

# LEGAL BRIEFINGS



## Top Ten ADA Issues Under Title I

### 1. Medical Examinations and Inquiries

#### a. Prohibition Against Exams and Inquiries Prior to Conditional Offer of Employment

Section 12112(d) of the ADA prohibits employers from requiring applicants or employees from conducting medical examinations and asking disability-related inquiries at certain periods of the employment process.

*Leonel v. American Airlines, Inc.*, 400 F.3d 702 (9th Cir. 2005)

The court reversed the lower court's granting of summary judgment in the case of three HIV-positive applicants who alleged employer conducted unlawful medical examinations during the application process by extending a job offer contingent on results of a medical examination. The court held that employers can only conduct medical examinations as the last stop of the application process and only after making a real job offer. Further, the court held that the ADA requires employers to evaluate all non-medical information before a medical examination, such that the only remaining hiring consideration is the applicant's ability to perform the job safely and effectively.

This analysis was developed by Equip for Equality for Cherry Engineering Support Services, Inc. (CESSI). It is developed for use by the national network of ADA and IT Technical Assistance Centers and is solely advisory in nature. Equip for Equality and CESSI believe the analysis to be current as of the effective date of the document, but make no representation that the discussion remains good law thereafter. The analysis is not intended to be a legal determination of rights or responsibilities in general or in any specific case. Funding for this information brief is provided in part by NIDRR under contract #ED-02-CO-0008 to CESSI. However, the content and analysis in the document do not necessarily represent the opinion of NIDRR or the U.S. Department of Education and you should not assume endorsement by the Federal government.

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## b. Confidentiality of Information Obtained from Medical Inquiries

Section 12112(d)(3)(B) of the ADA requires that the information obtained regarding the medical condition or history of an applicant is to be collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record.

In *Cripe v. Mineta*, 2006 WL 1805728 (D.D.C. June 29, 2006), the attorney of an employee with HIV sent a letter to the employer regarding accommodations. The employer failed to keep the letter confidential (the letter was sitting on a desk without an envelope) and, as a result other employees learned of the plaintiff's HIV status. The court rejected the employer's argument that the information did not have to be protected since it was not marked as confidential.

## c. Are Personality Tests Considered Medical Examinations?

Although the ADA expressly prohibits medical examinations at the pre-employment stage, many employers administer "personality" tests ostensibly to obtain information about job applicants, such as honesty and temperament, as a way to determine whether the person would be a good hire. These tests have become widespread and studies have found that approximately 44% of private employers administer some type of personality test as part of the application or promotion process. Mental health advocates oppose these tests because they can be used to

identify psychiatric disabilities resulting in the screening out of people with certain diagnoses. Accordingly, some employers are using personality tests to obtain illegal disability-related information in a more indirect way.

In *Karraker v. Rent-A-Center*, 411 F.3d 831 (7th Cir. 2005), a group of current and former employees filed a class action alleging that the employer's policy requiring employees seeking management positions to take the Minnesota Multiphasic Personality Inventory (MMPI) violated the ADA. The plaintiffs alleged that the MMPI can identify conditions such as depression, paranoia, schizoid tendencies and mania. The trial court found that the employer in this case did not violate the ADA because it was using the test for "vocational" purposes to identify personality traits in order to predict future job performance and compatibility. The plaintiffs appealed and the Seventh Circuit reversed and held that the MMPI is a test designed to diagnose mental impairments, and thus, it is an improper medical examination and violated the ADA. The court found that "Americans with disabilities often face barriers to joining and succeeding in the workforce. These barriers are not limited to inaccessible physical structures. They also include attitudinal barriers resulting from unfounded stereotypes and preju-



dice. People with psychiatric disabilities have suffered as a result of such attitudinal barriers, with an employment rate dramatically lower than people without disabilities and far lower than people with other types of disabilities.”

## 2. Essential Functions

In order to be protected under the ADA, an individual has to have an ADA disability and be “qualified.” To be qualified under the ADA, people with disabilities must be able to show that they:

- Have the requisite skills, experience, education, licenses, etc.;
- Are able to perform the essential functions of the job, either with or without a reasonable accommodation.

Many cases are being decided based on how whether a particular function is deemed essential:

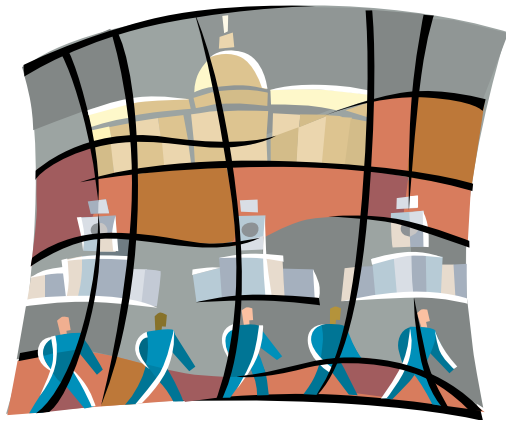
In *Taylor v. Rice*, 451 F.3rd 898 (D.C. Cir. 2006), plaintiff with HIV was denied a foreign officer position because he was deemed not qualified because he could not perform the essential functions of the job with or without an accommodation. The Government argued that worldwide availability was an essential function of the job, and the plaintiff’s condition prevented him from being able to work in any post worldwide due to the greater risk of contracting disease and insufficient medical care in certain parts of the world. After the trial court granted summary judgment for the Government, the D.C. Circuit Court of Appeals found that the case should continue because there

were questions of fact with respect to: a) whether the accommodation requested would indeed result in the elimination of an essential job function; b) whether the accommodation requested was reasonable; and c) whether the employee’s pulmonary condition was a non-discriminatory reason for denying the job.

In *Kielbasa v. Illinois E.P.A.*, 2005 WL 2978717 (N.D. Ill. Nov. 5, 2005), plaintiff worked for the EPA as a supervisor and part of his job was to travel to different test stations. After a loss of vision following surgery, plaintiff could no longer drive. Initially, the employer accommodated him by allowing other employees, who had to drive to the various test stations as part of their own duties, to transport him. Subsequently, the employer refused to let others drive him and he was demoted to a job with less pay and no supervisory responsibilities. Plaintiff filed under the ADA and ultimately, the court found that driving, and not traveling, was an essential function of the job. Since plaintiff could not drive, the court found he was no longer qualified under the ADA and his case was dismissed.

*Clarke-Kurek v. North Allegheny School District*, 2006 WL 1073158 (W.D. Pa. 2006), school district was justified in terminating teacher with kidney disease who could not work a full school day. Court held that working a full school day was an essential job function and school was not required to eliminate an essential function of the job.

*Puckett v. Park Place Entertainment Corp.*, 2006 WL 696180 (D. Nev. 2006) A cocktail waitress, with multiple sclerosis, requested that she be allowed to use a drink cart since she could no longer carry a drink tray weighing up to 30 pounds.



(Lifting and carrying was not listed as an essential job function in the job description.) The employer argued that the drink cart would not be practical in a crowded bar setting because of limited space between tables and patrons and that carrying drinks without a cart was an essential function of the job that could not be eliminated. The court held that a reasonable jury could find that carrying a tray was not an essential function and that the waitress could perform the job with the use of a drink cart.

### 3. Direct Threat

Under the ADA, an employer may exclude someone from a job if that person would pose a “direct threat” to health and safety, and therefore, is not “qualified” under the ADA. The ADA states that an employer must base a direct threat decision upon objective medical knowledge and conduct an individualized assessment of the employee’s present ability to safely perform the essential functions of the job instead of relying on stereotypes or paternalistic perspectives.

In *Darnell v. Thermafiber, Inc.*, 417 F.3d 657 (7th Cir. 2005), the court affirmed summary judgment for the employer who did not rehire an employee with

insulin-dependent, Type 1 diabetes after a pre-employment physical revealed his diabetes was not under control. The court held that an employee is not qualified for a position if his disability poses a direct threat to his safety or the safety of others, and that in this case the court found that uncontrolled diabetes in a manufacturing plant with dangerous machinery could cause serious injury.

In *Dark v. Curry County*, 451 F.3d 1078 (9th Cir. 2006), court ruled that there was a genuine material issue of fact as to whether client with epilepsy was a direct threat in the workplace following a seizure while driving. Employer needed to explore whether a reasonable accommodation, such as job reassignment or temporary medical leave, would be available to eliminate the alleged threat in the workplace.

In *Rodriguez v. ConAgra Grocery Product Co.*, 436 F.3d 468 (5th Cir. 2006), job applicant with diabetes was denied job finding that he would be a direct threat in the workplace because his diabetes was uncontrolled when his glucose level was found to be high. The court denied the defendant’s motion for summary judgment holding that the generalizations and false beliefs by person in charge of hiring were contrary to the ADA’s mandate to conduct an individualized, independent assessment.

In *Macy v. Hopkins County Board of Education*, 429 F. Supp. 2d 888 (W.D. KY 2006), a teacher had post-concussion syndrome, which caused her to have recurrent headaches, attention difficulty, short-term memory deficits, irritability with others, and outbursts of anger. The teacher allegedly made threats to members of the boys basketball team, telling them that she

would kill them if she heard them making fun of the girls. The teacher claimed that the alleged threat was merely an outburst of anger, which was a symptom of her disabling condition. The district court concluded that the ADA only protects “qualified employees,” and the teacher’s threats to kill students disqualified her from being a teacher.

### *Direct Threat to Self?*

Although the language of the ADA restricts direct threat to cases in which the person poses a threat to others, the U.S. Supreme Court found that direct threat also includes situations when the employee’s disability poses a threat to himself/herself.

In *Chevron v. Echazabal*, 536 U.S. 73 (2002), plaintiff was offered a job contingent on passing a medical examination. The examination revealed elevated liver enzymes and he was eventually diagnosed as having asymptomatic chronic active hepatitis C. Accordingly, his employer rescinded the employment offer on the basis that plaintiff would pose a direct threat to his own health and safety. The Supreme Court held that direct threat included “threat to self.”

In *Taylor v. Rice*, 451 F.3rd 898 (D.C. Cir. 2006), plaintiff applied to be an officer with the Foreign Service, but his application was rejected because he is HIV positive. The State Department has a policy that prohibits the Foreign Service from hiring people with HIV in these positions, claiming that they may require medical treatment that is not available in some of the less-developed countries where they might be stationed. Relying on *Echazabal*, the trial court held plaintiff would potentially be a direct threat to himself if he were hired as an officer in the Foreign

Service and deployed to a place that could not meet his medical needs. The D.C. Circuit court reversed finding that there may be reasonable accommodations that would be able to reduce the alleged direct threat so that there was not a substantial risk of significant harm to the plaintiff’s health in the workplace.

*EEOC v. E.I. du Pont de Nemours & Co.*, 406 F.Supp.2d 645 (E.D. La. 2005), an employee with back problems who had difficulty standing and walking was discharged, and the employer argued her difficulty walking posed a direct threat to herself or others because of her inability to evacuate in an emergency. The court held that she was not a direct threat to herself or others because the employee had no emergency duties, the chance of an emergency at the plant was small, and the employee could both perform her job and evacuate despite the back problems.

## 4. Reasonable Accommodation Issues

### a. Interactive Process

Once a reasonable accommodation has been requested, the employer should initiate an interactive process with the individual.

In *EEOC v. Sears, Roebuck and Co.*, 417 F.3d 789 (7th Cir. 2005), the court stated that “after an employee’s initial disclosure of a disability, the ADA obligates the employer to engage with the employee in an interactive process to determine the appropriate accommodation under the circumstances.”

In *Cutrer v. Louisiana State University*, 429 F.3d 108 (5th Cir. 2005), the court reversed summary judgment against an employee because there was evidence the university did not properly consider possible accommodations as part of the interactive process. The court held a jury should decide who was responsible for the breakdown in the interactive process, as an employer cannot block the accommodation process by preemptively terminating an employee before an accommodation can be considered.

In *Canny v. Dr. Pepper/Seven-Up Bottling Group, Inc.*, 439 F.3d 894 (8th Cir. 2006), the court declined to grant summary judgment for the employer, holding that whether the employer participated in the interactive process to determine reasonable accommodations after learning that the employee was legally blind was an issue for the jury. The court stated that in order to establish that the employer failed to engage in the interactive process, the employee must show (1) he is disabled, (2) he requested accommodations, (3) the employer did not assist him in seeking accommodations, and (4) he could have been reasonably accommodated but for the employer's lack of good faith.

In *Dugan v. Intel Corp.*, 2006 WL 1541475 (D. Ariz. June 1, 2006), to accommodate the plaintiff's knee injury, the employer offered to reassign him to vacant positions. Plaintiff rejected those positions because the new positions would afford him less time working with equipment. However, the evidence showed that without reassignment, the plaintiff would have not been able to perform the essential functions of the job, making the accommodation of reassignment reasonable.

## **b. Leave as a Reasonable Accommodation**

Courts have differed on how leave from work is treated as a reasonable accommodation under the ADA.

In *EEOC v. Sears, Roebuck & Co.*, No. 04-cv-7282 (N.D. Ill. 2005), a court allowed a class action to proceed when employer had a policy of automatically terminating employees with disabilities without regard to their individual circumstances and prospects of returning to work after spending more than a year on disability leave.

In *Lara v. State Farm Fire & Casualty Co.*, 121 Fed.Appx. 796, 2005 WL 288819 (10th Cir. 2005), an employee with back injuries failed to sustain a claim that State Farm should have provided a reasonable accommodation of additional leave time instead of terminating him. The court held that an employer may not be required to provide additional leave as a reasonable accommodation when the employee fails to provide information on the expected duration of his impairment and the employer thus lacks the knowledge needed to evaluate the reasonableness of the request.

In *Stamey v. NYP Holdings, Inc.*, 358 F.Supp.2d 317 (S.D.N.Y. 2005), the court granted summary judgment against a reporter with epilepsy who requested open-ended leave, as this was not a reasonable accommodation that would allow the employee to perform the essential job functions. The court reasoned that an employee must specify the duration of the leave needed and when the employee can return to work.

In *Altendorfer v. Kroll Ontrack, Inc.*, 2006 WL 1314318 (D. Minn. May 12, 2006), the court held that, although an unpaid leave can be a reasonable accommodation under appropriate circumstances, a second unpaid leave was not reasonable where the employee was both unable to work and unable to specify when she would be able to return to work.)

In *Goodum v. White*, 2006 WL 566469 (N.D. Ill. March 3, 2006), the court granted the Army's motion for summary judgment, holding that providing employee with two years of medical leave satisfied any requirement for reasonable accommodation under the Rehabilitation Act.)

## 5. Disability Harassment

### a. Background

Courts are consistently recognizing that claims for disability-based harassment can be made under the ADA, similar to how sexual harassment claims are recognized under Title VII. To establish a hostile work environment claim under ADA, plaintiff must prove:

1. She is a qualified individual with a disability,
2. She was subjected to unwelcome harassment,
3. The harassment was based on her disability,
4. The harassment was sufficiently severe or pervasive to alter a term,

condition, or privilege of employment, and

5. Employer knew or should have known about the harassment, but failed to take proper action to end it.

Most disability harassment cases are won or lost on the fourth factor, *i.e.*, whether the harassment was sufficiently severe or pervasive.

### b. Cases Dismissing Disability Harassment Claim

In *Ray v. New York Times Management Services*, 2005 WL 2467134 (M.D. Fla. Oct. 6, 2005), the court granted summary judgment for the employer, holding that the employee with hepatitis C failed to show that the discriminatory conduct created a hostile work environment. The employee's evidence failed to demonstrate numerous, specific incidents which unreasonably interfered with his working conditions. Disclosing an employee's medical condition to co-workers does not necessarily create a hostile work environment.

In *Dockery v. Nicholson*, 170 Fed. Appx. 63 (11th Cir. 2006), the court held that the employee failed to establish a case of disability harassment where employee with a leg impairment had to spend more time at furniture assembly than other employees, and where employee's supervisor allegedly grabbed his arm on one occasion and made demeaning comments about his disability, because there was no indication that the occurrences interfered with the employee's job performance.



In *Ferraro v. Kellwood Co.*, 440 F.3d 96 (2d Cir. 2006), an employer was not liable for its supervisor's harassing behavior when it exercised reasonable care to prevent and promptly correct discriminatory behavior and the employee complaining of harassment failed to avail herself of the preventative opportunities provided by the employer.

In *Mason v. Wyeth, Inc.*, 2006 WL 1526601 (4th Cir. May 31, 2006), an employer was not liable for disability harassment when the plaintiff failed to show that his manager's pranks were motivated by his hearing impairment, despite the fact that evidence showed that the manager specifically exploited the plaintiff's inability to hear by sneaking up on him and that, while the manager played pranks on other employees, the manager played more frequent pranks on the plaintiff.

In *Rozier-Thompson v. Burlington Coat Factory Warehouse*, 2006 WL 1889651 (E.D. Va. July 7, 2006), plaintiff filed suit for disability harassment after her supervisor made several disability related comments (supervisor called her "crippled", said she "should quit and go on disability," called her "stupid for trying to have a baby," and that she was "no good for the company.") The court rejected plaintiff's claims because they were made over a

two year period, and were not "physically threatening or the "type of deeply repugnant, humiliating treatment prohibited by the ADA."

### c. Cases Allowing Disability Harassment Claim to Proceed

In *Spencer v. Wal-Mart Stores, Inc.*, 2005 WL 697988 (D. Del. Mar. 11, 2005), the court affirmed the jury's award of \$12,000 damages for emotional distress to a former employee for her claims of hostile work environment and failure to accommodate. The court found that evidence that her supervisor and other employees yelled at her, refused to facilitate communications with her, and used obscene gestures directed towards her supported the jury's determination of a hostile work environment because she is hard of hearing.

In *EEOC v. Luby's, Inc.*, 2005 WL 3560616 (D. Ariz. Dec. 29, 2005), a floor attendant with a mental impairment was allowed to move forward with her hostile work environment claim against the employer restaurant. The employee alleged she was subjected to repeated name-calling, barking, and threats of violence, which may establish a hostile working environment.

In *Arrieta-Colon v. Wal-Mart Stores*, 434 F.3d 75 (1st Cir. 2006), court upheld a \$230,000 jury verdict in case where the employer did not take action against harassment employee with Peyronie's Disease experienced because of his penile implant. Employee was subjected to repeated teasing and harassment by co-workers and managers about his condition, including over the store's paging system. Co-work-

ers testified that supervisors knew about the harassment and failed to prevent it. Employer cannot shield itself from liability by relying on a grievance policy that is not consistently used.

In *Quiles-Quiles v. Henderson*, 439 F.3d 1 (1st Cir. 2006), the court found that evidence was sufficient for the jury to find a hostile work environment where employee was subject to such constant ridicule about his depression that he was hospitalized and eventually withdrew from the workforce. The court rejected the argument that it was the sort of conduct common in blue-collar workplaces such as the post office, and while it was inappropriate, the conduct did not constitute a hostile work environment.

## 6. Constructive Discharge

### a. The *Suders* Standard

In *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004), the U.S. Supreme Court recently articulated the standard for constructive discharge in a sexual harassment case. In *Suders*, a police communications officer alleged sexual harassment and constructive discharge under Title VII. She had resigned from the police force after her supervisors arrested her for theft of her own exam papers, which she stole because her supervisors were falsely forwarding information about her failing exams. The Court held that in order to establish constructive discharge, a plaintiff must show the existence of a hostile work environment, and that “the abusive working environment became so intolerable that her resignation qualified as a fitting response.” The question is

whether working conditions became so intolerable that a reasonable person in the employee’s position would have felt compelled to resign.

### b. Constructive Discharge Cases Under the ADA

In *Rooney v. Koch Air, LLC*, 410 F.3d 376 (7th Cir. 2005), an employee was demoted after being placed on work restrictions following an injury. After suffering another injury, the employee was offered another position with fewer physical requirements but lower pay. The employee rejected the offer and resigned, and filed suit alleging constructive discharge on account of his disability. Relying on *Suders*, the court granted summary judgment for the employer holding that the work conditions did not approach the intolerable levels required for constructive discharge.

In *Feliciano-Hill v. Principi*, 439 F.3d 18 (1st Cir. 2006), employee claimed that she suffered an adverse employment action through the creation of a hostile work environment and a constructive discharge. The court held that whether a work environment is sufficiently hostile is usually a question best left to a jury. The court determined that the evidence supported the jury’s verdict that employer’s treatment was not objectively intolerable, and that any isolated comments from her peers did not constitute the kind of pervasive harassment that would have led a reasonable person to resign.

In *Smith v. Henderson*, 376 F.3d 529 (6th Cir. 2004), a Post Office employee with rheumatoid arthritis requested restricted hours and delegated accounting duties as a reasonable accommodation following her

promotion. The employer refused, and the employee eventually resigned due to poor working conditions. The employee filed suit under the Rehabilitation Act alleging failure to accommodate and constructive discharge. In denying summary judgment for the employer, the court held that a jury could reasonably infer that USPS knew that by denying the requested accommodations, working conditions could become intolerable to a reasonable person with a disability. Failure to accommodate resulted in the employee working long hours, with the foreseeable consequences of deterioration of health and eventual resignation.

## 7. Retaliation

Under the ADA it is unlawful for an employer to retaliate against an employee based upon the employee's efforts to exercise his or her civil rights.

### a. U.S. Supreme Court Clarifies the Standard in Retaliation Cases

In *Burlington Northern & Santa Fe Railway Co.*, 126 S.Ct. 2405 (2006), plaintiff was the only female forklift operator in Burlington Northern's maintenance department in the Memphis office. After complaining of gender discrimination, she was reassigned to a less desirable laborer position, although it had the same pay and benefits. She filed a charge with the EEOC about the demotion. Subsequently, she was accused of insubordination toward a supervisor and suspended without pay. More than a month later, the company found she had not been insubordinate,

reinstated her and awarded her back pay. She then sued Burlington Northern for retaliation based in part on the transfer and the suspension. The U.S. Supreme Court ruled that suspending plaintiff and transferring her to a less desirable job independently established an actionable retaliation claim. Previously, some courts had required that to prove a retaliation complaint, plaintiffs had to show not only job-related adverse conduct by the employer but an "ultimate employment decision" such as a firing. The Supreme Court found that any action that materially injures or harms an employee who has complained of discrimination and would dissuade a reasonable worker from making or supporting a charge of discrimination can constitute actionable retaliation. Although the Supreme Court decision was a gender discrimination case, it is likely that judges will apply the same standard in ADA cases.

### b. Are Damages Available?

The courts are split over whether an employee can recover damages in an ADA retaliation claim. In addition to limiting damages, plaintiffs may also be denied access to a jury trial if there are no claims in which damages can be awarded.

*Edwards v. Brookhaven Science Associates, LLC*, 390 F.Supp.2d 225 (E.D.N.Y. 2005), the court held that a security police officer could pursue compensatory damages for his claim of termination in retaliation for his administrative complaint of discrimination. The court reasoned that because compensatory damages are available under Title I of the

ADA, they are also available for employment-related retaliation claims.

In *Cantrell v. Nissan North America*, 2006 WL 724549 (M.D. Tenn. March 21, 2006), the court held that, although there is no logic in a rule that precludes compensatory and punitive damages in an ADA retaliation case, where they are allowed in a Title VII retaliation case, any expansion of the plain language of Section 1981a should come from Congress, not the courts.

## 8. “Regarded As” Cases

### a. Background

If an employee is “regarded as” having a physical or mental impairment that substantially limits a major life activity, the employee has a disability under the ADA. Whether an employee is deemed to be within the “regarded as” prong of the definition of disability has been the subject of a great deal of litigation and courts vary widely on the interpretation of this provision of the ADA.

### b. Cases Denying “Regarded As” Claim

In *Pence v. Tenneco Automotive Operating Co., Inc.*, 169 Fed. Appx. 808 (4th Cir. March 7, 2006), the court ruled that an employer’s referral for psychological evaluation after the employee made threats of violence towards coworkers does not signify that the employer regarded the employee as having a mental disability under the ADA.

In *Wenzel v. Missouri-American Water Co.*, 404 F.3d 1038 (8th Cir. 2005), the court ruled that an employer’s mistaken belief that an employee’s lifting restriction was permanent did not mean it regarded him as disabled. The employer placed the employee on medical leave, but the court reasoned that perception that an employee is unable to work a particular job does not constitute a disability under the ADA.

In *Endlich v. Yellow Corp.*, 2006 WL 1520177 (10th Cir. June 26, 2006), court held that plaintiff with shoulder injury was not covered by ADA. Plaintiff argued that a “regarded as” plaintiff needed only show that the employer entertains “myths, fears, and stereotypes” about an employee without identifying how she is perceived to be substantially limited in a major life activity. The Court, however, found that in order to survive summary judgment, plaintiff needed to produce evidence that created a genuine issue of material fact as to whether 1) the defendant believed he was substantially limited in a major life activity when he was not so limited, or 2) that he had a limitation that the defendant considered to be substantial limitation in a major life activity when in fact it was not so limiting.

In *Breitkreutz v. Cambrex Charles City, Inc.*, 450 F.3d 780 (8th Cir. 2006), plaintiff supported his claim that defendant regarded him as disabled by showing that defendant refused to allow him to work despite his being able to perform the essential functions of his job and that defendant placed additional restrictions on him beyond those recommended by doctors. The Court rejected the claim, however, because the plaintiff did not show defendant viewed him as incapable of performing a broad category of jobs. If a restriction is based upon the recom-

mendations of physicians, then it is not based upon myths or stereotypes about the disabled and does not establish a perception of disability.

In *Lucas v. Methodist Hospital, Inc.*, 2006 WL 1307452 (7th Cir. May 4, 2006), the Court found that while supervisor's comments showed that the Hospital regarded Lucas as physically unable to perform the job for which they were interviewing for, that inability to perform one job did not show employee had an actual disability or was regarded as having a disability with respect to a broad class of jobs. Evidence that the defendant gave plaintiff a pass to use parking spaces reserved for disabled employees was not sufficient to prove that she was regarded as disabled.

### c. Cases Upholding "Regarded As" Claim

In *Todd v. Cincinnati*, 436 F.3d 635 (6th Cir. 2006), plaintiff, a former police officer, was granted a disability pension due to degenerative disc disease. A few years later he applied to be a firearms instructor with the police department. Officials interviewing him expressed doubts about whether he could perform the job due to his back injury and he was not hired. In his ADA suit, plaintiff alleged that the police department "regarded him as disabled." The court found that plaintiff could proceed with his ADA claim under a "regarded as" theory.

In *Rodriguez v. ConAgra Grocery Products Co.*, 436 F.3d 468 (5th Cir. 2006), court ruled that an employer regarded plaintiff with diabetes as disabled and violated the ADA by denying him

a job because of wrongful and stereotypical assumptions about his diabetes. The employer's doctor, as well as the person making the hiring decision, believed the plaintiff would experience dizziness and black-outs, based not on his past history, which they had never reviewed, but based on assumptions about "uncontrolled" diabetes. The court characterized the employer's position as a "blanket ban" on people with "uncontrolled" diabetes, and held that applying such a blanket ban without conducting an individualized assessment violates the ADA.

In *Quiles-Quiles v. Henderson*, 439 F.3d 1 (1st Cir. 2006), court held that a jury may find that the Postal Service regarded plaintiff as disabled because his supervisors perceived his mental impairment as substantially limiting his ability to engage in the major life activity of working. There was evidence that plaintiff's supervisors believed, without foundation, that his mental impairment made him a potential safety risk to his co-workers because they perceived him to potentially be violent. The Court reiterated that the determination that an individual with mental illness will pose a safety threat to others must be made on a case-by-case basis and must not be based on generalizations, misperceptions, ignorance, irrational fears, patronizing attitudes, or pernicious mythologies.

In *Pickney v. U.S. Postal Service*, 32 NDLR 244 (11th Cir. 2006), plaintiff claimed she was not hired because she was perceived her to have a disability due to prior knee and back injuries. The employer claimed it only perceived him as restricted from working in the mail handler position and did not regard him as substantially limited in the major life



activity of working. The 11th Circuit found that the employer did regard the plaintiff as substantially limited in the major life activity of working. The court relied upon the employer's letter denying the applicant the position which said his prior injuries would place his personal health and safety in jeopardy if he worked in any entry position, not just the mail handler position.

## 9. Major Life Activities

### a. Background

To be covered under the ADA, plaintiffs have to demonstrate that their physical or mental impairment substantially limits a major life activity. Since Congress intentionally did not establish a finite list of major life activities, courts are continuing to decide whether something qualifies as a major life activity under the ADA.

### b. Interacting with Others

In *Battle v. Mineta*, 387 F.Supp.2d 4 (D.D.C. 2005) the court granted

summary judgment for the employer, holding that the inability to interact with others due to anxiety disorder did not make him a qualified individual with a disability under the Rehabilitation Act. Although there is a split in the circuit courts, the court concluded that interacting with others is not a major life activity under the Rehabilitation Act. (*But see, Bell v. Gonzales*, 398 F.Supp.2d 100 (D.D.C. 2005), where a court held that interacting with others was a major life activity.)

### c. Elimination of Bodily Fluids

In *Heiko v. Colombo Savings Bank*, 434 F.3d 249 (4th Cir. 2006), the court reversed summary judgment for an employer who allegedly failed to promote an employee with end-stage renal disease, holding that the elimination of bodily waste is a major life activity. The court defined major life activity as an activity of central importance to daily life, and elimination of bodily waste is a daily activity of life-sustaining importance.

### d. Sterility

In *Yindee v. CCH, Inc.*, 2006 WL 2328695 (7th Cir. Aug. 11, 2006), the court found, in a case in which the plaintiff's cancer led to a hysterectomy, that although she no longer had cancer at the time of the termination, the sterility caused by treating cancer rendered her substantially limited in a major life activity (i.e. reproduction). Therefore, she was covered by the ADA. (relying on the Supreme Court's decision in *Bragdon v. Abbott*, 524 U.S. 624 (1998))

## 10. Mitigating Measures

### a. *Sutton v. United Airlines*, 527 U.S. 471 (1999)

In a trio of cases, the Supreme Court ruled that in determining whether a person with a correctable condition is substantially limited in a major life activity, the effects of the person's mitigating measure (e.g., eyeglasses, medication) must be considered.

### b. Cases Where Mitigating Measure Resulted in Dismissal of ADA Case

In *Kelly v. Metallics West, Inc.*, 410 F.3d 670 (10th Cir. 2005), an employee with a breathing problem from a pulmonary embolism in her lung requested the use of oxygen. The court held that the employee did not have an actual disability under the ADA because using oxygen mitigated all the limitations her

condition imposed on her performance of major life activities.

In *D'Angelo v. Conagra Foods*, 422 F.3d 1220 (11th Cir. Aug. 30, 2005), an employee with vertigo claimed she was substantially limited in the major life activity of working. The court held that the actual impairment claim failed because the employee was only limited in her ability to work as a product transporter, and did not provide evidence of limitations for other positions.

In *Collins v. Prudential Investment and Retirement Services*, 119 Fed. Appx. 371, 2005 WL 19466 (3rd Cir. 2005), an employee with ADHD failed to maintain her discriminatory discrimination claim because she was only moderately limited in a major life activity and that her ADHD was controlled by medication.

In *Dunlap v. Boeing Helicopter Division*, 2005 WL 435228 (E.D. Pa. 2005), a terminated employee with a hearing impairment failed to maintain his disability discrimination claim because his impairment was mitigated by a hearing aid, and his occasional difficulty of hearing people over the phone did not constitute a substantial limitation of a major life activity.

In *Rossi v. Alcoa, Inc.*, 129 Fed.Appx. 154 (6th Cir. 2005), an employee with sleep apnea failed to maintain his ADA claim because he was unable to demonstrate his condition substantially limited one of his major life functions. The court reasoned that a diagnosis of sleep apnea does not establish a disability under the ADA, and that his condition was controlled by medication.



*Marine v. H.J. Mohr & Sons, Co.*, 2005 WL 2293673 (N.D. Ill. 2005), the court held that a driver failed to show that his asthma substantially limited his ability to breathe, as his condition was controlled by medication. The court reasoned that corrective measures must be taken into account, and an individual does not have a disability under the ADA if he is able to function fully with the use of medication.

### c. Cases Where Mitigating Measure Did Not Result in Dismissal of ADA Case

In *Talbot v. Acme Paper & Supply Co.*, 2005 WL 2090699 (D. Md. August 30, 2005), *affirmed*, *Talbot v. Acme Paper and Supply Co.*, 173 Fed.Appx. 219 (4th Cir. 2006), an employee with end stage renal failure claimed that he was substantially limited in the major life activity of cleansing his own blood. The court held that he was a qualified individual under the ADA, as his kidney's inability to clean his blood substantially limited his major life activity of caring for himself. In analyzing the effects of mitigating measures under *Sutton*, the court noted that the "mitigative effect rendered by a particular treatment must be weighed against the negative side effects of that treatment." In this case, the mitigation from dialysis was outweighed by the burdens of using dialysis, and that these burdens constituted a substantial limitation on his ability to care for himself.

In *Capobianco v. City of New York*, 422 F.3d 47 (2nd Cir. 2005) an employee with congenital stationary night blindness argued he was substantially

limited in the major life activity of seeing. Defendant claimed that because he "mitigated" his condition by relying on others to drive him at night, he was not covered by the ADA. The 2nd Circuit rejected this argument and held that the mitigation under *Sutton* is limited to an "amelioration of the impairment itself, not simple avoidance of activities affected by the impairment."

### d. No ADA Disability When Impairments Potentially Could Be Mitigated

ADA coverage has been denied to plaintiffs who have substantially limiting impairments, but whose impairments arguably *could* be mitigated by medication or other measures. Although these plaintiffs are substantially limited in major life activities, courts have ruled that these plaintiffs have not availed themselves of medication or other corrective devices, and thus, are not entitled to the ADA's protections. These cases ignore the Supreme Court's requirement that plaintiffs be evaluated as they currently are and not how they may be in a mitigated state.

In *Atwell v. Hart County, KY*, 122 Fed. Appx. 215, 2005 WL 245282 (6th Cir. 2005), a prisoner with mental illness and substance abuse alleged failure to accommodate after refusing to take medications and subsequently injuring himself while suffering hallucinations and delusions. The court affirmed summary judgment for the jail, holding that if a condition could be mitigated or controlled by medication it does not substantially limit a major life activity, even if the person does not take the medication.