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Title: Americans With Disabilities Act: An Update on Title I

by

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An Update on Title I

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AMERICANS WITH DISABILITIES ACT:
AN UPDATE ON TITLE I

I. INTRODUCTION

This paper will hopefully provide a detailed discussion of certain of the most recent cases interpreting issues involving Title I of the Americans with Disabilities Act ("ADA") of 1990, codified at 42 U.S.C. §§ 12111-12117. Some of the cases address state laws prohibiting discrimination on the basis of disability which the courts have interpreted consistent with the ADA.

The general rule of Title I of the ADA is found in 42 U.S.C. § 12112(a):

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

There are three types of disabilities which are protected by the ADA. They are listed in § 12102(2):

> The term 'disability' means, with respect to an individual—
>
> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.

Only qualified individuals with disabilities are protected. Such individuals are defined as an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. § 12111(8)

The cases discussed in this paper address the issues of definition of disability, particularly the "record of" and being regarded as" aspects of the definition, whether an individual is

qualified, whether an impairment substantially limits an individual in a major life activity, reasonable accommodation, direct threat, whether job functions are essential or marginal, harassment on the basis of disability and what is known as the interactive process employers must engage in with employees in order to determine the extent of a disability and an appropriate reasonable accommodation. Certain of the cases are discussed in greater detail as the fact situations may be helpful in dealing with situations in your own practice.

II. DISCUSSION OF RECENT TITLE I CASES

1. *Allen v. Hamm*, 2006 WL 436054 (D. Md. February 22, 2006). In this case, several Baltimore city police officers filed a complaint alleging that the defendants wrongfully discriminated against them on the basis of actual or perceived disabilities in violation of the ADA and Rehabilitation Act of 1973. The defendants argued that they were entitled to judgment as a matter of law because the officers could not perform the essential functions of a Baltimore city police officer, i.e., making a forcible arrest, firing a weapon of deadly force, and driving a vehicle under emergency situations. The officers also filed a motion for summary judgment.

In August of 2004, the Baltimore city police department implemented General Order Q-23 providing that "[a]ll sworn members of the department are required to be capable of performing the full duties and law enforcement responsibilities of a sworn member to include the ability to make forceful arrests, to drive vehicles under emergency conditions, and to qualify with a weapon." The policy further provided that, while there were no permanent light duty positions within the department, a limited number of such assignments were available on a temporary basis, not to exceed twelve months, to accommodate officers who were ill, injured or under disciplinary investigation. The general order further required that any police officer determined by the public safety infirmary to be medically unqualified for full duty status must

apply for retirement benefits or return to full duty status within a specified amount of time. The general order did allow an officer to dispute any determination that he was medically unqualified for full duty status.

After General Order Q-23 was implemented, discussions ensued about how it would be administered. It was agreed that police officers would not be required to apply for retirement until city council bill 04-1545 was signed into law. That bill, which was signed into law in December of 2004, allowed police officers to file an application for a line of duty disability retirement benefit even if the officer could not satisfy the five year from date of injury filing requirement. In January 2005, the department sent letters to those police officers who had been determined were permanently unable to perform the duties of a police officer.

Six police officers who had been hurt in the line of duty and who had held light duty positions for quite some time filed the complaint. The issue before the court was whether the officers were "otherwise qualified" for the job of police officer. This resulted in the court deciding whether they could perform the essential functions of the job at issue, i.e., functions that bear more than a marginal relationship to that job, and if not, whether a reasonable accommodation by the employer would enable them to perform those functions.

As stated by the court, the essential functions of a job are the "fundamental duties" of the position. 29 C.F.R. § 1630.2(n)(1). A job function may be considered essential because, among other things, the position exists to perform that function, there are a limited number of employees to whom that function can be assigned, or the function is so specialized that the employee was hired specifically to perform it. 29 C.F.R. § 1630.2(n)(2). According to 29 C.F.R. § 1630.2(n)(3), evidence of whether a particular function is essential includes:

(i) The employer's judgment as to which functions are essential;

(ii) Written job descriptions prepared before advertising or interviewing applicants for the job;

(iii) The amount of time spent on the job performing the function;

(iv) The consequences of not requiring the incumbent to perform the function;

(v) The terms of a collective bargaining agreement;

(vi) The work experience of past incumbents in the job; and/or

(viii) The current work experience of incumbents in similar jobs.

The defendants contended that in the police department the essential functions of a police officer include the ability to make forceful arrests, to operate a vehicle under emergency conditions, and to qualify with a weapon. These functions were viewed as essential at least in part because of fundamental public and officer safety concerns. The officers responded that discovery was needed to determine which job functions are essential. They maintained that the essential functions analysis should focus on the functions of the light duty positions to which they were reassigned, not the position of a police officer. The court rejected that argument because all police officers, even those in administrative or supervisory positions, must be capable of making arrests, driving a vehicle and firing a weapon.

In focusing on the police officer position, the court noted that the officers did not dispute the judgment of the police department as to the essential functions. It was also pointed out that the Fraternal Order of Police had incorporated the light duty policy into its contract with the city of Baltimore. The court concluded its opinion by noting that no reasonable jury could find that the police department "exceeded the broad bounds afforded under the ADA to decide as an employer that being capable of making forceful arrests, driving vehicles under emergency conditions, and firing weapons of deadly force are essential functions for serving as a police officer. *Id.* at *8. Summary judgment was therefore upheld with respect to the issue of the

essential functions of a Baltimore police officer. The court further concluded that it was undisputed that the officers could not perform the essential functions.

The court then moved to the issue of reasonable accommodation. Under the ADA, an employer is required to make reasonable accommodations to the known physical or mental limitations of a qualified disabled individual unless the accommodation would impose an undue hardship on the operation of the business. 42 U.S.C. § 12112(b)(5)(A). According to this statute, a reasonable accommodation may include "[j]ob restructuring, part-time or modified work schedule, reassignment to a vacant position, and acquisition or modification of equipment or devices. . . ." 42 U.S.C. § 12111(9)(B).

The accommodation sought by the officers in this case was to allow them to continue to work in their permanent light duty positions. This is not a reasonable accommodation because permanent, light duty positions would effectively eliminate the essential functions required of a police officer. Thus, these officers were not otherwise qualified individuals.

2. *Arrieta-Colon v. Wal-Mart Puerto Rico, Inc., et al.*, 434 F.3d 75 (1st Cir. 2006).

This case involves a claim of harassment on the basis of disability. Colon began working at Wal-Mart in 1992. At the time he suffered from a condition known as Peyronie's Disease, which prevented him from having sexual intercourse. He underwent unsuccessful surgery in 1992 to attempt to correct the problem. In 1994 he underwent another surgery during which a penile prosthesis was implanted. This procedure was successful but left him with a side effect common to the procedure which consisted of having a constant semi-erection that was apparent through his clothing.

After returning to work, Colon was subjected to numerous incidents of harassment. He provided testimony from himself and three co-workers along with his supervisor. Apparently, the

co-workers learned about his surgery from individuals in the personnel department. The taunting about his surgery continued into 1995 and for the remaining years he worked at Wal-Mart. Much of the harassment expressed the view that he was impotent and that he needed to use a pump to achieve an erection. One of his co-workers testified that he thought Colon was impotent because a person who had a pump implanted was disabled as far as achieving an erection. Another co-worker testified that jokes were made regarding his age, saying that Colon needed to have a pump in order to have "relations." On occasion, employees used the store's paging system to announce that if Colon was close by to ask him to come to the warehouse and let them borrow his pump so they could life a pallet or box. He began to suffer from psychological depression caused by the harassment which led to an impact on his sexual functioning.

Additional testimony in the case from his former supervisors constituted admissions that they participated in the taunting. They also admitted that Colon complained to them. The court found that the evidence proved that Colon complained to supervisors in his chain of command at Wal-Mart up to the level of store manager. At no level was effective corrective action taken. In fact, the store manager stated that Colon was told that it would be easier to get rid of one person than to get rid of all the people who were engaging in harassing conduct.

The harassment took an emotional toll on Colon resulting in loss of sleep, weight and an inability to engage in sexual relations. A psychiatrist reported that he was suffering from a dysthymic disorder. He certified in 1999 that Colon was disabled on account of this disorder and that it was not work related.

Wal-Mart claimed that it had an open door policy which permitted any employee with a grievance to complain to any supervisor, manager, officer or even the president of the company. However, the company admitted that pursuant to this policy the grievance did not have to be

reduced to writing. No recording by the company was ever made of plaintiff's complaints, including complaints he made to the personnel department. In fact the personnel manager acknowledged that there might not be any written record of an employee making use of the open door policy and that she had never even seen such a record for any employee, much less for Colon.

In 1998 Colon filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") alleging that he had been subjected to a hostile work environment as a result of his age and medical condition. Four days after filing the charge of discrimination, he was reprimanded for failing to secure keys which could be used to access and steal merchandise. Ten days later he was reprimanded for working 24 minutes of overtime without the prior authorization of his assistant manager. He contended that these reprimands were unwarranted and given in retaliation for having filed a discrimination complaint with the EEOC. The date of the last reprimand was the last day of work for Colon.

The record developed at trial was not clear concerning the details of his departure. Wal-Mart claimed that he was given a leave of absence. He formally resigned approximately six months later, claiming that he left because of his emotional state and the fact that he had already submitted documentation and filed a complaint because of the discrimination. When he returned he claimed Wal-Mart began orchestrating a way to get rid of him. At his exit interview he noted that he was resigning because he was constantly harassed by his supervisors and co-workers.

Colon filed suit under the ADA and ADEA. Wal-Mart obtained a summary judgment on the age claim, but a trial was held on the hostile work environment and constructive discharge claims under the ADA and state law. With respect to the hostile work environment claim, the First Circuit noted that it had never squarely answered the question of whether a such a claim

was cognizable under the ADA. Wal-Mart addressed the issued before the district court, but did not argue it on appeal. The court therefore proceeded on the assumption that such a claim was cognizable.

Wal-Mart's first point on appeal concerned the denial of a jury instruction on the affirmative defense in harassment cases afforded by the United States Supreme Court's decisions in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). Those cases hold that an employer can be subject to vicarious liability for an actionable hostile environment created by a supervisor with immediate or successively higher authority over the employee. However, when no tangible employment action is taken, a defending employer can raise an affirmative defense to liability or damages subject to proof by a preponderance of the evidence.

The affirmative defense is unavailable when the supervisor's harassment resulted in a tangible employment action, such as a discharge, demotion or undesirable reassignment. The affirmative defense comprises two elements: (1) that the employer exercised reasonable care to prevent and correct promptly any harassing behavior and (2) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. Proof of an anti-harassment policy with a complaint procedure available to employees, while not necessarily dispositive of the first element of the affirmative defense, is relevant evidence.

After those cases were decided, a question arose as to whether constructive discharge which was caused by supervisor harassment so severe that it was intolerable constituted a *per se* tangible employment action so as to prevent the assertion of the *Faragher* affirmative defense. The Supreme Court addressed this question in *Pennsylvania State Police v. Suders*, 542 U.S. 129

(2004), holding that constructive discharge is not a *per se* tangible employment action. Rather, it held that a "tangible employment action" was an "official act", that is, "an employer-sanctioned adverse action officially changing [the employee's] employment status or situation, for example, a humiliating demotion, extreme cut in pay, or transfer to a position in which [the employee] would face unbearable working conditions." *Id.* at 131, 134. (explanation added) The court held that such an official act could both precipitate an employee's constructive discharge and be a tangible employment action that would preclude the employee's entitlement to the *Faragher* defense. *Id.* at 148-149.

The court rejected Wal-Mart's argument that it was entitled to an affirmative defense. The court below found that no reasonable jury could have concluded that either element of the defense had been met. The First Circuit refused to overturn this finding. The court also rejected Wal-Mart's argument that the evidence was insufficient to support the jury's finding of the existence of a hostile work environment that reasonably lead to Colon's constructive discharge. Finally, the court noted that Wal-Mart failed to preserve appellate review of another issue on appeal by failing to renew its motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50. That issue was whether plaintiff actually suffered from a disability or was regarded as having a disability within the meaning of the ADA.

3. *Battle v. United Parcel Service, Inc.*, 438 F. 3d 856 (8th Cir. 2006). Battle sued United Parcel Service, Inc. ("UPS") for disability discrimination and retaliation in violation of the ADA as well as Age Discrimination in Employment Act of 1967 ("ADEA"), the Family Medical Leave Act ("FMLA") of 1993 and the Arkansas Civil Rights Act of 1993. Battle was employed as a package division manager for UPS in Little Rock, Arkansas, where he supervised approximately 600 employees at 11 UPS centers. His primary responsibility was to ensure that

those employees under his supervision met monthly performance goals. In order to perform this job he received a daily operations report detailing the performance statistics for each center. He was required to focus on the worst performing centers and determine why the goals were not met, why problems occurred and propose solutions to correct them. He was then required to report his proposed solutions to his district manager.

In February of 2003, a new district manager was placed over Battle. According to the complaint, he required Battle to research and memorize extensive, unpredictable and useless information from the daily operations reports. If Battle did not answer the questions asked of him, he was berated in front of other employees. He became frustrated and depressed, eventually suffering a nervous breakdown only a couple of months after the new district manager was placed over him. On May 7 he requested FMLA leave for job related stress which was granted by UPS.

Shortly before the expiration of his FMLA leave, Battle wrote his district manager a letter informing him that it was difficult for him to understand, concentrate on, and perform the many tasks required of him. He requested an agenda before each meeting with the district manager and demanded to be returned to his job as it existed before the new district manager arrived. Alternatively, he requested an extended leave of absence. A copy of this letter was forwarded to the human resources manager of UPS.

Battle then met with the district manager and human resources director and presented a copy of the letter which had been signed by his primary physician. The physician indicated his agreement with the stated limitations and accommodation request. A return to work release from a different physician did not indicate any limitations or required accommodations. After a discussion of Battle's supposed restrictions and the contradiction between the physicians, the

human resources director told him that he could either return to work immediately without accommodation or have his primary care physician complete an ADA accommodation form for UPS. Battle responded that he could do his job with the accommodations described in his earlier letter, but agreed to ask his primary physician to complete an ADA accommodation form.

Approximately four (4) days later, UPS's regional occupation health manager sent Battle an acknowledgement of his request for a workplace accommodation and provided an ADA accommodation form to complete and return. Rather than comply with the request to complete the form, he submitted a report from his treating physician. According to the report, Battle was substantially impaired in his abilities to think, concentrate and function at work. It also stated that he would be able to return to full-time employment with appropriate psychiatric treatment, medication and reasonable workplace accommodations.

UPS again notified Battle that it could not process his request until he complied with the requirement that an ADA accommodation form be provided to the regional office. He then complied by submitting the form along with a second medical report from his treating physician. This report stated that he was not able to perform all physical and mental functions of his position, but specified that he needed accommodation only as to "unassigned tasks and lack of consistent defined agendas." The doctor also stated that he could perform all essential job functions for his position as defined by UPS.

One month later, Battle met with UPS's workplace planning manager to discuss the specific accommodations requested. This time he said that he could perform all essential functions of his position without accommodation. When asked why he needed an accommodation, he responded that he could not memorize all the information required by his district manager and that he needed an agenda before each meeting to be adequately prepared.

However, he also defined these tasks as marginal. After this meeting, the treating physician again wrote UPS. In this letter he stated that Battle was fully capable of performing all essential functions of his position.

A final report from the treating physician indicated that Battle's ability to think, concentrate and memorize was not substantially limited to such a degree that it would prevent his return to work in a normal workplace environment. Based upon this most recent report, UPS concluded that Battle no longer needed accommodation and that his job functions would not change upon his return to work. He returned to work two weeks later and continued to work successfully as a division manager under the district manager.

Shortly before returning to work, Battle sued UPS under the laws previously mentioned. The jury determined that UPS had not engaged in intentional disability discrimination, but that it failed to reasonably accommodate Battle's disability. The district court denied UPS's motion for judgment as a matter of law and UPS appealed.

The Eighth Circuit noted that a disability is a physical or mental impairment that substantially limits one or more of the major life activities of an individual. 42 U.S.C. § 12102(2)(A). Determining whether an individual has a qualifying disability requires an individualized analysis of the claimed impairment, including such factors as the nature and severity, probable duration, and expected long-term impact of the impairment. See 29 C.F.R. § 1630.2(j)(2); *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 483 (1999); *Heisler v. Metro. Council*, 339 F.3d 622, 627 (8th Cir. 2003).

Battle claimed that his depression, anxiety, and obsessive-compulsive disorders were ADA-qualifying disabilities because these mental impairments substantially limited him in the major life activities of thinking and concentrating. The Eighth Circuit agreed that the "ability to

perform cognitive functions on the level of an average person" constituted a major life activity. Accordingly, thinking and concentrating qualify as major life activities under the ADA. UPS argued that these disorders did not "substantially limit" Battle's ability to think or concentrate. The company argued that he failed to present sufficient proof that he was substantially limited in thinking and concentrating because he offered no evidence comparing his cognitive abilities to those of average people in the general population.

The Eighth Circuit noted that the treating physician's reports contradicted UPS's arguments. They found that there was support in the record for the jury's finding that Battle was disabled under the ADA. At trial, the doctor testified that Battle's depression and anxiety substantially limited his ability to think and concentrate as compared to the person in the general population. While the doctor conducted no studies or surveys to reach this conclusion, the court noted he was a medical doctor with 38 years of experience in evaluating and diagnosing psychiatric impairments such as those suffered by Battle. The doctor also explained to the jury that Battle thought and concentrated at a "laborious" rate, had to spend extra time working on projects and could not think and concentrate about matters unrelated to work. While he acknowledged that Battle was aided by psychiatric counseling and medication, he opined that he would continue to suffer similar limitations in his ability to think and concentrate in the foreseeable future.

As additional evidence, both Battle and his wife testified about the effects that his depression and anxiety had caused him in his daily life since 2003. They testified that he no longer made household or financial decisions, or disciplined his children, because he did not have the ability to deal with extraneous or unexpected issues, conflicts or demands outside of work. Thus, the Eighth Circuit rejected UPS's argument that he was not substantially limited.

UPS also contended that there was insufficient evidence for a jury to conclude that it failed to engage in a good-faith interactive process with Battle to determine whether he could perform the essential functions of his position, with or without reasonable accommodation. Under the ADA, an employer is required to provide reasonable accommodation to the known physical or mental limitations of an otherwise qualified employee with a disability, unless the accommodation would impose an undue hardship on the employer's business. See 42 U.S.C. § 12112(b)(5)(A). Where the employee requests accommodation, the employer must engage in an "informal, interactive process" with the employee to identify the limitations caused by the disability and the potential reasonable accommodations to overcome those limitations. An employer hinders this process when: (1) the employer knows about the employee's disabilities; (2) the employee requests accommodations or assistance; (3) the employer does not in good faith assist the employee in seeking accommodations; and (4) the employee could been reasonably accommodated but for the employer's lack of good faith.

The court reviewed the back and forth letters and meetings described earlier and found that the jury apparently believed that UPS did not act in good faith after the treating physician submitted a report indicating that Battle could satisfactorily perform essential job functions, with or without accommodation, and submitted an ADA accommodation form. The verdict form submitted by the jury supported that conclusion since it only awarded backpay for the two months after this report was submitted by the doctor. Based on this evidence, the Eighth Circuit refused to overturn the jury verdict on this issue.

4. *DeAngelo v. ConAgra Foods, Inc.*, 422 F.3d 1220 (11th Cir. 2005). DeAngelo, who suffered from vertigo, sued ConAgra Foods arguing that she was terminated from her job as a product transporter on the basis of a disability in violation of Title I of the ADA. She argued

that she was disabled both because she suffered from an impairment, vertigo, that substantially limited her ability to perform the major life function of working and because her employer regarded her as suffering from such an impairment.

She was diagnosed with vertigo shortly before she began working with ConAgra. She did not mention her condition when she was hired, and several months into her job began experiencing episodes of vertigo at work. She informed coworkers and her supervisor that working over a spreader belt was making her feel sick and dizzy and that she only became sick working on the spreader belt when she had to stare at it continuously.

In September 2001, after having worked a year and a half, a new supervisor assigned her to monitor a conveyor belt known as the "box-former belt." This was a duty DeAngelo had never performed and she testified that it made her feel light headed and off balance. She explained to another employee that the assignment made her sick and dizzy and asked for a different work assignment. When asked for documentation of her condition by a supervisor, she provided a copy of her prescription for Antivert. This was an anti-vertigo medication previously prescribed by her physician.

She also gave the plant manager a note from her doctor which indicated that she should not work more than five nights a week because of her medical condition. She was advised to avoid looking at moving objects such as belts because it could cause her to fall and sustain an injury. She testified in her deposition that the restriction on the number of days she could work was unrelated to her vertigo condition, but was a result of having had hepatitis and a prolonged case of the flu.

After receiving the doctor's note, plant personnel met with the vice president of human resources to discuss whether there were available positions that would not require DeAngelo to

look at and work around moving equipment such as conveyor belts. It was determined that there were no such positions. The day after this determination she was terminated. In the termination letter, she was advised that her position as a product transporter required her to work around moving conveyors and mechanized equipment, which was an integral part of the job. In addition, overtime was a requirement which made it necessary she work more than five nights per week. This too was regarded as an integral part of the job. Due to the restrictions placed upon DeAngelo by her physician, she was notified that she was terminated from her position because she posed a safety hazard to herself and her coworkers.

DeAngelo filed suit alleging that terminating her, rather than reasonably accommodating her by exempting her from working on the spreader belt and box-former belt, constituted disability-based discrimination. It was discrimination because she was actually disabled as a result of her vertigo condition and because her employer regarded her as disabled in violation of the ADA.

With respect to the claim that her vertigo condition constituted an impairment that substantially limited her ability to perform the major life activity of working, the Eleventh Circuit upheld the district court's decision that vertigo did not qualify as an actual impairment disability under the ADA since it did not substantially limit one or more of the major life activities. The court found that she did not show a genuine issue of material fact as to whether her vertigo *substantially limited* her ability to work. The court cited the U.S. Supreme Court's decision in *Sutton v. United Airlines*, 527 U.S. 471 (1999) holding that the statutory phrase "substantially limits" requires at a minimum that plaintiffs allege they are unable to work at a broad class of jobs. Because DeAngelo argued only that her vertigo interfered with her ability to work as a product transporter, not that she was restricted in her ability to perform a class of jobs

or broad range of jobs in various classes, she was unable to prevail on her "actual impairment" claim.

The court next addressed the "regarded as" disability claim. DeAngelo argued that she qualified under this category of disability because she "has a physical or mental impairment [vertigo] that does not substantially limit major life activities but is treated by a covered entity [ConAgra] as constituting such limitation." 29 C.F.R. § 1630.2(l).[1] (explanation added)

The Supreme Court held in *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516, 521-522 (1999), that "[a] person is regarded as disabled within the meaning of the ADA if a covered entity mistakenly believes that the person's actual, nonlimiting impairment substantially limits one or more major life activities." An employer may therefore violate the ADA when it makes an employment decision based on a physical or mental impairment, real or imagined, that is regarded as substantially limiting an major life activity. *Sutton v. United States Airlines*, 527 U.S. at 490.

The Eleventh Circuit agreed with the trial court that DeAngelo presented an issue of material fact as to whether she was regarded as disabled. DeAngelo claimed only to be limited in her ability to work directly on a conveyor belt for prolonged periods of time, but ConAgra witnesses testified that they regarded DeAngelo's impairment as substantially more limiting. The testimony further established that she was regarded as unable to perform any job that would place her in the vicinity of any moving equipment, thereby causing ConAgra to not be able to identify a single job in the plant that it believed DeAngelo could perform.

The trial court's ruling that DeAngelo was not a qualified individual under the ADA was rejected. It could not be established as a matter of law that working on a conveyor belt was an essential function of her product transporter position which she was unable to perform even with

a reasonable accommodation. The court stated that whether a function is essential is evaluated on a case-by-case basis by evaluating a number of factors. *Id.* at 1230. In making such a determination, the ADA provides: "Consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job." 42 U.S.C. § 12111(8).

The court turned to the evidence offered to establish the fact that the conveyor belt was an essential function and concluded that it failed to establish that fact. It noted that the testimony of DeAngelo's supervisors was inconclusive. For instance, the vice president of human resources and plant manager both testified about the product transporter position without even mentioning conveyor belt work as an essential function of the job. Another supervisor flatly stated that as a product transporter, DeAngelo would not work on a conveyor belt.

The company's written job description of the position also suggested that working on a conveyor belt *may* not be an essential function of the product transporter position. Therefore, the company's own assessment of the job did not produce proof that working on a conveyor belt was an essential function. Considering this evidence, the court could not agree that there was no genuine issue of material fact as to whether working on a conveyor belt was an essential function of the job of product transporter.

In rejecting DeAngelo's claim that she was regarded as disabled, the trial court also held that an individual who does not actually suffer from a disabling impairment, but rather is disabled only in the "regarded as" sense, is not entitled to a reasonable accommodation under the ADA. Therefore, the court concluded that because DeAngelo could not perform her job as a

product transporter without an accommodation, an exemption from working on the spreader and box-former belts, she had no claim under the ADA.

The court noted that whether the ADA's reasonable accommodation requirement applies to the "regarded as" category was an issue of first impression in that circuit. In analyzing this claim, the court noted that Fifth, Sixth, Eighth and Ninth Circuits all agreed with the trial court. However, the Third Circuit had previously held that under the plain language of the ADA employers are obliged to provide reasonable accommodations for individuals falling within any of the ADA's definitions of disabled, including those regarded as being disabled. *Williams v. Philadelphia Housing Authority Police Department*, 380 F.3d 751, 772-76 (3rd Circuit 2004).

Based on a review of the plain language of the ADA, the court joined the Third Circuit in holding that regarded as disabled individuals also are entitled to reasonable accommodations under the ADA. The court explained its holding by combining the statutory definitions and provisions into the following statement:

> [T]he ADA can only be read as barring discrimination '*against an individual with a physical or mental impairment* that substantially limits one or more major life activities of such individual who, with or without reasonable accommodation, can perform the essential functions of the employment position,' *and* as barring discrimination '*against an individual with a record of such an impairment* who, with or without reasonable accommodation, can perform the essential functions of the employment position,' *and*, finally, as barring discrimination 'against an individual *regarded as having an impairment* who, with or without reasonable accommodation, can perform the essential functions of the employment position.' In other words, the statute's prohibition on discrimination applies equally to all statutorily defined disabilities. *Id.* at 1235-1236. (emphasis in original)

The court concluded that the statute plainly prohibits not making reasonable accommodations for any qualified individual with a disability, including one who is disabled in the "regarded as" sense. The court could find no basis for differentiating among the three types

of disabilities in determining which are entitled to a reasonable accommodation and which are not.

5. *Darnell v. Thermafiber, Inc.*, 417 F.3d 657 (7th Cir. 2005). Thermafiber was engaged in the manufacture of mineral wool insulation at a plant in Wabash, Indiana. The process involved "melting rock and blast furnace slag in a furnace at temperatures of over 2600°F." After leaving the furnace, the molten material dropped into fast rotating wheels where it was cooled and spun to create rock fibers. The fibers were then glued, formed into boards and cured in ovens at temperatures of 600°F. Once cooled, the boards passed through a series of saws and high speed blades. Operators then retrieved the insulation pieces from the conveyor and lifted them onto another conveyor for shrink wrapping.

Darnell was hired by Thermafiber through a temporary employment agency. He was a Type 1 diabetic who was dependent upon insulin. Before beginning work, he was required to pass a pre-employment physical. During his physical, a nurse practitioner reported to the company that Darnell was capable of performing the requirements of the job.

Some eight months later, Darnell left the company to work outside the state. Up until that time, he had suffered no debilitating episodes related to his diabetes. Several months later, he returned to Indiana and applied for a full-time job with the company. He was offered a position contingent upon passing another pre-employment physical. In this examination, he was administered a urine glucose test and interview. The doctor performing the examination, whose practice included 180 diabetes patients, determined from the results of the test and interview that Darnell's diabetes was not under control. Because of this, he felt no need to conduct further tests or to review Darnell's medical chart. He reported to Thermafiber that Darnell was not capable of performing the physical requirements of the job because of his uncontrolled diabetes.

Darnell then learned that Thermafiber rescinded its offer of employment because he had not passed the physical examination. He filed a charge of discrimination with the EEOC claiming he suffered discrimination in violation of the ADA. The district court granted summary judgment in favor of the company which contended that Darnell's uncontrolled diabetes would pose a significant safety risk at the plant.

On appeal, Darnell argued that summary judgment was inappropriate because Thermafiber had not demonstrated that his uncontrolled diabetes made him a direct threat to safety at the plant. He also contended that it was unreasonable for the company to rely upon the second doctor's opinion because he failed to perform an adequate, individualized assessment of Darnell's ability to perform the job.

While the ADA prohibits an employer from discriminating against a qualified individual with a disability, an individual is not qualified if he presents a direct threat to his own health and safety or that of others. The determination that he poses a direct threat must be premised upon "a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence, and upon an expressly individualized assessment of the individual's present ability to safely perform the essential functions of the job." *Id.* at 660 (quoting *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 86 (2002)). According to the interpretative regulations, this assessment should take into account: (1) the duration of the risk, (2) the nature and severity of the potential harm, (3) the likelihood that the potential harm will occur, and (4) the eminence of the potential harm. 29 C.F.R. § 1630.2(r).

Darnell argued that the company doctor failed to perform an individualized assessment of his condition and abilities that were supported by objective, medical evidence. He argued that the assessment was based on stereotypes and insufficient data, the results of a single urine glucose

test, which should have been supplemented by more reliable blood tests. The Seventh Circuit disagreed. It recognized that testimonial evidence can provide sufficient support for a direct threat finding under the ADA and cited the deposition testimony of the doctor during which he related information from his interview with Darnell.

From that interview, the doctor learned that Darnell had a history of poor compliance and failure to seek medical attention; he admitted his blood sugar levels were too high and had not had them checked in a number of months, and that the last time they were checked they were not good. These admissions were corroborated by the results from the urine glucose test. In addition, during the interview, Darnell responded angrily to suggestions by the doctor that he should be better at controlling his diabetes. The court concluded that, under these circumstances, additional testing was unnecessary because the results would not have refuted the fact that Darnell was unmotivated to control his diabetes.

The court also rejected Darnell's argument that there was no evidence that his noncompliance was likely to cause substantial injury. The court found that the evidence was uncontested that blood sugar levels could fluctuate dramatically when diabetes goes unregulated. Even Darnell's doctor testified that this could cause unconsciousness, confusion and impaired judgment. Noting that Thermafiber employees were required to climb tall ladders, operate dangerous machinery and help lift 80 pound pieces of fiberboard, the court concluded that if Darnell were to experience these symptoms the injury to himself or others could be great.

Darnell also argued that predictions about possible falls from heights and injuries could not support the company's assertion that a diabetic was a direct threat under the ADA. Again the court disagreed. Darnell admitted his sugar levels were too high, that he did not adequately monitor his diabetes and was dependent upon insulin. It was this noncompliance, poor judgment

and admittedly high glucose levels that made it likely he would eventually experience a diabetic episode at the company. The court further stated that it had previously recognized that where a plaintiff's medical condition was uncontrolled, of an unlimited duration, and capable of causing serious harm, an injury could be considered likely to occur.

The Seventh Circuit upheld the finding of the direct threat and affirmed the summary judgment for the employer.

6. *Equal Employment Opportunity Commission and Keane v. Sears Roebuck and Company*, 417 F.3d 789 (7th Cir. 2005). This is an interesting case presenting several ADA issues. Keane began working at a Sears department store in Calumet City, Illinois in September 1992. In the summer of 1994 she began experiencing numbness in her right leg. While it did not affect her ability to walk short distances in the work area, it sometimes precluded her from taking longer walks such as those required to reach the employee cafeteria or the food court. She explained to her immediate supervisor, Ms. Klisiak, the difficulty she was having with her leg and asked if she could eat lunch in the intimate apparel stockroom. Klisiak initially agreed, but later announced a blanket policy forbidding all eating in the stockroom.

In the fall of 1994, Keane's condition began to worsen and she asked Klisiak if she could walk through the shoe stockroom when going between the area where employees clocked into work and the intimate apparel department. Keane explained that this shortcut would reduce by half the distance she had to walk at the beginning and end of each shift. Klisiak directed Keane to the shoe department manager, Ms. Krumweide, who denied the request. Klisiak then went to the store manager, Mr. Allen, on Keane's behalf and explained Keane's problem. She requested Keane be allowed to use the stockroom shortcut, but Allen refused.

Beginning in December 1994, Keane could walk no more than the equivalent of one city block without losing sensation in her leg. Once this happened walking became nearly impossible and slow. Keane eventually began using a cane when taking longer walks through the store. However, this did not alleviate her symptoms or allow her to walk further.

Later in December 1994, Keane was diagnosed with neuropathy, and non-insulin-dependent diabetes. Her neurologist wrote a note stating that she should avoid walking long distances or for prolonged periods. Keane brought the note to work and, because Klisiak was not in, gave it to another person who left it on Klisiak's desk. Klisiak found the note the following month. She knew that Keane's hours had been reduced at the end of the holiday season and decided, without discussing it with Keane, that the shortened schedule sufficiently limited Keane's walking. The changes in hours had not actually helped Keane because her problem was walking to and from the work area, regardless of the length of her work shifts. Klisiak put the doctor's note in Keane's personnel file without sharing it with anyone.

At some point, Klisiak gave Keane temporary permission to use the shoe stockroom as a shortcut. However, the first time Keane attempted to use it Krumweide yelled at her to get out the room and told her that Klisiak had no right to give her permission to use the shortcut in the shoe department. Later, Keane discovered that an employee had been stationed at the entrance to the room to prevent anyone from going through the stockroom.

Keane next asked Allen if she could park in the merchandise pickup lot near the employee entrance. He denied this request, but allowed Keane to park in a space reserved for people with disabilities outside of her department. However, this did not help since she still had to walk across the store to the employee clock-in location and then talk back to her work area in the intimate apparel department at the beginning and end of each shift. In the spring of 1995, in

addition to her right leg, Keane began to lose sensation in both feet when walking distances. At times she was required to hold onto the wall to avoid falling.

Around this same time, the store manager asked her to have her doctor to fill out a Sears Physician Certification form. In doing so, he did not indicate to her that there was anything wrong with her first doctor's note or indicate whether any specific information was needed. Nor did he asked her what sort of accommodation she was seeking.

At the store manager's request, Keane's general practitioner completed the form and stated that she suffered from diabetes and neuropathy in her right leg. He recommended that she limit excessive walking and be allowed a short access to her job site. When Allen received the form, it was his assumption that the accommodation request had been fulfilled since she had been allowed to use the reserve parking space near her department. He did not ask for nor did Keane provide any additional medical information concerning her condition or the adequacy of the accommodation.

Allen told Klisiak to inform Keane that she could not use the shoe stockroom as a shortcut. Klisiak did not tell Allen that she was aware that the handicapped parking spot was farther away than what Keane required and that she would still have to walk around the building to the employee clock-in location before proceeding to her assigned department.

After another month had passed, a meeting with held in which Klisiak told Keane that Allen had again denied her request to use the shoe stockroom shortcut. She also gave her a new schedule requiring her to work on Thursday evenings and Fridays which she had not been required to work. She told Klisiak that she was unavailable to work on these dates. She believed Sears had failed to accommodate her disability and was attempting to make her work

environment more difficult. She told Klisiak that the walking was too much for her and that she was going to have to resign.

The EEOC filed suit against Sears, with Keane intervening, alleging that the company failed to reasonably accommodate her disability. Keane also claimed that the company constructively discharged her from her position. The trial court found that Keane was not disabled under the ADA and that she could not show that she had been subjected to conditions that were so intolerable as to require resignation. It granted Sears summary judgment on both counts. The Seventh Circuit affirmed the constructive discharge summary judgment but found genuine issues of material fact as to whether Keane was disabled and remanded the case to trial. There were several interesting issues in this case which merit discussion.

The first issue was whether Keane was actually disabled under the ADA. All parties agreed that neuropathy was a physical impairment and that walking is a major life activity as defined in the ADA. The question was whether it substantially limited her ability to walk during the time she worked at Sears. The district court found that the Supreme Court's decision in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) raised the bar for a plaintiff to establish that she was substantially limited in her ability to perform a major life activity. *Toyota* held that "to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives." *Id.* at 198. The district court found that the language "severely restricts" governed this case and concluded that Keane was not severely restricted from walking.

On appeal, the Seventh Circuit disagreed. The major life activity involved in *Toyota* was the ability to perform manual tasks. The Seventh Circuit noted that this is different from walking.

It noted that the Supreme Court had expressly limited its grant of certiorari in *Toyota*, along with its analysis and holding, to the major life activity of performing manual tasks. The court stated:

> The ability to perform these type of tasks is much less telling when considering the major life activity of walking. The ability of a person who is wheelchair bound to wash his face or pick up around the house does not indicate that he is not disabled under the ADA, and it would not relieve his employer of the obligation to install a ramp or reasonably accommodate his limitations in other ways. The requirement that a plaintiff be unable to perform a 'variety of tasks' like the ones discussed in *Toyota* may not apply where the major life activity at issue is something other than the performance of manual tasks. 417 F.3d at 801.

The court went on to hold that to be disabled with regard to the major life activity of walking, the employee must be substantially limited in her ability to walk and the limitation must be permanent or long-term as well as considerable compared to the walking most people do in their daily lives. There was no evidence that Keane's impairment was temporary or short-term. A reasonable jury could have concluded based on the evidence and its own life experience that her severe difficulty in walking the equivalent of one city block was a substantial limitation compared to the walking most people do daily. The case was remanded on this issue to the district court for further exploration of the evidence on this issue.

Another issue which troubled the court was the one of reasonable accommodation. Sears did not contend that accommodating Keane's disability would have imposed an undue hardship. Sears' position was that it reasonably accommodated Keane's limitations by allowing her the use of a reserved parking space near her work area and by allowing her to use the intimate apparel stockroom to eat lunch as well as the use of the shoe stockroom shortcut for a period of time. The Seventh Circuit was unimpressed with these concessions and found they did not constitute a reasonable accommodation when the evidence was viewed in the light most favorable to Keane. One of the accommodations was rescinded and the other involved Keane facing a formal

reprimand when she tried to use it. Thus, the issue of whether she was actually reasonably accommodated was remanded to the district court.

The final issue which arose in this case concerned the "interactive process" which the employer and employee must engage in under the ADA. An employer is in violation of this requirement if it fails to provide a reasonable accommodation to the *known* physical or mental limitations of an otherwise qualified individual with a disability. 42 U.S.C. § 12112(b)(5)(A) (emphasis added).

The ADA requires the employee to initially inform the employer of a disability and of the need for an accommodation. After that, the employer and employee must work together through an interactive process to determine the extent of the disability and what accommodations are appropriate and available. If necessary, the employer must seek clarification. The court found that a reasonable jury could have determined that Sears was aware of Keane's disability sufficiently enough to have triggered the interactive process. Sears was therefore not entitled to judgment as a matter of law on this point.

The court also found that a jury could have concluded that Sears was responsible for the breakdown of the interactive process. According to the EEOC regulations, the purpose of the interactive process is to "identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." 29 C.F.R. § 1630.2(o)(3). Employers are required to engage in a flexible give and take with the disabled employee so that together they can determine what accommodation would enable the employee to continue working. *Id.* If the process fails to lead to a reasonable accommodation, responsibility will lie with the party that caused the breakdown. The employer may not simply

reject a requested accommodation without offering other suggestions or at least expressing a willingness to continue to discussing possible accommodations. *Id.* at 806.

In the *Keane* case, the court found that while she may not have articulated to Sears all the details of her disability, she discussed with her supervisors the difficulty she was having walking. Although Sears was not obligated to provide any specific accommodation, it could not simply reject a request and take no further action. A reasonable jury could have found that that is exactly what Sears did. *Id.* at 807. The court concluded as follows on this issue:

Sears argues that Keane should have said to someone '[y]ou have not gotten back to me' when it failed to respond to her requests for accommodations. It is not an employee's responsibility, however, to repeatedly prod a reticent employer. Keane was given no indication that Allen or anyone else at Sears was willing to work with her to determine a way to reasonably accommodate her disability. In this context, Sears cannot avoid liability by contending that Keane should have tried harder to force it out of its reluctant posture. *Id.* at 808.

7. *Heiko v. Colombo Savings Bank, F.S.B.*, 434 F.3d 249 (4th Cir. 2006). Heiko brought suit against his former employer alleging failure to promote and constructive discharge on the basis of disability. He commenced employment with the bank in January of 1998 in the position of loan assistant in the loan administration department. Prior to that, he received an undergraduate degree in mathematics and had worked in the banking industry since 1990. He progressed quickly through the ranks at the bank and in April 1999 was approved for promotion to senior operations officer/table-funded loan supervisor. He was again promoted in June 1999 to the position of assistant vice president of loan administration. In this position he also assumed supervisory authority over various lower level employees in loan administration.

Heiko was often asked to address problems outside the loan administration department. Among other things, he was responsible for creating a loan tracking device and a weekly loan report. He also participated in meetings on banking matters unrelated to his primary duties. He received favorable performance evaluations and in December 2000 was named employee of the year.

At the time Heiko joined the bank he suffered from polycystic kidney disease. Several months after his promotion to assistant vice president his condition deteriorated to the point where he was diagnosed with end-stage renal disease. This disease renders the kidneys virtually inoperative and prevents them from filtering dangerous toxins from the blood that naturally build up over time. To avoid toxic waste build up, and death within several months, end-stage renal disease must be treated with either a kidney transplant or dialysis.

Heiko began dialysis treatment in November of 1999. In this procedure his blood was pumped through a dialysis machine which purged the toxins and returned the cleansed blood to his body. The dialysis machine was attached by inserting a needle into a fistula located in his arm. A fistula is a surgically constructed connection between an artery and vein designed to withstand frequent needle insertions and augment blood flow. The dialysis regimen required a substantial amount of time and forced Heiko to rearrange his work schedule. He underwent dialysis three afternoons a week for four hours each day. In order to maintain a 40 hour work week, he worked from 7 a.m. to 2 p.m. on the days he received dialysis treatment.

The treatment caused him significant discomfort. According to his testimony, undergoing dialysis was like having a part-time job. When attached to the machine it was constricting, and often caused pain and swelling in his arm where the needle attached to the fistula. After the treatment he immediately went home to rest and felt exhausted for the remainder of the day. He

was usually only able to take baths because standing in the shower was too difficult. In the following mornings he would often feel the urge to vomit and would frequently remain nauseous well into the day. Dialysis also required changes to his diet, such as limitations on potassium intake, occasional fasting and a reduction in fluid consumption. He was once hospitalized for low potassium levels and had one of his kidneys removed in 2000. He also had several surgeries to build and repair his fistula.

After he started undergoing dialysis, Heiko's immediate supervisor who was vice president of the loan administration department, announced she was leaving the bank. Heiko was interested in her position and discussed his desire for this promotion with both his supervisor and the bank president. However, the president awarded the position to another person on the recommendation of Heiko's supervisor. The person awarded the position, Ms. Rubin, and Heiko were the only two considered.

Prior to her promotion to the position, Rubin had been employed with the bank for approximately 18 months and had served as head of the mortgage operations department. She did not have a college degree but had worked in banking since the mid-1970's. The mortgage operations department handled mortgage loans and was separate from loan administration, which was primarily concerned with commercial loans. However, mortgage operations was eventually brought within loan administration. Rubin was not familiar with certain types of management reports or with several of the computer programs utilized in the loan administration department. After her promotion, Heiko assisted in training her on various software applications and spreadsheet functions.

When told that he had not received the promotion, Heiko approached both the president and his supervisor to ask why he had not been named vice president. According to Heiko, the

bank president referred to the number of hours the vice president would need to work and noted that if Heiko was to receive a kidney transplant he would be out of the office for four to six months. Heiko contended that he informed the president on numerous occasions that a kidney transplant would only require a six week absence. When Heiko asked his supervisor about the promotion she replied "Look at your situation."

Heiko warned the president that promoting Rubin was a mistake and that various bank officers would not work under her. The president asked Heiko if he would, in addition to some of his current responsibilities, be interested in taking over Rubin's former responsibility of managing the mortgage operations department which was apparently in a state of disarray. Heiko declined this lateral move.

In July 2001 Heiko transferred to the loan processing department and began work as a loan processor. This move resulted in a loss of his assistant vice president title and previous responsibilities, but was not a reduction in salary. He was aware he would no longer be considered an assistant vice president once he joined loan processing. One month later he was informed that he would not receive an annual pay raise.

Shortly thereafter, he complained to several bank officers that the bank was discriminating against him on the basis of his kidney failure by not promoting him and later reducing his responsibilities. He also made this complaint to the bank president. At about that time, he informed the bank that he was searching for new employment.

A short time later, the bank president informed Heiko that the loan processing department was overstaffed and that the only available position was as the president's executive assistant. He accepted this job. He was also told that he would not be needed before 7:30 a.m. This impacted his total work hours because he still had to leave early for dialysis every other day. After several

weeks in the executive assistant position, the president asked Heiko to move back to the loan administration department because a loan assistant position had become available. This was the first position Heiko had occupied when he joined the bank.

About two months later Heiko resigned from the bank after accepting another job. Some two years later he received a kidney transplant which eliminated the need for dialysis treatment. Rubin, in the meantime, was unsuccessful as the vice president of loan administration. She was demoted to another position with a reduction in salary, and resigned one month later after the bank decided to terminate her employment.

Heiko filed suit alleging discrimination on the basis of his kidney failure in violation of Article 1, Section 26-19 of the Montgomery County Code (2004). The parties to the suit agreed that it was to be interpreted consistent with the federal ADA. Heiko contended that he was covered under the definition of disability set forth in the ADA because his end-stage renal disease rendered him substantially limited in the major life activity of eliminating bodily waste.

The first question was whether plaintiff was disabled within the meaning of the ADA. Heiko was required to make a three-part showing that he suffered from a physical or mental impairment substantially limiting one or more of his major life activities. That involved proving (1) that he had a physical or mental impairment, (2) that this impairment implicated at least one major life activity and (3) the limitation was substantial. *Id.* at 254. While agreeing that end-stage renal disease constitutes a physical impairment, the issue was whether it implicated a major life activity. The court noted that the ADA did not define that term. However, the United States Supreme Court decision in *Toyota Manufacturing Ky. Inc. v. Williams*, 534 U.S. 184 (2002), held that the term major life activities refers to those activities that are of central importance to

daily life, and that the average person in the general population can perform with little or no difficulty. *Id.*

Plaintiff contended that his kidney failure severely impacted his ability to eliminate bodily wastes. The court agreed that bodily waste elimination qualified as a major life activity as basic to any person's daily regimen and is also a daily activity that the average person can accomplish with little effort by urinating several times a day. Without it, hazardous toxins remain in the body and eventually become fatal. It was therefore easily regarded as being of central importance to daily life. For these reasons, the court concluded that waste elimination fit within the EEOC's non-exhaustive list of major life activities, which includes "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i) (2004).[2]

Having established that waste elimination constituted a major life activity, the next issue for the court was whether plaintiff's kidney failure substantially limited his ability to eliminate waste. Whether a person is substantially limited is a distinct and individualized inquiry that must consider not only a particular plaintiff's limitations, but also the effects of corrective mitigation measures. *Id.* at 256. Among the factors the court should consider in making the substantial limitation determination are the impairment's "nature and severity" and "expected duration". 29 C.F.R. § 1630.2(j)(i)-(ii). The impairment must be "permanent or long term". *Toyota Motor Manufacturing*, 534 U. S. at 198. This would not include sporadic or otherwise temporary impairments. Whether the plaintiff is substantially limited in a major life activity is determined by examining the unique facts and circumstances surrounding his particular impairment.

Applying these standards to Heiko's situation, the court concluded that he was substantially limited in his ability to eliminate waste. No reasonable jury could conclude otherwise. The court said:

> In order to accomplish the equivalent of urination, Heiko [plaintiff] had to insert a needle into a surgically-fashioned fistula and tether himself to a dialysis machine three afternoons per week, for a total of 12 hours. This did not include travel time to and from a dialysis center, or the time required to set up the dialysis equipment. Dialysis also unyieldingly set the terms of his daily schedule. While he was able to work a 40-hour week, his condition required him to arrive at work by 7 a.m. every other day. And whereas urination does not have side effects, after dialysis Heiko felt nauseous and depleted, unable to even to stand in the shower. These aspects of his renal failure and concomitant treatment dramatically 'distinguished him from the general population' and the major life activity of waste elimination. And while dialysis did of course enable Heiko to eliminate waste, the ADA 'addresses substantial limitations on major life activities, not utter inabilities.' *Id.* (explanation added) (internal citations omitted).

The court also found that the impairment was not temporary as he dealt with dialysis and its side effects each day.

> The prospect of a kidney transplant was speculative at best as he waited on a transplant list for over two years and only received a new kidney after nearly four years of dialysis. At all times relevant to the case, he was under the limitations described above. For these reasons, his impairment and mitigation measures rose to the level of severity that the substantial limitation requirement demands. *Id.* at 257.

The court next addressed the issues of failure to promote and constructive discharge. On the promotion claim, the bank argued that it promoted Rubin due to her superior qualifications. Because there was no direct evidence that disability impacted the decision, the case was analyzed under the framework adopted in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973). This case requires that the plaintiff first make out a *prima facie* case of discrimination. If he does, the burden then shifts to the defendant to provide a legitimate, non-discriminatory explanation for its decision. Once this neutral reason is proffered, the burden shifts to the plaintiff to establish that the employer's non-discriminatory rationale is a pretext for intentional

discrimination. At this point, the *prima facie* case combined with sufficient evidence to find the employer's asserted justification as false, may permit the trier of fact to conclude that the employer unlawfully discriminated. *Id.*; *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000).

The court concluded that plaintiff easily established a *prima facie* inference of discrimination and that the bank successfully rebutted it by responding that it selected Rubin due to superior qualifications. The issue is whether there was sufficient evidence of pretext. A plaintiff alleging a failure to promote can prove pretext by showing that he was better qualified, or "by amassing circumstantial evidence that otherwise undermines the credibility of the employer's stated reasons." *Id.* at 259.

In analyzing the employer's rationale of superior qualifications, the court assesses relative job qualifications based on criteria established as relevant to the position in question. The bank focused primarily on banking skills and experience. The vice president job description at issue listed the relevant job specifications as computer literacy and loan managerial servicing/administration experience in a banking atmosphere. The supervisor who assisted in making the promotion decision testified that there was no specific formula she used to evaluate candidates, but that banking experience and how much training the candidate would require were primary considerations.

The court found that a reasonable fact finder could determine that the bank's explanation for its promotion was unworthy of credence. Prior to his kidney condition worsening, Heiko was rapidly moving through the ranks at the bank. After he began extensive dialysis treatment he was denied a promotion. Further, a reasonable jury could conclude, on the basis of Heiko's greater familiarity with various aspects of commerce lending, his superior mastery of the relevant

computer programs used in the loan administration department, his quick succession of promotions and his performance evaluations, that the bank's contention that he was less qualified than Rubin could not be believed. The court found that he had greater experience in many areas of banking, including skills with computers. The supervisor acknowledged that Heiko had computer skills that were greater than Rubin's. The court found:

> While no single factor is dispositive, taken in combination they suggest Heiko was discernibly better qualified than Rubin. When a plaintiff asserts job qualifications that are similar or only slightly superior to those of the person eventually selected, the promotion decision remains vested in the sound business judgment of the employer. But where, as here, the plaintiff has made a strong showing that his qualifications are demonstratively superior, he has provided sufficient evidence that the employer's explanation may be pretext for discrimination. *Id.* at 261-262.[3] (internal citations omitted).

The final paragraph in the opinion is instructive with respect to the purpose of the ADA and state statutes prohibiting discrimination:

> The Americans with Disabilities Act and parallel state and local statutes reflect our national commitment that disabled persons should lead lives that, to the extent possible, are unencumbered by the disabilities that have befallen them. An individual's impairment should not operate to restrain his professional aspirations when in spite of his limitations, he has dedicated himself to his craft and sought advancement in his field. In the face of formidable obstacles, plaintiff persisted in his desire to develop his banking skills. While the ADA protects only a limited segment of our population, James Heiko fits clearly within its bounds. And though Colombo at times appears to have been appreciative of Heiko's work, there is sufficient evidence for a jury to conclude that its denial of a promotion was made on a prohibited basis. *Id.* at 263.

8. *Karraker v. Rent-a-Center, Inc.*, 411 F.3d 831 (7th Cir. 2005). Rent-a-Center is a chain of stores offering appliances, furniture and other household goods on a rent to own basis. Each store has a store manager, several middle managers and entry level account managers. Most of the new employees start as account managers and are promoted to upper level positions. In order to obtain a promotion, an employee was required to take the APT Management Trainee-

Executive Profile which was made up of nine tests designed to measure math and language skills as well as interests and personality traits.

As a part of this APT test, the plaintiffs and others were asked 502 questions from the Minnesota Multiphasic Personality Inventory ("MMPI"), a test the company said it used to measure personality traits. However, the MMPI also considers where an applicant falls on scales measuring traits such as depression, hypochondriasis, hysteria, paranoia, and mania. Elevated scores on certain scales of the MMPI can be used in diagnoses of certain psychiatric disorders.

According to the company procedure, all parts of the APT test were scored together and any applicant with more than twelve "weighted deviations" was not considered for promotion. An applicant could therefore be denied any chance for advancement simply because of his score on the MMPI. The plaintiffs in this case, the Karraker brothers, all had more than twelve deviations. They sued on behalf of employees at 106 Illinois Rent-a-Center stores claiming that the company's use of the MMPI as part of its testing program violated the ADA.

Among the provisions of Title I of the ADA is one which explicitly limits the ability of employers to use medical examinations and inquiries as a condition of employment. 42 U.S.C. § 12112(d)(1). The prohibitions include using pre-employment medical tests, a prohibition against the use of medical tests that lack job-relatedness and business necessity and a prohibition against the use of tests which screen out or tend to screen out people with disabilities.[4] The issue in this case was whether the MMPI fit within the ADA's definition of a medical examination.

The company did not argue that the test was job related and consistent with business necessity. It sought a clear finding from the court that the MMPI was not a medical examination and thus not regulated by the ADA. The court referenced the EEOC definition of a medical examination as a "procedure or test that seeks information about an individual's physical or

mental impairments or health."[5] According to the EEOC, the factors to consider in determining whether a particular test is a medical examination include:

(1) Whether the test is administered by a health care professional;

(2) Whether the test is interpreted by a health care professional;

(3) Whether the test is designed to reveal an impairment of physical or mental health;

(4) Whether the test is invasive;

(5) Whether the test measures an employee's performance of a task or measures his/her physiological responses to performing a task;

(6) Whether the test normally is given in a medical setting; and

(7) Whether medical equipment is used. *Id.*

The EEOC also holds that psychological tests that are designed to identify a mental disorder or impairment qualify as medical examinations, but such tests that measure personality traits such as honesty, preferences and habits do not. *Id.*

The Seventh Circuit stated that the case turned on whether the MMPI test was designed to reveal a mental impairment. The company argued that it used the MMPI only to measure personality traits. It argued in its brief on appeal that the MMPI did not test whether an applicant was clinically depressed, only "the extent to which the test subject is experiencing the kinds of feelings of depression that everyone feels from time to time (e.g., when their favorite team loses the World Series)." *Id.* at 835. The court found the example odd and illogical.

Another example offered at oral argument by the company was that the MMPI merely tested a "state of mood" and suggested that an applicant might score high on the depression scale because he lost his keys that morning. The court found it strange that the company would care if an applicant lost his keys on the morning of the MMPI or took the test the day after another

Chicago Cubs loss. It could not understand why the company would want to exclude an employee from consideration for a promotion because he happened to feel sad on the wrong day. Two possibilities existed to the court: either the MMPI was a very poor predictor of an applicant's potential as a manager or it actually was designed to measure more than just an applicant's mood on a given date.

> The Seventh Circuit found that the MMPI was designed, at least in part, to reveal mental illness and had the effect of hurting the employment prospects of one with a mental disability. Because of this the MMPI was best categorized as a medical examination. And, even though it was only a part of a battery of tests administered employees looking to advance, its use violated the ADA.

9. *Samuels v. Kansas City, Missouri School District*, 437 F.3d 797 (8th Cir. 2006).

Samuels was employed full-time by the school district beginning in 1978. Her first responsibility was to teach mentally handicapped and learning disabled students. In 1999, she accepted the position of case manager in the school district's Exceptional Education Department ("EED"). This position required frequent travel to several different schools, extensive walking and stair climbing and repetitive handwriting. In October of 2000, she applied for and was offered the position of vocational resource educator at the Manual Career and Technical Center, a position that appealed to her because it involved very little handwriting, no outside travel, limited walking and no significant physical activity. She received this position and resigned from her case manager position in December 2000.

One month prior to that, Samuels slipped and fell while entering a high school, sustaining injuries to her knee, neck and back. A few weeks later she was involved in a car accident in which she injured her back and ribs thereby aggravating the injuries suffered in her fall. Then, in January 2001, she slipped and fell on ice outside a restaurant and again aggravated her previous injuries.

After the first accident in November 2000, Samuels notified the vocational resource educator program director of her injuries and told him she needed to be on medical leave. On January 12, 2001, the program director wrote Samuels and stated the job offer was being withdrawn because he could not continue to wait for her to become available or to receive communication regarding her status. Due to the accidents and injuries she sustained, Samuels was on short-term leave from her position from November 2000 until approximately April 2001. While on leave, the school district asked that she complete required FMLA paperwork. She did not return the required documentation although she alleges she was never provided with the proper paperwork. During her leave period, the school district continued to compensate her at her normal rate of pay, using her sick leave, and held open her case manager position until she returned.

In April 2001, her physician released her to return to work on a part-time basis with restrictions. Throughout the remainder of the 2001 school year, she returned to her previous position as case manager but was unable to perform the physical tasks required. She was assigned to perform light duty clerical work in the EED office on a reduced schedule of 20 hours per week. When she returned to work she requested and received intermittent leave to attend physical therapy and other medical appointments relating to her injuries.

On May 21, 2001, Samuels submitted to the school district a formal request for job accommodations due to her disabilities and limitations. She also submitted a medical assessment of functional capability report. She asked to be assigned to buildings with one floor or an elevator, accessible handicapped parking or minimal walking, and room to perform stretching exercises. She also requested time for therapy and doctors' appointments. In response to this

formal request, she was evaluated by two medical professionals to determine whether she needed any accommodations to perform the essential functions of her position.

Her personal physician determined that she was still recovering from injuries she sustained in November of 2000, her capacity to lift or carry objects was limited to less than five pounds, she could stand or walk for a maximum of one hour each day, she could not sit for more than one hour without interruptions for rest and stretching and she lacked capacity to climb, stoop, crouch, kneel or crawl.

Pursuant to district policy, Samuels was also examined by a physician selected by the school district, who determined her impairments were resolved without any lasting affects and that she did not qualify for an accommodation. In this situation, district policy provided that it would pay for an independent medical evaluation if the opinion of the school district's doctor and the employee's doctor differed. The doctor hired for this task concluded, after an examination, that he believed she did not appear to be disabled and did not qualify for an accommodation. The school district then notified Samuels that her request for a job accommodation was denied.

A month later, she was transferred to a middle school to work as a learning disability teacher. The school was an alternative school for students who had been diagnosed with mental and behavioral disorders, many of whom had a history of violent and disruptive behavior toward others. The director of the EED transferred Samuels to this job based on her understanding that Samuels had requested and agreed to such a transfer, and that the school satisfied the majority of her criteria. Samuels, however, alleged that she never spoke to anyone about such a transfer and did not want to go there because she lacked the physical capacity to control the students.

After working about two months at the school, she was injured when a student kicked a chair in which she was sitting, causing pain to her lower back, ribs, neck and left leg. A doctor retained by the school district diagnosed her with a "vibratory" injury to her left lower extremity and back. She was cleared to return to work four days later. However, she requested and was granted an extended medical leave of absence without pay from September 10, 2001, until August 31, 2002.

In August 2002 she returned to work as an elementary school counselor until December 2003 when she again requested a long term leave of absence due to hypertension. On March 3, 2004, she brought suit against the district alleging that it violated the ADA by discriminating against her and refusing to provide reasonable accommodations for her disabilities. The district court granted summary judgment holding that she was not disabled within the meaning of the ADA.

To establish a *prima facie* case under the ADA, a plaintiff must demonstrate (1) her condition qualifies as a disability within the meaning of the ADA, (2) she is qualified to perform the essential functions of her position with or without a reasonable accommodation, and (3) she has suffered an adverse employment action due to her disability. Whether an impairment substantially limits a major life activity is a threshold question. Evidence of a medical diagnosis of an impairment is insufficient.

The Eighth Circuit found that the record contained no evidence that Samuels suffered from a long term or permanent disability. Her primary evidence was her contention that a medical evaluation concluded that she suffered a sixty percent (60%) permanent partial disability to her body as a whole. The court disagreed, noting that this doctor did not examine her until April 15, 2002, nearly one year after the school district denied her request for accommodations.

Because the determination of whether an individual is entitled to protection under the ADA should be made as of the time of the employment decision, the conclusions of this doctor were irrelevant. Even assuming his conclusions may have been relevant, the doctor did not state that she was incapable of working.

> The Court also concluded that she failed to offer evidence of limitations that made her unable to "perform either a class of jobs or a broad range of jobs in various classes." 29 C.F.R. § 1630.2(j)(3)(i). Evidence of general temporary work restrictions, without more, is insufficient to constitute a disability within the meaning of the ADA. The Court upheld the district court's grant of summary judgment on the ADA claim.

10. *Todd v. City of Cincinnati*, 436 F.3d 635 (6th Cir. 2006). The plaintiff was a former Cincinnati police officer who, in 1992 at the age of 37, was granted a disability pension due to degenerative disc disease which resulted from injuries suffered during his police career. In Todd's failure to hire lawsuit, the trial court found as a matter of law that city police officials did not regard him as disabled and did not refuse in 1996 to employ him as a firearms instructor because they regarded him as disabled. The question before the court was whether Todd offered material evidence that police officials denied him the job because they did regard him as disabled.

Todd produced evidence that two of the police officials in charge of hiring a firearms instructor at the police firing range made statements and notes during the interviewing process that showed they thought he should be rejected because of the medical disability for which he had been given a pension. One of the officials stated in his deposition that he had serious doubts that Todd could "physically do the demanding work" required of the position. He testified that even though Todd explained at length in the interviewing process that he was physically able to do the work, the official still had doubts because he could not understand how a person could

retire on a disability pension with a back injury and then come back and say that he could pick up something that was fairly heavy.

Todd also cited other testimony from that same official's deposition. This involved another candidate for the position who was born with only his thumb and index finger on one hand. The official was asked during his deposition whether the thought this candidate would have trouble performing the duties of the job because of the disability and whether some people may not respect him as much as another person who did not have such a disability. The official replied that as cruel as that might seem it was a fact of life. He testified that he doubted that either Todd or the other candidate should be given the job because of their disabilities. He was then asked the following question:

> Q: And then we had Newsom and we also had Todd [the plaintiff], who had physical disabilities, which in your mind may have eliminated their ability to completely be able to do the job as it was supposed to be done?
>
> A: Right.

Id. at 637.

In his affidavit in response to the motion for summary judgment, Todd stated that another official who interviewed him asked a number of questions regarding his herniated disc disability. Todd felt it was clear from the interview that this official doubted he could perform the job due to his back problem. The court found that the evidence offered by Todd raised an issue of material fact as to whether the two hiring officials regarded him as being disabled and therefore did not believe he should be hired because he was already receiving a disability pension from the city. The court also noted that the area director of the Cincinnati office of the EEOC made a determination that the city used Todd's record of a disability as a consideration for hire. Based on this evidence, the Sixth Circuit remanded the case back to the district court.

III. OTHER RECENT TITLE I CASES

1. *Armstrong v. Burdette Tomlin Memorial Hospital*, 438 F.3d 240 (3rd Cir. 2006). (Case involving the New Jersey Law Against Discrimination; issues included interactive process and reasonable accommodation.)

2. *Brandon v. Klingensmith Healthcare, Inc.*, 2005 WL 3434141 (W.D. Pa. December 13, 2005). (Plaintiff claimed that employer failed to accommodate her fibromyalgia and chronic headaches; district court granted summary judgment; court noted that when a plaintiff relies solely on her own statements to show that she has been substantially limited in a major life activity, the likelihood that she will be able to establish a disability within the meaning of the ADA is diminished. This plaintiff's impairment and associated limitations did not fall within the untrained juror's general experience or understanding. Fibromyalgia is a musculoskeletal disorder that is not well understood.)

3. *Branum v. United Parcel Service, Inc.*, 232 F.R.D. 505 (W.D. Pa. 2005). (Plaintiff suffered from post-traumatic stress disorder; sued alleging disability discrimination and retaliation; asserted class claims for failure to accommodate.)

4. *Canny v. Dr. Pepper/Seven-Up Bottling Group, Inc.*, 439 F.3d 894 (8th Cir. 2006). (Failure to engage in interactive process; plaintiff suffered form eye disorder which rendered him legally blind.)

5. *Crutcher v. Mobile Housing Board*, 20005 WL 2675207 (S.D. Ala. October 20, 2005). (Involved, among other issues, the interactive process.)

6. *Edwards v. Brookhaven Science Associates*, 390 F. Supp.2d 225 (E.D.N.Y. 2005). (Involving case of perceived or regarded as disabled and retaliation.)

7. *Fletcher v. Tufts University*, 367 F. Supp.2d 99 (D. Mass. April 15, 2005). Employee was qualified individual with standing to sue under Title I even though her mental disability rendered her unable to perform essential functions of her job; Title I prohibits disability plans that discriminate between persons with physical disabilities and those with mental disabilities.)

8. *Fuller v. J.P. Morgan Chase & Co.*, 423 F.3d 104 (2d Cir. 2005). (Appeals court upheld trial court decision holding that Title I of the ADA does not bar covered entities from offering different long-term disability benefits for mental and physical disabilities.)

9. *Head v. Glacier Northwest, Inc.*, 413 F.3d 1053 (9th Cir. 2005). (Held that reading and sleeping are major life activities under the ADA.)

10. *Josephs v. Pacific Bell*, 432 F.3d 1006 (9th Cir. 2005). ("Regarded as disabled" case; employer considered plaintiff unemployable because he had spent time in a mental institution and "might go off" on a customer; Ninth Circuit upheld jury verdict for plaintiff.)

11. *Keys v. City of Philadelphia*, 2005 WL 3234847 (E.D. Pa. November 29, 2005). (Discusses individualized assessment of the extent to which plaintiffs, who were police officers with the City of Philadelphia, alleged condition coupled with personal characteristics substantially limit the ability to work; a substantially limiting impairment for one individual may not be substantially limiting for another individual with different characteristics.)

12. *McCormack v. The Long Island Rail Road Company*, 2006 WL 490032 (S.D. N.Y. February 28, 2006). (Contains a discussion of both record of a disability and regarded as having a disability.)

13. *Patmythes v. City of Janesville*, 373 F. Supp.2d 924 (W. D. Wis. 2005). (Involved city employee suffering from cystic fibrosis whose job was eliminated in reduction of force.)

14. *Rodriguez v. ConAgra Grocery Products Company*, 436 F.3d 468 (5th Cir. 2006). (Lawsuit under Texas Commission on Human Rights Act; Texas courts look to analogous ADA decisions when interpreting the state act. "Regarded as" case where diabetes did not substantially limit a major life activity, but employer perceived diabetes to be substantially limiting.)

15. *Wojewski v. Rapid City Regional Hospital, Inc.*, 394 F. Supp.2d 1134 (D. S.D. 2005). (Case involved determining whether a doctor was an independent contractor or employee for purposes of determining whether the ADA applied; ADA does not apply to independent contractors.)

NOTES

[1] This is contradictory to her claim that she was disabled due to her vertigo.

[2] The court noted that every circuit court to address the issue concluded that waste elimination is a major life activity. *See Fiscus v. Wal-Mart Stores, Inc.*, 385 F.3d 378, 380 (3rd Cir. 2004); *Kammueller v. Loomis Fargo and Company*, 383 F.3d 779, 785 (8th Cir. 2004); *Gilbert v. Frank*, 9439, F.2d 637, 641 (2d Cir. 1991).

[3] The court rejected plaintiff's constructive discharge claim, finding that plaintiff did not show a deliberate intent on the part of the bank to force him to leave.

[4] The parties agreed that although the Karrakers were already employed by the company, the tests were administered pre-employment for ADA purposes because they were required for those seeking new positions. This permitted the court to avoid determining whether the Karrakers should be considered to be in the pre-employment offer category.

[5] *ADA Enforcement Guidance: Pre-employment Disability-Related Questions and Medical Examinations* (1995).