA and Puerto Rico law. He claimed IBM failed to reasonably accommodate his disability and that it subjected him to an intimidating and hostile work environment because of his disability. The district court awarded IBM summary judgment dismissing both arguments.

**Holding:** On appeal, Rocafort only raised the issue of failure to accommodate with respect to the request made by his doctor for the company to support and reassure him that the company was not going to terminate his job. The Court agreed with the district court’s ruling that IBM “adequately dealt” with this specific request. The only “stressful” event that occurred after this request was made was IBM’s offer of a separation package after discovering the letter in his computer. After Rocafort’s rejection of the package, IBM launched an investigation into the incident. The Court concludes that IBM did not fail to accommodate Rocafort’s disability. The decision to investigate the matter and question Rocafort, but still provide an extension of his training with a full salary and flexible schedule was reasonable. It would have been unreasonable for Rocafort to request “reassurance” by requiring IBM to consider him immune from suspicion for writing the letter, or even to pretend he was not a suspect. “The ADA is not a license for insubordination in the workplace”. The hostile work environment claim was not addressed on the merits, but rather was dismissed because it was waived during the district court proceedings.

**Sheehan v. City of Gloucester**, 321 F. 3d 21 (1st Cir. 2003).

**Facts:** The plaintiff was a member of the Gloucester Police Department from 1965 to 1994. In 1984 he began receiving treatment for hypertension. Twice in 1992 and once in 1993 he was hospitalized due to incidents of chest pain. Sheehan did not return to duty after the 1993 hospitalization. Several physicians concluded that Sheehan's hypertension and chest pains were job-related, and recommended his permanent retirement. An application for involuntary disability retirement was filed on his behalf by the chief of police before the Division of Public Employee Retirement Administration (PERA). PERA concluded that the plaintiff qualified for accidental disability and recommended his retirement because he had a permanent incapacity. Sheehan was retired on August 17, 1994. In May 1996 he brought an action for age and disability discrimination contending that his denial of his request for a reasonable accommodation violated the ADA. The City of Gloucester asserted that Sheehan was not disabled under the ADA and, alternatively, that he had been offered a reasonable accommodation (a quieter nightshift) which he had rejected. The district court found that the plaintiff was not substantially limited in his ability to work because there was no evidence that he was unable to perform a broad range of jobs. Further, considering that after retiring he had continued to work as a security guard, the court concluded that his ability to work was not substantially limited by hypertension. The district court also rejected Sheehan's claim due to a "record of" an impairment and for being "regarded as" a disabled individual. Regarding this last claim, the court established that the fact that the city considered Sheehan unable to perform the job of a police officer for Gloucester does not mean that he was regarded him as disabled for purposes of the ADA. The district court entered summary judgment for the City of Gloucester. Sheehan appealed the decision on the grounds that the district court took an unreasonable length of time to decide the motion for summary judgment, and due to this delay, the case was decided under the guidelines provided by the Supreme Court under *Toyota* (decided in 2002) rather than under *Murphy* (decided in 1999). According to Sheehan, he would have prevailed under *Murphy*. Thus, the plaintiff claims the delay resulted in an ex post facto application of the law and his due process rights were denied.

**Holding:** A party does not suffer a cognizable injury when a court applies the intervening precedent of a higher court which decides an issue against that party. A court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice, or there is statutory direction or legislative history to the contrary. In addition, the court affirmed the district court's decision that Sheehan failed to prove he was substantially limited in the major life activity of working.

**Whitlock v. Mac-Gray, Inc.**, 345 F. 3d 44 (1st Cir. 2003).

**Facts:** Whitlock was diagnosed with attention deficit hyperactivity disorder ("ADHD"). To accommodate his impairment, the employer allowed Whitlock to construct partitions around his workplace, and for a time, use an AM/FM radio to block background noise. On or about a year later, the company reorganized the department where Whitlock worked and moved him from the first to the second floor. This relocation required

removing the partitions. The radio also had to be removed due to co-workers' complaints. In response to these changes, the plaintiff took short-term disability leave. Upon return to work, he was permitted to install partitions around his workspace again and resume the use of a radio. The plaintiff was also allowed a work schedule of four days a week. Less than a year later, he filed a complaint against his employer and continued to work. In the complaint, Whitlock contended he was disabled by reason of his ADHD diagnosis and an alleged substantial limitation in his ability to work. He also alleged an abusive work environment due to his disability and that he was regarded as a disabled individual. During the time that he continued to work after filing the complaint, he called in sick frequently. Some time later, the plaintiff left on a second short-term disability leave. On or about five months later, plaintiff's doctor concluded that he was totally disabled and advised him not to return to work, but he did not leave his employment permanently until five months after the doctor's disability certificate was issued. Summary judgment was eventually entered for the employer dismissing all claims.

**Holding:** The district court's decision was affirmed. Whitlock's evidence may establish the existence of an impairment, but not of a disability under the ADA. "It is insufficient for individuals attempting to prove disability status to merely submit evidence of a medical diagnosis of an impairment". Also, because the plaintiff could not show that he was unable to work in a broad range of jobs, he was clearly not limited in the major life activity of working. Finally, the claim that he was "regarded as" disabled was also dismissed because Whitlock offered no evidence that he was perceived as unable to perform a broad range of jobs.

## **SECOND CIRCUIT**

**Saks v. Franklin Covey Co.**, 316 F.3d 337 (2<sup>nd</sup> Cir. 2003).

**Facts:** Former female employee sued under Title VII, the Pregnancy Discrimination Act (PDA) and the ADA because she was denied compensation for surgical impregnation procedures she underwent during the course of her employment in an attempt to become pregnant. Under the terms of the employer's health benefits plan (plan), surgical impregnation procedures were expressly excluded from coverage even if medically necessary. The district court granted summary judgment for the employer finding that the plan's exclusions affected male and female employee equally and thus did not violate Title VII. Although the district court found that infertility is a "pregnancy-related" condition and, thus, that the PDA prohibits discrimination on the basis of infertility, it held that the PDA was not violated because the plan provides equal coverage for male and female employees suffering from infertility. The district court also rejected the employee's state law claims as preempted by ERISA and her arguments that ERISA preemption had been waived by failing to raise it in the answer to the complaint.

**Holding:** The appellate court affirmed the district court's holding with respect to Title VII and the PDA on other grounds, and remanded with respect to the ERISA preemption issue. The court first held that the proper inquiry in reviewing a sex discrimination challenge to a health benefits plan under Title VII is whether exclusion of benefits for those conditions results in a plan that provides inferior coverage to one sex. The court disagreed with the district court by finding that discrimination based solely on reproductive capacity is not prohibited by the PDA, because reproductive capacity is common to both men and women. Reasoning that for a condition to fall within the PDA's prohibition of discrimination for "pregnancy ... and related medical conditions", the condition has to be unique to women, discrimination for infertility is not prohibited because it affects both men and women with equal frequency. The court went on to reason that although the surgical procedures are performed only on women, the need for the procedure might be traced to either or both sexual partners and, thus, the exclusion of surgical impregnation procedures does not violate Title VII.

Regarding the ERISA preemption issue, the appellate court joined the 1<sup>st</sup>, 3<sup>rd</sup>, 5<sup>th</sup> and 9<sup>th</sup> circuits in holding that this defense may be waived if not timely raised because it prescribes the choice of law, not jurisdiction. Raising the general defense of failure to state a claim is insufficient to raise the ERISA preemption defense. However, since a district court might construe a motion for summary judgment as a motion to amend the defendant's answer to the complaint, and the district court herein failed to rule on that motion, the case was remanded to the district court to consider such a ruling.

**Young v. Westchester County Dep't of Social Services**, 57 Fed. Appx. 492, 2003 U.S. App. LEXIS 1915 (unpublished), cert. denied, 156 L. Ed. 2d 658, 123 S. Ct. 2652, 2003 U.S. LEXIS 5063 (2003).

**Facts:** Former employee sued under the ADA alleging that her employer failed to accommodate her disability of "severe chronic obstructive pulmonary disease and obstructive airway disease" and for retaliation. Initially, however, the only information that the employer had of her disability was that she had trouble breathing and speaking, but the employees and employer's doctors agreed at the time that these problems were temporary. She claimed that she was denied an accommodation and was retaliated against because she was not granted a transfer until two years after she requested one and because she was subjected to disciplinary proceedings and harassed by her supervisor. The district court granted summary judgment for the employer on both counts, finding that the employer had not failed to provide a reasonable accommodation and that the alleged retaliatory acts were not "materially adverse".

**Holding:** The appellate court agreed with the district court that the employee's early symptoms did not trigger any obligation on the employer to provide an accommodation, since there was no evidence that the employer actually knew that her condition constituted a disability. Subsequent to her diagnosis there was no evidence of failure to accommodate, since by then she had returned to work, was subsequently transferred,

and there was no evidence that an open position was available prior to her transfer. Regarding the retaliation claim, the appellate court affirmed on other grounds. Since the employee admitted that the alleged harassment started before her disability manifested itself, and the disciplinary action was already ongoing at the time she requested an accommodation, no reasonable juror could have found a causal relationship between her protected activities and any adverse action directed against her.

**Peters v. Baldwin Union Free School District**, 320 F.3d 164 (2<sup>nd</sup> Cir. 2003).

**Facts:** Plaintiff, a former guidance counselor at defendant school, had a history of serious medical problems including a facial tumor and neurological impairments. She joked with another guidance counselor that she could commit suicide, which the other counselor mentioned to the school psychologist, who became alarmed and told school officials that plaintiff was considering suicide. The school's principal reassigned plaintiff to administrative duties at the district office; held a meeting with the guidance office staff and informed them that plaintiff had undergone a mental breakdown and was being reassigned for health reasons; and sent a letter to parents indicating that plaintiff was no longer acting as guidance counselor due to health reasons. Plaintiff was examined by two psychiatrists, one of which was chosen by the school, and a neurologist also chosen by the school, and was pronounced fit to return to her regular duties, after which she was reinstated to her former position. Upon her return, the school principal asked an intern guidance counselor to prepare a list of the problems she found while substituting for plaintiff. The assistant principal then sent plaintiff a memo indicating she would not be given tenure due to those problems. Plaintiff responded to the memo addressing each of the problems and the principal conducted an investigation and concluded both that the deficiencies were real and that she had altered or falsified school documents to cover up problems. Plaintiff was denied tenure and terminated, and sued under the Rehabilitation Act, the New York Human Rights Law (HRL), alleging that she was terminated because she was perceived as having a disability, and for defamation. At the close of plaintiff's case, the district court granted defendant's motion for a directed verdict in their favor, finding that plaintiff had not made a showing that defendants perceived her as incapable of working in a broad range of jobs.

**Holding:** The appellate court reversed, holding that plaintiff had presented sufficient evidence that defendants perceived her as being unable to take care of herself, which is a major life activity. The court stated that "a mental illness that impels one to suicide can be viewed as a paradigmatic instance of inability to care for oneself," and is therefore a protected disability under the Rehabilitation Act. The evidence regarding her poor performance and falsification of school records does not compel a finding in the employer's favor. Moreover, under the HRL she was not required to show that a perceived disability substantially limits a major life activity, so that her state law claim should have been submitted to the jury. The court affirmed the directed verdict on the defamation claim, finding that the principal's statements about plaintiff were made with a

qualified privilege, and that there was no evidence of ill will towards her or that the statements were motivated by spite.

**Felix v. NYC Transit Authority**, 324 F.3d 102 (2<sup>nd</sup> Cir. 2003).

**Facts:** While en route to an assignment as part of his work as a relief Railroad Clerk, plaintiff was stuck inside a train for some time and witnessed a smoke-filled platform caused by a firebombing incident that killed a fellow Railroad Clerk. A traumatized plaintiff was taken to a hospital's emergency room, and was subsequently diagnosed as having Post-Traumatic Stress Disorder (PTSD). Her doctors specified that she could not do any subway work, and she requested as an accommodation a reassignment to a position not involving such work. The overwhelming majority of Railroad Clerks work in token booths at subway stations, and those assigned to office jobs are deployed to work in token booths a few days a year. Plaintiff was terminated after not being able to return to work for a year. The district court granted defendant's motion for summary judgment on the basis that there was no nexus between the major life activity impaired (ability to sleep) and the accommodation requested (not working in the subway).

**Holding:** The appellate court affirmed 2-1, rejecting the EEOC's *amici* arguments and holding that there must be a causal link between the specific condition which limits a major life activity and the accommodation requested. An employer is required to provide a reasonable accommodation only for the disability which is the impairment of the major life activity. Other impairments that do not amount to a disability do not require accommodation. In this case, plaintiff's disability was her insomnia, which substantially limited her ability to sleep, but her inability to work on the subway did not substantially limit any major life activity. The fact that her inability to work in the subway was related to her insomnia, because they both stemmed from the same traumatic incident and resultant psychological disorder (PTSD), does not mean that the non-disability impairment is entitled to an accommodation. The court indicated that "the interpretation advanced by [plaintiff] and the EEOC would transform the ADA from an act that prohibits discrimination into an act that requires treating people with disabilities better than others who are not disabled but have the same impairment for which accommodation is sought."

**Henrietta D v. Michael R. Bloomberg**, 331 F.3d 261 (2<sup>nd</sup> Cir. 2003).

**Facts:** Plaintiff, indigent New York City residents who suffer from AIDS and other IV-related illnesses, sued the city and the state for violations of, *inter alia*, Title II of the ADA and the Rehabilitation Act for failing to provide them with adequate access to public benefits. The defendants argued that plaintiffs were not being discriminated against because they had not shown that they were receiving less access than persons without disabilities to the services they sought but, rather, that systemic breakdowns within the entire social services system were affecting non-disabled and disabled persons equally. The district court found the defendants liable under Title II of the ADA and the Rehabilitation Act.

**Holding:** The appellate court affirmed, holding that the measure of liability is whether the plaintiffs with disabilities could achieve meaningful access, and not whether the access the plaintiffs had was less meaningful than what was enjoyed by others.

**Zerilli-Edelglass v. NYC Transit Authority**, 333 F.3d 74 (2<sup>nd</sup> Cir. 2003).

**Facts:** Former employee filed a charge with the EEOC of sex discrimination and disability discrimination in violation of Title VII and the ADA, respectively, 357 days after she received notice of defendant's intent to terminate her employment. The employee argued that a letter she wrote earlier to the EEOC was a timely filed charge, but the district court rejected the argument because the letter was not under oath and was merely inquiring about the procedures for filing a retaliation complaint. She mailed her complaint to the district court 89 days after receiving her right to sue letter from the EEOC, and it was received by the clerk's office 92 days after the right to sue letter was received by plaintiff, which led the district court that it was untimely. The court rejected arguments that the limitations period should be equitably tolled.

**Holding:** The appellate court affirmed, holding that dismissal was proper for failure to file a timely charge with the EEOC, and that the district court's denial of equitable tolling was not an abuse of discretion.

**Conroy v. NYS Dep't of Correctional Services**, 333 F.3d 88 (2<sup>nd</sup> Cir. 2003).

**Facts:** Employees brought this action alleging that the ADA's prohibition against inquiries into the disabilities of a current employee was being breached by the employer's sick leave policy, which required employees to submit general diagnoses as part of a medical certification procedure following certain absences. The policy requires that the medical certification include a brief general diagnosis "sufficiently informative as to allow [the employer] to make a determination concerning the employee's entitlement to leave or to evaluate the need to have an employee examined by [the employee health service] prior to returning to work." The certification usually applied to employees absent for more than four days, but could be required of employees suspected of attendance abuse for all absences charged to sick leave. The district court denied the employer's motion for summary judgment and granted the employees' cross-motion for summary judgment because the requirement could cause an employee to divulge a disability or perceived disability, and rejected the employer's business necessity argument.

**Holding:** The appellate court affirmed the holding that the policy fell within the ADA's general prohibition, but vacated and remanded for further consideration of the business necessity defense. With respect to the employees' standing to bring the action, the court followed the rulings of the 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, and 10<sup>th</sup> Circuits and the position of the EEOC's enforcement guidance in finding that an employee need not prove that he has a disability unknown to his employer in order to challenge a medical inquiry or

examination under the ADA. Since a general diagnosis may tend to reveal a disability, or give rise to the perception of a disability, such a requirement is sufficient to trigger the protections of the ADA. Regarding the business necessity defense, the court held (in accord with the 9<sup>th</sup> Circuit) that in proving a business necessity, an employer must show more than that its inquiry is consistent with “mere expediency”, but rather that it is vital to the business. The employer must also show that the examination or inquiry genuinely serves the asserted business necessity, and that it is a reasonably effective method of achieving the employer’s goal. A business necessity will be found if the employer can demonstrate that a medical examination or inquiry is necessary to determine (1) whether the employee can perform job-related duties when the employer can identify legitimate, non-discriminatory reasons to doubt the employee’s capacity to perform his duties (such as frequent absences or a known disability that had previously affected the employee’s work), or (2) whether an employee’s absence is due to legitimate medical reasons, when the employer has reason to suspect abuse of an attendance policy. The court remanded the case for a determination of the benefits or lack thereof of the general diagnosis requirement, and of whether subjecting these employees to the general policy of inquiry is consistent with business necessity.

**Hudson v. Tomra of North America, Inc.**, 73 Fed Appx. 525, 2003 U.S. App. LEXIS 18778 (2<sup>nd</sup> Cir. 2003) (unpublished).

**Facts:** Plaintiff, a truck driver for defendant, seriously injured his left arm while lifting a box of glass bottles and went on a medical leave of absence for six months and on FMLA leave for an additional 12 weeks before being terminated because he was unable to return to work. At the time the employer did not have a “light duty” work policy, but adopted one about six months after plaintiff’s termination. Plaintiff sued, claiming that the employer was required to accommodate him by offering him a light duty position at the time he was terminated. The district court granted summary judgment for the employer.

**Holding:** The employer was not required to create a new light duty position for plaintiff at the time he was terminated.

**EEOC v. J. B. Hunt Transport, Inc.**, 75 Fed. Appx. 853, 2003 U.S. App. LEXIS 20103 (2<sup>nd</sup> Cir. 2003) (unpublished)

**Facts:** The EEOC brought an action against the employer for discriminating against a class of applicants who used prescription medications with side effects that might impair driving ability, in violation of the ADA. The district court ruled against the EEOC and, while an appeal was pending, the district court ordered the EEOC to pay \$175,157.65 in attorney’s fees. The appellate court affirmed the district court’s dismissal of the original action in a divided opinion and on more limited grounds than the district court’s ruling. The EEOC then appealed the award of attorney’s fees.

**Holding:** The appellate court reversed the district court's fees award. Adopting the Supreme Court's ruling regarding attorney's fees under Title VII, the court held that the district court had abused its discretion because the EEOC's case was not frivolous or unreasonable, particularly when considering that the district court judgment had been affirmed on more limited grounds than those on which the district court had ruled, and that one of the judges in the appellate court had dissented.

**Perry v. The State Insurance Fund**, 2003 U.S. App. LEXIS 24434 (2<sup>nd</sup> Cir. 2003) (unpublished).

**Facts:** The *pro se* plaintiff in this case, an employee of the New York State Insurance Fund, claimed violations of, *inter alia*, Titles I and II of the ADA for failure to accommodate her by giving her lighter physical work. The district court allowed plaintiff to amend her complaint four times before finally dismissing the complaint with prejudice for failure to state a claim. On the Title I claim the court found that the action was barred by sovereign immunity because the employer is a state agency, and on the Title II claim the court concluded that she had not alleged discriminatory animus or ill will based on her disability as required by such actions.

**Holding:** The appellate court affirmed the ruling with respect to the Title I claim, but vacated and remanded with respect to the Title II claim because plaintiff had not been advised of the requirement to plead discriminatory animus or ill will prior to having this claim dismissed.

### THIRD CIRCUIT

### FOURTH CIRCUIT

**Parkinson v. Anne Arundel Medical Center**, 2003 WL 22462655 (4th Cir. 2003).

**Facts:** Former employee sued under the American with Disabilities Act (ADA) alleging that his employer failed to accommodate his disability of severe coronary artery disease. Specifically, Parkinson contended that Anne Arundel Medical Center (AAMC) refused to honor his request not to work overtime after his heart attack, thereby failing to reasonably accommodate the limitation imposed by his disability. The district court concluded that Parkinson did not establish that he was disabled as defined by the ADA. The court reasoned that Parkinson had not established either that his restrictions on work or on physical activity made his impairment an actual disability under the ADA, or that AAMC regarded him as having such a disability during the relevant period. The district court also concluded that Parkinson failed to establish a prima facie case of retaliation under the ADA.

**Holding:** Affirmed. The Court held that before Parkinson could establish that AAMC refused to provide him with reasonable accommodations in violation of the ADA, he must show that he made a request to AAMC for accommodation of his disability. Parkinson did not make such a request and, in fact, had worked overtime prior to the date in question. The Court also held that Parkinson could not prove that he engaged in protected activity in order to establish his prima facie case of retaliation for his suspension. The Court concluded that Parkinson failed to rebut, by showing pretext, AAMC's legitimate non-retaliatory reasons offered for their action. Accordingly, Parkinson's claim for retaliation is without merit.

**Crow v. McElroy Coal Company**, 2003 WL 22670910 (N.D.W. Va.).

**Facts:** *Pro se* plaintiff sued his former employer alleging discrimination under Title VII and the Americans with Disabilities Act (ADA). The magistrate judge's report recommended that Plaintiff's complaint be dismissed for failure to state a claim. With regard to plaintiff's Title VII claim, plaintiff alleged that he was discriminated against because of his disability. Secondly, with regard to his ADA claim, plaintiff contended that his disability was not accommodated.

**Holding:** On appeal, the district court agreed with the magistrate judge and dismissed plaintiff's complaint with prejudice. The Court held that because disability is not a protected class under Title VII, plaintiff failed to state a claim to which relief can be granted. The Court also held that plaintiff failed to state a claim for "failure to accommodate" under the ADA. Specifically, plaintiff did not request accommodation at the time of his termination, nor did he request accommodation in a time manner after receiving a letter from his doctor regarding his "disability". The burden of requesting the accommodation lies with the employee, and because the plaintiff failed to make such a request, he did not state a claim for which relief can be granted.

**Equal Employment Opportunity Commission v. Dollar General Corporation**, 252 F.Supp.2d 277 (M.D.N.C. 2003).

**Facts:** Equal Employment Opportunity Commission (EEOC) sued employer on behalf of terminated employee, who was moderately mentally retarded, alleging discrimination under the Americans with Disabilities Act (ADA). The EEOC contended that Dollar General discriminated against its former employee, Bobbie Bost, based on a disability when it terminated Ms. Bost's employment. Dollar General argued that plaintiff couldn't show that Ms. Bost was a qualified individual with a disability.

**Holding:** On appeal, the court denied both motions for summary judgment and held that (1) plaintiff was a qualified individual with a disability within the meaning of the ADA; (2) in determining whether an employee is a qualified individual with a disability under the ADA, the "clerk" position held by the employee was a modified position that did not contemplate that the employee would perform all "essential functions" of the position as described in the employer's manual, but rather required that the employee carry out

only functions she was hired to, and did, perform; (3) in analyzing whether employee was qualified individual with disability, determinations as to nature of position held by employee and essential functions of position were questions of law; (4) genuine issues of material fact as to whether provision of job coach to employee was temporary training accommodation, and as to whether job coach performed essential function of position for employee, precluded summary judgment in ADA action on issues of whether provision of job coach was reasonable accommodation of employee's disability, and thus whether employee was qualified individual with disability; and (5) although temporary "job coach" to assist in training of qualified individual with disability could be reasonable accommodation, under the ADA, and full-time job coach providing more than training could not be reasonable accommodation.

**South Carolina Medical Ass'n v. Thompson**, 327 F.3d 346 (4th Cir. 2003).

**Facts:** An employee sued her employer for terminating her employment in violation of the Family Medical Leave Act, 29 U.S.C. §§ 2601-54. During her employment, the employee began experiencing various health problems including dizziness, nausea, exhaustion, and depression. Soon thereafter, the employee's physician reported that a physical examination showed early stages of cancer, and the physician suggested that the employee take time off from work. The employee advised her employer that she would need time off and the employer suggested that the plaintiff have her physician complete certain paperwork and return the same to the employer. The physician's report to the employer ultimately advised that the plaintiff suffered from irritable bowel syndrome, depression, and headaches and would need to be away from work for six weeks. Thinking that she was approved for six weeks of leave, the plaintiff left town and returned home at the end of her leave period. While she was on leave, the employer sent letters to Plaintiff indicating that she was only approved for leave for a period of five days from the date she made her request. The letter instructed the employee that if she did not return to work within so many days of the date of her letter that she would be terminated. Upon her receipt of the letter, the employee called her supervisor to discuss her situation. The employer explained that it was only able to give the employee short term leave based on the information provided by her physician. The employee was terminated because she failed to return to work on the date stated in the letter. When the employee requested more leave, paid or unpaid, she was advised that she was not eligible for FMLA protection because she had not worked for the employer at least one year. The employee sued alleging that she was terminated in violation of the FMLA. The employee countered by stating that the employee was not an "eligible" employee under FMLA because at the time she requested leave (the first time) she had not worked for the employer at least one year.

**Holding:** Appeal of jury verdict in favor of employee denied. Upon employee's second request for leave it could be determined that her initial leave had ended and her one year anniversary had passed. In addition, the jury could conclude that, at the time of the employee's second request for leave, she suffered from a "serious health condition" which prevented her from performing her ordinary duties.

**Muovich v. Raleigh County Bd. Of Educ.**, 2003 WL 550389 (4th Cir. Feb. 27, 2003).

**Facts:** A teacher sued a county board of accommodation for its alleged failure to accommodate her disability under the West Virginia Human Rights Act, §§ 5-11-1 et seq. (2003). The teacher began experiencing health problems once she began teaching at a local elementary school. In an attempt to alleviate such problems the teacher requested the following accommodations: that any new carpet be installed during the summer or on weekends because the carpet glue irritated her respiratory system; that the janitors flush bleach used in toilets instead of leaving the bleach – used to combat a sewer gas odor-- in the toilets overnight; and that the school switch a particular cleaning product that was used. The teacher's physician also requested that the school change cleaning products because of the irritation such products caused the teacher. All accommodation requests were refused. Among the arguments raised in defense of its actions, the school board argued that the plaintiff was not disabled since she continued to work despite her illness, and that there was no reasonable accommodation that would have allowed the teacher to continue working.

**Holding:** Jury verdict affirmed. The fact the teacher kept working despite her condition was of no moment. “We see no reason to penalize a plaintiff who is willing to continue working, despite substantial discomfort and the risk of worsening—and possibly permanent—injury, when her employer refuses to provide a reasonable accommodation. In addition, the jury was not found to be unreasonable in determining that replacing carpet on the weekends or during the summer and using products that were not respiratory irritants could be reasonable accommodations.

**Peebles v. Coastel Office Products, Inc.**, 2003 WL 21019353 (4<sup>th</sup> Cir. 2003).

**Facts:** Terminated employee sued alleging wrongful discharge under the Family Medical Leave Act. The employee took more than three weeks off to cope with feelings of anxiety and depression. Prior to taking leave, the employee stated that he felt ill and left work early as a result. Upon leaving his office, the employee went to the emergency room for a psychiatric consultation. The employee was then discharged with instructions not to return for one week. The employee faxed his supervisor a note from his physician, which, under the heading of restrictions, indicated “none. The employee then visited his personal physician who reported to the employee's supervisor that the employee required follow-up appointments and medication adjustments, which would require additional time-off. During the entire period of his leave, the employee's supervisor contacted the plaintiff to determine his condition. The plaintiff, and subsequently even his personal care physician, provided vague and untruthful reports about plaintiff's condition. The employer was never informed of the nature and severity of the plaintiff's illness, which would have provided information on which the employer could make a preliminary determination as to whether the employee's absence was justified.

**Holding:** Judgment of the district court is affirmed. The employee failed to meet the threshold requirements of FMLA as he failed to provide his employer with sufficient information necessary to trigger the employer's duties and obligations under the same.

**Montgomery v. Maryland**, 2003 WL 21752919 (4<sup>th</sup> Cir. 2003).

**Facts:** The plaintiff sued her employer alleging that its reassignment of her while on medical leave for surgery violated FMLA. Upon the cessation of her leave, the employee was reassigned to a position with the same pay grade and benefits of her old job. The employee also received a significant raise within two months of her return to employment. Ultimately, Plaintiff's complaint was dismissed

**Holding:** The Family Medical Leave Act did not allow for the recovery of emotional damages. In addition, the employee was not entitled to reinstatement to her former position. Under FMLA, employers must restore employees to the same or equivalent positions with equivalent pay, benefits, or other conditions of employment.

**Dean v. Phillip Morris USA, Inc.**, 2003 WL 21754998 (M.D.N.C).

**Facts:** The employee took medical leave to have surgery on her knee. Upon her return to work, the employer's physician placed restrictions prohibiting bending, kneeling, climbing. In addition, the employee's work hours were restricted. Phillip Morris then determined that due to her restrictions, the employee could not return to the job she held before leave. The employee was subsequently placed in a different area of the defendant's plant without any alteration in the plaintiff's pay, benefits, classification, and opportunities.

**Holding:** The employee was not disabled, as she was not substantially limited in her ability to work in a broad class of jobs. The fact the employee was currently employed by Defendant in the same classification she held before her surgery demonstrates that she was not substantially limited in her ability to work in a broad class of jobs, but —due to physical restrictions —unable to perform certain jobs. In addition, the plaintiff's reassignment to a different working area would not support a "regarded as" disability claim since attempts to respond to documented medical restrictions would not support a regarded as disability claim. Finally, the employers request for a medical examination — limited only to the condition which gave rise to the examination — would not support a "regarded as" disability claim

**Williams v. Charleston Area Medical Center**, 2003 WL 22386992 (W. Va.).

**Facts:** Plaintiff sued Charleston Area Medical Center (CAMC) alleging that CAMC failed to accommodate his disability under the West Virginia Human Rights Act. After Plaintiff was diagnosed with Graves Disease, he obtained a release from his doctor stating that he was "not allowed to climb on ladders or be above his [height]." Plaintiff claimed that CAMC failed to give him any accommodation for his disability and also failed to follow

its own policies as to accommodations for disabled employees. The jury concluded that plaintiff was a qualified person with a disability; however, the jury also found that both climbing a ladder and working overhead were essential functions of plaintiff's position as a Maintenance Mechanic.

**Holding:** The Court affirmed the lower court and held that an employer's duty to accommodate an individual with a disability under the West Virginia Human Rights Act does not require the employer to eliminate an essential function of a job. The Court analogized to the American with Disabilities Act and stated that courts in other jurisdictions have held that "[a] reasonable accommodation can never involve the elimination of an essential function of a job." *citing Shannon v. New York City Transit Auth.*, 332 F.3d 95, 100 (2d Cir. 2003)(internal citations omitted).

### **FIFTH CIRCUIT**

**Cleveland v. Federal Express Corp.**, 2003 WL 22905314 (6th Cir. Nov. 28, 2003).

**Facts:** A long-term employee of Federal Express contracted systemic lupus after having taken two maternity leaves. The lupus was apparently controlled by medication. When she became pregnant again, her physicians advised her to stop taking her lupus medication and to commence a medical leave approximately seven months before her child was due. Federal Express' policies permitted positions to be filled after a 90-day leave of absence provided that the employee on leave is notified that the position was being posted. Federal Express posted and filled the plaintiff's position, Customer Service Support Manager, in accordance with this policy. The plaintiff attempted to return to work approximately eight months after commencing her leave but there was no position available for which she was qualified in a location that did not require her to move. She was eventually terminated when she could not find a position and filed suit under the ADA and the Pregnancy Discrimination Act.

**Holding:** The Sixth Circuit rejected the pregnancy discrimination claim but reversed summary judgment for the employer on the ADA claim. The court acknowledged that although other Circuits have held that indefinite leaves do not constitute a reasonable accommodation, the Sixth Circuit "has declined to adopt a bright-line rule defining a maximum duration of leave that can constitute a reasonable accommodation." According to the court, since the plaintiff was not suffering from an acute medical condition that might well persist indefinitely and thereby lengthen a leave indefinitely, the plaintiff could have established that her lengthy leave would have been a reasonable accommodation of her lupus during her pregnancy. The court further stated that even though the plaintiff might be able to establish a reasonable accommodation, the employer can still be granted summary judgment if the accommodation would impose an undue hardship. Although two supervisors submitted essentially un rebutted testimony in support of two of the four undue hardship factors that should be "considered" according to the EEOC's regulations, the Sixth Circuit held that since the supervisors failed to address the other two factors, a jury could determine that the

employer failed to carry its burden of showing an undue hardship. The Sixth Circuit further held that it could disregard the testimony of one of the two supervisors because the plaintiff claimed that he made disparaging comments about her lupus. Although there is no indication in the opinion that the plaintiff ever introduced any evidence to dispute the supervisor's evidence about the hardship imposed by the plaintiff's leave, the Sixth Circuit ignored his testimony because the supervisor's "judgment was clouded by his animosity towards individuals who have lupus."

**Justice v. Pike County Bd. of Educ.**, 2003 WL 22479210 (6th Cir. Nov. 4, 2003).

**Facts:** A disabled grants director with post-traumatic arthritis and a political opponent of the new superintendent of schools was moved to a classroom position by the superintendent. The plaintiff was unable to perform classroom duties due to her disability and was granted a disability retirement by the Kentucky Teacher's Retirement System. She then filed suit against the school district and its superintendent, alleging First Amendment and ADA claims.

**Holding:** The Sixth Circuit reversed summary judgment for the school district on both First Amendment and ADA grounds. With regard to the ADA, the court – relying on *Cleveland v. Policy Mgmt. Sys. Corp.*, 565 U.S. 795 (1999), and *Dotson v. Pike County Board of Education*, 2001 WL 1216998 (6th Cir. 2001) – held that the plaintiff was not estopped from making an ADA claim even though she qualified for a disability retirement by establishing that she was unable to perform the job of a teacher.

**U.S. v. Cinemark USA, Inc.**, 348 F.3d 569 (6th Cir. 2003).

**Facts:** In this interesting public accommodations case under Title III of the ADA, the Department of Justice challenged a corporate movie theatre owner's use of stadium seating as discriminating against wheelchair bound patrons. The Department of Justice argued that wheelchair bound patrons were required to look up at the screen at sharp angles from wheelchair accessible locations, causing severe discomfort. Cinemark countered by arguing that the applicable Justice Department regulation merely required that wheelchair bound patrons be provided with an unobstructed line of sight similar to other patrons and that the Justice Department was estopped from asserting its challenge because the theatre had been certified in accordance with local building codes that had themselves been certified as complying with Title III of the ADA by the Justice Department.

**Holding:** The Sixth Circuit held that the applicable Justice Department regulation, Americans with Disability Act Accessibility Guidelines (ADAAG) § 4.33.3, requires more than merely an unobstructed view in seating adjacent to other patrons. The line of sight must be "comparable" to other patrons. This means that wheelchair bound patrons must be provided with both comparable viewing angles as well as an unobstructed view of the movie screen, not just a viewing angle and line of sight similar to perhaps the worst seats in the movie theatre. The fact that the theatre was built in accordance with

building codes approved by the Justice Department as complying with Title III did not preclude the Justice Department from later challenging the seating for disabled individuals. The approval of the building codes, however, may dictate that any relief be prospective only.

**Mitchell v. Chapman**, 343 F.3d 811 (6th Cir. 2003).

**Facts:** A letter carrier who suffered from chronic neck pain arising from an injury sustained while serving in the Navy was transferred to a clerical position and was not permitted to resume letter carrier duties after his physician stated that he could return to full duties with a special harness for the mail bag. The plaintiff filed two successive actions alleging a variety of claims, including claims under the ADA, Rehabilitation Act, Title VII and the FMLA.

**Holding:** The Sixth Circuit ruled that most of the plaintiff's claims, including his ADA and Rehabilitation Act and FMLA claims against the USPS, were barred under a claim preclusion theory by virtue of the decision in his first lawsuit. The court addressed at length, however, the issue of whether the FMLA imposes individual liability on employees of a public agency. The court rejected the holding of the Eighth Circuit in *Darby v. Bratch*, 287 F.3d 673 (8th Cir. 2002) (individual liability to public employees), and the reasoning of the Eleventh Circuit in *Wascura v. Carver*, 169 F.3d 683 (11th Cir. 1999) (which held that there was no individual liability on different grounds), and held that the text of the FMLA could not be read to impose individual liability on employees of public agencies.

**McLeod v. Parson's Corporation**, 2003 WL 22097841 (6th Cir. Sept. 5, 2003).

**Facts:** The plaintiff claimed that he was discharged because of his age and because he had cancer. He was laid off following cancer treatments in a reduction in force. A jury ruled in favor of the employer. On appeal, the Sixth Circuit resolved a number of evidentiary issues focused primarily on the plaintiff's age claim in favor of the employer. The court also addressed the question of whether the Sixth Circuit "should adopt the approach followed by several other circuits, with respect to the plaintiff's burden of proof under the ADA," and permit ADA cases to proceed based on a mixed-motive theory.

**Holding:** The Sixth Circuit rejected the holdings in other circuits and ruled that plaintiffs cannot recover under the ADA in mixed motive cases. In the Sixth Circuit, "in order to prevail on a claim alleging a violation of the ADA, a plaintiff must demonstrate that he or she: (1) is an individual with a disability; (2) is otherwise qualified to perform the job requirements with or without reasonable accommodations; and (3) was discharged solely on account of the disability." (Emphasis added)

**Lane v. Bell County Board of Education**, 2003 WL 21949188 (6th Cir. Aug. 12, 2003).

**Facts:** A teacher suffering from post-traumatic stress syndrome (PTSD) based on alleged mistreatment by her principal was assigned to a noisy classroom with poor ventilation, no air conditioning and no windows. When these conditions exacerbated the teacher's PTSD, she requested a reassignment, which was denied. She therefore left on an FMLA leave and did not return to work. She subsequently sued alleging that the school district had a duty to accommodate her PTSD under the ADA.

**Holding:** The Sixth Circuit rejected the teacher's ADA claim, holding that there was no evidence that the teacher was precluded by her disability – PTSD – from performing a broad range or a class of jobs. Instead, although the teacher claimed she could no longer teach, “she really only submitted evidence to show she could not teach under the conditions in her particular room at Yellow Creek Elementary School.” (Emphasis in original) The Sixth Circuit also rejected the teacher's claim that her working conditions caused or exacerbated her PTSD because she had previously sued the school district under 42 U.S.C. § 1983 and obtained a substantial settlement relative to her PTSD. As part of that settlement, she had waived any ADA claims relative to her PTSD. The Sixth Circuit accordingly held that this settlement precluded the teacher's attempt to once again litigate the causation or exacerbation of her disability.

**Thompson v. E.I. DuPont Denemours and Co.**, 2003 WL 21771959 (6th Cir. July 23, 2003).

**Facts:** The plaintiff suffered from a serious back impairment and had several permanent restrictions that precluded him from performing any of the regular, vacant positions in the employer's facility. The plaintiff, however, claimed that he should have been permitted to perform a BRP Operator position, which was a temporary sedentary position designed to address a specific project. According to the plaintiff, he would have been able to work in the BRP position for several months while the employer looked for other vacant regular positions in which to place him permanently.

**Holding:** The Sixth Circuit upheld the dismissal of the plaintiff's ADA claim, holding that an employer is not required to reassign a disabled employee to a vacant temporary position, nor are they “required to keep an employee on staff indefinitely in the hope that some position may become available some time in the future.” Assignment to a temporary position would have effectively required the employer to create a new, permanent position, which is not required by the ADA: “a temporary position is not a reasonable accommodation for an individual with a permanent disability when placement in such a temporary position would result in the creation of a new, permanent position.” The court also held that the employer was not required to place the plaintiff in a vacant lab position because such a placement would have amounted to a promotion.

**Mehr v. Starwood Hotels & Resorts Worldwide, Inc.**, 2003 WL 21771963 (6th Cir. July 23, 2003).

**Facts:** An Iranian hotel worker who claimed that her work assignments and ultimate separation were discriminatory based on her national origin and sex attempted to amend her complaint to add an ADA claim that she was discriminated against for being “short”.

**Holding:** The Sixth Circuit held that her proposed amendment would be futile because being “short” is not a disability under the ADA. The term “impairment” does not include physical characteristics such as height and weight that are in the “normal” range.

**Huge v. General Motors Co.**, 2003 WL 1795691 (6th Cir. March 26, 2003).

**Facts:** In this case, the plaintiff suffered from depression and had trouble getting out of bed at times and arriving at work on time. The plaintiff was ultimately fired for being late to work, crying when she was criticized, failing to meet deadlines, and having to be trained on computer programs that she had previously claimed to understand. She sued, claiming discrimination based on her depression, and had her case thrown out by the trial court.

**Holding:** The Sixth Circuit affirmed, noting that “the fact that a person has a history of depression does not necessarily mean that she has a disability under the ADA.” The court concluded that the plaintiff had not shown that she was substantially limited in the major life activity of working simply by submitting evidence that she could not stay motivated, had trouble getting out of bed and making it to work on time, had difficulty concentrating, and had trouble asking for help. She was not “significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person.”

**Coulter v. Deloitte Consulting, L.L.C.**, 2003 WL 22514343 (6th Cir. Nov. 4, 2003).

**Facts:** The plaintiff was terminated the day before she was to return from an FMLA leave after numerous complaints about her performance surfaced during her leave as a result of the normal annual review process at Deloitte Consulting. In addition, the plaintiff’s temporary replacement, who had previously held her job and retired, raised a number of concerns about her performance. The plaintiff had not been previously warned about performance problems.

**Holding:** The Sixth Circuit rejected the plaintiff’s claims, holding that the fact that she was on an FMLA leave did not insulate her from the consequences of negative assessments of her performance generated as part of the normal and regular review process at Deloitte Consulting. Moreover, the plaintiff was an at-will employee who was not entitled to a warning prior to termination. Accordingly, the employer’s failure to provide the plaintiff with a prior warning did not establish that the reason for terminating her was pretextual under the FMLA.

**Cavin v. Honda of America Mfg., Inc.**, 346 F.3d 713 (6th Cir. 2003).

**Facts:** The employer had a rule that if an employee missed one day of work, he or she should contact security to report the absence but that if he or she missed more than one day, needed a leave of absence and the leave was unforeseeable, he or she should contact Administration – Leave Coordination. If the employee failed to call in for three days, he or she would be terminated. The plaintiff was injured in a motorcycle accident on June 21 and given a note from the doctor at the emergency room excusing him from returning to work until June 24. A second doctor released the employee until June 28. The employee had contacted security about his absences on June 21-25, but not Leave Coordination. Conveniently for the plaintiff, the plant shut down for a week after June 28, so the plaintiff did not attempt to return to work until July 6, at which time he finally notified Leave Coordination about his absence. He applied for FMLA leave to cover his entire absence, but a portion of his absence was not deemed FMLA leave because he had not reported his absence to Leave Coordination as required by company policy. This resulted in attendance related discipline. The plaintiff was subsequently absent for an extended period relating to the same injuries but never complied with the employer's FMLA policy regarding medical certification and was accordingly terminated for excessive absenteeism. Although the plaintiff clearly failed to comply with medical certification procedures during his second period of absence, the discipline he received for the first absence played a role in the decision to terminate his employment.

**Holding:** The Sixth Circuit, in a troublesome decision, declined to follow the Tenth and Seventh Circuits' decisions in *Holmes v. The Boeing Co.*, 166 F.3d 1221, 1999 WL 9760 at \*3 (10th Cir. Jan. 12 1999), and *Lewis v. Holsum of Fort Wayne, Inc.*, 278 F.3d 706 (7th Cir. 2002), which held that employers could discipline or discharge employees for failing to comply with time-off policies. According to the Sixth Circuit, "the FMLA does not permit an employer to limit his employee's FMLA rights by denying them whenever an employee fails to comply with internal procedural requirements that are more strict than those contemplated by the FMLA." The court determined that Honda's policy was more strict than the FMLA because the FMLA requires that notice be given by the employee as soon as practicable under the circumstances. Honda's policy, on the other hand, limited the notice period to 3 days. The Sixth Circuit ignored the fact that there were no extenuating circumstances making it impractical for the plaintiff to contact Honda's Leave Coordination department about his absence in accordance with company policy. According to the court, telling a security guard who was employed by a subcontractor that he was in a motorcycle accident and "just got out of the hospital" was sufficient to create a fact issue on whether the plaintiff gave adequate notice of the need for a leave, even though he told the security guard that he would return to work the next day. The Sixth Circuit acknowledged that Honda had done the smart thing in trying to delegate FMLA administration to a Leave Coordination department staffed by professionals (as opposed to security guards) who understand the statute, but held that "we are not persuaded that notice to security constitutes notice to Honda only of the event of an absence, not of a need for a leave of absence." Honda should have inquired further or should have modified its call-in procedure.

**Arban v. West Pub. Corp.**, 345 F.3d 360 (6th Cir. 2003).

**Facts:** The plaintiff, a sales representative, was facing mounting pressure about serious performance problems that were documented in various oral and written communications about the plaintiff's lackluster performance and certain misrepresentations and double billings. Perhaps in response to this mounting pressure, the plaintiff went on an FMLA leave for severe esophagitis and stress. During the next few days, the plaintiff received calls from his co-workers who, at the direction of a supervisor, were attempting to get updates about pending sales leads. While he was on leave, a decision was made to terminate the plaintiff, who resigned in lieu of termination. The plaintiff later filed suit alleging violations of the FMLA.

**Holding:** The Sixth Circuit affirmed a jury verdict in the plaintiff's favor, placing great emphasis on the fact that although there was considerable discussion about the plaintiff's performance problems and misrepresentations prior to his leave, no final decision had been made prior to the leave. The jury was therefore permitted to draw the inference that the decision was made in order to deny him his substantive right to reinstatement. The Sixth Circuit also stated that the evidence supported the plaintiff's contention that West Publishing was retaliating against him under the FMLA because of the calls to his home seeking information about sales leads. Although West Publishing claimed that it had legitimate business reasons for making these calls, the jury was permitted to assess the credibility of this assertion. The court held that the district court did not abuse its discretion in denying an award of front pay because the plaintiff's evidence on front pay was purely speculative. Moreover, the issue of front pay did not have to be submitted to a jury because it is a matter for the court. The Sixth Circuit held that district court abused its discretion, however, in refusing to award liquidated damages. The district court had ruled that the decision to terminate was made before the FMLA leave request was made and was therefore made in good faith and delayed to a later date due to the Christmas holiday. The Sixth Circuit stated that this ruling was inconsistent with the jury's finding that the plaintiff was terminated because of his medical leave, not his misconduct, and therefore remanded the case for an award of liquidated damages.

**Gibson v. City of Louisville**, 336 F.3d 511 (6th Cir. 2003).

**Facts:** The plaintiff, who was terminated and claimed his rights under the FMLA were violated, appealed a jury verdict in favor of the City, arguing that he should have been given a mixed-motive instruction. According to the plaintiff, retaliation for exercising rights under the FMLA need only be a factor, not the factor, in a termination decision.

**Holding:** The Sixth Circuit upheld the district court's use of a jury instruction stating that plaintiff had to establish that he was terminated because he requested FMLA leave. The court held, however, that a more precise jury instruction would have asked with requesting an FMLA leave was a determining factor in terminating the plaintiff.

**Pharakhone v. Nissan North America, Inc.**, 324 F.3d 405 (6th Cir. 2003).

**Facts:** The plaintiff was out on leave due to his wife's recent childbirth and worked at his wife's restaurant during this time, despite being explicitly and repeatedly told that this was not permitted. This work violated the company's policy of prohibiting employees from engaging in "unauthorized work for personal gain while on leave."

**Holding:** The Sixth Circuit held that there was no evidence that the plaintiff was fired for taking FMLA leave, but rather because he violated company policy by working while on a leave of absence.

**Pownall v. City of Perrysburg**, 2003 WL 1870912 (6th Cir. April 8, 2003).

**Facts:** The plaintiff needed to schedule surgery after learning that her breast implants had ruptured. She informed her employer, who asked her what the surgery was for in order to determine if it was elective and if it could be postponed, as the original date was inconvenient for the workplace. The plaintiff told her supervisor that she wasn't comfortable discussing the surgery. She was asked these questions again, refused to discuss the matter, and stated, "I guess this means you want me to quit." The supervisor assured her that this was not the case, but the employee stated that she was quitting, filled out the required forms, and left the office. The employer later wrote her a letter asking her to confirm her intent to resign. She then responded with a letter stating that she had felt pressured to quit.

**Holding:** The Sixth Circuit rejected the plaintiff's FMLA claim. The court held that the plaintiff had expressed an immediate intention to resign and also went so far as to fill out the forms and leave the office before the end of the workday. Thus, she had completed all the steps necessary to effect her resignation. The court rejected her constructive discharge claim, holding that her working conditions were not so intolerable as to be unendurable by a reasonable employee.

**Taylor v. Invacare Corp.**, 2003 WL 21212674 (6th Cir. May 21, 2003).

**Facts:** The application of an occurrence-based no-fault attendance policy resulted in the plaintiff's termination. Some of the absences that led to occurrences, however, were for serious health conditions that should have qualified for FMLA leave.

**Holding:** Although the plaintiff did not expressly seek FMLA leave for some of the absences that qualified as FMLA leave, it was the responsibility of the employer to designate the absences as FMLA-qualifying and not to charge the plaintiff with occurrences for those absences under the no-fault attendance policy. The plaintiff also could not be charged with occurrences for foreseeable FMLA-qualifying absences when he did not provide the employer with prior notice. The employer had allegedly failed to post the required FMLA notice, which would have advised the employee of his obligation to notify the employer of a foreseeable absence.

**Perry v. Jaguar of Troy**, \_\_\_ F.3d \_\_\_, 9 Wage & Hour Cas.2d (BNA) 350, 2003 WL 23015473 (6th Cir. December 30, 2003).

**Facts:** The plaintiff, an auto parts counter-person, sought a leave during the Summer months of 2001 to care for his 13-year-old son who had been diagnosed with learning disabilities, attention deficit disorder (ADD) and attention deficit hyperactivity disorder (ADHD). The son's mother could not care for the child during the non-school months of 2001 because of her work schedule. According to the plaintiff, his son needed to be constantly monitored for safety reasons and to ensure that his behavior was socially acceptable. The plaintiff claimed that he could not find affordable day care. The employer denied him FMLA leave, but did allow him to take a leave of absence. Upon the plaintiff's attempt to return to work at the end of the Summer, the employer informed him that his position had been filled and that there was no other work available.

**Holding:** The Sixth Circuit rejected the employer's contention that the plaintiff did not provide adequate notice of his need for FMLA leave, because the employer was aware that the plaintiff was requesting leave to care for his son and because the employer ultimately communicated to the plaintiff that it was denying him FMLA leave. The Sixth Circuit also rejected the employer's contention that the plaintiff did not provide adequate medical certification of his need for leave. Although the requirement to provide medical certification appeared in the employee handbook, the employer had not sent the plaintiff specific written notice of his obligation to provide medical certification upon learning that he was requesting a leave that might qualify as FMLA leave. Nor did the employer ever advise the plaintiff of the consequences for not providing medical certification. Notwithstanding the foregoing, the Sixth Circuit rejected the plaintiff's FMLA claim because the son did not have a serious health condition that required the plaintiff's care. The plaintiff was unable to show that his son was incapacitated during the Summer of 2001. To the contrary, the employer established that the son "was able to attend school and engaged in the same daily activities in which most children engage: riding bikes, swimming, playing video games, watching television, and playing with neighborhood friends." According to the Sixth Circuit, "[t]he fact that a child with learning disabilities does not function at the same level as a child of the same age without learning disabilities sheds no light on whether that child can perform regular daily activities." Likewise, although the son probably required more supervision than some children, "[t]he comparative amount of supervision a child needs standing alone does not address the child's ability to engage in regular daily activities."

### **SIXTH CIRCUIT**

**Cleveland v. Federal Express Corp.**, 2003 WL 22905314 (6th Cir. Nov. 28, 2003).

**Facts:** A long-term employee of Federal Express contracted systemic lupus after having taken two maternity leaves. The lupus was apparently controlled by medication. When she became pregnant again, her physicians advised her to stop taking her lupus

medication and to commence a medical leave approximately seven months before her child was due. Federal Express' policies permitted positions to be filled after a 90-day leave of absence provided that the employee on leave is notified that the position was being posted. Federal Express posted and filled the plaintiff's position, Customer Service Support Manager, in accordance with this policy. The plaintiff attempted to return to work approximately eight months after commencing her leave but there was no position available for which she was qualified in a location that did not require her to move. She was eventually terminated when she could not find a position and filed suit under the ADA and the Pregnancy Discrimination Act.

**Holding:** The Sixth Circuit rejected the pregnancy discrimination claim but reversed summary judgment for the employer on the ADA claim. The court acknowledged that although other Circuits have held that indefinite leaves do not constitute a reasonable accommodation, the Sixth Circuit "has declined to adopt a bright-line rule defining a maximum duration of leave that can constitute a reasonable accommodation." According to the court, since the plaintiff was not suffering from an acute medical condition that might well persist indefinitely and thereby lengthen a leave indefinitely, the plaintiff could have established that her lengthy leave would have been a reasonable accommodation of her lupus during her pregnancy. The court further stated that even though the plaintiff might be able to establish a reasonable accommodation, the employer can still be granted summary judgment if the accommodation would impose an undue hardship. Although two supervisors submitted essentially un rebutted testimony in support of two of the four undue hardship factors that should be "considered" according to the EEOC's regulations, the Sixth Circuit held that since the supervisors failed to address the other two factors, a jury could determine that the employer failed to carry its burden of showing an undue hardship. The Sixth Circuit further held that it could disregard the testimony of one of the two supervisors because the plaintiff claimed that he made disparaging comments about her lupus. Although there is no indication in the opinion that the plaintiff ever introduced any evidence to dispute the supervisor's evidence about the hardship imposed by the plaintiff's leave, the Sixth Circuit ignored his testimony because the supervisor's "judgment was clouded by his animosity towards individuals who have lupus."

**Justice v. Pike County Bd. of Educ.**, 2003 WL 22479210 (6th Cir. Nov. 4, 2003).

**Facts:** A disabled grants director with post-traumatic arthritis and a political opponent of the new superintendent of schools was moved to a classroom position by the superintendent. The plaintiff was unable to perform classroom duties due to her disability and was granted a disability retirement by the Kentucky Teacher's Retirement System. She then filed suit against the school district and its superintendent, alleging First Amendment and ADA claims.

**Holding:** The Sixth Circuit reversed summary judgment for the school district on both First Amendment and ADA grounds. With regard to the ADA, the court – relying on

Cleveland v. Policy Mgmt. Sys. Corp., 565 U.S. 795 (1999), and Dotson v. Pike County Board of Education, 2001 WL 1216998 (6th Cir. 2001) – held that the plaintiff was not estopped from making an ADA claim even though she qualified for a disability retirement by establishing that she was unable to perform the job of a teacher.

**U.S. v. Cinemark USA, Inc.**, 348 F.3d 569 (6th Cir. 2003).

**Facts:** In this interesting public accommodations case under Title III of the ADA, the Department of Justice challenged a corporate movie theatre owner's use of stadium seating as discriminating against wheelchair bound patrons. The Department of Justice argued that wheelchair bound patrons were required to look up at the screen at sharp angles from wheelchair accessible locations, causing severe discomfort. Cinemark countered by arguing that the applicable Justice Department regulation merely required that wheelchair bound patrons be provided with an unobstructed line of sight similar to other patrons and that the Justice Department was estopped from asserting its challenge because the theatre had been certified in accordance with local building codes that had themselves been certified as complying with Title III of the ADA by the Justice Department.

**Holding:** The Sixth Circuit held that the applicable Justice Department regulation, Americans with Disability Act Accessibility Guidelines (ADAAG) § 4.33.3, requires more than merely an unobstructed view in seating adjacent to other patrons. The line of sight must be "comparable" to other patrons. This means that wheelchair bound patrons must be provided with both comparable viewing angles as well as an unobstructed view of the movie screen, not just a viewing angle and line of sight similar to perhaps the worst seats in the movie theatre. The fact that the theatre was built in accordance with building codes approved by the Justice Department as complying with Title III did not preclude the Justice Department from later challenging the seating for disabled individuals. The approval of the building codes, however, may dictate that any relief be prospective only.

**Mitchell v. Chapman**, 343 F.3d 811 (6th Cir. 2003).

**Facts:** A letter carrier who suffered from chronic neck pain arising from an injury sustained while serving in the Navy was transferred to a clerical position and was not permitted to resume letter carrier duties after his physician stated that he could return to full duties with a special harness for the mail bag. The plaintiff filed two successive actions alleging a variety of claims, including claims under the ADA, Rehabilitation Act, Title VII and the FMLA.

**Holding:** The Sixth Circuit ruled that most of the plaintiff's claims, including his ADA and Rehabilitation Act and FMLA claims against the USPS, were barred under a claim preclusion theory by virtue of the decision in his first lawsuit. The court addressed at length, however, the issue of whether the FMLA imposes individual liability on employees of a public agency. The court rejected the holding of the Eighth Circuit in

Darby v. Bratch, 287 F.3d 673 (8th Cir. 2002) (individual liability to public employees), and the reasoning of the Eleventh Circuit in Wascura v. Carver, 169 F.3d 683 (11th Cir. 1999) (which held that there was no individual liability on different grounds), and held that the text of the FMLA could not be read to impose individual liability on employees of public agencies.

**McLeod v. Parson's Corporation**, 2003 WL 22097841 (6th Cir. Sept. 5, 2003).

**Facts:** The plaintiff claimed that he was discharged because of his age and because he had cancer. He was laid off following cancer treatments in a reduction in force. A jury ruled in favor of the employer. On appeal, the Sixth Circuit resolved a number of evidentiary issues focused primarily on the plaintiff's age claim in favor of the employer. The court also addressed the question of whether the Sixth Circuit "should adopt the approach followed by several other circuits, with respect to the plaintiff's burden of proof under the ADA," and permit ADA cases to proceed based on a mixed-motive theory.

**Holding:** The Sixth Circuit rejected the holdings in other circuits and ruled that plaintiffs cannot recover under the ADA in mixed motive cases. In the Sixth Circuit, "in order to prevail on a claim alleging a violation of the ADA, a plaintiff must demonstrate that he or she: (1) is an individual with a disability; (2) is otherwise qualified to perform the job requirements with or without reasonable accommodations; and (3) was discharged solely on account of the disability." (Emphasis added)

**Lane v. Bell County Board of Education**, 2003 WL 21949188 (6th Cir. Aug. 12, 2003).

**Facts:** A teacher suffering from post-traumatic stress syndrome (PTSD) based on alleged mistreatment by her principal was assigned to a noisy classroom with poor ventilation, no air conditioning and no windows. When these conditions exacerbated the teacher's PTSD, she requested a reassignment, which was denied. She therefore left on an FMLA leave and did not return to work. She subsequently sued alleging that the school district had a duty to accommodate her PTSD under the ADA.

**Holding:** The Sixth Circuit rejected the teacher's ADA claim, holding that there was no evidence that the teacher was precluded by her disability – PTSD – from performing a broad range or a class of jobs. Instead, although the teacher claimed she could no longer teach, "she really only submitted evidence to show she could not teach under the conditions in her particular room at Yellow Creek Elementary School." (Emphasis in original) The Sixth Circuit also rejected the teacher's claim that her working conditions caused or exacerbated her PTSD because she had previously sued the school district under 42 U.S.C. § 1983 and obtained a substantial settlement relative to her PTSD. As part of that settlement, she had waived any ADA claims relative to her PTSD. The Sixth Circuit accordingly held that this settlement precluded the teacher's attempt to once again litigate the causation or exacerbation of her disability.

**Thompson v. E.I. DuPont Denemours and Co.**, 2003 WL 21771959 (6th Cir. July 23, 2003).

**Facts:** The plaintiff suffered from a serious back impairment and had several permanent restrictions that precluded him from performing any of the regular, vacant positions in the employer's facility. The plaintiff, however, claimed that he should have been permitted to perform a BRP Operator position, which was a temporary sedentary position designed to address a specific project. According to the plaintiff, he would have been able to work in the BRP position for several months while the employer looked for other vacant regular positions in which to place him permanently.

**Holding:** The Sixth Circuit upheld the dismissal of the plaintiff's ADA claim, holding that an employer is not required to reassign a disabled employee to a vacant temporary position, nor are they "required to keep an employee on staff indefinitely in the hope that some position may become available some time in the future." Assignment to a temporary position would have effectively required the employer to create a new, permanent position, which is not required by the ADA: "a temporary position is not a reasonable accommodation for an individual with a permanent disability when placement in such a temporary position would result in the creation of a new, permanent position." The court also held that the employer was not required to place the plaintiff in a vacant lab position because such a placement would have amounted to a promotion.

**Mehr v. Starwood Hotels & Resorts Worldwide, Inc.**, 2003 WL 21771963 (6th Cir. July 23, 2003).

**Facts:** An Iranian hotel worker who claimed that her work assignments and ultimate separation were discriminatory based on her national origin and sex attempted to amend her complaint to add an ADA claim that she was discriminated against for being "short".

**Holding:** The Sixth Circuit held that her proposed amendment would be futile because being "short" is not a disability under the ADA. The term "impairment" does not include physical characteristics such as height and weight that are in the "normal" range.

**Huge v. General Motors Co.**, 2003 WL 1795691 (6th Cir. March 26, 2003).

**Facts:** In this case, the plaintiff suffered from depression and had trouble getting out of bed at times and arriving at work on time. The plaintiff was ultimately fired for being late to work, crying when she was criticized, failing to meet deadlines, and having to be trained on computer programs that she had previously claimed to understand. She sued, claiming discrimination based on her depression, and had her case thrown out by the trial court.

**Holding:** The Sixth Circuit affirmed, noting that “the fact that a person has a history of depression does not necessarily mean that she has a disability under the ADA.” The court concluded that the plaintiff had not shown that she was substantially limited in the major life activity of working simply by submitting evidence that she could not stay motivated, had trouble getting out of bed and making it to work on time, had difficulty concentrating, and had trouble asking for help. She was not “significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person.”

**Coulter v. Deloitte Consulting, L.L.C.**, 2003 WL 22514343 (6th Cir. Nov. 4, 2003).

**Facts:** The plaintiff was terminated the day before she was to return from an FMLA leave after numerous complaints about her performance surfaced during her leave as a result of the normal annual review process at Deloitte Consulting. In addition, the plaintiff’s temporary replacement, who had previously held her job and retired, raised a number of concerns about her performance. The plaintiff had not been previously warned about performance problems.

**Holding:** The Sixth Circuit rejected the plaintiff’s claims, holding that the fact that she was on an FMLA leave did not insulate her from the consequences of negative assessments of her performance generated as part of the normal and regular review process at Deloitte Consulting. Moreover, the plaintiff was an at-will employee who was not entitled to a warning prior to termination. Accordingly, the employer’s failure to provide the plaintiff with a prior warning did not establish that the reason for terminating her was pretextual under the FMLA.

**Cavin v. Honda of America Mfg., Inc.**, 346 F.3d 713 (6th Cir. 2003).

**Facts:** The employer had a rule that if an employee missed one day of work, he or she should contact security to report the absence but that if he or she missed more than one day, needed a leave of absence and the leave was unforeseeable, he or she should contact Administration – Leave Coordination. If the employee failed to call in for three days, he or she would be terminated. The plaintiff was injured in a motorcycle accident on June 21 and given a note from the doctor at the emergency room excusing him from returning to work until June 24. A second doctor released the employee until June 28. The employee had contacted security about his absences on June 21-25, but not Leave Coordination. Conveniently for the plaintiff, the plant shut down for a week after June 28, so the plaintiff did not attempt to return to work until July 6, at which time he finally notified Leave Coordination about his absence. He applied for FMLA leave to cover his entire absence, but a portion of his absence was not deemed FMLA leave because he had not reported his absence to Leave Coordination as required by company policy. This resulted in attendance related discipline. The plaintiff was subsequently absent for an extended period relating to the same injuries but never complied with the employer’s FMLA policy regarding medical certification and was accordingly terminated for excessive absenteeism. Although the plaintiff clearly failed to comply with medical

certification procedures during his second period of absence, the discipline he received for the first absence played a role in the decision to terminate his employment.

**Holding:** The Sixth Circuit, in a troublesome decision, declined to follow the Tenth and Seventh Circuits' decisions in *Holmes v. The Boeing Co.*, 166 F.3d 1221, 1999 WL 9760 at \*3 (10th Cir. Jan. 12 1999), and *Lewis v. Holsum of Fort Wayne, Inc.*, 278 F.3d 706 (7th Cir. 2002), which held that employers could discipline or discharge employees for failing to comply with time-off policies. According to the Sixth Circuit, "the FMLA does not permit an employer to limit his employee's FMLA rights by denying them whenever an employee fails to comply with internal procedural requirements that are more strict than those contemplated by the FMLA." The court determined that Honda's policy was more strict than the FMLA because the FMLA requires that notice be given by the employee as soon as practicable under the circumstances. Honda's policy, on the other hand, limited the notice period to 3 days. The Sixth Circuit ignored the fact that there were no extenuating circumstances making it impractical for the plaintiff to contact Honda's Leave Coordination department about his absence in accordance with company policy. According to the court, telling a security guard who was employed by a subcontractor that he was in a motorcycle accident and "just got out of the hospital" was sufficient to create a fact issue on whether the plaintiff gave adequate notice of the need for a leave, even though he told the security guard that he would return to work the next day. The Sixth Circuit acknowledged that Honda had done the smart thing in trying to delegate FMLA administration to a Leave Coordination department staffed by professionals (as opposed to security guards) who understand the statute, but held that "we are not persuaded that notice to security constitutes notice to Honda only of the event of an absence, not of a need for a leave of absence." Honda should have inquired further or should have modified its call-in procedure.

**Arban v. West Pub. Corp.**, 345 F.3d 360 (6th Cir. 2003).

**Facts:** The plaintiff, a sales representative, was facing mounting pressure about serious performance problems that were documented in various oral and written communications about the plaintiff's lackluster performance and certain misrepresentations and double billings. Perhaps in response to this mounting pressure, the plaintiff went on an FMLA leave for severe esophagitis and stress. During the next few days, the plaintiff received calls from his co-workers who, at the direction of a supervisor, were attempting to get updates about pending sales leads. While he was on leave, a decision was made to terminate the plaintiff, who resigned in lieu of termination. The plaintiff later filed suit alleging violations of the FMLA.

**Holding:** The Sixth Circuit affirmed a jury verdict in the plaintiff's favor, placing great emphasis on the fact that although there was considerable discussion about the plaintiff's performance problems and misrepresentations prior to his leave, no final decision had been made prior to the leave. The jury was therefore permitted to draw the inference that the decision was made in order to deny him his substantive right to reinstatement. The Sixth Circuit also stated that the evidence supported the plaintiff's

contention that West Publishing was retaliating against him under the FMLA because of the calls to his home seeking information about sales leads. Although West Publishing claimed that it had legitimate business reasons for making these calls, the jury was permitted to assess the credibility of this assertion. The court held that the district court did not abuse its discretion in denying an award of front pay because the plaintiff's evidence on front pay was purely speculative. Moreover, the issue of front pay did not have to be submitted to a jury because it is a matter for the court. The Sixth Circuit held that district court abused its discretion, however, in refusing to award liquidated damages. The district court had ruled that the decision to terminate was made before the FMLA leave request was made and was therefore made in good faith and delayed to a later date due to the Christmas holiday. The Sixth Circuit stated that this ruling was inconsistent with the jury's finding that the plaintiff was terminated because of his medical leave, not his misconduct, and therefore remanded the case for an award of liquidated damages.

**Gibson v. City of Louisville**, 336 F.3d 511 (6th Cir. 2003).

**Facts:** The plaintiff, who was terminated and claimed his rights under the FMLA were violated, appealed a jury verdict in favor of the City, arguing that he should have been given a mixed-motive instruction. According to the plaintiff, retaliation for exercising rights under the FMLA need only be a factor, not the factor, in a termination decision.

**Holding:** The Sixth Circuit upheld the district court's use of a jury instruction stating that plaintiff had to establish that he was terminated because he requested FMLA leave. The court held, however, that a more precise jury instruction would have asked with requesting an FMLA leave was a determining factor in terminating the plaintiff.

**Pharakhone v. Nissan North America, Inc.**, 324 F.3d 405 (6th Cir. 2003).

**Facts:** The plaintiff was out on leave due to his wife's recent childbirth and worked at his wife's restaurant during this time, despite being explicitly and repeatedly told that this was not permitted. This work violated the company's policy of prohibiting employees from engaging in "unauthorized work for personal gain while on leave."

**Holding:** The Sixth Circuit held that there was no evidence that the plaintiff was fired for taking FMLA leave, but rather because he violated company policy by working while on a leave of absence.

**Pownall v. City of Perrysburg**, 2003 WL 1870912 (6th Cir. April 8, 2003).

**Facts:** The plaintiff needed to schedule surgery after learning that her breast implants had ruptured. She informed her employer, who asked her what the surgery was for in order to determine if it was elective and if it could be postponed, as the original date was inconvenient for the workplace. The plaintiff told her supervisor that she wasn't comfortable discussing the surgery. She was asked these questions again, refused to

discuss the matter, and stated, “I guess this means you want me to quit.” The supervisor assured her that this was not the case, but the employee stated that she was quitting, filled out the required forms, and left the office. The employer later wrote her a letter asking her to confirm her intent to resign. She then responded with a letter stating that she had felt pressured to quit.

**Holding:** The Sixth Circuit rejected the plaintiff’s FMLA claim. The court held that the plaintiff had expressed an immediate intention to resign and also went so far as to fill out the forms and leave the office before the end of the workday. Thus, she had completed all the steps necessary to effect her resignation. The court rejected her constructive discharge claim, holding that her working conditions were not so intolerable as to be unendurable by a reasonable employee.

**Taylor v. Invacare Corp.**, 2003 WL 21212674 (6th Cir. May 21, 2003).

**Facts:** The application of an occurrence-based no-fault attendance policy resulted in the plaintiff’s termination. Some of the absences that led to occurrences, however, were for serious health conditions that should have qualified for FMLA leave.

**Holding:** Although the plaintiff did not expressly seek FMLA leave for some of the absences that qualified as FMLA leave, it was the responsibility of the employer to designate the absences as FMLA-qualifying and not to charge the plaintiff with occurrences for those absences under the no-fault attendance policy. The plaintiff also could not be charged with occurrences for foreseeable FMLA-qualifying absences when he did not provide the employer with prior notice. The employer had allegedly failed to post the required FMLA notice, which would have advised the employee of his obligation to notify the employer of a foreseeable absence.

**Perry v. Jaguar of Troy**, \_\_\_ F.3d \_\_\_, 9 Wage & Hour Cas.2d (BNA) 350, 2003 WL 23015473 (6th Cir. December 30, 2003).

**Facts:** The plaintiff, an auto parts counter-person, sought a leave during the Summer months of 2001 to care for his 13-year-old son who had been diagnosed with learning disabilities, attention deficit disorder (ADD) and attention deficit hyperactivity disorder (ADHD). The son’s mother could not care for the child during the non-school months of 2001 because of her work schedule. According to the plaintiff, his son needed to be constantly monitored for safety reasons and to ensure that his behavior was socially acceptable. The plaintiff claimed that he could not find affordable day care. The employer denied him FMLA leave, but did allow him to take a leave of absence. Upon the plaintiff’s attempt to return to work at the end of the Summer, the employer informed him that his position had been filled and that there was no other work available.

**Holding:** The Sixth Circuit rejected the employer’s contention that the plaintiff did not provide adequate notice of his need for FMLA leave, because the employer was aware that the plaintiff was requesting leave to care for his son and because the employer

ultimately communicated to the plaintiff that it was denying him FMLA leave. The Sixth Circuit also rejected the employer's contention that the plaintiff did not provide adequate medical certification of his need for leave. Although the requirement to provide medical certification appeared in the employee handbook, the employer had not sent the plaintiff specific written notice of his obligation to provide medical certification upon learning that he was requesting a leave that might qualify as FMLA leave. Nor did the employer ever advise the plaintiff of the consequences for not providing medical certification. Notwithstanding the foregoing, the Sixth Circuit rejected the plaintiff's FMLA claim because the son did not have a serious health condition that required the plaintiff's care. The plaintiff was unable to show that his son was incapacitated during the Summer of 2001. To the contrary, the employer established that the son "was able to attend school and engaged in the same daily activities in which most children engage: riding bikes, swimming, playing video games, watching television, and playing with neighborhood friends." According to the Sixth Circuit, "[t]he fact that a child with learning disabilities does not function at the same level as a child of the same age without learning disabilities sheds no light on whether that child can perform regular daily activities." Likewise, although the son probably required more supervision than some children, "[t]he comparative amount of supervision a child needs standing alone does not address the child's ability to engage in regular daily activities."

### **SEVENTH CIRCUIT**

**Discovery House, Inc. v. Indianapolis**, 318 F.3d 176 (7th Cir. 2003).

**Facts:** Discovery House operates substance abuse clinics and sought to open a facility in an area of Indianapolis zoned for doctor's offices and hospitals. A city employee indicated the zoning would allow the facility, but the board of zoning denied the request. The Indiana Court of Appeals overturned the ruling and the operator sued the city for damages. The operator alleged that the denial was based on the drug-addicted status of its residents, therefore violating the ADA, Rehabilitation Act ("RA"), and the 14<sup>th</sup> Amendment's equal protection clause. After the case was removed to federal court, the jury found for the operator and awarded over \$1 million in lost profits for the period between the permit denial and the state court of appeals' reversal.

**Holding:** The Seventh Circuit reversed, stating that Title II of the ADA and RA may be treated alike and neither contemplate a recovery based on lost profits. The court acknowledged that the operator has standing only because it provides services to persons covered by the Acts, but the remedies sought must be those which directly benefit the disabled. The court also reversed the judgment on the equal protection claim, stating that the operator failed to prove discriminatory intent or a lack of rational relationship between the decision and a legitimate governmental purpose.

**Rauen v. United States Tobacco Mfg.**, 319 F.3d 891 (7th Cir. 2003).

**Facts:**Over a period of two years, Rauen was diagnosed with both breast and rectal cancer. After treatment, her daily activities became complicated as her illness and surgeries necessitated frequent trips to the bathroom and caused overwhelming fatigue. She requested UST to permit her to work from a home office. UST met with her to discuss the request, where it became clear that the accommodation she sought was to conduct all of her work from home. UST did not provide a decision after the meeting and Rauen continued to work. Four months later, Rauen filed a charge of disability discrimination with the EEOC alleging, among other things, that UST violated the ADA by not granting her the home office accommodation. The district court granted UST's motion for summary judgment, basing its decision on the fact that Rauen continued to perform all of the essential aspects of her job without accommodation.

**Holding:**The Seventh Circuit affirmed the decision through a different analysis. The court cited its own precedent that home offices are rarely a reasonable accommodation, noting that most jobs require teamwork, personal interaction, and supervision that cannot be found in a home office environment. Only in "very extraordinary cases" are they reasonable. Rauen's job description requires her to monitor others' work, answer questions, and ensure a smooth manufacturing process that would be difficult to perform from home.

**Good Shepherd Manor Found. v. City of Mومence**, 323 F.3d 557 (7th Cir. 2003).

**Facts:**The City of Mومence shut off the water to a newly-constructed Good Shepherd group care facility (before residents had moved in) claiming that Good Shepherd had failed to fulfill an agreement to extend water and sewage lines to its northern boundary. The City granted the sewer and water permits based on this condition, and due to the disagreements between Good Shepherd and its neighbors regarding the costs, the lines were never extended. Good Shepherd brought suit alleging violations of the ADA, among other claims. The district court limited the ADA claim to discriminatory intent and impact, and precluded a claim based on a failure to provide reasonable accommodations. The jury found in favor of the City and Good Shepherd appealed the ruling regarding the preclusion of the accommodation claim.

**Holding:** The Seventh Circuit affirmed the judgment of the district court, noting that the duty of reasonable accommodation is confined to rules and policies that hurt handicapped people by reason of their handicap. Here, the City's failure to provide water did not hurt the Good Shepherd residents by reason of their handicap, but solely by virtue of a need for water common to all people. In a footnote to the case, the court noted that as long as a demand affects all people equally, there no ADA issue regardless of whether that demand was valid under state law.

**Bruggeman v. Blagojevich**, 324 F.3d 906 (7th Cir. 2003).

**Facts:** Parents of developmentally disabled residents brought action against state officials alleging violations of Medicaid, RA, and ADA statutes. The plaintiffs argued

that the state was not providing identical services statewide, and insisted on a right of access to facilities within a 45-minute drive of their homes. The district court dismissed the claims based on lack of standing and Eleventh Amendment immunities.

**Holding:**The Seventh Circuit affirmed the court in regards to the Medicaid claim but remanded the ADA and RA claims. The court failed to understand why the district court concluded the plaintiffs lacked standing, and noted that the district court and briefs were virtually silent on the merits of the RA and ADA claims. The issue on remand will be to determine if Illinois has a plan for placing qualified persons in less restrictive settings with a waiting list that moves at a reasonable pace.

**Dyke v. O'Neal Steel, Inc.**, 327 F.3d 628 (7th Cir. 2003).

**Facts:**Dyke, a temporary employee with only one eye sued his employer alleging violations of the ADA. Dyke was terminated from his temporary position after the human resources division learned of his monocular vision while reviewing his application for a permanent position. The company requires employees to pass vision and physical abilities tests which Dyke would not be able to pass. Temporary employees are tested after thirty days of employment, and those that cannot meet the required standards are also terminated. The district court judge determined that O'Neal regarded Dyke as having a substantially limiting impairment, but granted summary judgment for O'Neal based on his determination that Dyke failed to show he could perform the essential functions of either the temporary or permanent position. Specifically, the judge determined that Dyke was estopped from asserting his qualification as disabled because of statements Dyke made to the Social Security Administration in a Report of Continuing Disability. Dyke appealed, based only on the claim arising from his termination from the temporary position.

**Holding:**The Seventh Circuit affirmed the decision. The court agreed with the district court that a reasonable jury could infer that O'Neal regarded Dyke as having a substantially limiting impairment. The court also agreed with the judge's conclusion that Dyke cannot show he was a qualified individual, but based their conclusion on different grounds. The court noted that temporary employees who have been working for more than thirty days have to pass the vision and physical tests, and there was unchallenged expert testimony that the standards were reasonable, appropriate for the job, and necessary for the worker safety and job performance. Dyke did not dispute this testimony, nor provide evidence that he would have been able to pass the test and perform the essential functions of the position.

**Byrne v. Avon Prod., Inc.**, 328 F.3d 379 (7th Cir. 2003).

**Facts:** Byrne was discharged for sleeping on the job and sued Avon under ADA and FMLA, claiming that Avon discriminated against him based on his depression. Byrne was a model employee, but was discovered in early November 1998 asleep on the job. After this incident, Avon installed a camera to investigate further and collected additional

evidence of this behavior. Avon attempted to meet with Byrne, who mumbled several odd phrases but agreed to attend the meeting. When he did not appear at the meeting, he was fired. Relatives learned that he had barricaded himself in a room, and took him to a hospital where he was treated for depression. When Avon refused to take him back, he filed suit. The district court granted summary judgment for Avon, ruling that his activity was misconduct on the job and therefore not covered by ADA or FMLA.

**Holding:** The Seventh Circuit vacated and remanded the case. The court felt that Byrne impliedly requested accommodation in late November via his unusual behavior, and Avon should have classified his absence as FMLA leave. It noted that a person unable to give notice is excused from doing so, and that Byrne was incapable of providing notice of his illness. His changed behavior, from model employee to incoherent malingerer, may have been enough to provide notice to Avon of a medical condition. The case was remanded with the instruction that the judge consider the possibility that Byrne's last two weeks of employment should be reclassified as FMLA leave and consider what adjustments along those lines may be appropriate.

**Dryek v. Garvey**, 334 F.3d 590 (7th Cir. 2003).

**Facts:** Dryek, a former air controller, was terminated by the Federal Aviation Administration (Garvey is the Administrator). Dryek claimed that he was terminated because of his diabetes, and filed suit under the ADA, RA, and Title VII. Dryek was diagnosed with diabetes while working for the FAA, mere diagnosis of which is grounds for denying an initial hire as an air traffic controller. A controller who is diagnosed after employment may maintain medical clearance through "special consideration", which is based on a review of medical history and control of diabetes. The FAA repeatedly asked Dryek to submit medical reports that detailed this information, which he failed to submit, and contended that Dryek was terminated for failing to provide this documentation. Dryek contended that this reason was pretextual and that he was terminated based on his diabetes that he claimed was under control. He further argued that his case was bolstered by the fact that he was not given another position in the FAA that didn't require medical clearance. The district court granted summary judgment in favor of the FAA, holding that Dryek failed to establish the FAA's reason was pretextual.

**Holding:** The Seventh Circuit affirmed the decision, noting that Dryek had failed to provide all of the information requested by the FAA to evaluate his request for special consideration. In addition, Dryek did not submit materials which supported a conclusion that his diabetes was under stable control over a period of time - a requirement for a medical clearance. The court also addressed his contention regarding the FAA's failure to place him in a different position, noting that there were no positions available for an air traffic controller who could not qualify for medical clearance.

**Butler Manuf. Co. v. United Steel Workers of America**, 336 F.3d 629 (7th Cir. 2003).

**Facts:**McMahill, an employee of Butler, was terminated for excessive absenteeism. United Steel Workers contested her termination and the parties submitted the dispute to arbitration. Butler specifically invited the arbitrator to review the record in light of the FMLA to determine if any of McMahill's absences were justified under the statute, arguing that the absences didn't qualify. The arbitrator considered the absences, relying on the FMLA, and found for McMahill. Butler brought action to vacate the arbitration award, arguing that the FMLA was not incorporated into the bargaining agreement and that the arbitrator was acting outside his scope by considering it. The district court agreed and granted a motion for summary judgment in Butler's favor.

**Holding:**The Seventh Circuit reversed the decision. The court began by noting that its ability to review arbitral awards is generally limited to considering whether the arbitrator acted outside the scope of authority – the question in this case. The court reviewed the collective bargaining agreement and noted that the agreement allows for equal opportunity for employment “in accordance with the provisions of law,” which allows the arbitrator to consider external law. Principles of estoppel also prevent Butler from encouraging an arbitrator to consider external law, losing in arbitration, and then seeking relief from the unfavorable decision in federal court by arguing that the arbitrator lacked authority to consider the law in the first instance.

**Tokes v. Air-Land Transport Services, Inc.**, 343 F.3d 895 (7<sup>th</sup> Cir. 2003).

**Facts:** Tockes was a truck driver with a permanently injured right hand. He alleged, and the court accepted as true, that when he was fired his employer of one month told him that he was being fired because of his disability, that he was crippled, and that the company was at fault for having hired a handicapped person. Tockes admitted that he was not disabled within the meaning of the ADA, but he argued that his employer's comments showed that he was regarded as having a disability.

**Holding:** The court, Judge Posner writing, held that Tockes case failed because “there is no evidence that his employer harbored the erroneous belief that he was disabled *within the meaning of the act.*” The court opined that the words used by the employer are “all words with a range of meanings, and do not without more connote a belief that the individual is under the protection of the ADA.” Unless the employer mistakenly believes that the employee has an ADA qualifying disability, the employer's acting on the mistaken belief does not violate the statute.

**Phelan v. City of Chicago**, 347 F.3d 679 (7<sup>th</sup> Cir. 2003).

**Facts:** City employee was fired upon return from FMLA leave because of poor performance before the leave and because the city was better satisfied with the performance of the temporary replacement.

**Holding:** Employee's case was properly dismissed for failure to allege facts that, if taken as true, would constitute a violation of the FMLA. It is not a violation of the FMLA

to dismiss an employee for poor performance, regardless of when the employer comes to that decision, and the fact that an employee is on FMLA leave at the time that decision is made is insufficient evidence to overcome a motion to dismiss.

## **EIGHTH CIRCUIT**

**Alexander v. Northland Inn**, 321 F.3d 723 (8<sup>th</sup> Cir. 2003).

**Facts:** Alexander was a housekeeping supervisor at Northland Inn when she was in a non-work related automobile accident that caused her neck and back pain. Alexander's doctor prepared a "Report of Work Ability" that limited her ability to lift, do heavy or repetitive pushing or pulling, or make frequent position changes. Northland required its housekeeping supervisors to assist in cleaning tasks, including vacuuming. Alexander performed these duties until February 24, 1999, when her supervisor asked her to vacuum. Alexander refused and then assigned the work to another employee. Northland's benefits manager contacted Alexander's doctor to confirm Alexander was able to perform the essential functions of her job. After discussing the request with Alexander, her doctor responded by adding a restriction to her "Report of Work Ability" that said "No vacuuming." Northland then terminated Alexander and she sued Northland alleging discrimination under the ADA. The district court granted Northland's motion for summary judgment.

**Holding:** The Eighth Circuit affirmed the district court. In order for an ADA claim to survive summary judgment, the claimant must demonstrate a prima facie showing she could perform the essential functions of her job with or without reasonable accommodation. The Eighth Circuit decided vacuuming was an essential function of Alexander's job because cleanliness is an important part of maintaining Northland's "AAA four-diamond rating" and because of the limited number of employees available to vacuum. The Eighth Circuit determined Alexander could not vacuum with or without reasonable accommodation. Although Alexander argued she could in fact vacuum, the Eighth Circuit found it was reasonable for the hotel to rely on her doctor's command of "No vacuuming."

**Armstrong v. Systems Unlimited, Inc.**, 2003 WL 22077483 (8<sup>th</sup> Cir. 2003).

**Facts:** Armstrong returned to work at Systems Unlimited following maternity leave, at which time Systems demoted her claiming she had performance problems. Armstrong subsequently brought an action under Title VII, the Pregnancy Discrimination Act, the FMLA, and the Iowa Civil Rights Act, claiming gender and pregnancy discrimination, constructive discharge, and FMLA retaliation. The district court granted Systems Unlimited's motion for summary judgment motion on all of Armstrong's claims.

**Holding:** The Eighth Circuit affirmed the district court. With regard to Armstrong's FMLA retaliation claim, the Eighth Circuit concluded she was unable to rebut Systems' evidence she was having performance problems before she went on leave, and that her

superiors discovered additional performance problems while she was on leave. Here, the Eighth Circuit determined the evidence demonstrated that Systems Unlimited had been concerned about performance problems before Armstrong engaged in protected activity, which evidence undercut any significance of temporal proximity.

**Barket v. Nextira One**, 2003 WL 2182091 (8<sup>th</sup> Cir. 2003).

**Facts:** Barket worked as a technician for Nextira. His job duties included installing and maintaining telephone and data communications equipment. His job further required that he be able to lift 50 to 75 pounds, do commercial driving, climb steps, bend and stoop, and climb a ladder. In 1997, Barket sustained severe injuries to his right ankle and foot when he was involved in an on-the-job auto accident. Barket returned to his job later that year, with physical restrictions, including a limitation on the number of hours he could work in one day, a lifting restriction, a restriction against commercial driving, and a climbing restriction. Because those restrictions precluded Barket from performing his job duties, Nextira created a light duty position for Barket involving clerical work.

In early 1999, Barket's supervisor reported to his supervisors Barket had exhausted all light duty work in his department and he was unable to procure additional light duty work from other departments. On February 9, 1999, Nextira decided to terminate Barket. On February 15, and unbeknownst to Nextira, Barket's physician amended Barket's work restriction allowing him to work eight hours per day and allowing commercial driving. On February 22, Barket received notice he had been terminated. Barket subsequently brought a lawsuit against Nextira alleging Nextira terminated him in violation of the ADEA and the ADA. The district court granted Nextira's motion for summary judgment, concluding there was no direct evidence of age or disability discrimination and that Barket could not establish a prima facie case under the ADEA and/or ADA.

**Holding:** The Eighth Circuit affirmed the district court. With regard to his ADA claim, the Eighth Circuit confirmed Barket was not able to demonstrate he was qualified to perform the essential functions of his job, with or without reasonable accommodation. Because Barket conceded during his deposition that at the time of his termination he was not performing the essential functions of his job, and because he did not argue that Nextira had received notice of the amended work restrictions prior to his termination, the Eighth Circuit determined that his ADA claim failed as a matter of law.

**Brunke v. Goodyear Tire and Rubber Co.**, 344 F.3d 819 (8<sup>th</sup> Cir. 2003).

**Facts:** After beginning work in Goodyear's Lincoln, Nebraska plant, Brunke was diagnosed with epilepsy in June 1997 and had a seizure at work in February 1998. Throughout 1997 and 1998, Brunke had arguments with co-workers that caused Goodyear to remind both employees of its zero tolerance for threatening and violent behavior. Brunke was suspended for four days because of a complication with a

supervisor in October of 1998. In the following two years, Brunke argued with co-workers about work assignments, had another heated confrontation that caused Goodyear to issue written warnings to Brunke and a co-worker, and caused Goodyear to suspend Brunke for ten days after he wrote a threatening note and affixed it to a co-worker's locker with a knife. After the last incident, Brunke was warned that future incidents would result in discharge. After another confrontation with a co-worker in November 2000, an investigation by Goodyear's human resources department, and the recommendation by two staff physicians that there was no reason why Brunke's epilepsy would cause his misbehavior, Brunke was terminated.

Brunke subsequently filed suit against Goodyear claiming Goodyear discharged him from employment on the basis of a disability, namely his epilepsy, and a perceived disability, namely his substantially limiting emotional instability. The district court concluded Brunke failed to establish a prima facie case of disability discrimination and failed to demonstrate that Goodyear's proffered nondiscriminatory reason for terminating him was a pretext for unlawful discrimination.

**Holding:** The Eighth Circuit affirmed the district court. The Eighth Circuit held the record was devoid of any evidence Brunke's epilepsy substantially limited him in one or more of his major life activities at the time he was discharged. There was no evidence connecting his workplace behavior with his epilepsy and no evidence that epilepsy substantially limited his major life activities outside the workplace.

Brunke's contention he had a "substantially limiting emotional instability" was abandoned before the Eighth Circuit. However, the Eighth Circuit went on to note the ADA's definition of an impairment does not include common personality traits such as poor judgment or a quick temper. Therefore, where there is no medical evidence of a mental or psychological disorder, an employee cannot establish a prima facie case of an ADA "regarded as" disability simply because he was discharged for a failure to get along with co-workers.

**Burchett v. Target Corp.**, 340 F.3d 510 (8<sup>th</sup> Cir. 2003).

**Facts:** Burchett developed depression and her performance suffered. Under her physician's orders, Burchett was granted in turn, a medical leave of absence, and a part-time schedule with reduced responsibilities. The performance of her duties continued to decline and Burchett asked for transfer to a less stressful position. Target's internal policy prohibited transfers when poor performance problems existed. When informed of this, Burchett abruptly left and never came back. Target placed her on long-term disability.

Burchett sued Target, alleging her disability was not accommodated with the requested transfer. The district court granted the employer's motion for summary judgment on Burchett's ADA claims holding that Burchett failed to establish a genuine issue of material fact as to whether her employer failed to accommodate her by denying her a

transfer. Burchett failed to show that with the accommodations employer had provided, she was unable to perform the duties of her position because of her alleged disability.

**Holding:** The Eighth Circuit affirmed the district court. Burchett's ADA claim was rejected by the Eighth Circuit largely because the employer engaged in an "interactive process" to find "reasonable accommodations." The employer properly engaged in "interactive process" with Burchett by identifying potential accommodations and granting her shorter hours and less stressful duties. This fulfilled the employer's obligation. Even if a transfer was a reasonable accommodation, Target was not obligated to grant it. Also, the neutrality of the poor performance/no-transfer policy was found to be non-discriminatory.

**Fenney v. Dakota, Minnesota & Eastern Railroad Co.**, 327 F.3d 707 (8<sup>th</sup> Cir. 2003).

**Facts:** Fenney had only limited use of his right arm and hand. In 1990, Fenney began working as an "on-call" locomotive engineer for Dakota. This position required Fenney to be ready to report to work at all times. Dakota's union contract required the company to notify on-call engineers at least one and one-half hours before they were to arrive at work. However, Fenney was given advance notification of two and one-half to three hours until the railroad hired new management that instituted a uniform two-hour advance calling time. Fenney's request for additional time was denied several times. Finally, Fenney, fearful of losing his job, demoted himself to the position of weekend conductor. He then filed a suit against Dakota for failure to accommodate under the ADA and the Minnesota Human Rights Act. The district court granted Dakota's motion for summary judgment.

**Holding:** The Eighth Circuit reversed the district court. In analyzing whether Fenney was substantially limited in a "major life activity" the Eighth Circuit held Fenney's physical impairment limited his "major life activity" of "caring for himself." Next, the Eighth Circuit addressed the question of whether this limitation was "substantial." The Eighth Circuit agreed with a majority of the other circuits that have addressed the question that this definition applies to all "major life activities," not just the "major life activity of performing manual tasks. Viewing the testimony in the light most favorable to Fenney, the Eighth Circuit found he could overcome summary judgment on the issue of whether he has a disability.

The Eighth Circuit also found that Fenney had overcome his initial burden of demonstrating he suffered from an adverse employment action. Generally, when an employee voluntarily resigns or is demoted he cannot claim an adverse employment action. However, most courts recognize the idea of "constructive discharge" where an employee has no choice but to quit because of an employer's actions. The Eighth Circuit extended this approach to the idea of a "constructive demotion" where an employee has no choice but to demote himself.

**Gilmore v. AT&T**, 319 F.3d 1042 (8<sup>th</sup> Cir. 2003).

**Facts:** Gilmore worked as a personal service representative at AT&T's call center. AT&T's code of conduct, with which Gilmore admittedly was familiar, stated that a customer service representative was expected to be on the phone while clocked in to work, unless that customer service representative was on a limited or scheduled break. A customer service representative who was off-line without management authorization or who was not on a scheduled break was considered to be misusing company time or in violation of the code of conduct. Violations of the code of conduct were considered grounds for discipline, including termination.

Gilmore's termination occurred on June 3, 1999, after a series of attendance violations. After Gilmore's first absence, Gilmore received a letter of warning for that absence that was later rescinded due to a change in the AT&T attendance policy. Gilmore was issued a letter of warning for a second absence, and a final warning for her third absence. In the final warning, Gilmore was notified that any further absences would result in her termination.

On June 2, 1999, Gilmore spent a portion of the morning off the phone complaining of severe physical pain. When notified of her illness, her supervisor met with Gilmore to discuss the nature of her problem. At that time, Gilmore noted she was suffering from stomach pain, but expressed concern if she left the office that her absence would result in another attendance violation and her termination. Her supervisor noted she either needed to leave work or be answering calls. Gilmore declined to leave work.

Later that day, Gilmore's supervisor monitored Gilmore's calls and observed Gilmore spent much of the afternoon placing customers on hold for extended periods of time or telling customers about her physical problem. Gilmore was off-line for approximately 128 minutes that day. Gilmore returned to work the following day and admitted she had been off-line, but said that she remained clocked in to avoid another attendance violation and to avoid risk of termination. After discussing the matter, Gilmore's supervisor informed her she was terminated effective immediately because of her misuse of company time.

After filing a formal grievance for worker's compensation with her union, AT&T representatives and union officials came to an agreement under which AT&T would recharacterize Gilmore's termination as a suspension without pay and Gilmore would return to work as soon as she was cleared by her doctor after receiving treatment for injuries suffered as a result of falling down a set of stairs as she left work on her last day. However, even after being cleared to return to work, Gilmore failed to do so. As a result, AT&T withdrew its offer to reinstate Gilmore. Gilmore subsequently filed suit against AT&T alleging, among other things, her termination was based upon her race and disability, in violation of Title VII and the ADA. The district court granted AT&T's motion for summary judgment.

**Holding:** The Eighth Circuit affirmed the district court. With regard to her disability discrimination claim, Gilmore alleged that AT&T's withdrawal of her reinstatement

violated the ADA. However, Gilmore was not able to demonstrate that she was a qualified individual under the ADA. Gilmore had filed for and obtained disability payments alleging she was unable to work due to her disability. Gilmore had neither claimed her statements on her disability application were inaccurate, nor had she provided any evidence to reconcile her asserted inability to perform the essential functions of her job with her claim under the ADA. On that basis, the Eighth Circuit held the district court properly concluded Gilmore was not a qualified individual under the ADA and thus that summary judgment on Gilmore's disability discrimination claim was appropriate.

In addition, the Eighth Circuit determined the district court had properly concluded Gilmore failed to prove AT&T's nondiscriminatory reason for withdrawing her reinstatement was a pretext for disability discrimination. Gilmore had admittedly failed to return to work after she was cleared to do so by her doctor.

**Harris v. P.A.M. Transport, Inc.**, 2003 WL 21505837 (8<sup>th</sup> Cir. 2003).

**Facts:** P.A.M., a "contract and common motor carrier business," requires all prospective drivers to complete a training program, obtain a commercial driver's license and satisfy the United States Department of Transportation (DOT) medical standards. Harris, a prospective driver, received a medical examination and the physician indicated Harris satisfied the DOT medical regulations. The physician sent Harris' medical report to P.A.M. and it showed he was taking four prescription medications and had recently undergone a kidney transplant. P.A.M.'s doctor therefore requested additional medical records and concluded Harris did not qualify for employment as a commercial driver under DOT regulations. Harris sued P.A.M., alleging the company had violated the ADA. The district court dismissed the case claiming it lacked subject matter jurisdiction because Harris had failed to exhaust the administrative remedies available under DOT regulations.

**Holding:** The Eighth Circuit affirmed the district court, agreeing Harris had failed to exhaust his administrative remedies. Furthermore, the Eighth Circuit found that dismissal was particularly appropriate because Harris could not prove that he was qualified to perform the job function of a commercial truck driver, an essential element of an ADA claim. The court pointed out that the ADA was limited by the application of federal safety rules such as the DOT regulations. Harris never obtained the certificate of physical qualification required by the DOT regulations. Therefore, he was not qualified to be a commercial driver and did not fall under the protections of the ADA.

**Heisler v. Metropolitan Council**, 339 F.3d 622 (8<sup>th</sup> Cir. 2003).

**Facts:** Heisler suffered from depression for over 20 years. Her condition became much more problematic in February 1998 when she was also diagnosed with dysomnia, a sleep disorder. In January 1999 she was hospitalized for six days after suicidal ideations occurred. Her employer, Metropolitan, permitted her to take FMLA

leave. When she returned from leave, she was restricted to not working at night. Her doctor recommended part-time shifts from 4 p.m. to 8 p.m.

Part of Heisler's job involved supervising "vault pullers," who removed fare boxes from city buses in the evening. Her supervisor agreed to permit her to work the four-hour shift from March 22 until June 1999. Heisler requested a day shift job between 6 a.m. and 5 p.m., but Metropolitan contended that an essential function of a Fare Collection Supervisor was to supervise the vault puller operation which only took place in the evening and nighttime hours.

In mid-June Heisler took a one-week leave under the FMLA. Her physician clearly stated that when she returned to work, she could only work day hours because night work aggravated her depression and dyssomnia. Metropolitan continued to take the stance that Heisler was disqualified from the position of Fare Collection Supervisor if she could not work the evening hours. It therefore discharged Heisler when she would not return to evening hours. Heisler brought suit under the ADA, contending that she was substantially disabled in several major life activities and that her employer failed to make reasonable accommodation. The district court granted Metropolitan's motion for summary judgment.

**Holding:** The Eighth Circuit affirmed the district court. Heisler did not argue her disability prevented her from working, but the Eighth Circuit noted her work activities were relevant to assess the extent that her depression limits the ability to perform other major life activities. The Eighth Circuit observed an employee is not substantially limited in the major life activity of working when he or she is limited to a 40-hour work week. What Heisler did focus on was her difficulty sleeping, interacting with people, and concentrating. However, the Eighth Circuit did not believe there was sufficient evidence in the record to show a "substantial" impairment in any of these activities.

With regard to her dyssomnia, the Eighth Circuit determined Heisler failed to mention sleeping as one of the effects of her depression in her deposition. "The record does not reveal the severity of her sleep apnea or whether her sleeping has improved with medication. Heisler has simply failed to establish that her depression, or any other impairment, significantly restricted her ability to sleep as compared to the general population."

The Eighth Circuit also found Heisler did not produce enough evidence to show she was substantially limited in her ability to interact with others. Her testimony that she could still do her job and supervise other employees greatly undercut this claim. She admitted that she had a support network, among them some friends. The same was true of her claim that she was substantially limited in concentration since her ability to collect money and supervise others collecting money seemed to belie any limitation in concentration.

**Lerohl v. Friends of Minnesota Sinfonia**, 322 F.3d 486 (8<sup>th</sup> Cir. 2003).

**Facts:** Lerohl and Hanson were regular members of the Minnesota Sinfonia. However, the director of the Sinfonia stopped offering work to Lerohl and Hanson in 1999. Hanson alleged this was a violation of the ADA because it occurred after she was absent for several months to recover from an injury sustained during a Sinfonia rehearsal. Lerohl claimed it was a violation of Title VII because it was in retaliation for her complaint about sexual harassment against the director. The district court dismissed both complaints, stating that the ADA and Title VII did not apply because Lerohl and Hanson were independent contractors, not employees.

**Holding:** The Eighth Circuit affirmed the district court. Lerohl and Hanson were independent contractors because they are “highly skilled professionals who own their own instruments and need no on-the-job training other than rehearsals,” they “retained control over the extent to which they committed their available professional time to the Sinfonia,” the Sinfonia did not withhold income or FICA taxes, and the Sinfonia provided no other employee benefits. The court concluded that because Lerohl and Hanson were not employees, the ADA and Title VII did not apply to them.

**Liljedahl v. Ryder Student Transportation Services, Inc.**, 341 F.3d 836 (8<sup>th</sup> Cir. 2003).

**Facts:** Liljedahl worked for Ryder and its predecessor for twenty-three years, the last eleven as a manager in the Oakdale, Minnesota terminal. In August 1996 Liljedahl’s primary care physician diagnosed Liljedahl with emphysema. In December 1996, Liljedahl was diagnosed with lung cancer. Later that month Liljedahl’s surgeon removed Liljedahl’s lymph nodes and half of her left lung during lung resection surgery. The cancer surgery was curative. Liljedahl was on paid medical leave from December 1996 to March 1997.

On February 19, 1997, Liljedahl wrote her supervisor a handwritten note saying, “I’m due back 3/3 ‘half time’ – which in my mind means ‘as tolerated.’” She included with her letter a note dated February 17, 1997 from her doctor, which read in full, “Ms. Liljedahl has been recuperating from surgery. I have recommended she return to work half-time on March 3.”

From early April to June 1997, Ryder assigned another employee to assist Liljedahl in the Oakdale terminal. Liljedahl’s supervisor never asked Liljedahl about her need for an accommodation, never sought clarification of the February 17, 1997, doctor’s note, and never sought additional medical documentation. On May 16, 1997, Liljedahl wrote a ten paragraph memorandum to her supervisor responding to her supervisor’s memoranda on her work issues. In a paragraph discussing her hectic dispatch schedule, Liljedahl wrote the following statement: “I work between 9 and 12 hours a day now without coming in any earlier. There is enough experience between Greg and Bart to do the job. And, if I remember correctly, I still have not gotten full-time plus overtime clearance from my doctor.”

The Oakdale terminal's two largest customers made significant complaints about the Oakdale terminal for the 1996-1997 school year. Based on the Oakdale terminal's unsatisfactory performance, St. Paul assessed the largest non-performance penalty in its history against any terminal. In a July 17, 1997, memo to Liljedahl, her supervisor wrote: "We are out of time...virtually all of your customers have expressed a serious service concern. We must do something about it now!"

On August 5, 1997, due to customer complaints and poor performance, Ryder placed Liljedahl on a ninety-day probation period to review her performance. Ryder also sought a response by August 28, 1997. On August 27, 1997, Liljedahl responded by memorandum, which included the following statement: "You also say my physical status has nothing to do with how much I was able to do? I am still healing and am on pain medication. A person can run out of time as a Minnesota manager short of drivers, dispatching 3 to 5 hours a day and filling in where ever [sic] necessary to keep staff's work done." Based on Liljedahl's "defiant response," which indicated "she was not interested in working on any of the problems that [her supervisor] had outlined," Ryder discharged Liljedahl on September 3, 1997. Liljedahl subsequently sued Ryder for disability discrimination, in violation of the Minnesota Human Rights Act (MHRA).

Liljedahl claimed her impairment "materially limited one or more of her major life activities, including, but not limited to, employment and recreational activities." Liljedahl later moved to file a Second Amended Complaint that included new factual allegations: "Plaintiff had minor breathing problems and emphysema prior to being diagnosed with lung cancer in 1996. In December 1996, she had surgery for the cancer, which resulted in the surgical removal of nearly half of one of her lungs and an exacerbation of her symptoms resulting from the emphysema." Liljedahl also claimed she had an impairment that materially limited the major life activities of "walking, sleeping and breathing."

Liljedahl moved for partial summary judgment on two issues: (1) She is a qualified individual with a disability; and (2) Ryder had a duty to provide a reasonable accommodation. Ryder moved for summary judgment on all claims. Ryder too filed for summary judgment. The district court granted Ryder's motion for summary judgment and denied Liljedahl's motion for partial summary judgment.

Addressing Liljedahl's disability claims under the MHRA, the district court concluded Liljedahl was not disabled because of her cancer. The district court also determined that, even if Liljedahl had a respiratory disability, Liljedahl never gave Ryder notice of the respiratory disability or requested an accommodation for it.

**Holding:** The Eighth Circuit affirmed the district court. The Eighth Circuit determined Liljedahl's lung cancer did not qualify as a "disability" under the MHRA, Liljedahl failed to establish that Ryder had knowledge of her emphysema and breathing problems and that such problems were exacerbated by her lung cancer and surgery, and Liljedahl failed to show that she required any accommodations as a result of emphysema and

breathing problems. As such, the Eighth Circuit held that Liljedahl's MHRA claim failed as a matter of law.

**Longen v. Waterous Co.**, 2003 WL 22382951 (8<sup>th</sup> Cir. 2003).

**Facts:** Longen was an employee with Waterous Company from July 23, 1974, until he was terminated on September 7, 2000. During that time he had recurring substance abuse battles, entering chemical dependency treatment five times while employed by Waterous.

Waterous learned of Longen's problems with chemical substances in February 1994. On February 17, 1994, Longen and Waterous entered into an agreement in which the parties agreed that if Longen successfully completed a treatment program, then Waterous would allow Longen to return to work without any discipline. However, in May 1995, Longen relapsed. The parties then entered into a similar, but more structured, agreement permitting Longen to return to work if he successfully completed another in-patient treatment program as well as an extensive aftercare program.

Less than six months after exiting the in-patient treatment program, Longen again relapsed and entered another treatment program. Waterous and Longen entered into a third agreement, which was deemed by the parties as a last chance agreement ("LCA"). It again permitted Longen to return to work. However, it required him to, among other things, complete the two-and-a-half-month treatment program and to "abstain from using any mood altering chemicals, including alcohol." The parties agreed if Longen violated any of the terms of the LCA, then he would "be subject to immediate termination."

Despite this, and in June 1996 his treatment Waterous learned Longen was using cocaine. On June 25, 1996, Waterous suspended Longen for five work days and notified him of its intent to dismiss him based upon the last chance provision of the January agreement. On July 2, 1996, however, Longen's union and Waterous negotiated still another LCA. Under the terms of this agreement Longen was permitted to return to work after the completion of his suspension. The terms of that agreement stated: "Future use of any mood altering chemicals, including alcohol or violation of working rules generally related to chemical dependency will result in immediate termination of employment from Waterous Company."

Four years later while absent from work because of a workers' compensation injury, Longen was arrested for driving while intoxicated ("DWI"). In June 2000 he pleaded guilty to the charge. Four months after the arrest Waterous learned of the DWI. Pursuant to the terms of the LCA, Waterous terminated Longen's employment on September 7, 2000. Longen filed suit alleging wrongful termination under the ADA. The district court granted Waterous' motion for summary judgment.

**Holding:** The Eighth Circuit affirmed the district court. Longen argued before the district court that the LCA Longen agreed to and signed is not a legitimate reason for

terminating Longen because it violated the ADA. The Eighth Circuit determined that all return-to-work agreements, by their nature, impose employment conditions different from those of other employees. Courts have consistently found no disability discrimination in discharges pursuant to such agreements. In addition, the terms to which Longen agreed were supported by valuable consideration, i.e., that he would not be terminated. Longen did not allege he was coerced or was made to sign the LCA under duress. The Eighth Circuit therefore upheld the binding nature of such agreements.

Longen also argued the LCA violated the ADA because it subjected him to termination for any “future use of any mood altering chemicals,” regardless of whether the use of such chemicals was at his workplace. To support his argument, Longen seized upon the ADA’s language, stating that an employer “may require that employees shall not be under the influence of alcohol...at the workplace.” However, the Eighth Circuit noted § 12114(c) refers to the types of permissible restrictions a company may impose upon all employees *at the workplace*--regardless of whether they are alcoholics or not. However, under the ADA there are no restrictions on what type of further constraints a party may place upon himself.

**Mitchell v. Iowa Protection & Advocacy Services, Inc.**, 325 F.3d 1011 (8<sup>th</sup> Cir. 2003).

**Facts:** Iowa Protection & Advocacy Services (Iowa P & A) is a nonprofit corporation that provides advocacy services for individuals with developmental and mental health disabilities. Mitchell was hired by Iowa P & A to coordinate a grant program. As part of her duties she was required to review applications for participation in a program designed to teach individuals with developmental disabilities to be effective advocates for their rights. Mitchell’s supervisor advised her not to consider several applications she received from individuals who had either been charged with sexual offenses or had engaged in inappropriate sexual behavior. However, Mitchell told her supervisor that she would not exclude these applicants because she thought it would be a violation of anti-discrimination laws. Five days later, Mitchell was fired from her position. Mitchell sued Iowa P & A under the ADA, which prohibits retaliation against an individual because that individual opposed an act or practice made unlawful by the ADA. The district court granted Iowa P & A’s motion for summary judgment.

**Holding:** The Eighth Circuit affirmed the district court. In order to demonstrate a prima facie case of retaliation under the ADA Mitchell was “required to show that she engaged in protected conduct, that she suffered an adverse employment action, and that the adverse action was causally linked to the protected conduct.” Iowa P & A presented substantial evidence Mitchell’s elimination was due to budgetary reasons and was not retaliatory. The Eighth Circuit held the “temporal proximity” between Mitchell’s discussion with her supervisor and her elimination was not enough to demonstrate the adverse action was causally linked to the protected conduct. Therefore, Mitchell could not demonstrate a prima facie case of retaliation under the ADA and summary judgment was appropriate.

**Ollie v. Titan Tire Co.**, 336 F.3d 680 (8<sup>th</sup> Cir. 2003).

**Facts:** Ollie applied for a job at Titan Tire. On his application, Ollie identified himself as a disabled veteran. Titan Tire offered him a job contingent upon a physical examination and drug screen. The doctor who performed the examination for Titan Tire wrote that Ollie “*was medically able to perform the essential functions of his job with certain accommodations.*” The doctor also wrote that “patient has asthma, may have difficulty in areas [with] dust or fumes.” One of Titan Tires’ managers then interpreted the doctor’s statement as preventing *any* work around dust or fumes, writing on the application “asthma, no working where dust or fumes.” The manager concluded that because there was no place in Titan Tire’s plant that did not have dust or fumes, there was no job available for Ollie and did not hire him. Ollie sued Titan Tire under the ADA, alleging that the company regarded him as being disabled. A jury found in Ollie’s favor.

**Holding:** The Eighth Circuit upheld the jury’s verdict. The court found Titan Tire did not rely on a doctor’s restrictions (the doctor simply said the applicant *may* have difficulty with dust and fumes), but rather on its own interpretation of the doctor’s advice and its opinion that Ollie could not perform the essential functions of any available job. Thus, although the employer’s interpretation of the applicant’s report was most likely an attempt to protect itself and Ollie from repeated health problems and absences, the employer was still liable for damages under the ADA.

**Philip v. Ford Motor Co.**, 328 F.3d 1020 (8<sup>th</sup> Cir. 2003).

**Facts:** During his ten-year employment at a Ford assembly plant, Philip began experiencing back pain and hand discomfort. Ford placed Philip in various positions to accommodate his work restrictions, until he was finally placed in a position in which he test-drove cars. In 1998, Philip was removed from this position and placed on “no work available” status. Philip then sued Ford, claiming violations of the ADA and Minnesota Human Rights Act. The district court granted Ford’s motion for summary judgment.

**Holding:** The Eighth Circuit affirmed the district court. The Eighth Circuit focused its analysis of whether Philip was “disabled” within the meaning of the ADA. Philip claimed he was substantially limited in the major life activities of gripping, reaching, lifting, standing, sitting and walking. The Eighth Circuit emphasized that this is a general inquiry that considers “most people’s daily lives,” not Philip’s individual life. Although Philip cannot operate a vibrating air tool, he was still able to mow his grass, operate a weed whacker, wash his car by hand, dress, groom, and feed himself. Therefore, the Eighth Circuit held Philip was not disabled within the meaning of the ADA.

**Reed v. Home Depot USA, Inc.**, 2003 WL 2155896 (8<sup>th</sup> Cir. 2003).

**Facts:** Reed was hired in April 1997 as a sales associate by Home Depot. In July 1999, Reed was seen for back and neck pain arising from a non-work-related slip and fall incident. Pursuant to doctor’s orders, Reed did not work from July 6 to August 17 and thereafter was to work with light restrictions for four weeks. Reed asked the store

manager to be transferred to the phone center. The manager told Reed he had to remain in his department but could have extra breaks, should abide by his restrictions, and should seek assistance from other associates. In July 2000, Reed notified Home Depot staff that he needed to be off work due to back pain. Reed then had back surgery. Reed's last day of active employment was July 20, 2000, and he was terminated (some ten months later) in May 2001 for "abandonment of job."

The district court granted summary judgment for Home Depot. As to his disability claim, the district court concluded Reed failed to show he had a substantially limiting physical or mental impairment. Reed also failed to demonstrate an adverse employment decision because he was allowed to remain in his position despite his medical restrictions until he left for medical leave, from which he did not return.

**Holding:** The Eighth Circuit affirmed the district court. The Eighth Circuit concluded that with regard to Reed's disability discrimination claim, summary judgment for Home Depot was proper because Reed failed to show his back and neck problems qualified as a disability under the ADA. Reed could not demonstrate that he was substantially limited in performing manual tasks, and could not demonstrate that he had an impairment that prevented or severely restricted him from doing activities that were of central importance to most people's daily lives. Reed also could not demonstrate his impairment was permanent or long term.

**Russell v. TG Missouri Corp.**, 340 F.3d 735 (8<sup>th</sup> Cir. 2003).

**Facts:** Russell was employed by TG Missouri on a full-time basis from January 3, 1996, until her termination in October of 1999. At the time of her termination, she worked as an inspector, where her duties included inspecting parts, packaging, assembling, and documenting defects.

Russell has been diagnosed with bipolar disorder. On February 5, 1999, Russell took a thirty-day leave of absence under the FMLA due to stress unrelated to her job. On March 5, 1999, she returned to work without limitations. In August 1999, Russell was working twelve-hour shifts. At her request her physician sent a letter to her manager, requesting that her shifts be limited to eight hours per day. TG Missouri complied with Dr. Moran's request and adjusted her hours accordingly.

On September 5, 1999, Russell's supervisor telephoned her physician to find out whether Russell was only limited to eight hours per day or whether she was also limited to forty hours per week. The supervisor was told by someone in Russell's physician's office--not Russell's physician--that the restriction referred only to the number of hours Russell could work per day, not per week. Although her supervisor informed Russell of this conversation, she did not follow up to have him request an additional forty-hour per week limitation.

On Friday, October 22, 1999, Russell's supervisor told Russell's immediate supervisor, Carla Robertson, that the workers on Line 3 would have to report to work the next day

to clean. When Robertson informed Russell that she would have to work the next day, Russell became visibly upset. Russell alleges that she began experiencing an anxiety attack. Russell believed that she was the only one being required to work that Saturday and she felt that she was being punished for requesting a workplace accommodation. Other employees from Line 2 and Line 3 were required to work that Saturday.

At approximately 11:00 a.m. on Friday, October 22, Russell told Robertson that she needed to leave. Robertson replied it would be considered an unscheduled absence if she did. Russell indicated that she was going to leave anyway and, shortly thereafter, left without permission. She did not state that it was medically necessary for her to leave or that she was having an anxiety attack. The next day, Saturday, October 23, Russell did not show up for work. When Russell showed up for work on Monday, October 25, she was informed that she had been terminated for leaving work early on Friday without permission and for refusing to work as scheduled on Saturday--actions considered to be job abandonment and insubordination.

Russell filed suit, alleging disability discrimination in violation of the ADA. The district court concluded that there was no genuine issue of material fact and that TG Missouri was entitled to judgment as a matter of law. The district court assumed, without deciding, that Russell's bipolar disorder was a disability within the meaning of the ADA. However, the district court concluded Russell could not show her termination was caused by her disability. The district court reasoned there was no genuine issue of fact as to whether TG Missouri's non-discriminatory reasons for discharging Russell (i.e., job abandonment and insubordination) were pretextual, whether similarly-situated employee had been treated more favorably, or whether she had ever requested an accommodation limiting her weekly work hours.

**Holding:** The Eighth Circuit affirmed the district court. The Eighth Circuit held no genuine issues existed as to whether TG Missouri failed to act in good faith to reasonably accommodate Russell's disability. In addition, TG Missouri's stated reasons for Russell's discharge--job abandonment and insubordination--were not pretext for discrimination based on her disability.

**Sanders v. May Department Stores Co.**, 315 F.3d 940 (8<sup>th</sup> Cir. 2003).

**Facts:** Sanders, a thirteen-year employee of May Department Stores, suffered from gender dysphoria and wanted to "undergo gender reassignment surgery." He requested a leave of absence under May's personal-leave policy that allows an employee to receive up to one week of leave for each year of service. After this leave of absence Sanders wanted to submit his resignation so he could begin a new life in another state. At that time, a human resources representative at May informed Sanders he might qualify for FMLA leave. However, Sanders rejected this possibility because the FMLA required him to provide medical certification of the need for his leave and he wanted to keep the surgery confidential. Sanders underwent the surgery and then, after personal plans changed, went back to work at May in a different position. Within three

months May fired Sanders for poor performance. Sanders then brought suit against May, alleging it violated the FMLA. The jury entered a verdict in favor of May on all counts.

**Holding:** The Eighth Circuit affirmed the jury's verdict. The Eighth Circuit held Sanders had failed to request FMLA leave, a requirement to invoking the protections of FMLA, because he had expressly rejected FMLA leave. The Eighth Circuit also decided that Sanders had been given sufficient written notice under the FMLA because May's human resources office had posted information about FMLA and Sanders had received a memorandum describing FMLA protections. Sanders' decision to take May's personal leave and not FMLA leave was voluntary. The Eighth Circuit also refused to overturn the jury's determination Sanders was fired for performance reasons, and not in retaliation for her complaints about FMLA violations, because Sanders did not offer sufficient evidence of retaliation.

**Shaver v. Independent Stave Co.**, 2003 WL 22829837 (8<sup>th</sup> Cir. 2003).

**Facts:** Shaver had suffered from nocturnal epilepsy since he was a teenager, and subsequently underwent an operation where part of his brain was removed and replaced by a metal plate. After this operation, he was able to get a job working at the Independent's timber mill but was later fired for what Independent claimed to be insubordination. Shaver subsequently sued under the ADA and the Missouri Human Rights Act (MHRA), alleging a claims of hostile work environment based upon his alleged disability and retaliation. Shaver alleged he had been harassed by his co-workers because of his epilepsy and cranial operation. Specifically, Shaver alleged his co-workers had called him names, such as "platehead", and made a number of other derogatory remarks related to his condition. The district court granted Independent's motion for summary judgment on Shaver's ADA and MHRA claims.

**Holding:** The Eighth Circuit reversed the portion of the district court's summary judgment order denying a cause of action based on a hostile work environment claim under the ADA. The Eighth Circuit held it would follow decisions from the Fourth and Fifth Circuits, holding that hostile work environment claims are actionable under the ADA. In so doing, the Eighth Circuit examined what it felt to be the salient part of the ADA, prohibiting discrimination that affects the terms, conditions, and privileges of employment. The Eighth Circuit was persuaded by the fact that this language was borrowed directly from Title VII and had been interpreted consistently since 1971 as allowing hostile work environment claims under that Act. Given that the ADA was passed in 1991, the court felt that Congress intended this language to include all of the prohibitions that it had under Title VII.

The Eighth Circuit adopted the framework applied in Title VII cases to be used in ADA claims. First, the plaintiff must be a member of the protected class. Second, he must demonstrate he was subject to unwelcome harassment. Third, the harassment must have occurred because of his membership in the protected class. And finally, the

harassment must have been severe enough to affect the terms, conditions, and privileges of employment. Furthermore, the Eighth Circuit again borrowed from Title VII cases in holding that to satisfy the fourth prong of the test, the plaintiff must show that the harassment was both subjectively and objectively hostile.

Applying that framework, the Eighth Circuit held that dismissal of Shaver's hostile work environment claim was proper in that the harassment Shaver underwent was not objectively hostile as a matter of law. The Eighth Circuit also dealt with other aspects of Shaver's claims, but not on novel ADA issues or grounds.

**Simonson v. Trinity Regional Health System**, 2003 WL 21658618 (8<sup>th</sup> Cir. 2003).

**Facts:** Simonson was employed as a registered nurse at Trinity Regional Health System from 1972 until 1999. During that time she suffered several work-related injuries that required accommodations by Trinity. In January of 1999, Simonson was moved to a temporary position working on the computer system. However, in September of 1999, Trinity eliminated the position and terminated Simonson. Simonson sued Trinity for discrimination under the ADA, alleging that Trinity "regarded" her as disabled. The district court granted Trinity's motion for summary judgment.

**Holding:** The Eighth Circuit affirmed the district court. When claiming an employer "regarded" an employee as disabled, the employee must show the employer entertained misconceptions about the employee, either that the employee had an impairment that she did not have, or that the employee's impairment was more "substantially limiting" than it really was. Simonson did not present any evidence that Trinity perceived her as having a substantially limiting impairment. The mere fact Trinity was aware of Simonson's past medical problems did not mean that it regarded her as disabled.

**Schuler v. SuperValu, Inc.**, 2003 WL 21658616 (8<sup>th</sup> Cir. 2003).

**Facts:** SuperValu offered Schuler a position as order selector in their warehouse on the condition he pass a medical examination. During this examination, Schuler revealed he had epilepsy. The physician recommended Schuler for employment with the restrictions he could not drive forklifts, work around unprotected dangerous equipment, or work around unprotected heights. When Schuler called SuperValu to check on the status of his employment offer he was informed the company could not hire him due to his medical restrictions. Schuler sued SuperValu alleging discrimination under the ADA. The district court granted SuperValu's motion for summary judgment.

**Holding:** The Eighth Circuit affirmed the district court. Schuler argued before the district court SuperValu mistakenly believed he was substantially limited in the major life activity of working. Noting it is "questionable logic" to consider "work" a major life activity when the ultimate question to be resolved is whether a person was denied the opportunity to work because of a disability, the Eighth Circuit pointed out the special restrictions placed on the major life activity of "work" by the EEOC. "According to the

EEOC regulations, a person is substantially limited in the major activity of working if that person is 'significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities.'" Because there was no evidence SuperValu knew of Schuler's epilepsy, the Eighth Circuit agreed with the district court that SuperValu did not regard Schuler as substantially limited in the major life activity of work.

**Wood v. Crown Redi-Mix, Inc.**, 339 F.3d 682 (8<sup>th</sup> Cir. 2003).

**Facts:** Wood was a ready-mix concrete truck driver for Crown. In October of 1998, Wood fell into a hole at a concrete plant and suffered permanent nerve damage. Wood's injuries prevented him from driving a ready-mix concrete truck, walking more than a quarter mile without resting and his legs becoming numb, lifting in excess of fifty pounds, and from twisting and bending. Additionally, Wood's injuries caused him to become impotent. Crown terminated wood in March of 1999 because Wood could not perform the duties of a ready-mix truck driver and Crown could not accommodate Wood's permanent work restrictions with another position. Wood sued Crown alleging it violated the ADA. The district court granted Crown's motion for summary judgment.

**Holding:** The Eighth Circuit affirmed the district court. Conceding Wood was limited in his ability to walk, the Eighth Circuit concluded his quarter mile limitation was only "moderate," not substantial. Likewise conceding Wood was limited in his ability to lift, twist, and bend, the Eighth Circuit concluded those limitations too were only "moderate," in part because Wood could still do daily household chores such as washing dishes, doing laundry, and taking out the trash. The Eighth Circuit also concluded Wood's injuries did not limit him in the major life activity of working, as Wood alleged only that he could not perform the ready-mix truck driver position, not that he was limited in a broad class of jobs. Finally, the Eighth Circuit concluded Crown did not have a duty to accommodate Wood's purported procreation limitation. The court noted, "[w]here the reasonable accommodation requested is unrelated to the limitation, we do not believe an ADA action may lie."

## **NINTH CIRCUIT**

**Miles v. State of California**, 320 F.3d 986 (9th Cir. 2003).

**Facts:** Employee sued the state for disability discrimination and retaliation under the ADA. The district court dismissed the case for lack of jurisdiction under the Eleventh Amendment and awarded costs to the state. Employee appealed.

**Holding:** Affirmed. The court held that the state was a "prevailing party" pursuant to Rule 54(d) of the Federal Rules of Civil Procedure because dismissal based on Eleventh Amendment immunity is not a dismissal for lack of subject matter jurisdiction

for which costs are not awarded, and the dismissal is a material alteration in the legal relationship of the parties.

**Kaplan v. City of N. Las Vegas**, 323 F.3d 1226 (9th Cir.), cert. denied, \_\_\_ U.S. \_\_\_, 2003 WL 22251293 (2003).

**Facts:** Plaintiff was a peace officer for the City who was injured during an employment-related training exercise. After the injury, plaintiff could not hold a gun or grasp objects with his right hand. When plaintiff was later diagnosed with permanent rheumatoid arthritis, the City terminated him for inability to perform the essential functions of his job because he was permanently disabled by rheumatoid arthritis. Plaintiff later learned that he was misdiagnosed and that he did not actually have rheumatoid arthritis. Plaintiff then filed a claim alleging discrimination under the ADA. The district court granted the City's motion for summary judgment because plaintiff could not show that he is a "qualified individual" within the meaning of the ADA. Plaintiff appealed.

**Holding:** Affirmed. Plaintiff was not a "qualified individual" within the meaning of the ADA because, at the time of his termination, he could not perform the essential functions of a peace officer (restraining prisoners, using firearms, and engaging in hand-to-hand combat) even with an accommodation. In addition, as a matter of first impression in the Ninth Circuit, there is no duty to accommodate an employee who is merely "regarded as" having a disability. To conclude otherwise would create a disparity in treatment among non-disabled employees because non-disabled employees would be better off if their employers treated them as disabled. Further, granting accommodations to "regarded as" employees improvidently encourages such employees to perpetuate their employers' misperception of a disability. Also, requiring accommodations for employees who are not truly disabled compels employers to waste their limited resources when those resources could be better spent assisting persons who are actually disabled.

**Sharber v. Spirit Mountain Gaming Inc.**, 343 F.3d 974 (9th Cir. 2003).

**Facts:** Plaintiff, an employee of an Indian casino, filed suit against the casino pursuant to the FMLA. The district court granted the casino's motion to dismiss because tribal courts should have the first opportunity to determine whether they have jurisdiction to hear claims based on the FMLA and the tribal exhaustion requirement also applies to issues of tribal sovereign immunity. Plaintiff appealed.

**Holding:** Affirmed in part, reversed in part and remanded. The court affirmed the district court's conclusion that tribal courts should have the first opportunity to determine whether they have jurisdiction to hear actions based on the FMLA and that the tribal exhaustion requirement applies to issues of tribal sovereign immunity. However, dismissal of the case is reversed and remanded because the district court should have stayed, not dismissed, the federal action pending the exhaustion of tribal remedies.

**Echazabal v. Chevron USA, Inc.**, 336 F.3d 1023 (9th Cir. 2003).

**Facts:** Plaintiff applied for employment at an oil refinery for the same position he has held for over twenty years as an employee of the oil refinery's various maintenance contractors. Plaintiff was twice denied employment because he failed to pass a physical inspection. The refinery's doctor determined that because plaintiff's liver was releasing higher than normal levels of enzymes, plaintiff's health might be at risk from exposure to chemicals. Plaintiff's own doctors then diagnosed him with asymptomatic, chronic active hepatitis C. Plaintiff informed his personal doctors about the work he continued to perform at the oil refinery, and none of them advised him to cease working there. About three years after the plaintiff was denied employment for the first time, the refinery denied plaintiff's second request for employment based on the medical opinion of another physician. In addition, the refinery requested that plaintiff's employer remove him from the refinery or place him in a position that would eliminate his exposure to chemicals. As a result, plaintiff's employment was terminated. Plaintiff subsequently obtained medical opinions declaring that he was in no greater risk of injuring himself by working in the refinery than any other employee. Plaintiff filed a disability discrimination claim under the ADA. The district court entered summary judgment in favor of the oil refinery, and plaintiff appealed. The Ninth Circuit, in an earlier opinion, held that the "direct threat" defense against ADA claims does not include threats to the employee's own health. However, the Supreme Court reversed and remanded, holding that the "direct threat" defense includes threats to an employee's own health and that the EEOC's "direct threat" regulation was valid. The only remaining issue on remand was whether the oil refinery had met the requirements for assertion of the "direct threat" defense.

**Holding:** Summary judgment in favor of the refinery was reversed and remanded for further proceedings. The district court erred in granting summary judgment in favor of the refinery because material issues of fact remain as to whether the refinery satisfied the requirements of the "direct threat" defense to ADA claims. Whether an employer's actions are facially reasonable is not the standard for determining whether the employer has made the required "individual assessment" under the "direct threat" defense. Further, mere avoidance of stereotypes does not satisfy the affirmative obligation to make an "individualized assessment" as to whether to exclude an individual from the workplace because his condition poses a "direct threat" to his own health. Accordingly, fact issues exist as to whether the refinery's decision not to hire was based on reasonable medical judgment and whether the refinery properly assessed the nature and severity of potential harm, likelihood that potential harm would occur, and imminence of the potential harm. Also, the fact that plaintiff's conflicting medical opinions were offered after the oil refinery made the decision not to hire plaintiff does not preclude considering those opinions when determining whether employer's "individualized assessment" of plaintiff's situation was objectively reasonable.

The dissent, however, argues that the opinion of the oil refinery's doctors along with evidence of concurrence by one of plaintiff's own doctors preclude finding a genuine

issue of material fact as to employer's "individualized assessment" of plaintiff's situation when conflicting medical opinions were not produced until the filing of the lawsuit. The dissent forewarns that the majority's decision improvidently exposes employers to costly litigation. In addition, the decision forces employers to bear the cost of second-guessing facially reasonable opinions of competent physicians or conducting their own full trial of the relevant medical issues.

**Brown v. City of Tuscon**, 336 F.3d 1181 (9th Cir. 2003).

**Facts:** Plaintiff was a detective in the city police department. During her employment, plaintiff became severely depressed and attempted suicide, which led to hospitalization and several weeks of medical leave. When plaintiff returned to work, she was excused from working night time "on call" hours based on the recommendation of employer's clinical psychologist. In response to inquiries by plaintiff's supervisor about her inability to perform night "on call" hours, plaintiff filed a complaint with employer's Internal Affairs Division. Later, plaintiff was suspended for 10 days for falsifying certain police reports in an effort to cover up her untimely submission of a citation in an assault case. Plaintiff filed suit under the ADA claiming acts of retaliation and interference. The district court granted employer's motion for summary judgment. Plaintiff appealed.

**Holding:** Affirmed as to the retaliation claim and reversed and remanded as to the interference claim. Plaintiff's retaliation claim was properly dismissed because plaintiff failed to present sufficient evidence that employer's non-retaliatory explanation for suspending her was a pretext for retaliation. Plaintiff's circumstantial evidence did not make a sufficient showing of pretext in light of the fact that employer's actions leading to the suspension were mandated by internal policies and procedures. As to the interference claim, the district court erred by applying Title VII's burden shifting to the interference claim. Instead, the ADA interference claim should be treated like claims under the interference provisions of the Fair Housing Act, the Family and Medical Leave Act and the National Labor Relations Act. Also, summary judgment on the interference claim is precluded because plaintiff raised a genuine issue of material fact as to whether a supervisor threatened her with demotion or forced retirement if she did not give up her existing accommodation, which allegedly caused direct harm in the form of short-term memory problems and feelings of stress and harassment.

**Fraser v. Goodale**, 342 F.3d 1032 (9th Cir. 2003).

**Facts:** Plaintiff was a senior account specialist at a bank. Plaintiff suffers from a severe, life-threatening type of diabetes. Plaintiff must carefully monitor her diet everyday and must test her sugar levels several times daily. While at work, plaintiff was notified by her supervisor that she could not eat at her desk. Minutes later, plaintiff became disoriented because of her diabetes. Despite several attempts to explain her situation, plaintiff's supervisor refused to back down and plaintiff eventually passed out in employer's lobby. Plaintiff complained about this occurrence in a letter to her supervisor's boss, and plaintiff was subsequently terminated. Plaintiff sued alleging

discrimination under the ADA and Oregon disability law. The district court granted employer's motion for summary judgment concluding that plaintiff was not disabled under the ADA because she failed to demonstrate a genuine issue of material fact as to whether her diabetes substantially limited her ability to eat, care for herself, think, and communicate.

**Holding:** Affirmed in part and reversed and remanded in part. Summary judgment as to plaintiff's ADA claims was reversed and remanded on the basis that plaintiff demonstrated a genuine issue of material fact that she was disabled. The court concluded that diabetes is a "physical impairment". Further, as a matter of first impression, the court held that broadly speaking, eating is a major life activity. Specifically, eating was a major life activity to the plaintiff because her diabetes restricts the type of foods she can eat and requires constant assessment of blood sugar levels before consuming any food. Notably, however, the court cautioned that every dietary restriction would not necessarily be considered a major life activity. Finally, triable issues existed regarding whether plaintiff was substantially limited in the major life activity of eating because of her demanding and highly difficult treatment regimen. The court, however, affirmed the district court's conclusion that plaintiff was not substantially limited in caring for herself, thinking and communicating because of the infrequency of these limitations.

**Savage v. Glendale Union High School**, 343 F.3d 1036 (9th Cir. 2003).

**Facts:** Plaintiff, a disabled individual, was an education services technician at Glendale Union High School District. The School District terminated plaintiff after she refused to affix a flag to her wheelchair to make herself more visible to students in the classroom. Among other claims, plaintiff sued for discrimination under the ADA. Employer filed a motion to dismiss for lack of subject matter jurisdiction arguing that plaintiff's ADA claim is barred by the Eleventh Amendment because the School District is an arm of the state. The district court denied the motion, holding that the School District was not an arm of the state and therefore not entitled to sovereign immunity under the Eleventh Amendment. The School District appealed.

**Holding:** Affirmed. The court held that the School District was not an arm of the state by applying the five-part test set out in *Mitchell v. Los Angeles Community College District*, 861 F.2d 198, 201 (9th Cir. 1988).

**Moreau v. Air France**, 343 F.3d 1179 (9th Cir. 2003).

**Facts:** Plaintiff, an assistant station manager for an airline, requested a twelve-week leave of absence to assist his ill father. The airline denied his request for leave claiming that it was exempt from the FMLA because it employed fewer than 50 employees at the employee's worksite or within a 75-mile radius. The employee took the leave anyway and was subsequently terminated. The employee filed suit alleging, among other claims, that his termination violated the FMLA. Plaintiff claimed that the airline was not

exempt as a "joint employer" of certain contracted service workers and therefore exceeded the 50-employee limit. The district court granted employer's motion for summary judgment because the airline was not a "joint employer." Plaintiff appealed.

**Holding:** Affirmed. The airline was not a "joint employer" of the contracted service workers and therefore was exempt from the FMLA. The "joint employer" determination requires consideration of the entire relationship and an assessment of the "economic reality" of the situation. In addition, the joint employment determination is informed by "joint employer" cases arising under the Fair Labor Standards Act and the Migrant and Seasonal Agricultural Worker Protection Act.

The "regulatory factors" from the "joint employer" cases indicate the airline was not a "joint employer" because the airline: (1) lacked the ability to hire or fire the contractors; (2) did not determine the service workers' compensation or method of payment; (3) did not keep employment records for the service workers; and (4) did not control the service workers, but rather providently imparted guidance on what services are to be performed and indirectly supervised to ensure compliance with various safety and security regulations. The "nonregulatory factors" from the joint employer cases also indicate the airline was not a "joint employer" because: (1) the service contracts were negotiated and quite specific; (2) there was no indication the contracts could simply be passed on to another contractor; (3) the work was primarily performed on the premises of the contracting company; (4) the contractors invested significant capital in expensive equipment to perform the services compared to minimal investment made by the airline; and (5) all of the contractors serviced multiple carriers in addition to the defendant airline. The court also determined that there was no "economic dependence" that would indicate "joint employment" despite shared premises arrangements that were negotiated in the service contracts and reimbursements from the airline to the contractors for overtime caused by airline delays.

**EEOC v. Luce, Forward, Hamilton & Scripps**, 345 F.3d 742 (9th Cir. 2003).

**Facts:** Applicant was refused employment as a legal secretary because he refused to sign an agreement to arbitrate all claims arising from his employment. After applicant unsuccessfully sued employer in state court for wrongful termination, the Equal Employment Opportunity Commission ("EEOC") brought suit against the employer for retaliation in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), the Americans with Disabilities Act of 1990 ("ADA"), the Age Discrimination in Employment Act of 1967 ("ADEA"), and the Equal Pay Act of 1963 ("EPA"). The EEOC also sought a permanent injunction forbidding the employer from requiring that employees sign arbitration agreements as a condition of employment and engaging in unlawful retaliation. The district court refused to award relief based on *res judicata* grounds and rejected the request for injunctive relief under the ADA, the ADEA and the EPA. However, the district court relied on precedent established in *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir. 1998) to enjoin employer from requiring applicants to agree to arbitrate Title VII claims and from enforcing existing agreements

to arbitrate Title VII claims. However, the district court did not expressly rule on the EEOC's request for injunctive relief prohibiting employer from engaging in unlawful retaliation. Both parties cross-appealed and a three-judge panel reversed the grant of injunctive relief. The Ninth Circuit agreed to rehear the appeal *en banc*.

**Holding:** Summary judgment granting injunctive relief is reversed and remanded, and the request for injunctive relief on the retaliation theory is remanded for the district court to address in the first instance. Joining the other circuits that have addressed the issue, and reversing its decision in *Duffield*, the Ninth Circuit holds that the Civil Rights Act of 1991 does not bar enforcement of pre-employment arbitration agreements.

**Liu v. Amway Corp.**, 347 F.3d 1125 (9th Cir. 2003).

**Facts:** Plaintiff was a scientist who took maternity leave and requested an extension of her return date. The request for an extension was denied but eventually a shorter extension period was agreed upon. Immediately afterward, plaintiff's medical leave was converted to a personal leave of absence even though her leave was still entitled to FMLA status. Plaintiff requested extensions on several occasions, but the requests were initially denied except for an additional one-week extension. Plaintiff's supervisor made it clear throughout that he expected plaintiff to return to work because he was holding projects for her. When plaintiff's supervisor learned that at least one position in plaintiff's department would be eliminated, plaintiff received a performance evaluation in which the score she received placed her at the bottom of her department, a drop of 19% from the evaluation she received from a former supervisor six months earlier. Then, while still on leave, plaintiff was terminated based on her evaluation and the recommendation of her supervisor. Among other claims, plaintiff sued for interference with protected leave under the FMLA and California law. The district court granted summary judgment on the FMLA claim in favor of employer because the interference claim was irrelevant as plaintiff sustained no damages since she was on leave when she was terminated.

**Holding:** Grant of summary judgment on plaintiff's FMLA claim was reversed. Triable issues of material fact exist as to whether employer interfered with plaintiff's rights by denying and discouraging her use of FMLA leave and as to whether plaintiff's rights were interfered with by the mischaracterization of her FMLA leave as personal leave.

**Allen v. Pacific Bell**, 2003 U.S. App. Lexis 22960, \_\_\_ F.3d \_\_\_ (9th Cir. Nov. 10, 2003).

**Facts:** Plaintiff was a services technician for Pacific Bell. Medical evaluations conducted by both plaintiff's and Pacific Bell's doctors revealed that plaintiff's health required that work be sedentary in nature with minimal walking. Based on these medical evaluations, Pacific Bell concluded that plaintiff could work with restrictions, but not as a services technician. Accordingly, Pacific Bell initiated a job search for a position that would accommodate plaintiff's health limitations. While Pacific Bell was searching for an alternative job, plaintiff asked several times to be reinstated into his services technician position. Pacific Bell requested that plaintiff submit medical evidence that his physical condition had improved, and plaintiff failed to comply with the request. Plaintiff also failed to appear for a keyboard test, which resulted in losing all further rights to accommodations under employer's policies and collective bargaining agreement. Subsequently, plaintiff was terminated. Plaintiff filed a claim alleging discrimination under the ADA and California disability law. The district court granted Pacific Bell's motion for summary judgment. Plaintiff appealed.

**Holding:** Affirmed. Employer appropriately concluded that plaintiff could not perform the essential functions of a services technician even with accommodations because plaintiff failed to comply with his employer's request that plaintiff submit new medical evidence that his work restriction could be lifted. Accordingly, employer did not have a duty to engage further in the interactive process with respect to plaintiff's position as a services technician. Further, plaintiff's failure to cooperate in the job search process

absolved his employer from its interactive duty to consider alternative accommodations within the company.

### **TENTH CIRCUIT**

**Doebele v. Sprint/United Mgmt. Co.**, 342 F.3d 1117 (10th Cir. 2003).

**Facts:** Doebele was a financial analyst for Sprint from September 1996 until her termination in April 1999. In 1998, Doebele began seeing a psychiatrist, who diagnosed her as suffering from bipolar disorder, attention deficit disorder, and hypothyroidism, and placed her on short-term disability leave. Upon her return from leave, Doebele's supervisors increased her workload, and asserted to human resources personnel that they wanted to be "Rid of" Doebele. Subsequently, Doebele's psychiatrist placed her back on leave. The same day she was placed back on leave, Doebele informed human resources of her intention to file a complaint of "Discrimination and hostile environment". Doebele returned to work in February 1999, but was terminated due to "attendance problems and lack of personal effectiveness" the following April. Doebele ultimately brought suit against Sprint, alleging ADA disability discrimination (as having a disability, as having a record of disability, and as being perceived as disabled), retaliation for having exercised her FMLA and ADA rights, and retaliation in anticipation of future workers' compensation claims. The district court granted summary judgment to Sprint on all claims.

**Holding:** The Tenth Circuit affirmed the district court's ruling on the majority of Doebele's claims, but held that Doebele had raised issues of fact with respect to her perceived-disability and FMLA/ADA retaliation claims. With respect to the perceived-disability claim, the court noted that Doebele's supervisors disregarded her psychiatrist's assessment and recommendations, concluding that such disregard supported "the inference that their actions were improperly based on myth, fear, and stereotype, rather than an individualized evaluation of Ms. Doebele's abilities" and permitted the inference that Doebele was regarded as impaired in the major life activity of working. With respect to the FMLA/ADA retaliation claim, the court noted the existence of direct evidence of retaliatory motive and circumstantial evidence of pretext, including evidence that Doebele was treated differently from other employees with mental problems; the court emphasized that at summary judgment, all doubts concerning pretext must be resolved in the nonmoving party's favor.

**Chaffin v. Kan. State Fair Bd.**, 348 F.3d 850 (10th Cir. 2003).

**Facts:** Chaffin and other plaintiffs were attendees of the Kansas State Fair who relied on wheelchairs for mobility. The plaintiffs alleged that, as a result of the state fair's failure to comply with ADA Accessibility Guidelines (the "ADAAG"), their 2000 state fair experience had been marred by being effectively trapped in a so-called "handicapped seating" section of a grandstand, unable to use the restroom, unable to obtain an unobstructed view of the stage, and unavoidably jostled by other attendees. In 1994, 1997, 1998, 1999, 2000, and 2002 the state fair generated plans for improving the fairgrounds' ADA compliance, but the district court nevertheless found numerous deficiencies at fair facilities, the majority of which would not be corrected by the state

fair's most recent "Master plan." The district court held that the plaintiffs were entitled to bring an action to enforce the ADAAG, and ordered the state fair to submit a self-evaluation and transition plan to the court.

**Holding:** The Tenth Circuit affirmed the decision of the district court, rejecting the state fair's argument (among others) that, so long as the plaintiffs had basic "access" to the fairgrounds and its programs, they could not have been "excluded from" or "denied the benefits of" the state fair. Instead, the court emphasized that the ADA and ADAAG require public entities to provide "meaningful access" to their programs or services. The court further held that Title II of the ADA was intended by Congress to remedy a broad, comprehensive concept of discrimination against the disabled, "including disparate impact discrimination" (as opposed to preventing intentional discrimination only), and that, because the state fair was not in compliance with the ADA, the plaintiffs were entitled to bring an action against it to enforce the ADAAG.

**EEOC v. W.H. Braum, Inc.**, 347 F.3d 1192 (10th Cir. 2003).

**Facts:** An employment applicant applied unsuccessfully for a position at Braum, soon afterward filing a claim alleging disability discrimination (among other charges). The applicant subsequently dismissed her own suit without prejudice, whereupon the EEOC brought the current action on her behalf. The district court dismissed the EEOC's action, holding that the applicant's federal ADA claim was time-barred under Oklahoma's state statute of limitations, and that as such the EEOC was barred from seeking monetary relief on the applicant's behalf (although it remained entitled to seek injunctive relief). On reconsideration, the district court affirmed its prior holding, concluding that the applicant's individual claim was time-barred and that the EEOC's derivative action was barred on res judicata principles.

**Holding:** On interlocutory appeal, the Tenth Circuit held that Title I of the ADA expressly adopted the statutory scheme of Title VII of the Civil Rights Act of 1964, so that no "gap" existed to be filled in by borrowing a state statute of limitations. Because the applicant's individual action was therefore not time-barred, and because dismissal without prejudice did not trigger res judicata, the court concluded that the EEOC was entitled to seek monetary as well as injunctive relief on its derivative claims against Braum.

**Croy v. COBE Labs., Inc.**, 345 F.3d 1199 (10th Cir. 2003).

**Facts:** Croy, a female employee diagnosed with multiple sclerosis ("MS"), brought suit against her employer COBE, alleging failure to accommodate pursuant to the ADA, sex discrimination (failure to promote), and breach of contract. Croy described her MS symptoms as including headaches, dizziness, vertigo, and extreme fatigue, and alleged that her health condition limited her major life functions by requiring her to miss work frequently, often with little or no notice, and by frequently causing her to be unable to lift heavy objects, complete household chores, or cook for her family. Nevertheless, Croy expressly asserted that she was able to perform her job duties in a satisfactory manner, such that no unfavorable performance evaluation could have been appropriate. The district court held that Croy had failed to show substantial impairment of any major life

activity, and granted summary judgment to COBE on the ADA claim. The district court also granted summary judgment on Croy's remaining claims, holding that the discrimination claim was time-barred, but failing to provide any explanation for its disposition of the breach-of-contract claim.

**Holding:** The Tenth Circuit agreed with the district court that when a plaintiff claims that he or she is able to perform his or her job duties at a satisfactory level, he or she cannot also claim to be impaired in the major life activity of working. (The court assumed without deciding that "working" constitutes a major life activity.) The court therefore affirmed the district court's summary judgment of Croy's ADA claim. The court also affirmed that the discrimination claim was time-barred, but reversed with respect to the breach-of-contract claim, remanding to the district court for further proceedings.

**Revels v. Lucent Techs., Inc.**, 60 Fed. Appx. 740 (10th Cir. 2003) (unpublished).

**Facts:** Revels took a leave from work for dental surgery, and during her leave, her son died from an accidental gunshot wound. Revels extended her medical leave due to grief and depression, initiating a wage continuation plan under Lucent's ERISA welfare program, initially set to terminate the following year. During her leave, Revels underwent weekly treatments for depression, grief, and stress. Revels requested and received a note from her doctor releasing her to return to work, but Lucent's policy was that any work medical release must specify a change in physical condition before the employee could return to work, which was absent from Revels' note. Lucent subsequently terminated her employment. Revels brought this action against Lucent and the local union board, alleging that Lucent's refusal to permit her to return to work after a 52-week disability leave violated the ADA and that the union also violated the ADA and breached its obligations to her by not filing a grievance against Lucent under the FMLA. The district court granted summary judgment in favor of Lucent and the union.

**Holding:** The Tenth Circuit held that Lucent offered a legitimate, nondiscriminatory reason for not allowing Revels to return to work and that the union's failure to file a grievance against Lucent for not rehiring Revels was not a breach of its obligations to her. The court observed that Lucent's goal of the release requirement, which ensures that returning to work does not hamper an employee's recovery, is rational and legitimate. Because the court held that Lucent's reason was nondiscriminatory, the court did not need to address the issue of whether Revels was "qualified and disabled" under the ADA.

**Kourianos v. Smith's Food & Drug Ctrs., Inc.**, 65 Fed. Appx. 238 (10th Cir. 2003) (unpublished).

**Facts:** Kourianos brought an ADA hostile work environment discrimination claim against her former employer, alleging that her diagnosed depression and anxiety substantially limited the major life activity of "emotional stability" and that she was "disabled" pursuant to the ADA. Kourianos' deposition testimony, however, showed that Kourianos perceived herself as functioning normally in society, was able to maintain

good interpersonal relationships, cared for herself and her small child, attended college part time, and performed all of her job requirements satisfactorily. Based on this testimony, the district court granted summary judgment in favor of the employer and concluded that there was insufficient evidence in the record to establish that she was a qualified individual with a disability pursuant to the ADA.

**Holding:** The Tenth Circuit affirmed the district court's judgment and held that Kourianos' own deposition testimony established that she did not suffer a substantial limitation in any major life activity arising from her alleged depression and anxiety and therefore did not suffer a disability under the ADA. The court further observed that because Kourianos did not establish that she was substantially limited in a major life activity, the court was not required to address the novel question of whether emotional stability can be recognized as a major life activity under the ADA. However, the court did note that it would not refute an entire class of plaintiffs that all have distinctly different mental impairments that may or may not substantially limit a major life activity.

**McCrary v. Aurora Pub. Sch.**, 57 Fed. Appx. 362 (10th Cir. 2003) (unpublished).

**Facts:** McCrary, an elementary school teacher, was absent from 16 classes during the 1996-97 school year. She subsequently claimed to suffer from a number of physical ailments, including sleep deprivation, learning disabilities, adult attention deficit disorder, high blood pressure, and esophagus irritation. She further asserted that her health condition was worsening, although nobody at the school had previously been aware of any of her ailments. McCrary made many requests for a variety of accommodations, which the school district granted except in those cases in which the requested accommodation contradicted a remediation plan implemented to improve the quality of McCrary's teaching. The principal recommended that McCrary be transferred to a Classroom Support Teacher ("CST") position, because she believed it would bring McCrary more success; McCrary declined the transfer. Before the 1998-99 school year, McCrary notified the principal that she was taking a leave of absence until her disability retirement application was approved, and the principal transferred another teacher into the CST position. McCrary then submitted her resignation and claimed that she had been forced to take disability retirement due to her declining health, which she blamed on the school district's refusal to grant all the accommodations she requested. McCrary brought a claim of ADA disability discrimination, and the district court granted summary judgment in favor of the school district.

**Holding:** The Tenth Circuit affirmed the district court's decision. The court held that McCrary did not present sufficient evidence to establish a significant limitation in her ability to think or to learn as alleged impairments affecting a major life activity. McCrary did not argue that she was completely unable to perform any of the major life activities she identified, and therefore she was required to show that she was significantly restricted as to the condition, manner, or duration under which she could perform each identified activity, as compared with the average person. The court found that McCrary failed to establish that she had a disability as defined in the ADA, and therefore the court did not address any of the issues relating to reasonable accommodation.

**VanMeveren v. Whirlpool Corp.**, 65 Fed. Appx. 698 (10th Cir. 2003) (unpublished).

**Facts:** In a single week, VanMeveren was absent for one entire day and for five hours on another. She sought to have her all-day absence counted as FMLA leave and her other absence counted as a partial absence. After an investigation, Whirlpool terminated her employment because VanMeveren lied about her full-day absence in order to obtain unwarranted FMLA leave time and because the partial absence was her seventh unexcused absence of the year, which automatically gave Whirlpool grounds for termination in accordance with Whirlpool's tardy policy. VanMeveren filed a complaint, alleging that Whirlpool terminated her in retaliation for taking FMLA leave. Following a jury verdict in VanMeveren's favor, the district court granted judgment as a matter of law under Fed. R. Civ. P. 50(b) in favor of Whirlpool.

**Holding:** The Tenth Circuit affirmed the district court's grant of Whirlpool's Rule 50(b) motion because Whirlpool had articulated two legitimate, nonretaliatory reasons for its termination decision. Because VanMeveren stipulated that she was subject to automatic termination if her seventh absence was unexcused and presented no evidence at trial that the absence was excused, the court held that no reasonable jury could have found that Whirlpool did not have a legitimate reason for firing her.

**Crano v. Graphic Packaging Corp.**, 65 Fed. Appx. 705 (10th Cir. 2003) (unpublished).

**Facts:** Crano worked as a "packer inspector" for GPC until 1996 when he went on indefinite medical leave for treatment of liver disease and an organ transplant. According to GPC's leave policy, when an employee's absence from work extends beyond a year the employee is no longer on "current-employment status". During Crano's absence, GPC decided to phase out the position of packer inspector (but "grandfathered" packer inspectors currently working for the company). When Crano tried to return to GPC in 1998 for a shortened shift of four hours, GPC told him that the packer inspector position had been eliminated. The company informed Crano that he could "apply for any available positions at [GPC] on the same basis as any other non-employee applicant." Crano filed suit against GPC alleging violation of the ADA. The district court granted GPC's motion for summary judgment.

**Holding:** The Tenth Circuit affirmed the judgment of the district court, holding that GPC had no duty to reinstate Crano as a packer inspector after the position had been eliminated. The court further held that after Crano's status as a current employee expired, GPC was not required to reassign him to some other job within the company. The court stated that the ADA does not require the creation of jobs or vacancies to accommodate a disabled worker. The court also stated that Crano cannot premise his ADA claim on GPC's failure to make an exception to its leave policies as a form of accommodation to his condition, because the ADA does not impose an obligation on employers to reserve a job opening for an employee's possible return from indefinite leave.

**Romero v. City & County of Denver Dep't of Soc. Servs.**, 57 Fed. Appx. 835 (10th Cir. 2003) (unpublished).

**Facts:** Romero was a general management assistant III for the City and County of Denver Department of Social Services (“DSS”). He filed a grievance alleging a sexually hostile work environment because of “belligerent comments from a co-worker, a threatening banner taped across his office door, and handouts that ridiculed and demeaned men.” Romero was later disqualified from working at DSS because of medical restrictions that prevented him from working. Romero sued DSS alleging, among other things, discrimination and retaliation under the ADA. The district court refused to grant summary judgment to DSS on Romero’s ADA discrimination claim, and then ordered the case administratively closed pending the U.S. Supreme Court’s decision in *Board of Trustees v. Garrett*, 531 U.S. 356 (2001). When the case was reactivated, the district court granted DSS’s motion for summary judgment on the ADA discrimination claim.

**Holding:** The Tenth Circuit found that Romero’s ADA claims were properly dismissed. According to *Garrett*, the Eleventh Amendment to the U.S. Constitution protects a state, and the arms of the state, from suits for money damages brought by state employees for violation of the ADA. *Garrett*, 531 U.S. at 360. DSS is an arm of the state of Colorado. Therefore, it was immune from a suit for money damages by Romero. The *Garrett* court also noted that a private individual could still pursue an action for injunctive relief against a state official. However, Romero had not stated a claim for injunctive relief, because the word “equitable” did not appear in his complaint. Additionally, Romero sued only the state agency itself, not a state official.

**Velarde v. Associated Reg’l & Univ. Pathologists**, 61 Fed. Appx. 627 (10th Cir. 2003) (unpublished).

**Facts:** Velarde was a full-time courier for Associated Regional & University Pathologists (“ARUP”). As part of his job Velarde was required to “maneuver boxes weighing up to fifty pounds.” Velarde began experiencing back pain and took time off from work to receive treatment. He returned with a 25-pound lifting restriction. ARUP terminated Velarde’s employment when he later decided that he could not return to work due to a non-work-related injury. Velarde sued ARUP, claiming discrimination under the ADA. The district court granted summary judgment for ARUP.

**Holding:** The Tenth Circuit affirmed, finding that Velarde was not “disabled” within the meaning of the ADA. The parties agreed that Velarde was impaired and that “lifting” is a major life activity, but disagreed over whether Velarde was “substantially limited” in his lifting ability. The court distinguished between impairments that are substantially limiting on their face and those that require some evidence comparing the impairment to the ability of an average person. According to the court, the 25-pound lifting restriction was not substantially limiting on its face. Furthermore, Velarde had not presented any evidence comparing his lifting abilities to those of the general populace, instead concentrating on “how his impairments prevent him from performing the specific duties of his assigned job.” Therefore, Velarde had not demonstrated that he was “disabled” within the meaning of the ADA.

## ELEVENTH CIRCUIT

**Wood v. Green**, 323 F.3d 1309 (11th Cir.), cert. denied, 124 S. Ct. 467 (2003).

**Facts:** Mark Wood began working for the Clerk's Office for the Circuit Court for Lee County, Florida in 1974. In 1978 he began suffering from cluster headaches. By 1985 this caused Wood to miss lengthy periods of work and prevented him from performing a substantial portion of his duties. The Clerk's Office created a special position of Court Coordinator for Wood to accommodate his extended absences. The primary duties in this position were to review new legislation and rules that would affect the Court's operations, to work with court supervisors and to monitor court financial accounts. When Wood was absent, other employees had to perform his work. In the years 1995 through 1999, Wood missed significant amounts of work each year B as many as 15 weeks. He was approved another leave on December 2, 1999. The leave that Wood requested was indefinite. When he did not return by January 5, 2000, Charlie Green terminated his employment. Wood sued Green raising claims under the Americans With Disabilities Act and the Family Medical Leave Act. A jury found in favor of Wood on his ADA claim and against him on his FMLA claim. (Wood did not pursue the FMLA claim further.) The District Court denied Green's motion for judgment as a matter of law holding that the request for leave was not truly indefinite, but was only for a month or two based on the pattern of prior leaves that Wood had received. Green appealed.

**Holding:** The Eleventh Circuit held that an indefinite leave of absence is not a reasonable accommodation under the ADA and that Wood's request was for an indefinite leave. The accommodation requested was not one that allows Wood to continue to work in the present, but in the future at some indefinite time. While the Eleventh Circuit noted that a termination which immediately followed the beginning of an indefinite leave might be actionable, given that Green waited over a month in this case, that potential exception did not apply. Finally, the Court reaffirmed its prior holding in another case that even if Green had made prior accommodations of longer lengths of leave, the fact that a prior accommodation was made does not make that accommodation reasonable.

**Morrison v. Amway Corp.**, 323 F.3d 920 (11th Cir. 2003).

**Facts:** David Morrison was a Charter Pilot employed by Magic Carpet Aviation. Magic Carpet was owned by Amway Corporation, an air charter service that services a number of professional sports franchises including the Orlando Magic. One of Morrison's main responsibilities was piloting charter flights for the Orlando Magic. The Orlando Magic is a unit of RDV Sports, Inc. Both Amway and RDV are owned by Richard DeVoss or his family. Morrison, who suffered from clinical depression, requested four weeks time off in 1999. He was granted two weeks. A subsequent request was denied altogether. Four months later, pornographic images were found on Morrison's office computer in violation of Magic Carpet's company policy and Morrison was terminated. Morrison asserted that he was terminated for exercising his rights under the FMLA. The District Court dismissed the case for lack of jurisdiction because Amway did not have the sufficient number of employees within 75 miles of Magic Carpet's worksite for FMLA coverage. It rejected Morrison's argument to count the employees of both Amway and

RDV. The District Court dismissed Morrison's complaint after weighing the jurisdictional facts and reaching a conclusion that jurisdiction did not exist pursuant to Federal Rule of Civil Procedure 12(b)(1). Morrison appealed, arguing that the District Court should have analyzed the issue under the more lenient standards of Rule 56 in determining whether both Amway and RDV's employees had to be considered because the alleged jurisdictional element was also an element of his claim under the FMLA.

**Holding:**The Eleventh Circuit reversed. It held that dismissal under Rule 12(b)(1) is only appropriate "[i]f the facts necessary to sustain jurisdiction do not implicate the merits of plaintiff's cause of action." (emphasis omitted) Under the FMLA, "eligible-employee" status is a threshold jurisdictional question. It is also a prima facie element for recovery in a civil action. Thus, the Eleventh Circuit held that since the issue of "eligible-employee" status implicates both jurisdiction and the merits, questions about that status are properly treated in a Rule 56 motion, not a Rule 12(b)(1) motion.

**Davila v. Delta Air Lines, Inc.**, 326 F.3d 1183 (11th Cir.), cert. denied, 124 S. Ct. 568 (2003).

**Facts:**Manuel Davila was a pilot for Delta Air Lines, Inc. Over a number of years he received disability benefits relating to a medical condition. Davila reported to Delta that his condition prevented him from receiving the Federal Aviation Administrative first-class medical certificate that was required to enable him to fly commercial passenger aircraft. Delta fired Davila asserting that he had fraudulently obtained the disability benefits by withholding from Delta the fact that he actually had a valid first-class medical certificate during the time period that he received benefits. Davila, pursuant to the applicable collective bargaining agreement, appealed his discharge to the System Board of Adjustment and later petitioned the District Court pursuant to the Railway Labor Act to vacate an adverse ruling on his grievance. The District Court denied relief. Subsequently, Davila filed a state court action alleging an Americans With Disabilities Act claim arising out of the same termination. The case was removed to federal court. The District Court dismissed the action holding that his ADA claim was precluded by the prior decision relating to his grievance. Davila appealed to the Eleventh Circuit.

**Holding:** The Eleventh Circuit affirmed. The Eleventh Circuit held that both the ADA claim and the prior grievance share the same "transactional basis" the reason for his termination. The Eleventh Circuit also held that the fact that Davila did not yet have a right to sue letter with respect to his ADA claim at the time he filed the first suit did not prevent the application of the preclusion doctrine. Finally, the Eleventh Circuit held that since the District Court had to review the merits of the grievance decision in order to make its determination in the initial suit, that first action acted as a resolution on the merits and is a proper basis for preclusion.

**Bylsma v. Freeman**, 346 F.3d 1324 (11th Cir. 2003).

**Facts:**The District Court entered summary judgment on Plaintiff's claim under the Family Medical Leave Act on the grounds that Defendant-State was immune from claims under the Family Medical Leave Act under the Eleventh Amendment to the United States Constitution.

**Holding:**The Eleventh Circuit reversed in light of the Supreme Court's intervening ruling in Nevada Department of Human Resources v. Hibbs, 123 S. Ct. 1972 (2003) which held that Congress validly abrogated the Eleventh Amendment immunity for claims against the State under the FMLA

**Garrett v. University of Ala. at Birmingham Bd. of Trustees**, 344 F.3d 1288 (11th Cir. 2003) (per curiam).

**Facts:**Patricia Garrett, Milton Ashe and Joseph Stevenson each suffer from disabilities and each sued their former employers -- various State agencies -- under the Rehabilitation Act, the Americans with Disabilities Act and the Family Medical Leave Act. After the Supreme Court of the United States held that the claims under the ADA were barred by the Eleventh Amendment, the Eleventh Circuit held that claims under the Rehabilitation Act were similarly barred unless the State had waived its Eleventh amendment immunity. The Eleventh Circuit then remanded to the District Court to determine whether the State waived its Eleventh Amendment immunity by accepting federal funds. The District Court determined that the State had not waived that immunity and entered summary judgment dismissing all claims.

**Holding:** The Eleventh Circuit reversed. The Court held that the receipt by the State of funds whose receipt Congress provided on the condition that the State consent to federal jurisdiction, was sufficient to waive the defense of Eleventh Amendment immunity. Thus, it reinstated the Rehabilitation Act claim.

**Shotz v. City of Plantation, Florida**, 344 F.3d 1161 (11th Cir. 2003).

**Facts:**Frederick A. Shotz was requested to perform a voluntary examination of a recently constructed Community Center and Volunteer Park in Plantation, Florida to determine whether it complied with the requirements of Title II of the Americans with Disabilities Act and the applicable regulations. Shotz provided the report which revealed some violations. As a result of receiving the report, other members of the City government conducted a thorough background check on Shotz which included Shotz's criminal, credit and driving records, medical history, involvement in professional disciplinary and other civil proceedings, property ownership, social relationships, including an ongoing conflict with a neighbor, as well as a criminal report involving his wife. This information was then provided by a City Council member to the media. Shotz sued the City and the individual members of the City government that had disclosed the information alleging retaliation under the ADA. The District Court held that there was no individual liability under Title II of the ADA and that the provision of the information on Shotz to the media was not sufficiently adverse to form the predicate of a retaliation claim. Shotz appealed.

**Holding:** Distinguishing its prior decisions under Title I which hold that private individuals are not appropriate defendants under the ADA with respect to employment discrimination claims, the Eleventh Circuit held that individual persons could be liable for violations under Title II. The Court thoroughly surveyed the applicable statutory, case law and legislative history in exhaustive fashion. The Eleventh Circuit also considered the alternate ruling that the public release of the personal information was not

sufficiently adverse to establish a prima facie case of retaliation. Because the breadth of the personal information allegedly “released” went beyond any legitimate bounds, the Court held that it was sufficient to establish the adverse action element of a prima facie case of retaliation. Finally, the Eleventh Circuit ultimately affirmed dismissal as to two individual defendants because insufficient evidence was provided to show that they participated in or had prior knowledge of the dissemination of the information.

**Russell v. North Broward Hosp.**, 346 F.3d 1335 (2003).

**Facts:** Margaret Russell began working as a Patient Accounts Adjustment Representative at North Broward Hospital in June of 1996. Her work included computer work, light typing, filing and telephone work. After prior instances of unscheduled absences and reprimands, Russell slipped and fell at work on May 31, 2000. Over the next ten days she was out of work for some full days and parts of others, but never for three full days in a row. On June 13, 2003, Russell was terminated for excessive absenteeism. Russell then filed an action against the hospital for retaliation for exercising her FMLA-protected rights. A jury returned a verdict in favor of the hospital and the District Court entered final judgment in favor of the hospital. Russell appealed.

**Holding:** The Eleventh Circuit affirmed. It rejected Russell’s argument that partial days of incapacity always, as a matter of law, meet the regulatory requirements for a calendar day of illness. The Eleventh Circuit held that its interpretation was not only faithful to the statute but added certainty to the law by reading the regulation to set forth an objective bright-line rule. Finally, because the applicable regulation, which was consistent with the Eleventh Circuit’s decision, did not stray from the terms of the statute, the Eleventh Circuit held that the regulation was valid.