Case Law Update: ADA Amendments Act of 2008

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Table of Contents

Actual Disability – Substantially Limited in a Major Life Activity?

Allergies

Is or May Be Substantially Limited

Knudson v. Tiger Tots Community Child Care Center (Iowa Ct. App. Jan. 9, 2013). Applying the ADAAA's changes to a case arising under a state disability discrimination law that incorporates the federal ADA standards, the court held that the "episodic or in remission" provision should be applied when determining if a tree nut allergy substantially limits plaintiff in a major life activity.

Anemia

Is or May Be Substantially Limited

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

Anxiety, Depression, PTSD, and Related Impairments

Is or May Be Substantially Limited

Palacios v. Continental Airlines, Inc., 2013 WL 499866 (S.D. Tex. Feb. 11, 2013). Plaintiff received medical treatment, including medication, for depression over a period of years. "Plaintiff testified that his depression affected his ability to sleep and eat over a period of several years, that sometimes he slept too much, one time for almost two days, and at other times he could not sleep, that sometimes he didn't eat, and that sometimes he just sat in his living room and did not do anything, 'just ... blank.' Plaintiff testified that prior to taking his FMLA leave, he chose to allow others to work many of his hours, which company policy allowed, and that due to his depression he did not really care about potentially losing his house or making car payments or paying other accounts. Plaintiff testified that it took a lot of effort to get out of bed and take care of himself ….the self-described severity of Plaintiff's depression and its adverse effects on his desire to work, his sleeping, his eating, and his attention to ordinary care of himself, supported

by some medical evidence Plaintiff presents, would appear sufficient under the more lenient standard of the ADAAA at least to raise a fact issue that Plaintiff had a disability under the ADA." (footnotes omitted).

Duggins v. Appoquinimink School Dist., ___ F. Supp. 2d ___, 2013 WL 472283 (D. Del. Feb. 5, 2013). "Duggins claims she was diagnosed with severe depression and depression is recognized under the ADA as a mental impairment. She also contends she alerted the District as to her condition on March 18, 2009 when the diagnosis was made. Duggins presents a medical form that states she had difficulty concentrating and sleeping, but is silent as to how the depression affected any other aspect of her life. The same form indicates she experienced a depressive episode that may or may not be recurrent, but had an expected duration of approximately six months. A six month long ordeal that eliminates the capacity to work for over a month is inevitably an impairment to a major aspect of Duggins' life and qualifies as a disability under the ADA." (footnotes omitted).

Mercer v. Arbor E & T, LLC, 2013 WL 164107 (S.D. Tex. Jan. 15, 2013). Plaintiff, an operations manager, alleged she was unlawfully demoted and then terminated based, inter alia, on an anxiety disorder. Denying summary judgment for the employer, the court found that plaintiff's own testimony about the anxiety disorder's effects (memory loss, difficulty concentrating, extreme weight loss, limitations in speaking, hair loss to the point of having to wear wigs, blurred vision, inability to stand or walk, difficulty breathing, chest pains, and inability to care for herself and complete household duties) could be sufficient for a reasonable finder of fact to conclude she was substantially limited in concentrating or other major life activities. The court rejected the employer's argument that the alleged disability was not sufficiently long-term because she was cleared to return to work by her physician after only a month, ruling: "Mercer's ability to return to work does not establish that she no longer suffered from a disability. The very existence of the ADA recognizes that a disability and gainful employment are not mutually exclusive." Although mistakenly citing the Toyota Motors standard, the court also found that plaintiff could be found substantially limited in concentrating even based only on her deposition testimony that her anxiety disorder caused her to take longer to get things done and they required more concentration. "The post-ADAAA regulations make clear that '[t]he comparison of an individual's performance of a major life activity to the performance of the same activity by most people in the general population will not require scientific, medical, or statistical analysis.' 29 C.F.R. § 1630.2(j)(v)." See also Mercer v. Arbor E & T, LLC, 2012 WL 1425133 (S.D. Tex. April 21, 2012) (dismissing original complaint for failure to state a claim due to lack of allegations regarding limitations, but granting leave to amend).

Dentice v. Farmers Insurance Exchange, 2012 WL 2504046 (E.D. Wis. June 28, 2012). Plaintiff, a claims representative, sought and obtained a medical leave of absence for what was later diagnosed as depression, general anxiety disorder, and panic disorder. After nine months, he returned to work and sought accommodations for these conditions as well as carpal tunnel syndrome, and was subsequently terminated. Plaintiff alleged disability discrimination and denial of accommodation, contending his impairments substantially limited him in major life activities "including but not limited to, thinking,

concentrating, learning, interacting and communicating with others, caring for oneself, eating, sleeping, performing manual tasks, and marital relations." Denying the employer's motion for summary judgment on the issue of disability coverage "[i]n light of the expanded scope of the definition of 'substantial limitation,'" the court cited the fact that plaintiff's impairments required a nine-month absence from work as well as continued medical treatment even after he returned to work, and "affected many facets of his life, including both his work and personal life."

Wright v. Stark Truss Co., Inc., 2012 WL 3029638 (D.S.C. May 10, 2012). Plaintiff, who worked as a shipping supervisor/dispatcher, was responsible for contacting customers, setting up delivery dates, calling customers back to reconfirm, making schedules for drivers, and supervising yard employees. After several months of periodically being absent from work for doctors' appointments in an effort to diagnose a variety of physical symptoms including nausea, vomiting, and weight loss, plaintiff began to experience depression and anxiety in May 2009. He allegedly threatened his wife and threatened suicide, and was involuntarily committed to a behavioral health clinic for a 72-hour observation, following which he was released without restrictions. When he returned to work one week later, he was terminated. Denying the employer's motion for summary judgment on plaintiff's ADA discriminatory discharge claim, the court rejected the employer's argument that the impairment was "temporary" and therefore not "substantially limiting," holding that under the ADAAA "episodic or in remission" rule the evidence could show that when active, plaintiff's depression and anxiety substantially limited him in sleeping, eating, thinking, and concentrating.

Kravits v. Shinseki, 2012 WL 604169 (W.D. Pa. Feb. 24, 2012) (court noted it would have found plaintiff's PTSD to be substantially limiting in light of the EEOC regulations citing it as an example of an impairment that "should easily be concluded" to be substantially limiting, but he failed to put any evidence of his diagnosis in the record).

Estate of Murray v. UHS of Fairmount, Inc., 2011 WL 5449364 (E.D. Pa. Nov. 10, 2011). Denying employer's motion for summary judgment, the court ruled nurse's own testimony of her diagnosis of depression was sufficient to establish disability. Viewing her depression, which was diagnosed four years prior to her employment, as chronic, and citing the EEOC's amended regulations as receiving Chevron deference, the court found that there was sufficient evidence from which a jury could conclude the depression substantially limited plaintiff in a major life activity in light of her deposition testimony that she experienced not eating, not sleeping, having racing thoughts, and feeling hopeless and helpless. Even though there was no evidence as to the duration or comparative nature of these limitations, the court concluded: "The Court recognizes that the record as to whether Murray's depression substantially limits her major life activities is incredibly sparse. Nevertheless, given the stated intent of the ADAAA, the statute's command to construe 'disability' broadly, and the dearth of post-ADAAA case law opining on the issue, the Court declines to grant summary judgment on the basis of failing to make out a prima facie case of 'disability' under the ADA."

Kinney v. Century Services Corp. II, 2011 WL 3476569 (S.D. Ind. Aug. 9, 2011). "Prior to the passage of the ADAAA, the Seventh Circuit frequently found 'isolated bouts' of depression to be temporary impairments and not disabilities as defined by the ADA. See Brunker v. Schwan's Home Service, Inc., 583 F.3d 1004, 1008 (7th Cir. 2009) . . . . The ADAAA, however, expressly aimed to expand the definition of disability and to shift the burden to the employer to comply with the regulations of the ADA. Pub.L. 110–325, § 2(b)(1), (2), (4), (5). To that end, the ADAAA includes the provision that 'an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.' 42 U.S.C. § 12102(4)(D). Within the new paradigm of the ADAAA, the Seventh Circuit has not addressed the extent to which intermittent depression, however severe, constitutes a disability. However, a similar issue was decided by the district court in Hoffman v. Carefirst of Fort Wayne, Inc., where the court held an employee with cancer will be considered disabled even if the cancer is in remission at the time of the alleged adverse employment action. 737 F. Supp. 2d 976 (N.D. Ind. 2010). After Hoffman, the [EEOC] released regulations that also offer guidance as to the interpretation of the 'episodic or in remission' language of the ADAAA. Comments to the regulations state: 'This provision is intended to reject the reasoning of court decisions that certain individuals with certain conditions—such as epilepsy or post traumatic stress disorder—were not protected by the ADA because their conditions were episodic or intermittent.' 29 C.F.R. § 1630(j)(1)(vii). In this case, although there is no dispute that Ms. Kinney's depression did not impact her work performance following her return to work, [dkt. 38 at 7], there is also no dispute that, before she was hospitalized, Ms. Kinney advised Ms. Ruckman that Ms. Kinney's doctor recommended hospitalization because the depression was severe enough that Ms. Kinney was suicidal. Regardless whether her depression impacted her work when inactive, there is no question that, by its very nature, inpatient treatment substantially impacts (in fact, precludes) work performance and limits major life activities. Given Ms. Kinney's debilitating symptoms when her depression was active, the Court finds that Ms. Kinney's depression at least raises a genuine issue of fact as to whether she is a qualified individual under the ADA."

Naber v. Dover Healthcare Associates, Inc., 765 F. Supp. 2d 622 (D. Del. Feb. 24, 2011), aff'd, 2012 WL 1072311 (3d Cir. April 2, 2012) (unpublished) (see EEOC amicus brief filed 8/26/11, available at www.eeoc.gov, arguing that although the district court held that plaintiff's major depression could be found to be a substantially limiting impairment under the amended ADA, in doing so the court did not acknowledge the full scope of the significant changes to the coverage analysis effectuated by the ADAAA).

Not Substantially Limited

Carter v. City of Syracuse School District, 2012 WL 930798 (N.D.N.Y. March 19, 2012). Employer's motion to dismiss granted where complaint merely contained a conclusory allegation that plaintiff's "work related stress condition renders her disabled."

Culotta v. Sodexo Remote Sites Partnership, 864 F. Supp. 2d (E.D. La. 2012). Plaintiff was demoted from HR Director to Training and Development Director and then made to

transfer to Employee Relations Manager, but continued throughout to have the same duties. She alleged that she was forced to quit when the new HR Director, knowing that plaintiff had a fear of water and that she could not work offshore, suddenly required that she begin working offshore. Moving to dismiss her ADA discrimination claim, Sodexo argued the complaint failed to include sufficient detail about how plaintiff's fear of traveling over water amounts to a mental impairment that substantially limits her in the major life activity of working, as alleged. Quoting extensively from the EEOC's amended ADA regulations at 29 C.F.R. § 1630.2(j)(1) and 1630.2(j)(4), the court held that the allegations were insufficient even under the ADAAA's amended definition of disability. Despite her alleged inability to perform HR duties offshore, plaintiff's allegations showed she was "capable of working in general," and declined transfer to a contract position that would not have required travel over water. Therefore the allegations could not establish that she was substantially limited in performing a class or broad range of jobs.

Frantz v. Shinseki, 2012 WL 259980 (M.D.N.C. Jan. 27, 2012). Plaintiff, a registered nurse, was employed by the Department of Veterans Affairs at a medical center as Associate Chief Nurse for Acute Care. Following a 2007 investigation finding negligence in her unit, she provided a letter from her physician stating she was unable to do any work of any kind for six months, due to stress, anxiety, and post-traumatic stress disorder. She was subsequently terminated based on the earlier investigation, but was reinstated after a successful administrative challenge. Plaintiff filed suit under the Rehabilitation Act, challenging the agency's actions, including the alleged failure to restore her to her original position, and denial of reasonable accommodation upon ultimately returning to work in January 2009. Granting the employer's motion for summary judgment, the court held -- noting it would reach the same conclusion under the ADAAA -- that notwithstanding her physician's letter, plaintiff "failed to present evidence to even attempt to establish that her stress and anxiety are impairments that substantially limit any major life activity … nor do her affidavits address the extent of her impairment and its impact on her life activities." In reaching this conclusion, the court relied on evidence that after the requested six-month leave, plaintiff's treating physician cleared her to return without restrictions, and an employer fitness-for-duty evaluation concluded she was able to work on a full-time basis but that "alternative reporting relationships or reassignment would be prudent." The court held that "it is well-established that the inability to work with particular co-workers or supervisors does not create a substantial limitation on the major life activity of working."

Klute v. Shinseki, 855 F. Supp. 2d 653 (D.D.C. Jan. 9, 2012). Plaintiff, a federal government attorney with adjustment disorder, alleged denial of accommodation during a period that spanned both before and after the effective date of the ADAAA. Granting summary judgment for the employer, the court determined even assuming the ADAAA standards apply, plaintiff alleged a substantial limitation in working, which could not be demonstrated because the evidence showed he was merely unable to work for a particular supervisor or in a particular workplace.

Asperger's Syndrome, Autism, and Related Impairments

Not Substantially Limited

McElwee v. County of Orange, 2011 WL 4576123 (S.D.N.Y. Sept. 30, 2011), aff'd on other grounds, 700 F.3d 635 (2d Cir. 2012). In a case arising under Title II of the ADA and Section 504 of the Rehabilitation Act alleging disability discrimination against an individual with Asperger's Syndrome who provided volunteer janitorial and housekeeping duties for a federally funded rehabilitation center, the court granted summary judgment for defendant on grounds that his behavior had warranted termination of his services. On the issue of whether plaintiff was an "individual with a disability," the court held that no rational trier of fact could find plaintiff was substantially limited in "interacting with others" because he "does not lack the basic fundamental ability to communicate with others … but rather his communication is merely 'inappropriate, ineffective, or unsuccessful."

Asthma

Is or May Be Substantially Limited

Lloyd v. Housing Authority of the City of Montgomery, Alabama, 2012 WL 1466561 (M.D. Ala. April 27, 2012). Denying summary judgment for the employer on a portion of plaintiff's ADA claim, the court held that plaintiff's hypertension and asthma could be found to substantially limit him in the major life activity of working after his 2010 transfer, based on his doctor's FMLA certification that these impairments limited his ability to work in the sun and around cleaning chemicals. However, for the period plaintiff had no work restrictions prior to his 2010 transfer, the court found plaintiff failed to adduce evidence of how his impairments would have affected him in a "hypothetical, untreated state" without mitigating measures. "At bottom, the expanded definitions of 'disability' and 'major life activities' mean that treatable yet chronic conditions like hypertension and asthma render an affected person just as disabled as a wheelchair-bound paraplegic—if only for the purposes of disability law. Yet the ADAAA left untouched the plaintiff's burden of proof in a disability case; he still has to prove he has a disability. The plaintiff thus bears the burden of producing evidence about how his condition would affect him if left untreated. A contrary rule would require courts to gaze into a crystal ball, put on a white coat, and divine how a given impairment would have affected the plaintiff had he decided to leave it untreated."

Not Substantially Limited

Moore v. Sprint Communication Co., 2012 WL 4480696 (W.D. Tex. Sept. 18, 2012). Plaintiff's asthma required her to occasionally use a machine dispenser for 30 minutes during work breaks. Citing the ADAAA but not applying any of its changes, the court, citing pre-ADAAA case law as "instructive," held that because plaintiff's asthma was intermittent, it did not substantially limit a major life activity. The court also noted that

plaintiff failed to produce any evidence from her doctor indicating the effects of her asthma, and testified in her deposition that it did not interfere with her ability to work.

Back, Leg, Knee and Related Impairments

Is or May Be Substantially Limited

Chicago Regional Council of Carpenters v. Thorne Associates, Inc., ___ F. Supp. 2d ___, 2012 WL 4458392 (N.D. Ill. Sept. 25, 2012). Rosas, a carpenter, was excluded from a job with defendant because he failed a "fitness for hire" (FFH) exam requiring lifting ability of 50-100 pounds. Denying defendant's motion to dismiss, the court did not find Rosas had a particular physical impairment, and concluded that Rosas was not substantially limited in lifting because many people could not lift 50-100 pound boxes, but found that this may represent the "rare case" of a substantial limitation in the major life activity of working, if it is true that Rosas was unable to perform lifting tasks that really are required for journeyman carpentry work -- or even for drywall installation work alone – which would represent a broad range of jobs. The court cited the appendix to EEOC's revised ADA regulations, which states that for a person "whose job requires heavy lifting," a 50-pound lifting restriction may qualify as a disability if it prevents that person "from performing not only his or her existing job but also other jobs that would similarly require heavy lifting."

Rico v. Xcel Energy, Inc., ___ F. Supp. 2d ___, 2012 WL 4466631 (D.N.M. Sept. 25, 2012). Plaintiff, an apprentice utility lineman, alleged that his employer failed to reassign him to a vacant position to accommodate medical restrictions that he not lift more than 60 pounds or climb utility poles following back surgery. Denying the employer's motion to dismiss the complaint, the court rejected the employer's reliance on pre-ADAAA cases holding that such limitations did not substantially limit any major life activities. Although the employer argued such cases were "valid guidance" because they were not decided on the basic principles set forth in Toyota and Sutton, the court disagreed: "The Court does not read the ADAAA's repudiation of prior case law so narrowly. Indeed, in the ADAAA, Congress specifically noted that 'lower courts have incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities.' Pub.L. No. 110–325, § 2(a)(6), 122 Stat. at 3553 (emphasis added). In response to these lower court decisions, Congress passed the ADAA for the express purpose of lowering the threshold for the term, 'substantially limits,' and the EEOC has instructed that courts now apply that term to require a degree of functional limitation that is lower than the standard applied prior to the ADAAA. The express language of the ADAA and its interpretative regulations thus call into question the continued precedential value of pre-amendment cases, such as those cited by Defendants, which well might have applied a higher degree of functional limitation than is now permissible under the statute to determine whether lifting restrictions are stringent enough to qualify an individual as disabled."

Harty v. City of Sanford, 2012 WL 3243282 (M.D. Fla. Aug. 8, 2012). Plaintiff, a foreman of a bricklaying crew who had received a medical discharge from the military

due to a right knee injury that did not heal completely, had a 40% VA disability rating, was permanently restricted from squatting, using stairs, kneeling, running, or jumping, takes pain medication, and is prescribed a cane or crutches to assist in walking. However, he continued to engage in the restricted activities by modifying the way he performed them (e.g., bending at the waist or sitting on his hip rather than kneeling). Denying summary judgment for the employer in an ADA challenge to the employer's decision to terminate plaintiff due to restrictions following a re-injury, the court held plaintiff was substantially limited in the major life activities such as walking, standing, lifting, bending, and performing manual tasks, noting: "While he is able to ameliorate the effects of his disability by doing these things 'in a different way,' the ADAAA does not permit such measures to be considered. 29 C.F.R. § 1630.2(j)(5) ('Examples of mitigating measures…include, but are not limited to: … (iv) Learned behavioral…modifications…') Rather, the Court must hypothesize whether Harty would be 'substantially limited' in the absence of any mitigating behaviors. As problematic as this is, it does not occur in a vacuum." (quoting Appendix to 29 C.F.R. Pt. 1630 statement that "[a]n individual who, because of the use of a mitigating measure, has experienced no limitations, or only minor limitations, related to the impairment may still be an individual with a disability, where there is evidence that in the absence of an effective mitigating measure the individual's impairment would be substantially limiting.") The court held that "there is some evidence to suggest that Harty would be substantially limited without his mitigating behavior" given his VA disability rating and the fact that two physicians had opined he was permanently restricted from various physical activities.

Socoloski v. Sears Holding Corp., 2012 WL 3155523 (E.D. Pa. Aug. 3, 2012). The court summarily concluded that plaintiff's arthritis, hernia, and rotator cuff issues could be found to substantially limit a major life activity given his testimony that he was at times unable to work, and that he required assistance lifting and performing manual tasks.

Lohf v. Great Plains Mfg., Inc., 2012 WL 2568170 (D. Kan. July 2, 2012). Plaintiff, who had spondylolisthesis, a low back condition, was restricted from frequent or repetitive lifting of more than 25-30 pounds, excessive stooping and bending, and prolonged sitting or standing. His employer accommodated these restrictions for a number of years by providing a stool and lifting assistance with certain heavy materials. The employer terminated him, citing a misconduct issue which plaintiff alleged was a pretext for disability discrimination. While granting summary judgment for the employer on the merits, the court ruled first as a threshold matter that plaintiff established disability: "Under the ADA prior to the adoption of the ADAAA, plaintiff's lifting restrictions may not have sufficed to establish him as disabled . . . However, under the ADAAA, the definition of disabled has been expanded. This has led several courts to conclude that lifting restrictions similar to those imposed on the plaintiff here are now adequate to constitute a disability under the ADA or sufficient to avoid summary judgment on the issue. See Mills v. Temple Univ., 2012 WL 1122888 at —— 8–9 (E.D. Pa. Apr.3, 2012) (summary judgment denied to defendant on issue of whether plaintiff was disabled under the ADA because she had a lifting restriction of more than three pounds); Williams v. UPS, 2012 WL 601867 at * 3 (D.S.C. Feb.23, 2012) (adopting and approving magistrate's ruling that summary judgment should be denied to defendant on issue of

whether plaintiff was disabled under the ADA because he had a twenty-pound lifting restriction). Although this is a close question, the court is persuaded under the less restrictive standard of the ADAAA that plaintiff has offered sufficient evidence to raise a genuine issue of fact as to whether he was disabled at the time he was terminated from employment. The court is mindful that under the ADAAA the inquiry into whether or not the limitation is substantial is not meant to be 'extensive' or demanding. A reasonable factfinder could find that plaintiff is substantially limited in his ability to lift."

Davis v. Vermont Department of Corrections, 2012 WL 1269123 (D. Vt. April 16, 2012). Plaintiff alleged he was subjected to disability harassment resulting from his hernia condition and surgery. Denying the employer's motion to dismiss on disability coverage, the court ruled that while the duration of his limitation was unclear from the complaint, it appeared that he alleged that at least from December 2008 to March 2009 he was unable to perform manual tasks such as lifting and pulling or to engage in sexual intercourse, and these allegations "are sufficient under the lenient standards of the ADAAA to establish an actual disability."

Mills v. Temple University, 2012 WL 1122888 (E.D. Pa. April 3, 2012). Plaintiff, a hospital clerical employee, experienced pain and difficulty lifting and filing due to a work-related back injury, though she had no doctor-imposed work restrictions during the period of her worker's compensation. She subsequently continued to be treated for pain management, and was eventually diagnosed with disc degeneration, bulging, and kyphosis. In her action alleging discriminatory termination and denial of reasonable accommodation, the employer argued her impairment was not substantially limiting because she continued to perform day-to-day activities such as caring for herself and her daughter, driving, shopping, attending classes, and commuting on the bus or train. Rejecting this argument, the court noted that during the relevant time, plaintiff took intermittent leave for doctor's appointments and to recover from epidural injections related to her condition, and although she continued to engage in daily activities and chores, she found them painful and exhausting. Based on plaintiff's own testimony that she was restricted from lifting anything weighing more than three pounds, that she consequently changed her manner of performing various activities, and that her doctor indicated on her FMLA application that she was unable to perform filing duties at work, the court held in denying the employer's summary judgment motion that under the expanded ADAAA definition of disability this evidence could be sufficient to show a substantial limitation in lifting. In reaching this conclusion, the court rejected the employer's reliance on pre-ADAAA case law, and noted that post-ADAAA cases had held lesser lifting restrictions to be substantially limiting. See, e.g., Molina v. DSI Renal, Inc., 2011 U.S. Dist. LEXIS 139889, at *16–22 (W.D. Tex. Dec. 5, 2011) (finding that a reasonable juror could conclude that an individual limited to lifting less than twenty pounds was disabled under a state statute that has been amended to reflect the amendments embodied in the ADAAA); Williams v. UPS, 2012 U.S. Dist. LEXIS 23079, at *16–20 (D.S.C. Jan. 31, 2012) (report and recommendation adopted in relevant part by Williams v. UPS, No. 10–1546, 2012 U.S. Dist. LEXIS 23080, at *10 (D.S.C. Feb. 23, 2012) (concluding that a plaintiff with a permanent restriction on lifting more than twenty pounds could be disabled under the ADAAA)).

Barlow v. Walgreen, 2012 WL 868807 (M.D. Fla. March 14, 2012). Plaintiff, a Senior Beauty Advisor at Walgreen who had the musculoskeletal disorders of spinal stenosis, cervical disc disease, neural foraminal stenosis, and cervical radiculopathy, could perform light lifting, and bend and stoop for short periods of time. However, heavy lifting, heavy pulling, and prolonged bending or stooping caused severe pain and muscle tightness in her upper back. These impairments made it difficult to perform some of her duties, such as unloading merchandise on "truck days," which occur once or twice per week, which required lifting "totes" that weighed two pounds empty and up to 50 pounds when full. For many years, if she encountered a tote too heavy for her to lift, plaintiff either asked for help or unloaded lighter totes until help was available. She also had some difficulty with duties involving relocation of merchandise and lifting heavy merchandise for customers, such as a gallon of milk or a twelve-pack of bottled water. Despite these limitations, she often received the highest possible rating on her performance appraisals. When a new store manager took over on September 1, 2009, however, plaintiff was assigned new janitorial duties hat would involve heavy lifting and requested accommodation. At the manager's request, she obtained and submitted a note from her doctor verifying her limitations. The manager dismissed the note as insufficiently explaining plaintiff's limitations, and requested that she obtain additional information from her doctor, but declined the doctor's invitation to speak directly. The manager subsequently concluded she was "obviously disabled" said she would no longer be able to work in the store. Denying Walgreen's motion for summary judgment on plaintiff's claims of denial of accommodation and discriminatory termination, the court ruled that a reasonable jury could conclude under the changes made by the ADAAA that plaintiff's impairments substantially limit the operation of her musculoskeletal system.

Medlin v. Honeywell Analytics, Inc., 2012 WL 511997 (M.D. Tenn. Feb. 15, 2012). Plaintiff challenged his termination under the ADA, alleging that injuries from a car accident made it difficult for him to sit for long periods, climb stairs and ladders, carry heavy things, sleep, and engage in sexual activity as well as general "day-to-day stuff." Finding that plaintiff could show genuine issues of material fact as to disability coverage, the court held this evidence was sufficient to show substantial limitations to major life activities, notwithstanding that plaintiff had been released to return to work, and had held at least three different full-time jobs since his termination. In reaching this conclusion, the court noted: "Congress enacted the ADA Amendments Act in 2008 in order to reinstate a broad scope of protection to be available under the ADA. Milholland v. Sumner County Bd. of Educ., 569 F.3d 562, 566 (6th Cir.2009).

Molina v. DSI Renal, Inc., 840 F. Supp. 2d 984 (W.D. Tex. 2012). In a case arising under a state anti-discrimination law that by its terms is intended to correlate with corresponding provision of the ADA, the court applied the ADAAA standards and EEOC's amended ADA regulations. In denying summary judgment on a denial of accommodation claim brought by a certified medical assistant with lumbar internal disc derangement, lumbar rediculopathy, and lumbago, the court applied the EEOC's regulations that allow, among other things, for comparing "the condition under which the individual performs the major life activity" or "the manner in which the individual

performs the major life activity," including "pain experienced when performing a major life activity." The court held a reasonable juror could find plaintiff's impairments substantially limited her in various major life activities, including lifting, bending, and the operation of a major bodily function (musculoskeletal) in light of her intermittent pain and other symptoms. Rejecting the employer's argument that plaintiff could not be disabled because his back pain was variable, the court noted that under the revised statute an impairment that is "episodic" is a disability if it "substantially limits a major life activity when active." The court also applied the ADAAA standard for determining substantial limitation without regard to mitigating measures, citing plaintiff's deposition testimony that she took Tylenol for her pain, which if she was experiencing pain on an eight out of ten level would reduce the pain to a five, thereby demonstrating that without the mitigating measure the pain would be experienced at a level of eight out of ten.

Negron v. City of New York, 2011 WL 4737068 (E.D.N.Y. Sept. 14, 2011). Denying the employer's motion to dismiss, the court found sufficient allegations of disability, where plaintiff alleged that bullet fragments lodged in her left hand and chest caused pain and inflammation. The court viewed the impairment as episodic and therefore considered whether it was substantially limiting when active -- when the pain and inflammation occurred -- and held that the facts alleged would support the conclusion that the impairment substantially limited plaintiff in the major life activities of performing manual tasks or working, given that during flare ups she was unable to use her left hand for work tasks, and at one point required one month off of work.

Cohen v. CHLN, Inc., 2011 WL 2713737 (E.D. Pa. July 13, 2011). Denying employer's motion for summary judgment, the court ruled that plaintiff's back impairment (lumbar radiculopathy with spinal and foraminal stenosis) could be a substantially limiting impairment. He needed the assistance of a cane and was only able to walk ten to twenty yards at a time before having to stop and rest. The employer argued that the condition was of too short a duration to qualify as a disability, but the court observed: "[t]he ADAAA mandates no strict durational requirements for plaintiffs alleging an actual disability. Even if it did, plaintiff's evidence could allow a jury to find that his condition was by no means fleeting. Plaintiff's back and leg issues began four months before his termination and were not resolved by the injections recommended by plaintiff's doctor. At the time of the termination, plaintiff's doctor had suggested the possibility of surgery requiring extensive recovery time, with no indication that plaintiff's condition would be resolved permanently. Such a severe, ongoing impairment stands in distinct contrast to those cited by the EEOC as merely minor and temporary, such as the common cold or flu. 29 C.F.R. pt. 1630.2, app. § 1630.2(l)."

Patton v. ecardio Diagnostics LLC, 793 F. Supp. 2d 964 (S.D. Tex. 2011). FMLA case in which the court discusses "substantially limited" under the ADAAA, finding the standard satisfied where the individual had two broken femurs that necessitated using a wheelchair "for several weeks, if not months" and then walking with a cane, and where after 1 1/2 years she still walked with pain and a limp.

Fleck v. Wilmac Corp., 2011 WL 1899198 (E.D. Pa. May 19, 2011). Denying employer's motion to dismiss complaint under Rule 12(b)(6), the court ruled that a physical therapist who alleged denial of accommodation and discriminatory termination after surgery for an ankle injury could be an individual with a disability using either the pre- or post- ADAAA definition of an impairment that substantially limits a major life activity. The court concluded that plaintiff's pre-surgery use of a "cam boot" to aid her in the amount of standing and walking required at work, and post-surgery inability to stand for more than an hour or walk more than a half mile, could be found to constitute a substantial limitation in the major life activities of standing and walking. Rejecting the employer's citation to pre-ADAAA cases in the same jurisdiction holding such limitations were insufficient, the court noted that those decisions were fact-specific, and factors such as the difficulty sustaining her level of mobility or the speed at which she could walk might distinguish this case even under pre-ADAAA standards.

Not Substantially Limited

Zick v. Waterfront Commission of New York Harbor, 2012 WL 4785703 (S.D.N.Y. Oct. 4, 2012). Plaintiff, an attorney for a state commission, sustained two broken bones in her right leg, requiring a cast and use of crutches. Her doctor recommended that she telework for 8-10 weeks and keep her right leg elevated, leading to various disputes and her resignation under threat of termination. Without citing the ADAAA although the dispute occurred in 2010, the court found plaintiff did not have a disability, applying pre-ADAAA case law holding that temporary impairments are not substantially limiting.

Poper v. SCA Americas, Inc., 2012 WL 3288111 (E.D. Pa. Aug. 13, 2012). Granting summary judgment for the employer, the court held that the evidence did not establish that plaintiff's back impairment, which he testified interfered with brushing his teeth, bending, and lifting "more than 30 pounds without really feeling a pain," substantially limited a major life activity.

Rankin v. Loews Annapolis Hotel Corp., 2012 WL 1792637 (D. Md. May 14, 2012). Plaintiff alleged discriminatory termination and failure to accommodate his restrictions and complications following arthroscopic surgery on his left knee, including chronic pain, an inability of the knee to support his weight, and a limp. Granting the employer's motion to dismiss, the court found these allegations were at odds with other allegations in the complaint that his daily activities were unimpeded and he was able to work normally. To the extent plaintiff alleged that his condition worsened on or about the day he was terminated, when he did not show up for work and instead went to the doctor and complained that his knee began to buck or give way, the court ruled this could not be sufficient to show a substantially limiting impairment, quoting pre-ADAAA case law holding "temporary medical conditions" such as recuperation from surgery, are not disabilities under the ADA.

Koller v. Riley Riper Hollin & Colagreco, 2012 WL 628009 (E.D. Pa. Feb. 28, 2012). Plaintiff, an attorney, was granted approximately two weeks of leave for surgery due to a knee injury (torn ACL), but was terminated one week after his post-surgical twice-

weekly physical therapy sessions began. The court denied the employer's motion to dismiss plaintiff's FMLA claim, but dismissed the ADA claims for failure to plead disability even under the amended standard. Plaintiff's complaint alleged that for two weeks following his surgery, he was in pain and heavily medicated, so he had trouble staying awake and concentrating, and had difficulty moving and driving because the cast on his knee reduced movement. "These allegations do not rise to the level of important, let alone, substantial limitations on a major life activity. Plaintiff pleads that the temporary pain and medication post-surgery hindered—not substantially limited—his ability to stay awake and alert two weeks after the surgery. Additionally, Plaintiff pleads that two weeks after the surgery, he had difficulty moving and driving, but was able to come to work. However, he makes no allegations regarding his physical condition at the time of termination, except to say he arrived late to work twice because he was attending physical therapy sessions." The court explained: "Though 'substantially limits' is not meant to be a demanding standard, '[n]ot every impairment will constitute a disability within the meaning of this section.' 29 C.F.R. § 1630.2(j)(1) (ii). See also 154 Cong. Rec. S8840 (2008) (statement of Sen. Tom Harkin) ('We reaffirm that not every individual with a physical or mental impairment is covered by the first prong of the definition of disability in the ADA.'). In fact, the ADAAA was adopted to specifically address certain impairments that were not receiving the protection that Congress intended—cancer, HIV–AIDS, epilepsy, diabetes, multiple sclerosis, amputated and partially amputated limbs, post-traumatic stress disorder, intellectual and developmental disabilities—not minor, transitory impairments, except if of such a severe nature that one could not avoid considering them disabilities. See, e.g., 154 Cong. Rec. H8286 (2008) (statement of Rep. George Miller). Although Congress sought to abrogate the 'significantly or severely restricting' requirement as it pertained to the 'substantially limits' factor of the ADA, the ADAAA still requires that the qualifying impairment create an 'important' limitation. 29 C.F.R. pt. 1630 App. (2011). See also H.R.Rep. No. 110–730 (2008) ('[T]he limitation imposed by an impairment must be important ....'). Therefore, even under the relaxed ADAAA standards, a plaintiff is still required to plead a substantially limiting impairment. See Fleck, 2011 U.S. Dist. LEXIS 54039, at *12–15."

Mazzeo v. Color Resolutions Int'l, Inc., Case No. Case No. 3:10-cv-1108-J-37JRK (M.D. Fla. Dec. 15, 2011), appeal pending, (No. 12-10250 11th Cir.) (see EEOC amicus brief filed 3/12/12, available at www.eeoc.gov, arguing that plaintiff's herniated disc substantially limited him in the major life activities of lifting and neurological function).

Clark v. Western Tidewater Regional Jail Authority, 2012 WL 253108 (E.D. Va. Jan. 26, 2012). Plaintiff, a probationary jail officer, was terminated for failure to complete a state-mandated training program after three attempts. Entering summary judgment for the employer on plaintiff's claim of denial of reasonable accommodation, the court held that none of her physical impairments (torn ACL, left knee sprain, lumbar strain, and post-concussion syndrome) substantially limited a major life activity. On September 21, 2009, plaintiff's physician restricted her to work that did not involve excessive exercise; on October 14, 2009, she was prohibited from engaging in prolonged standing, which was expressed in an October 15, 2009 form as able to engage in "normal activities" with

an "opportunity to rest-sit every hour"; and on November 3, 2009, she was cleared to return to full duty status. "Although the ADAA's implementing regulations indicate that a substantial limitation need not severely restrict an individual's ability to perform a major life activity, 29 C.F.R. § 1630.2(i)(1)(ii), "the phrase 'substantially limits' sets a threshold that excludes minor impairments from coverage…." (citations omitted). "The Court is unable to conclude that a three week restriction on Clark's ability to stand for prolonged periods of time constitutes a substantial limitation on the major life activity of standing."

Overfield v. H.B. Magruder Memorial Hosp., Inc., 2012 WL 243341 (N.D. Ohio Jan. 25, 2012). Plaintiff, a nurse, was on medical leave for a hysterectomy when she developed another medical condition, and was restricted from working for an additional month, following which she was restricted from lifting more than 10 pounds with her left arm for 4-6 weeks, and thereafter "had to be careful" with the arm. Granting summary judgment for the employer on disability coverage, the court held this was insufficient to substantially limit her in any major life activity, citing the various activities in which she could engage.

Neumann v. Plastipak Packaging, Inc., 2011 WL 5360705 (N.D. Ohio Oct. 31, 2011). In a case arising after January 1, 2009, the court applied a mix of pre-ADAAA and ADAAA standards in concluding that plaintiff's back injury was short-lived and corrected by surgery, and therefore did not substantially limit a major life activity.

Blood Disorders

Is or May Be Substantially Limited

LaPier v. Prince George's County, Md., 2013 WL 497971 (D. Md. Feb. 7, 2013). Plaintiff, a student police officer, alleged the County discriminated against him when it deemed him physically unfit for duty because of his blood disorder. Although granting the employer's motion for summary judgment on the merits because plaintiff was held not to be qualified, the court ruled as a preliminary matter that even though the evidence was somewhat unclear as to precisely what impairment plaintiff had, there was sufficient evidence to conclude that he had a vascular or blood condition that substantially limited his ability to work, breathe, and/or to have proper circulation. In a prior decision denying the employer's motion to dismiss, 2012 WL 1552780 (D. Md. April 27, 2012), the court ruled the allegations were sufficient to allege a substantially limiting impairment and "[a]nything less would make a mockery" of the ADAAA's statutory mandate that the definition of disability "shall be construed in favor of broad coverage…."

Cancer

Is or May Be Substantially Limited

Haley v. Community Mercy Health Partners, 2013 WL 322493 (S.D. Ohio Jan. 28, 2013). Plaintiff, a registered nurse, alleged she was terminated after 32 years of

employment because she took leave to care for a parent and then leave for her own breast cancer treatment. Denying the employer's motion for summary judgment on the issue of disability coverage, the court rejected the argument that plaintiff could not be an individual with a disability under the ADA definition because she denied in her deposition that she is disabled, holding that an employee does not need to "affirmatively self-identify as 'disabled' in order to meet the legal definition of having a disability under the ADA. "[T]he Court finds that a reasonable jury could conclude that Haley was disabled under the ADA . . . She was obviously disabled when the cancer was active, as it substantially limited the major life activity of normal cell growth. In addition, the cancer substantially limited the major life activity of her work. Haley took extensive time off for surgery and recuperation between the end of November 2009 and January 18, 2010, during which time she could not work at all . . . When Haley did return to work, her activity was substantially limited by initially being restricted to half days. . . . If her cancer were to recur and become active again, it would again substantially limit the two areas of major life activity of work and normal cell growth."

Angell v. Fairmount Fire Protection District, 2012 WL 5389777 (D. Colo. Nov. 5, 2012). Undisputed facts that plaintiff had been diagnosed with cancer and had undergone surgeries and treatment for his cancer, was adequate to defeat summary judgment on the question of whether plaintiff was substantially limited in a major life activity. In reaching this conclusion, the court cited the ADAAA's "episodic or in remission rule" and addition of the major bodily function of "normal cell growth," and quoted the new statutory provisions, legislative history and various provisions of EEOC's regulations, including 29 C.F.R. § 1630.2(j)(3)(iii) ("it should easily be concluded that … cancer substantially limits [the major life activity of] normal cell growth") and the appendix to 29 C.F.R. § 1630.4 ("We hope this will be an important signal to both lawyers and courts to spend less time and energy on the minutia of an individual's impairment, and more time and energy on the merits of the case – including whether discrimination occurred because of the disability….") (internal quotation omitted).

Unangst v. Dual Temp Co., Inc., 2012 WL 931130 (E.D. Pa. March 19, 2012). Plaintiff was diagnosed with non-Hodgkin's lymphoma, a form of cancer, in late October or early November 2008, and went on paid short-term disability leave during his chemotherapy treatment. In February 2009, his doctor deemed him "cancer free," with no medical restrictions. When he returned to work on March 9, 2009, he was informed that he was being terminated due to the economic downturn. In his subsequent ADA suit for denial of accommodation and discriminatory termination, the court granted the employer's motion for summary judgment on the merits, but first ruled that plaintiff could establish disability coverage: "The ADA was clearly intended by Congress to protect cancer patients from disability discrimination. See H. Rep. No. 101-485, pt. 3, at 29 (1990). Cancer is a 'paradigmatic example of such an impairment.' Adams v. Rice, 531 F.3d 936, 952 (D.C. Cir. 2008). Plaintiff has further demonstrated that his chemotherapy treatment substantially limited his ability to perform major life activities, due largely to the fatigue and nausea he experienced as a result of the treatment. …Plaintiff's cancer diagnosis in late 2008 qualified him for the protections of the ADA at that time. Plaintiff was cancer-free as of February 2009, and cleared to return to work without restrictions. …However,

it is likely that Plaintiff's cancer, while in remission at the time of the alleged adverse employment actions, would substantially limit a major life activity when active. This entitles Plaintiff to ADA coverage. See 42 U.S.C. § 12102(4)(D)." See also Cyrus v. Papa's Dodge, Inc., 2012 WL 1057310 (D. Conn. March 28, 2012) (applying the ADAAA standard to a pre-Act fact pattern, the court held: "Prostate cancer substantially limits the operation of major bodily functions, as evidenced by plaintiff's catheterization. Moreover, impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active." 29 C.F.R. § 1630.2(j)(1)(vii)).

Katz v. Adecco USA, Inc., 845 F. Supp. 2d 539 (S.D.N.Y. 2012). Analyzing case under the ADA and broader New York State Human Rights Law, the court cited the statutory change that expanded major life activities to include major bodily functions such as "normal cell growth," cases that have applied the "episodic or in remission" provision, and the EEOC's amended ADA regulations explaining that cancer should "easily" be found to be substantially limiting. The court held that there was a genuine issue of material fact as to whether plaintiff – who was not hired after identifying herself to a recruiter as a breast cancer survivor – was an individual with a disability. "As a result of the amendments to the ADA, it appears not to matter that [plaintiff's] cancer was in remission at the time of the alleged discrimination."

Meinelt v. P.F. Chang's China Bistro, Inc., __ F. Supp. 2d __, 2011 WL 2118709 (S.D. Tex. May 27, 2011). Plaintiff, a restaurant manager, alleged he was terminated in violation of the ADA when, three days after telling his employer that he had a brain tumor, he was fired for the stated reason of improperly adjusting employees' hours. Denying the employer's motion for summary judgment on the question of whether Meinelt is an "individual with a disability," the court ruled: "Under the ADAAA, 'a major life activity also includes the operation of a major bodily function, including but not limited to, … normal cell growth … [and] brain ... functions.' 42 U.S.C. § 12102(2)(B). . . . P.F. Chang's relies on pre-ADAAA cases to argue that Meinelt's brain tumor is not a disability. See, e.g., Branscomb v. Grp. USA, Inc., No. CV 08–1328–PHX–JAT, at *5–6 (D. Ariz. Sept. 23, 2010) (holding that a benign brain tumor requiring three months' leave was not a disability). . . . P.F. Chang's does not, however, explain the relationship between that [pre-ADAAA] case law and the statutory amendments. Nor does P.F. Chang's explain how Piner's knowledge that Meinelt had a brain tumor—an abnormal cell growth—that would require brain surgery is insufficient to create a triable issue as to whether Meinelt was disabled or was regarded as disabled. See 42 U.S.C. § 12102(2)(B)."

Norton v. Assisted Living Concepts, Inc., 786 F. Supp. 2d 1173 (E.D. Tex. 2011). Denying employer's motion for summary judgment, the court held the evidence was sufficient to establish that plaintiff's kidney cancer could be a substantially limiting impairment under the ADAAA, noting that major life activities now include major bodily functions such as normal cell growth, and that impairments that are episodic or in remission are now deemed substantially limiting if they would be when active. "The court finds that renal cancer, when active, substantially limits the major life activity of normal cell growth…. Therefore, that Norton may have been in remission when he

returned to work at ALC [after six weeks off for surgery] is of no consequence." The court stated that its conclusion was "bolstered" by EEOC's final regulations interpreting and implementing the ADAAA: "The EEOC's final regulations implementing the amendments provide a list of impairments that, because they substantially limit a major life activity, will "in virtually all cases, result in a determination of coverage under [the actual disability prong]." 29 C.F.R. § 1630.2(j)(3)(ii) (effective May 24, 2011). One of the impairments listed is "cancer" because it "substantially limits [the major life activity] of normal cell growth." Id. at § 1630.2(j)(3) (iii). See also the EEOC's interpretive guidance accompanying its final regulations, 76 FR 16978–01, 2011 WL 1060575, at ––– –17007, 17011, & 17012 (citing examples in the legislative history of the ADAAA where Congress named cancer as the kind of impairment that would qualify as a disability under the amended Act)." Rejecting the employer's attempt to distinguish this case from Hoffman, in which the plaintiff had stage III renal cancer, the court noted that "cancer at any stage 'substantially limits' the 'major life activity' of 'normal cell growth.'"

Hoffman v. Carefirst of Fort Wayne, Inc., 737 F. Supp. 2d 976 (N.D. Ind. Aug. 31, 2010). Plaintiff, a medical equipment service technician, was diagnosed with stage III renal carcinoma in November 2007, took short-term disability leave for surgery and recovery, and returned to work January 2, 2008, without restrictions, and did not take any significant time off. One year later, in response to a new requirement that all service technicians work overtime (between 65 and 70 hours per week) and do a night shift once a week, plaintiff sought accommodation, providing a doctor's note stating "[p]atient may not work more than 8 hours/day, 5 days/week. Dx: Stage III renal cancer." In plaintiff's subsequent action challenging the denial of accommodation and resulting termination, the employer argued plaintiff did not have a substantially limiting impairment because at the time in question his cancer was in remission and he had been working for a year without restrictions. Rejecting this argument, the court held that it "is bound by the clear language of the ADAAA . . . [which] clearly provides that 'an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active . . . In other words, under the ADAAA, because Hoffman had cancer in remission (and that cancer would have substantially limited a major life activity when it was active), Hoffman does not need to show that he was substantially limited in a major life activity at the actual time of the alleged adverse employment action." The court also noted that its "conclusion is further bolstered by EEOC's interpretive guidance," since the Commission's ADAAA regulatory proposal "specifically provides that 'cancer' is an example of 'impairments that are episodic or in remission,'" and states that cancer is an example of an impairment that will "consistently meet the definition of disability" because it "substantially limits major life activities such as normal cell growth…." Responding to defendant's argument that the proposed regulations could not be relied upon, the court noted that "[w]hether or not EEOC's [proposed] regulations are 'retroactive' is not the issue here. Rather, the Court includes this discussion of the EEOC's interpretation of the ADAAA (which clearly was in place at the time of the alleged discriminatory action), as another tool to glean the intended meaning of the Amendments."

Not Substantially Limited

Fierro v. Knight Transportation, 2012 WL 4321304 (W.D. Tex. Sept. 18, 2012). Granting in part defendant's motion to dismiss plaintiff's complaint, the court ruled that merely alleging that he had adenoid cystic carcinoma, a form of cancer, without alleging any facts describing a substantial limitation in a major life activity, was insufficient to state a claim.

Brandon v. O'Mara, 2011 WL 4478492 (S.D.N.Y. Sept. 28, 2011). Rejecting the employer's argument that plaintiff had to allege her fatigue from cancer treatment was "not temporary" in order to establish a substantially limiting impairment, the court held that "the statutory text makes clear" that the six month "transitory" part of the "transitory and minor" exception applies only to the "regarded as" prong of the definition of disability. However, the court – without mentioning the addition by the ADAAA of major bodily functions such as normal cell growth – granted the employer's motion to dismiss on the ground that the complaint had insufficient detail regarding how limited plaintiff was, given that it only referenced that she would "experience fatigue" and was "not to engage in lifting objects."

Fields v. Verizon Center, 2011 WL 4102087 (D. Md. Sept. 13, 2011). Finding that plaintiff's breast cancer was not a substantially limiting impairment under the Montgomery County, Maryland anti-discrimination ordinance, the court held that the county ordinance's statutory definition of "disability" does not mention impairments that are "episodic or in remission" as being included in its definition of "disability." "Thus, the Court declines to extend the interpretation of the ADA amendments adopted by the Hoffman and Norton courts to apply to the MCC here."

Non-Cancerous Tumors

Is or May Be Substantially Limited

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

Colostomy, Gastrectomy, and Related Impairments

Is or May Be Substantially Limited

Pilling v. Bay Area Rapid Transit, 881 F. Supp. 2d 1152 (N.D. Cal. 2012). In a Title II ADA case, defendant argued plaintiff's use of colostomy apparatus following removal of a portion of his colon did not "substantially limit" him in the major life activity of

eliminating waste because it only took him a few minutes longer than the average person to use the restroom. Rejecting this approach, the court held that it was "apparent" that plaintiff was substantially limited in the major bodily functions -- bowel and digestive – given that he now eliminates waste through an opening in his abdomen.

Kravtsov v. Town of Greenburgh, 2012 WL 2719663 (S.D.N.Y. July 9, 2012). Due to cancer and other conditions, plaintiff underwent a total gastrectomy (removal of his stomach), removal of his small intestine and reconstruction of his bile and pancreatic ducts. As a result of his surgeries, he has dumping syndrome and other symptoms, and must eat small portions 8 to 10 times per day in a reclining or semi-reclining position and subject to various other limitations. In this action under Title II of the ADA involving accommodation of plaintiff as a litigant at a courthouse, the court held: "Under post-ADAAA standards, . . . a jury could easily find, based on his description of his impairment, that he is substantially limited compared to most people in the general population at least in his ability to eat and the functioning of his digestive and bowel systems. Defendants rely on portions of Plaintiff's testimony that he is able to work, works from home unless he is needed in the office, and can plan his meals so that he can be away from home for periods of time without eating, and that his condition is improving. . . . But, in Plaintiff's case, planning meals is a mitigating measure the ameliorative effects of which cannot be considered in determining whether his impairment substantially limits major life activities. As to improvements in Plaintiff's condition, temporary impairments can qualify as substantially limiting, see Brandon, 2011 WL 4478492, at *7 ("'[T]he effects of an impairment lasting or expected to last fewer than six months can be substantially limiting ....'") (quoting 29 C.F.R. § 1630.2(j)(1)(ix)), and thus a jury could find that he was disabled on the day in question. In any event, the evidence on which Defendants rely does not establish that Plaintiff is or ever will be functioning on substantially the same level as the general population, and a jury could thus conclude that Plaintiff is still disabled despite improvements in his condition."

Not Substantially Limited

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

Diabetes

Is or May Be Substantially Limited

Munoz v. Echospere, LLC, 2010 WL 2838356 (W.D. Tex. July 15, 2010). Applying the ADAAA's mitigating measures rule under parallel state law, the court observed: "While her diabetes is currently controlled by medication, it stands to reason that without her

medication, Munoz's diabetes would substantially impair her ability to work . . . Prior to beginning her insulin regiment (sic), Munoz's blood sugar varied widely, such that she had a diabetic stroke, was unable to walk, had difficulty concentrating, and was not certified to work by her physician."

Not Substantially Limited

Kinchion v. Cessna Aircraft Co., 2013 WL 66077 (D. Kan. Jan. 4, 2013). Granting the employer's motion to dismiss the complaint, with leave for the plaintiff to amend, the court held that the mere mention of diabetes with nothing more was insufficient to plead disability. The court ruled that notwithstanding the ADAAA's broad coverage standard and the EEOC's mention in its regulations of diabetes as an example of a type of impairment that "will, in virtually all cases" result in coverage, "[i]f plaintiff is relying on such an impairment and its substantial limitation on his endocrine function, he merely has to allege as much in the complaint. But the defendant should not have to guess at the basis for the claim of disability discrimination …. Parroting the statutory language without any facts" is insufficient.

Fibromyalgia, Chronic Fatigue Syndrome, and Related Impairments

Is or May Be Substantially Limited

Howard v. Pennsylvania Dept. of Public Welfare, 2013 WL 102662 (E.D. Pa. Jan. 9, 2013). Plaintiff, an income maintenance caseworker, produced evidence from which a reasonable jury could conclude that her fibromyalgia substantially limits her ability to walk, sleep, and perform manual tasks as compared to most people. Plaintiff's own testimony as well as an affidavit filed by her husband indicated that when her condition flares up, she has difficulty walking for extended periods of time, particularly in rainy weather, her ability to perform activities of daily life such as household chores is limited, and she suffers from persistent sleep disturbances. Plaintiff produced over 450 pages of medical records documenting her treatment and supporting the conclusion that these symptoms are consistent with fibromyalgia. The court noted that the fact that plaintiffs regularly experiences pain when performing these activities bolstered this conclusion, citing 29 C.F.R. § 1630.2(j)(4)(ii). Rejecting the employer's argument that her condition was not a disability because her symptoms "wax and wane," the court ruled: "The ADAAA plainly forecloses this line of reasoning. 42 U.S.C. § 12012(4)(D) ('An impairment [that] is episodic or in remission is a disability if it would substantially limit a major life activity when active.') Accordingly, I need not address Defendants' argument further."

Wirey v. Richland Community Center, 2012 WL 6681214 (C.D. Ill. Dec. 21, 2012). Although the court granted summary judgment for the employer on the merits of plaintiff's discriminatory termination claim, the court ruled as to coverage that plaintiff could demonstrate her chronic fatigue syndrome (CFS) substantially limited her in the major life activities of thinking and concentrating. Even though plaintiff provided no medical records, and her physician's notes to the employer only referenced a "health

issue" and "ongoing medical problems," the court found sufficient plaintiff's own testimony about how her CFS interfered with her ability to remain awake and alert, and the assistance she required from her mother to care for herself at home. As part of its analysis, the court rejected the employer's argument that plaintiff could not be substantially limited in working since she rarely missed work; "requiring an individual with a physical or mental impairment to miss work or leave early in order to qualify for a disability would encourage that individual to be absent from work . . . This is an absurd result…."

Kravits v. Shinseki, 2012 WL 604169 (W.D. Pa. Feb. 24, 2012) (plaintiff could show that his obstructive sleep apnea, fibromyalgia, and depression were actual disabilities).

Graves' Disease

Is or May Be Substantially Limited

Seim v. Three Eagles Communications, Inc., 2011 WL 2149061 (N.D. Iowa June 1, 2011). Plaintiff, an on-air radio personality employed by a company that operated seven stations, alleged that he was denied accommodation and terminated in violation of the ADA after he informed several members of management at Three Eagles he had a "blood disease" and would require occasional time off, and sought but was denied transfer to one of several available afternoon shifts because side effects of his medication included early-morning drowsiness, confusion, and slurred speech. Seim further alleged that the disease makes standing for prolonged periods painful, but that his request for a chair (broadcasters typically stood during their on-air programs) was also denied. On the question of whether his Graves' Disease and the side effects of medications he uses to treat it rendered him an individual with a disability, he alleged that he was substantially limited in the major life activities of sleeping, standing, speaking, concentrating, thinking, communicating, working, and the functions of his immune, circulatory, and endocrine systems, noting various symptoms of the disease, including rapidly deteriorating vision, weight fluctuation, insomnia, narcolepsy, anxiety, swelling and skin lesions of the lower extremities, and difficulty standing for long periods of time. Finding that Seim's affidavit and deposition testimony regarding his limitations were along sufficient to overcome summary judgment, the court denied the employer's motion on the issue of whether Seim is an "individual with a disability," ruling under the ADAAA that a reasonable jury could find that Seim was substantially limited in these major life activities. See also Jones v. Bracco Ltd. Partnership, 2013 WL 696381 (D.S.D. Feb. 26, 2013) ("In light of the recent directive from Congress, the court concludes that Jones's deposition testimony is enough to create a question of fact as to whether Jones was substantially limited in her ability to perform a major life activity and, therefore, disabled under the ADA").

Howard v. Steris Corp., __ F. Supp. 2d __, 2012 WL 3561965 (M.D. Ala. Aug. 17, 2012). Plaintiff submitted evidence that his pulmonologist and sleep specialist diagnosed him with obstructive sleep apnea, and stated that it "definitely" interferes with his ability to sleep, and evidence that his regular physician diagnosed plaintiff's Graves' Disease

that his endocrinologist said "can cause trouble sleeping too." "This testimony provides a reasonable juror with enough evidence to conclude that Howard's physical impairments substantially limited his ability to sleep, a major life activity under the ADAAA."

Hand Impairments (Missing or Impaired Fingers, Carpal Tunnel, etc.)

Is or May Be Substantially Limited

Gregor v. Solar Semiconductor, Inc., 2013 WL 588743 (D. Minn. Feb. 13, 2013). After an accident resulting in partial loss of the index and middle fingers on his dominant hand, plaintiff was cleared to return to work with medical instructions to avoid "pinch[ing] and fine manipulation" and "vibrating tools." and not to perform torquing, crimping or any firm grasping with his that hand. Denying the employer's motion for summary judgment on plaintiff's ADA denial of accommodation claim, the court held he could be found substantially limited in the major life activity of performing manual tasks, noting that at the time of the litigation plaintiff still did not have the ability to pinch between his thumb and index or middle fingers. In reaching this conclusion, the court said its conclusion was reinforced by the appendix to EEOC's amended ADA regulations at 1630.2(j)(1)(ii) (issued after Gregor's termination), which states: "that the major life activity of performing manual tasks (which was at issue in Toyota) could have many different manifestations, such as performing tasks involving fine motor coordination, or performing tasks involving grasping, hand strength, or pressure. Such tasks need not constitute activities of central importance to most people's daily lives, nor must an individual show that he or she is substantially limited in performing all manual tasks." (emphasis added).

Gibbs v. ADS Alliance Data Systems, Inc., 2011 WL 3205779 (D. Kan. July 28, 2011). Employer's summary judgment motion denied on disability discrimination and retaliation claims arising out of plaintiff's termination following carpal tunnel surgery on her left hand. "[T]he ADAAA was passed in response to decisions by the U.S. Supreme Court that, according to Congress, had 'created an inappropriately high level of limitation necessary to obtain coverage under the ADA,' and was intended to reinstate 'a broad scope of protection ... available under the ADA.' See Norton v. Assisted Living Concepts, Inc., ___ F. Supp.2d ___, 2011 WL 1832952, at *7 (E.D. Tex. May 13, 2011) (citations omitted). While an ADA plaintiff must still show that he or she has a physical or mental impairment that substantially limits a major life activity, 42 U.S.C. § 12102(1)(A), the ADAAA has 'significantly expanded' the terms within that definition in favor of broad coverage. See Norton, ___ F. Supp.2d at ___, 2011 WL 1832952, at *7. In expanding the definition of disability, Congress intended to convey 'that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis' and that the 'primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations.' See id. (citations omitted). Consistent with this purpose, the implementing regulations state that the terms 'substantially limiting' and 'major' are not intended to be 'demanding' standards. 29 C.F.R. § 1630.2(i)(2) & (j)(1)(i) (2011). Recognizing, then, that the court must consider the evidence of plaintiff's alleged disability through the lens

of the less demanding standard of disability set forth in the ADAAA, defendant's argument in support of its motion for summary judgment on this issue is decidedly brief -- it asserts only that plaintiff has the burden to prove that her impairment substantially limits a major life activity despite the broader reach of the ADAAA. After examining the evidence in the record bearing on this issue (certainly there is some evidence that plaintiff's condition affected her ability to perform manual tasks), and keeping in mind that this inquiry is not meant to be 'extensive' or demanding, the court concludes that genuine issues of material fact exist as to whether plaintiff's carpal tunnel syndrome constitutes a disability within the meaning of the ADA."

Hearing Impairments

Not Substantially Limited

Curley v. City of North Las Vegas, 2012 WL 1439060 (D. Nev. April 25, 2012). "Plaintiff has 'binaural hearing impairment of 0%' and [] he is 'able to achieve 96% in speech recognition' at 70db resulting in his being 'deemed to have 3% whole person impairment for tinnitus that impacts the ability to perform activities of daily living.' This indicates that the severity of the impairment is limited. Plaintiff is likely to continue to suffer from Tinnitus, but he admits that without hearing aids and while wearing two sets of earplugs, he was able to hear co-workers speaking to him. This admission demonstrates that the expected long term impact of the impairment is small. Even under the broadened definition of disability in the now-amended ADA 'not every impairment will constitute a disability within the meaning of [the ADA]' 29 C.F.R. § 1630.2(j)(1)(ii). Plaintiff's has failed to show that his impairment is substantially limiting. If impairment at the levels experienced by Plaintiff amounts to 'substantial' limitation that word has no meaning and any hearing impairment could constitute a disability. Accordingly, summary judgment is granted in favor of Defendant on the issue of disability."

Heart Conditions

Is or May Be Substantially Limited

LaPier v. Prince George's County, Md., 2013 WL 497971 (D. Md. Feb. 7, 2013) (although evidence was somewhat unclear as to precisely what impairment plaintiff had, the court held there was sufficient evidence to conclude that he had a vascular or blood condition that substantially limited his ability to work, breathe, and/or to have proper circulation; summary judgment for employer granted on other grounds).

Sickels v. Central Nine Career Center, 2012 WL 266945 (S.D. Ind. Jan. 30, 2012). Mr. "Sickels alleges physical impairments resulting from his stroke and heart condition [coronary artery disease] that substantially limited his mobility. Because mobility could impact several major life activities—walking, lifting, standing, and bending—and bearing in mind that Central Nine regarded Mr. Sickels's physical impairments as qualifying disabilities for ADA purposes, we conclude that he is 'disabled' within the meaning of the statute."

Rojas v. Waldorf Astoria Collection, 2012 WL 2020049 (D.P.R. June 5, 2012). Denying defendant's motion to dismiss the complaint, the court held that allegations that plaintiff was diagnosed with several vascular impairments, permanent in nature, that impede her ability to stand for a long time "is enough to infer" that she is a disabled individual for pleading purposes.

Hepatitis

Is or May Be Substantially Limited

Hardin v. Christus Health Southeast Texas St. Elizabeth, 2012 WL 760642 (E.D. Tex. Jan. 6, 2012) (Report and Recommendation of Magistrate Judge), adopted 2012 WL 760636 (E.D. Tex. March 8, 2012). Plaintiff, a registered nurse diagnosed with Hepatitis C in 1993, was hired by defendant as a lab nurse in 2008, but was terminated approximately one year later after failing a drug screen administered because of his accidental needle stick of another employee during a procedure. In a pro se ADA case challenging the discharge, a Magistrate Judge concluded that the complaint should be dismissed on the merits, but first found as a threshold matter that plaintiff's Hepatitis C could constitute an actual disability applying the "episodic or in remission" rule, because when active it causes symptoms such as nausea "dumping syndrome," and malaise, which become aggravated during acute episodes, and would substantially limit major bodily functions such as the immune system, digestive, bowel, and bladder, as well as other major life activities such as working, eating, and sleeping.

HIV

Is or May Be Substantially Limited

Alexiadis v. New York College of Health Professions, __ F. Supp. 2d __, 2012 WL 4130521 (E.D.N.Y. Sept. 20, 2012). Plaintiff's evidence concerning hospitalizations due to Staph infections, difficulty recovering from injuries, and his T-cell levels was held sufficient to create a triable issue of fact on whether his HIV infection substantially limited the function of his immune system.

King v. Chester County Prison, 2012 WL 831962 (E.D. Pa. March 12, 2012). In case arising under Title II of the ADA, the court summarily found that plaintiff's HIV infection is a substantially limiting impairment, citing the examples in 29 C.F.R. § 1630.2(j)(3)(iii) as a "list of per se disabilities."

Horgan v. Simmons, 2010 WL 1434317 (N.D. Ill. Apr. 12, 2010). Plaintiff, who had been diagnosed as HIV-positive for 10 years but kept his status confidential, had been a sales manager for the employer since 2001. Stating that he was "worried" about plaintiff, the company president met with plaintiff in July 2009 and demanded to know whether plaintiff was having medical problems. Plaintiff ultimately disclosed his HIV-positive status but stated that it did not affect his ability to do his job. Plaintiff alleged that the

president urged him to tell his family about his condition; asked him "how he could ever perform his job with his HIV positive condition and how he could continue to work with a terminal illness"; and told him he did not believe that plaintiff "could lead if the employees knew about his condition." According to plaintiff, the president then told him to leave the plant immediately, and he was terminated the next day. Plaintiff sued under the ADA, alleging that he was subjected to both discriminatory termination and an impermissible disability-based inquiry. Moving to dismiss, the employer contended that HIV infection does not always substantially limit a major life activity and that plaintiff could not meet the definition of disability. Denying the motion, the court noted that the ADAAA made clear that the immune system function is a "major life activity." In adopting the ADAAA, Congress also made clear its intent that "the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations," and thus "the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis." The court concluded that it was "certainly plausible – particularly, under the amended ADA – that Plaintiff's HIV positive status substantially limit[ed] a major life activity: the function of his immune system," and stated that this conclusion was "consistent with the EEOC's proposed regulations to implement the ADAAA which list [at section 1630.2(j)(5)] HIV as an impairment that will consistently meet the definition of disability."

Hypertension

Not Substantially Limited

Ratcliff v. Mountain Brook Bd. of Educ., 2012 WL 1884898 (N.D. Ala. May 22, 2012) Summary judgment granted for employer, where plaintiff argued that her high blood pressure substantially limited her in working under the ADAAA standard but the only evidence offered was a three-hour hospital visit and occasional ill and woozy feelings.

Influenza

Not Substantially Limited

Lewis v. Florida Default Law Group, P.L., 2011 WL 4527456 (M.D. Fla. Sept. 16, 2011). Finding plaintiff could not establish that the H1N1 virus she had (or was thought to have) for a period of 1-2 weeks constituted a disability, the court granted summary judgment for the employer on plaintiff's denial of accommodation and discriminatory termination claims. Rejecting plaintiff's attempt to argue that the virus is an episodic condition that would be substantially limiting when active, the court ruled: "The flu (whether seasonal or H1N1), however, is different from the more permanent—albeit episodic—conditions like cancer, epilepsy, asthma, bipolar disorder, schizophrenia, hypertension, diabetes and post-traumatic stress disorder that this provision was intended to include within the definition of disability. See 29 C.F.R. Pt. 1630, App'x (citing Joint Hoyer–Sensenbrenner Statement, pp. 2–3; 2008 House Judiciary Committee Report, pp. 19–20). Assuming that the symptoms experienced by

Lewis (i.e., being bedridden, physically drained, and dizzy, having shortness of breath, vomiting, and diarrhea) were 'physical impairments,' Lewis has failed to show that these temporary impairments 'substantially limited' any major life activity given the extremely short duration that she suffered from those impairments."

Intellectual Disabilities

Is or May Be Substantially Limited

Graham v St. John's United Methodist Church, 2012 WL 5298156 (S.D. Ill. Oct. 25, 2012). Plaintiff's allegations of cognitive impairment from head injury were sufficient to satisfy pleading requirements for disability. Plaintiff alleged that he has permanent brain damage which causes him difficulty in articulating his thoughts and comprehending, especially in stressful situations, and also causes him to be overly acquiescent.

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

Not Substantially Limited

Adams v. Festival Fun Parks, LLC, 2013 WL 951710 (D. Conn. March 12, 2013) (relying on pre-ADAAA case law and without citing the ADAAA, the court granted summary judgment for employer, holding that complainant submitted insufficient evidence of his diagnosis of and limitations from mild mental retardation).

Irritable Bowel Syndrome

Is or May Be Substantially Limited

Edwards v. Chevron U.S.A., Inc., 2013 WL 474770 (S.D. Tex. Feb. 7, 2013). Denying the employer's motion for summary judgment on plaintiff's discriminatory termination and denial of accommodation (telecommuting) claim, the court ruled that her irritable bowel syndrome could be substantially limiting in light of the ADAAA's "episodic or in remission" rule, because her condition flared up from time to time during her life—most recently requiring that she take several months medical leave in early 2010. . . . Under the amended ADA, that is sufficient. Accordingly, for the purposes of the ADA, Edwards is disabled."

Kidney Impairments

Is or May Be Substantially Limited

Esparza v. Pierre Foods, 2013 WL 550671 (S.D. Ohio Feb. 12, 2013). Plaintiff's complaint alleged that his impairment, kidney stones "substantially limits at least one major life activity," "prevented him for (sic) standing, lifting, bending, driving, and working" and "affected his ability to control his bladder," that his employer "knew or had reason to know that Rosario suffered from a disability and/or regarded him as disabled," that he had to "request off work numerous times due to the pain ... and to attend medical treatment," that it was severe enough for him to "schedule" surgery to remove the stones, and that he was medically restricted from working "for two weeks or until his condition improved." Defendant moved to dismiss the complaint, arguing among other things that on the face of the allegations the impairment was only two weeks long and therefore too temporary to be substantially limiting. Denying the motion, the court noted that under the amended ADA, an impairment that is "episodic or in remission" is a disability if it would substantially limit a major life activity when active. 42 U.S.C. § 12102(4)(D).

Mallard v. MV Transp., Inc., 2012 WL 642496 (D. Md. Feb. 27, 2012). Denying the employer's motion to dismiss and rejecting the employer's reliance on pre-ADAAA case law, the court held that plaintiff sufficiently alleged a disability, where the complaint stated that he had chronic kidney disease, necessitating regular dialysis treatment, and that he "has not been able to urinate for the past 20 years." The court concluded this was sufficient to allege a substantially limiting impairment, since the condition affects bladder function, which the court observed is now expressly listed with other major bodily functions in the ADA as a "major life activity" at 42 U.S.C. § 12102(2)(B).

Learning Disabilities and Attention Deficit Disorder

Is or May Be Substantially Limited

Doe v. Samuel Merritt University, 2013 WL 428637 (N.D. Cal. Feb. 1, 2013). Finding that medical school student with attention deficit disorder could show under Title III of the ADA that she was substantially limited in the major life activity of "test-taking."

Not Substantially Limited

Healy v. National Board of Osteopathic Medical Examiners, 2012 WL 1574783 (S.D. Ind. May 3, 2012). Medical student's learning disabilities and AD/HD did not substantially limit his ability to learn, read, think, or concentrate under the ADAAA standard, especially in light of his above-average scores on the ACT, SAT, and other standardized testing, during which he received no accommodation.

Migraine Headaches

Not Substantially Limited

Allen v. Southcrest Hospital, 2011 WL 6394472 (10th Cir. Dec. 21, 2011) (unpublished). A former medical assistant, who experienced migraine headaches several times a week, alleged that she was discriminated against when her employer failed to accommodate her and terminated her. According to the plaintiff, on the days that she had migraine headaches, she would come home after work and "crash and burn" (i.e., she could not do anything other than take her medication and go straight to bed). Affirming summary judgment for the hospital, the court held that although the plaintiff asserted that she was substantially limited in caring for herself, she presented no evidence concerning such factors as how much earlier she went to bed than usual, which specific self-care tasks she was forced to forgo as a result of going to bed early, how long she slept after taking her medication, what time she woke up the next day, whether it was possible for her to complete the next morning self-care activities that she had neglected the previous evening, or how her difficulties in caring for herself on days she had a migraine compared to her usual routine of evening self-care. The court also held that while the plaintiff "mentioned in passing" her difficulties with sleeping, she "insufficiently developed" this argument. Finally, analyzing whether the plaintiff, who only experienced migraines when working for one doctor, could be substantially limited in working under the ADAAA standard set forth in the interpretive guidance to EEOC's amended regulations, the court held that because the plaintiff's migraines did not substantially limit her in a "class or broad range of jobs," she was not substantially limited in working.

Mann v. Donahoe, 2012 WL 569189 (D. Conn. Feb. 21, 2012). Applying mostly pre-ADAAA standards even though the case arose after January 1, 2009, the court granted summary judgment for the employer on plaintiff's disability discrimination claims under the Rehabilitation Act, finding that she failed to adduce sufficient medical evidence from which a trier of fact could find that her headaches or her alcoholism substantially limited a major life activity.

Multiple Sclerosis and Related Impairments

Is or May Be Substantially Limited

Carbaugh v. Unisoft International, Inc., 2011 WL 5553724 (S.D. Tex. Nov. 15, 2011). Rejecting the pre-ADAAA cases on which the employer relied as having "no precedential weight," the court applied the "episodic or in remission" rule -- and relied exclusively on plaintiff's own description of his symptoms -- to deny the employer's motion for summary judgment on the issue of whether plaintiff's relapsing, remitting multiple sclerosis was a substantially limiting impairment.

Walter v. Wal-Mart Stores, Inc., 2011 WL 4537931 (N.D. Ind. Sept. 28, 2011). Court summarily found, and employer did not dispute, that evidence showed employee's

degenerative neurological condition, Friedreich's Ataxia, substantially limited his ability, to walk, stand, see, and speak.

Feldman v. Law Enforcement Associates Corp., 2011 WL 891447 (E.D.N.C. March 10, 2011). District court denied employer's motion to dismiss ADA claims by employee with multiple sclerosis. The court's decision did not mention the ADAAA's addition of major bodily functions as major life activities, but applied the new rule for conditions that are "episodic or in remission" to conclude that the employee could state a claim because his multiple sclerosis could be an impairment that is substantially limiting when active. In support of this conclusion, the court also cited section (j)(5) of the EEOC's proposed regulations, which cited multiple sclerosis as an example of an impairment that would consistently meet the definition of disability.

Obesity

Is or May Be Substantially Limited

Lowe v. American Eurocopter, LLC, 2010 WL 5232523 (N.D. Miss. Dec. 16, 2010). Acknowledging that many pre-ADAAA cases held obesity was not a disability, the court denied the employer's motion to dismiss, holding that in light of changes made by the ADAAA, plaintiff's obesity could be covered under prongs 1 or 3 of the amended definition of disability.

Pregnancy-Related Impairments

Is or May Be Substantially Limited

Price v. UTI, United States, Inc., 2013 WL 798014 (E.D. Mo. March 5, 2013). Denying summary judgment for the employer on plaintiff's ADA denial of accommodation claim arising out of her termination three weeks after giving birth, while she was recovering from a cesarean section: "… an impairment need not be permanent or long-term, and it meets the definition of 'substantially limits' under the ADA if it is 'episodic or in remission ... [and] would substantially limit a major life activity when active.' 29 C.F.R. § 1630.2(j)(1)(vii). The Equal Employment Opportunity Commission Interpretive Guidance excludes pregnancy itself as a physical impairment. 29 C.F.R. Pt. 1630, App. § 1630.2(h) ('conditions, such as pregnancy, that are not the result of a physiological disorder are also not impairments'). However, a 'physical impairment' includes any physiological disorder or condition that affects the reproductive systems, which can be an impairment or complication related to pregnancy. See 29 C.F.R. 1630.2(h)(1). Taking the evidence in a light most favorable to plaintiff, there is evidence in the record that plaintiff was disabled within the meaning of the ADA because there is evidence that plaintiff suffered multiple physiological disorders and conditions that affected her reproductive system."

Nayak v. St. Vincent Hospital and Health Care Center, Inc., 2013 WL 121838 (S.D. Ind. Jan. 9, 2013). Plaintiff, a medical student in an OB/GYN residency program, was not

renewed in her third year, following a seven-month absence for pregnancy-related and post-partum complications that included being ordered to remain on complete bed rest for six months, miscarriage of one of the twins she was carrying, and post-partum difficulties, including symphysis pubis dysfunction that lasted two months and required physical therapy before returning to work. Denying in part the employer's motion to dismiss her ADA challenge to her termination, the court rejected the employer's reliance on pre-ADAAA cases involving pregnancy-related complications. "Given the lenient standard on a motion to dismiss, the current change in the law stating that an impairment lasting less than six months can be substantially limiting, … the court, in an abundance of caution, finds Plaintiff has sufficiently pled a plausible claim for disability discrimination under subsection (A) [a physical or mental impairment that substantially limits one or more major life activities]."

Alexander v. Trilogy Health Services, LLC, 2012 WL 5268701 n.10 (S.D. Ohio Oct. 23, 2012). "Plaintiff's preeclampsia substantially limited the operation of her circulatory and urinary functions because it cause her blood pressure to reach a dangerous 180/1000 and protein levels in her kidneys to rise to dangerous levels as well."

Mayorga v. Alorica, Inc., 2012 WL 3043021 (S.D. Fla. July 25, 2012). Allegations plaintiff's breech presentation and several emergency room visits for a variety of pregnancy-related complications were sufficient allegations of a substantially limiting impairment to defeat the employer's motion to dismiss for failure to state a claim; "where a medical condition arises out of a pregnancy and causes an impairment separate from the symptoms associated with a healthy pregnancy, or significantly intensifies the symptoms associated with a healthy pregnancy, such medical condition may fall within the ADA's definition of a disability."

Not Substantially Limited

Wanamaker v. Westport Board of Education, 2012 WL 4445314 (D. Conn. Sept. 25, 2012). Plaintiff, a computer teacher, alleged she was terminated in violation of the ADA due to transverse myelitis, a condition she developed following her pregnancy that required she take an additional 30-60 days of medical leave following completion of her maternity leave. Granting the employer's motion to dismiss her ADA claim, the court held the allegations were insufficient because other than her diagnosis, plaintiff "pled no other facts indicating how this condition substantially limited one or more major life activities." The court further noted that courts have only found complications resulting from pregnancy to be substantially limiting in "extremely rare cases," and that "[i]t appears that even under the ADAAA's broadened definition of disability short term impairments would still not render a person disabled," citing language in the appendix to the EEOC's amended regulations stating: "Impairments that last only for a short period of time are typically not covered, although they may be covered if sufficiently severe."

Sam-Sekur v. The Whitmore Group, LTD, 2012 WL 2244325 (E.D.N.Y. June 15, 2012). Employer's motion to dismiss granted on plaintiff's ADA claims of discrimination based on pregnancy-related medical conditions.

Selkow v. 7-Eleven, Inc., 2012 WL 2054872 (M.D. Fla. June 7, 2012). Plaintiff experienced a weakened back during pregnancy, preventing her from performing heavy lifting at work from the fifth month of her pregnancy onward. Granting summary judgment for the employer on plaintiff's ADA discrimination claim, the court ruled that the condition was not substantially limiting, though did not cite the ADAAA standards.

Sleep Apnea

Is or May Be Substantially Limited

Orne v. Christie, 2013 WL 85171 (E.D. Va. Jan. 7, 2013). Plaintiff, an attorney for the Virginia State Corporation Commission, alleged he was denied accommodation and terminated in violation of the ADA. Denying the employer's motion to dismiss on disability coverage, the court rejected the employer's reliance on pre-ADAAA sleep apnea cases, instead holding that plaintiff's sleep apnea could substantially limit the major life activities of concentrating or sleeping. The court reasoned that the amended statute expressly provides that mitigating measures include "oxygen therapy equipment and supplies," and therefore plaintiff's "use of a CPAP machine, which provides [him] with a steady supply of oxygen, thus counts as a mitigating measure whose effect is disregarded" under the ADAAA. See also Feldman v. Olin Corp., 692 F.3d 748 (7th Cir. 2012) (holding plaintiff's sleep apnea could be a substantially limiting impairment even under the pre-ADAA standard); Johnson v. Farmers Insurance Exchange, 2012 WL 95387 (W.D. Okla. Jan. 12, 2012) (facts in complaint were sufficient for pleading purposes to allege plaintiff's sleep apnea was a substantially limiting impairment).

Howard v. Steris Corp., __ F. Supp. 2d __, 2012 WL 3561965 (M.D. Ala. Aug. 17, 2012). Plaintiff, an assembly line worker, brought ADA denial of accommodation, discriminatory termination, and retaliation claims against his employer after he was fired for sleeping on the job. Prior to ruling on the merits in the employer's favor because it had no knowledge of plaintiff's disability, the court held that his condition met the ADAAA definition of a substantially limiting impairment: "This expanded [major life activities] list, for better or worse, makes a person afflicted with a common, minor condition 'just as disabled as a wheelchair-bound paraplegic—if only for the purposes of disability law.' Lloyd v. Montgomery Hous. Auth., ___ F.Supp.2d __, No. 2:10–cv–1103, 2012 WL 1466561, at *7 (M.D. Ala. Apr. 27, 2012) (Fuller, J.). Even so, 'the ADAAA left untouched the plaintiff's burden of proof; he still has to prove he has a disability.' Id. Here, Howard has met his initial burden of showing he has a disability. His pulmonologist and sleep specialist, Dr. Franco, diagnosed him with obstructive sleep apnea and stated that it 'definitely' interferes with Howard's ability to sleep … And his regular physician, Dr. Carpenter, diagnosed Howard with Graves' disease, which can cause trouble sleeping too, according to Dr. Casals, his endocrinologist … This testimony provides a reasonable juror with enough evidence to conclude that Howard's physical impairments substantially limited his ability to sleep, a major life activity under the ADAAA. 42 U.S.C. § 12101(2)(A)."

Kravits v. Shinseki, 2012 WL 604169 (W.D. Pa. Feb. 24, 2012). Plaintiff, a human resources employee at the U.S. Department of Veterans Affairs, brought claims for discriminatory termination and denial of accommodation under the Rehabilitation Act. Ruling on the employer's motion for summary judgment, the court noted at the outset of its analysis that the case presented "the possibility of a particularly brief inquiry" on disability, because one of plaintiff's conditions – post-traumatic stress disorder – "is listed in the ADA regulations as an impairment that will 'virtually always be found to impose a substantial limitation on a major life activity,'" and "[t]he regulations expressly that PTSD 'substantially limits brain function,'" (citing 29 C.F.R. § 1630.2(j)(3)(ii) and (iii)). However, absent any evidence in the record of plaintiff's PTSD diagnosis, the court held it could not rely on the bare assertion made in the complaint when ruling on a motion for summary judgment. Nevertheless, denying the employer's motion, the court found that plaintiff could show that his obstructive sleep apnea, fibromyalgia, and depression were actual disabilities, based on evidence consisting of a decision from the VA confirming that he had obstructive sleep apnea, and his own testimony that it interfered with his sleep, causing him to be tired and interfering with his ability to concentrate. Based on this information, the court held: "[i]t would be reasonable to conclude that an individual with [his] conditions would be substantially limited in the major life activities of learning and sleeping 'as compared to most people in the general population.' See 29 C.F.R. § 1630.2(j)(1)(ii)." Rejecting the employer's argument that plaintiff's claim was undermined by his ability to engage in various activities, such as doing administrative work, doing activities in connection with his home purchase, renovation, and his father's estate and home sale, pursuing a college education, and vacationing in Thailand, the court instead held: "The new ADA regulations, however, directly undermine the Department's examples, stating in relevant part: 'In determining whether an individual has a disability under the 'actual disability' or 'record of' prongs of the definition of disability, the focus is on how a major life activity is substantially limited, and not on what outcomes an individual can achieve. For example, someone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in the major life activity of learning because of the additional time or effort he or she must spend to read, write, or learn compared to most people in the general population.' 29 C.F.R. § 1630.2(j)(4)(iii). Contrary to this regulation, the Department seeks to undercut [plaintiff's] evidence of disability by highlighting his physical, social, and academic achievements. [His] ability to engage in the activities identified by the Department do[es] not alter the fact that he has presented evidence that could reasonably establish that his diagnosed conditions substantially limit his ability to sleep and learn…." The court noted that it reached this conclusion by assessing the facts "under the new, less searching analysis called for by the ADAAA," and that its conclusion "is bolstered by the following guidance in the regulations [and statute]: 'The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether an individual's impairment substantially limits a major life activity. 29 C.F.R. § 1630.2(j)(1)(iii).'"

Stroke

Is or May Be Substantially Limited

Sickels v. Central Nine Career Center, 2012 WL 266945 (S.D. Ind. Jan. 30, 2012). Plaintiff had a stroke two months before beginning work as an instructor at a public career and technical school. He completed in-patient rehabilitation prior to beginning work, but following therapy, he continued to experience pain, strength limitations, and neuropathy. During his first two weeks of work he requested and received a wheelchair to use for traveling long distances around the campus, thereafter walking with the assistance of a cane for six months. He continued to have mobility issues, and in February 2009 was hospitalized with coronary artery disease, took one month of leave, and returned to work with "even more impaired" mobility and "issues with stamina." Plaintiff challenged his subsequent termination as discrimination on various grounds, alleging with respect to disability that his stroke and heart condition substantially limited his mobility. In the first part of its analysis, prior to granting summary judgment for the employer on all claims on other grounds, the court held plaintiff had a substantially limiting impairment: "Because mobility could impact several major life activities – walking, lifting, standing, and bending – and bearing in mind that Central Nine regarded Mr. Sickels' physical impairments as qualifying disabilities for ADA purposes, we conclude that he is 'disabled' within the meaning of the statute."

Not Substantially Limited

Hardwick v. John and Mary E. Kirby Hospital, 860 F. Supp. 2d 641 (C.D. Ill. 2012). Plaintiff became a purchasing clerk, a position with different and more challenging responsibilities than she had previously held. From the outset, she became confused and had trouble thinking and concentrating. She subsequently had a stroke and returned to work within days with no restrictions. She then continued to have the same trouble thinking and concentrating. Granting summary judgment for the employer, the court ruled that even applying the ADAAA standard, plaintiff was required to provide "specific, detailed evidence regarding her impairment and its effect on her abilities," but instead only offered into evidence "vague generalities and has not shown that she had any limitations that were caused by her stroke."

Azzam v. Baptist Healthcare Affiliates, Inc., 855 F. Supp. 2d 653 (W.D. Ky. Jan. 5, 2012). Plaintiff, a surgical registered nurse, experienced either a stroke or a cerebrovascular accident while on vacation. At the emergency room, she was diagnosed with a "probable transient ischemic attack versus cerebrovascular accident likely thromboemolic." The discharge summary stated that "CT brain without contrast was negative for intracranial bleed and the patient was thought to have nonhemorrhagic acute cerebrovascuar accident affecting her right side and speech and presumed to be thromboembolic phenomenon from cardiac source." It also stated that "[h]er right-sided weakness has completely resolved, however, she continues to have residual expressive aphasia which needs continuation of outpatient speech therapy … and follow up with her primary M.D." Upon returning home, she saw her cardiologist, who insisted she see a

neurologist before releasing her to return to work without restrictions, and the neurologist prescribed medications and neurological exercises. After two months of FMLA leave, she was cleared to work light duty 4 hours per day, 5 days per week, with no nights or weekends ("call" duty), and returned to work with no patient care responsibilities. One month later, she had "shown steady improvement" and was released to perform patient care but still with part-time and "no call" restrictions. Four months later, she was terminated for refusing to resume a normal schedule absent medical clearance. In an ADA suit challenging the termination as disability discrimination and failure to accommodate, the court ruled that there was no evidence to support plaintiff's contention that her impairment substantially limited her in the major life activities of neurological function or concentration. With respect to the major life activity of working, the court ruled that plaintiff failed to demonstrate how her fatigue and inability to work full-time or on weekends (due to fatigue, lack of stamina, and need to take bedtime medications) substantially limited her in performing her job as an RN or a comparable nursing position without "call" responsibilities.

Stuttering

Is or May Be Substantially Limited

Medvic v. Compass Sign Co., LLC, 2011 WL 3513499 (E.D. Pa. Aug. 10, 2011). Denying the employer's motion for summary judgment, the court found that plaintiff's stuttering could be found to substantially limit him in the major life activity of communicating. Noting that "a medical diagnosis is not enough," and that "plaintiff must produce individualized evidence showing that their limitation has substantially affected them in their own experience," the court found plaintiff satisfied this standard based on the deposition testimony of plaintiff, his treating physician, and his coworkers that although he knows what he wants to say, his stuttering can keep him from communicating his thoughts to others for up to minutes at a time, impedes his social life, and is a lifelong impairment that cannot be treated, although its underlying cause can be alleviated with medication. Applying the ADAAA, the court stated: "Our analysis … has been altered by the 2008 ADA Amendments Act of 2008, which rejected the 'permanent' and 'long term' requirement embodied in the original Act and stated that 'episodic or in remission fits within the definition of disability if it would substantially limit when active.' (emphasis added). Here, there is evidence from which a jury could conclude that when Plaintiff's stutter is active, it substantially limits his ability to communicate, sometimes rendering him totally incapable of communicating at all. This actual impact, which may be episodic, is also lifelong." Rejecting the employer's argument that plaintiff could not be substantially limited in communicating given that he "sat for his deposition and if necessary would be a witness at a trial," the court held that plaintiff "can still be substantially limited in communicating even if he is able to communicate at times without limitation."

Not Substantially Limited

Bess v. Cumberland County, N.C., 2011 WL 4809879 (E.D.N.C. Oct. 11, 2011). Plaintiff's mere allegation that he "happens to stutter" was insufficient to plead actual disability; employer's motion to dismiss granted. Similarly, an allegation that a county official "wrote about" his disability was held insufficient to plead an employment action taken because of an actual or perceived impairment as would be required for "regarded as" coverage. See also Bess v. County of Cumberland, 2011 WL 3055289 (E.D.N.C. July 25, 2011).

Transient Ischemic Attack ("Mini-Stroke")

Is or May Be Substantially Limited

Feldman v. Law Enforcement Associates Corp., 2011 WL 891447 (E.D.N.C. March 10, 2011). District court denied employer's motion to dismiss ADA claims by employee who was hospitalized for two days and off work for several weeks due to a transient ischemic attack ("mini-stroke"). The court rejected the employer's argument that because the employee was able in spite of his impairment to engage in activities such as "leaving the house, going to doctor appointments, and contacting a lawyer," he could not be substantially limited. The court found that he may have been substantially limited in working, quoting the NPRM's statement that "[i]n determining whether an individual has a disability, the focus is on how a major life activity is substantially limited, not on what an individual can do in spite of an impairment." See also Bowman v. St. Luke's Quakertown Hospital, 2012 WL 6527402 (E.D. Pa. Dec. 13, 2012) (allegation of multiple transient ischemic attacks sufficient to plead disability).

Vision Impairments

Is or May Be Substantially Limited

Smith v. Valley Radiologists, Ltd., 2012 WL 3264504 (D. Ariz, Aug. 9, 2012). Applying the ADAAA standards in a case arising in 2008, the court held that plaintiff's ocular toxoplasmosis could be found to substantially limit her in seeing, reading and driving, given evidence that she has 20/200 vision, and although able to read and use a computer with corrective magnifying lenses, she has centrally located blind spots in both eyes that are not correctable and she functions solely on her peripheral vision.

Markham v. Boeing Co., 2011 WL 6217117 (D. Kan. Dec. 14, 2011). Without analyzing neurological modifications as a mitigating measure to be disregarded under the ADAAA, the court nevertheless ruled that there were genuine issues of material fact as to whether plaintiff's monocular vision rendered him substantially limited in seeing.

Eldredge v. City of St. Paul, 809 F. Supp. 2d 1011 (D. Minn. 2011). Denying cross-motions for summary judgment, the court ruled that plaintiff established that he is disabled within the meaning of the ADA due to his Stargardt's Macular Dystrophy, a

progressive disease causing a small blind spot in the center of his vision, which negatively impacts his central acuity vision. Evidence showed vision scores of 20/200 in plaintiff's left eye, with defendant's expert scoring him 20/200 in both eyes, and while his vision had been deemed stable for several years, it will not reverse itself or improve. The court noted that the disability determination under the ADAAA should be made without regard to the ameliorative effects of the mitigating measures plaintiff used or proposed to use, including a magnifying glass and/or a pocket telescope. Moreover, there was no evidence to suggest that the temporary use of such devices addressed his overall visual impairment in the way in which corrective lenses might resolve nearsightedness.

Gil v. Vortex, L.L.C., 2010 WL 1131642 (D. Mass. Mar. 25, 2010). Plaintiff, a punch press operator who was completely blind in one eye, brought claims under the ADA challenging his employer's requirement that he provide two doctor notes and submit to an independent medical examination to verify his ability to work without incident, and his subsequent termination due to the employer's fears that he might injure himself. The employer moved to dismiss, contending that plaintiff's allegations were insufficient to plead disability even under the ADAAA standards. Denying the motion, the court held that even though the complaint was devoid of any references to "substantial limitations" resulting from plaintiff's monocular vision, enough had been "pled to satisfy the relaxed disability standard of the Amendments Act."

Pridgen v. Department of Public Works/Bureau of Highways, 2009 WL 4726619 n.17 (D. Md. Dec. 01, 2009). "Under the ADA Amendments Act of 2008, a person who has lost sight in one eye but retains full use of his other eye is 'disabled.' Disability is to be construed 'in favor of broad coverage ... to the maximum extent permitted' by the ADA. 42 U.S.C.A. § 12102(4)(A). 'The term 'substantially limits' shall be interpreted consistently with the ADA Amendments Act of 2008.' Id. § 12102(4)(B)."

Not Substantially Limited

Mota v. Aaron's Sales and Lease Ownership, 2012 WL 3815332 (E.D. Pa. Sept. 4, 2012). Plaintiff, a manager trainee in a position that required driving a company truck, was terminated when his Pennsylvania Department of Transportation medical certification was revoked due to his monocular vision. Plaintiff alleged a violation of the ADA, contending that instead of terminating him the employer should have reassigned him to a customer service representative position, which did not require driving. Granting the employer's motion for summary judgment, the court held that plaintiff conceded his monocular vision "does not affect any activity [in his] normal life" and, quoting Knutson, "fails to provide evidence from which a reasonable jury could find more than a mere difference in his vision compared to others." The court further held, citing pre-ADAAA case law, that an inability to hold jobs requiring that he drive commercial vehicles did not render him substantially limited in working.

Hill v. Southeastern Freight Lines, Inc., 2012 WL 2564903 (M.D.N.C. July 2, 2012). Plaintiff, a pick-up and delivery driver with glaucoma, alleged he could not accept the linehaul position he was offered in lieu of termination because it was medically

inadvisable for him to drive at night. Granting summary judgment for the employer on plaintiff's discriminatory termination claim, the court held that he could not show he was substantially limited in the major life activity of working because he could still perform many other driving positions, and could not show he was substantially limited in seeing because there was no evidence regarding visual acuity, and the evidence submitted indicated he could drive with glasses, read without glasses, as well as perform various other activities.

Knutson v. Schwann's Home Service, Inc., 2012 WL 1466681 (D. Minn. April 27, 2012). Granting summary judgment for the employer, the court held that plaintiff could not show his monocular vision rendered him substantially limited in seeing even under the ADAAA standard. Despite evidence that plaintiff cannot wear corrective lenses because they cause double vision, and has anywhere from 20/150 to 20/80 vision in his left eye, the court held no reasonable jury could find he was substantially limited in seeing compared to others because "his overall vision is excellent," there was no evidence he lacks depth perception, and he continues to drive.

Low v. McGuinness, 2012 WL 537491 (E.D. Cal. Feb. 17, 2012). The court dismissed a Title II ADA claim brought by a state prisoner who was denied prescription eyeglasses for five months. Citing the amended statutory provision which states that "ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity," the court held "[a] vision impairment that can be corrected by ordinary prescription eyeglasses does not qualify as a 'disability' within the meaning of the ADA."

Rumbin v. Association of American Medical Colleges, 803 F. Supp. 2d 83 (D. Conn. March 21, 2011). In a case under Title III of the ADA brought by a medical applicant alleging denial of accommodation for his vision impairments (glaucoma, convergence insufficiency, binocular dysfunction, and oculor-motor dysfunction) on the MCAT, the court stated that it would apply the ADAAA standards to that portion of plaintiff's claim arising on or after January 1, 2009, but granted summary judgment for defendant. The court concluded that plaintiff failed to adduce evidence of a substantial limitation in seeing, learning, or reading compared to most people, notwithstanding evidence about his own limitations, including that he developed headaches, eye-fatigue, and blurred vision while reading for prolonged periods, had great difficulty reading or test-taking for more than 30 minutes at a time, required breaks, and developed double vision, headaches, and eye strain if forced to go beyond 20–30 minutes of test taking, and had difficulty with everyday tasks such as grocery shopping and using computers.

Vocal Cord Impairments

Is or May Be Substantially Limited

Pearce-Mato v. Shinseki, 2012 WL 2116533 (W.D. Pa. June 11, 2012). Plaintiff, a VA Medical Center nurse, had vocal cord edema brought on by mercury toxicity. When active, the condition made speaking difficult and painful, and intermittently required use of an electrolarynx device while working to vocalize sounds plaintiff spoke. Denying the employer's motion for summary judgment on plaintiff's claims of discriminatory discharge and denial of accommodation, the court ruled she could be substantially limited in speaking. "The fact that the periods during which an episodic impairment is active and substantially limits a major life activity may be brief or occur infrequently is no longer relevant to determining whether the impairment substantially limits a major life activity."

Unspecified Medical Condition

Not Substantially Limited

Gesegnet v. J.B. Hunt Transport, Inc., 2011 WL 2119248 (W.D. Ky. May 26, 2011). Record contained no evidence from a medical doctor concerning the precise nature of plaintiff's disability, but rather just two questionnaires on which plaintiff checked the "no" box next to "nervous or psychiatric disorders, e.g., severe depression" yet checked the "yes" box next to the "medication" line. "In difficult cases, a plaintiff usually proves disability through a combination of medical evidence and personal testimony detailing the practical impact of that medical condition. Here, Plaintiff is lacking in each area. The Court finds no medical evidence which precisely defines that extent of Plaintiff's disease and the medical limitations due to it. Without a valid medical opinion, courts cannot simply assume that a disease or diagnosis has disabling consequences. The medical forms fall short of what is necessary." See also Aguirre v. W.L. Flowers Machine & Welding Co., 2011 WL 2672348 (S.D. Tex. July 7, 2011) ("Plaintiff's reference to a 'medical condition' that. limited him to working no more than forty-five hours per week does not adequately allege the existence of a 'disability' as defined by the ADA, as it neither states the nature of the impairment nor the manner in which Plaintiff's major life activities are substantially limited").

Broderick v. Research Foundation of State Univ. of New York, 2010 WL 3173832 (E.D.N.Y. Aug. 11, 2010). Nurse manager brought ADA lawsuit alleging denial of accommodation and discriminatory termination after she re-injured her left hip. The court granted a motion to dismiss the claims, with leave to replead, holding that the complaint's reference to an unspecified injury to plaintiff's hip and lower back without an explanation of what major life activity it substantially limited, was insufficient to state a claim even under the ADAAA standards.

II. "Record of"

Behringer v. Lavellle School for the Blind, 2010 WL 5158644 n.10 (S.D.N.Y. Dec. 17, 2010). In this pre-ADAAA case involving alcoholism, the court quotes the EEOC's question-and-answer guide on the proposed regulations to support the proposition that "record of" coverage requires a past history of a substantial limitation, not employer reliance on a medical record as such. "The EEOC has explained its interpretation of a 'record' of disability. The EEOC affirms that 'coverage under the 'record of' prong of the definition of 'disability' does not depend on whether an employer relied on a record (e.g., medical, vocational, or other records that list the person as having a disability) in making an employment decision. An employer's knowledge of an individual's past substantially limiting impairment relates to whether the employer engaged in discrimination, not to whether an individual is covered.'"

III. "Regarded as"

Is or May Be "Regarded As"

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

D'Entremont v. Atlas Health Care Linen Services Co., LLC, 2013 WL 998040 (N.D.N.Y. March 13, 2013). Denying employer's motion to dismiss, the court held that allegations were sufficient to state a claim of disparate treatment based on "regarded as" coverage. Plaintiff alleged that he had a chronic back problem, was nevertheless able to perform his job, his back problems were aggravated by assignment to perform heavy lifting in a particular location in the factory, the employer learned about his medical condition through phone messages and doctor's notes, and his employment was terminated because of his health issues. "Plaintiff's *prima facie* case may be lacking in great detail as to the specifics of his disability, his description of his ability to perform the essential functions of his job may be sparse, and his recitation of causation may not be unassailable, but the Court concludes that his pleadings 'state a claim to relief that is plausible on its face.' *Twombly*, 550 U.S. at 570. Further, given Plaintiff's detailed account of his brief employment, his interaction with physicians, and his ultimate encounter with [his

supervisor], the Court concludes that the Complaint provides Defendants with sufficient notice as to the nature of the claim."

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

Kiniropoulos v. Northampton County Child Welfare Service, 2013 WL 140109 (E.D. Pa. Jan. 11, 2013). The same month as notifying his supervisor of limitations due to a leg injury and then requesting FMLA leave, plaintiff, a county child welfare caseworker, was suspended and subsequently terminated for alleged infractions and misconduct. While granting the employer's motion to dismiss plaintiff's ADA claim on the ground that he was not "qualified," the court first ruled that his allegations were sufficient for purposes of "regarded as" coverage. The court ruled that although plaintiff did not expressly allege that his injury would last six or more months, it was not apparent on the face of the pleadings that it did not. Moreover, the court cited case law permitting an inference that an employer's action was based on disability due to the temporal proximity between the action and when the employer learned of the employee's medical condition.

Stahly v. South Bend Transportation Corp., 2012 WL 58830 (N.D. Ind. Jan. 3, 2013). Plaintiff, a bus driver, challenged her termination on various grounds, including perceived disability. Denying the employer's motion for summary judgment on coverage, the court rejected the employer's reliance on pre-ADAAA case law, ruling that it could be concluded the termination was "because of" a perceived impairment, given that management knew she was taking medication and suffered an anxiety attack for which she was admitted to an emergency room, and that she took FMLA leave, and was referred by the employee assistance program to a stress recovery center.

Walker v. Venetian Casino Resort, 2012 WL 4794149 n.11 (D. Nev. Oct. 9, 2012). A reasonable jury could conclude that plaintiff was "regarded as" disabled under the ADAAA standard based on evidence that the employer "knew of her disability in the form of communications between [the employer] and [plaintiff's] physician," as well as e-mails exchanged among the employer's employees discussing plaintiff's inability to work.

Hoback v. City of Chattanooga, 2012 WL 3834828 (E.D. Tenn. Sept. 4, 2012). Plaintiff, a police officer, was deployed to Iraq when his National Guard unit was activated, and then resumed his police duties. Several years later, the city terminated him after concluding based on a fitness for duty psychological evaluation that due to PTSD he could not perform his job safely. After plaintiff prevailed at trial on his ADA discriminatory termination claim, the employer moved to set aside the verdict, arguing

that plaintiff was not "regarded as" an individual with a disability, and even if he was, his termination was justified. The court held that as to the first step in the analysis, terminating someone because of their medical condition is "regarding" the employee as an individual with a disability. The court rejected the employer's argument that it only regarded plaintiff as incapable of performing the functions of a police officer, not as substantially limited in any major life activity. "This argument would have been convincing, and perhaps determinative, if the relevant events in the case occurred before January 1, 2009. However, because the events occurred after January 1, 2009, the ADAAA applies to the city's conduct . . . A plaintiff must only show that he was "subjected to an action prohibited under [the ADA] because of an actual or perceived physical or mental impairment whether or not the impairment limits a major life activity." Since a reasonable jury could conclude, and in fact in the litigation the city conceded, that plaintiff was terminated because evaluations indicated he was unfit due to his PTSD, he was "regarded as" an individual with a disability. Turning then to the merits of whether the termination was nevertheless justified due to direct threat to safety, the court upheld the jury's verdict in plaintiff's favor based on testimony by the decisionmaker that he did not consider a second evaluation which found plaintiff was fit for duty, and other evidence supporting that plaintiff was fit for duty.

Saley v. Caney Fork, LLC, 2012 WL 3286060 (M.D. Tenn. Aug. 10, 2012). Plaintiff, a restaurant manager, was terminated approximately 10 days after having requested and been granted a 3-day restriction on lifting more than 10 pounds following an outpatient medical test (liver biopsy) related to his hemochromatosis (a life-threatening disorder of the iron metabolism for which he intermittently undergoes phlebotomy treatments during which his blood is drained to lower iron levels). Denying the employer's motion for summary judgment, the court held that neither the actual impairment nor the perceived condition were "transitory and minor," given that the employer told co-workers plaintiff was fired due to his health problems. The employer also argued that it only knew plaintiff had had an outpatient procedure but knew nothing of his diagnosis or prior medical history, and therefore had insufficient knowledge of the impairment to have acted "because of" it and thus "regarded" plaintiff as an individual with a disability. The court found there was conflicting testimony on this point that precluded summary judgment, given plaintiff's testimony that he discussed with the employer that he had been diagnosed with "iron overload," and had discussed its effects, his liver biopsy, his abnormal blood-iron levels, the potential for his condition to "do damage to the organs," his restrictions, and the prescribed treatments needed.

Harty v. City of Sanford, 2012 WL 3243282 (M.D. Fla. Aug. 8, 2012). Plaintiff was "regarded as an individual with a disability because he was asked to resign due to his restrictions."

Baldwin v. Duke Energy Corp., 2012 WL 3564021 (W.D.N.C. July 13, 2012). Plaintiff, a computer programmer, challenged his termination as disparate treatment based on his cancer and related surgery. Citing the ADAAA "regarded as" standard but then applying the pre-ADAAA standard, the court denied defendant's motion to dismiss, finding sufficient the allegations that while plaintiff was out for cancer surgery, his managers

removing his belongings from his cubicle, told co-workers he would not be returning to work, impeded his return to work, gave him an allegedly false performance review that differed from an interim review prepared before managers learned of his illness, and then terminated him.

Wright v. Hyundai Motor Manufacturing Alabama LLC, 2012 WL 2814153 (M.D. Ala. July 10, 2102). Plaintiff, who held a variety of different weld shop positions, was diagnosed with impingement syndrome of the right shoulder, requiring surgery and leave under FMLA, and then upon return to work injured his elbow, left shoulder, and right knee. After each injury, he alleged the employer refused to allow him to return to work despite his medical clearance in light of the fact that he had work restrictions, and he was eventually terminated. Partially denying summary judgment for the employer, the court found that this evidence could be sufficient to show "regarded as" coverage, i.e., that plaintiff was subjected to an action prohibited by the ADA because of an actual or perceived impairment.

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

Snyder v. Livingston, 2012 WL 1493863 (N.D. Ind. April 27, 2012). Plaintiff alleged that because of a perceived mental impairment, she was demoted, and then ultimately transferred and eventually resigned, from her job at a Hearing Center run by defendant ENT. Denying the employer's motion for summary judgment on the issue of whether plaintiff could show she was regarded as an individual with a disability, the court held that "under the amended, more expansive version of the ADA," defendants could not rely on pre-ADAA case law holding that calling plaintiff an impairment-related epithet was insufficient to establish "regarded as" coverage. "Furthermore, according to the new regulations, this Court is not supposed to engage in an extensive analysis of whether plaintiff is disabled under the ADA, but rather focus on whether ENT has complied with its obligations and whether discrimination has occurred. 29 C.F.R. § 1630.1(c)(4). Here, despite statements in affidavits from [managers] that they did not perceive Snyder as disabled, there is sufficient evidence to create a factual dispute as to whether Livingston or others at ENT regarded Snyder as disabled, including what Livingston's comment actually was—that Snyder was either unstable or on a 'bit of an emotional rollercoaster'—and whether Livingston then repeated the 'unstable' comment, as Snyder alleges, or merely the 'emotional roller coaster' comment, as Livingston admits (Livingston Aff. ¶ 7), to others at ENT. Therefore, Snyder has presented enough evidence from which a reasonable jury could conclude that ENT regarded her as disabled."

LaPier v. Prince George's County, Md., 2012 WL 1552780 (D. Md. April 27, 2012). Plaintiff, a student police officer, alleged the County "regarded" him as disabled when it deemed him physically unfit for duty because of his blood disorder. The County moved to dismiss, alleging that the blood disorder was "transitory and minor." Denying the motion, the court found the complaint sufficiently alleged a "more than minor" blood disorder, given the court's holding that it also sufficiently alleged a substantially limiting impairment under the "actual disability" coverage prong. The court also held that the impairment as alleged was not "transitory" (i.e., an actual or expected duration of 6 months or less") because it was described as a disorder plaintiff had had since adolescence.

Davis v. Vermont Department of Corrections, 2012 WL 1269123 (D. Vt. April 16, 2012). Plaintiff alleged he was subjected to disability harassment resulting from his hernia condition and surgery. The employer moved to dismiss the complaint on various grounds, including that the condition was "transitory and minor," and thus could not form the basis for "regarded as" coverage. Denying the motion, the court held that given the duration of the alleged harassment, it appeared that the perceived impairment lasted longer than six months. In addition, defendant could not show from the face of the complaint that the impairment was minor.

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

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

Wells v. Cincinnati Children's Hospital Medical Center, 860 F. Supp. 2d 469 (S.D. Ohio 2012). Plaintiff, a hospital nurse who worked in the "critical airway unit" from 2003-09, developed a gastrointestinal condition, underwent gall bladder removal surgery, and was prescribed medications, including morphine, oxycodone, and lotronex. Due to side effects of the medications, plaintiff exhibited instances of undisputed erratic behavior in the workplace, including going to the wrong room to start an IV, providing "a jumbled and confused" end-of-shift report, being confused for about four hours, and having "blacked out" for a period of time. She was suspended without pay pending a series of fitness-for-duty examinations. Thereafter, she signed a "return-to-work" agreement with various conditions, but sued the hospital claiming disability discrimination in failing to

reinstate her to the "critical airway unit," and denying her a reasonable accommodation. Denying the hospital's motion for summary judgment, the court found that a reasonable juror could conclude plaintiff was "regarded as" an individual with a disability because she was subjected to the adverse employment action (not being reinstated to the "critical airway unit," which resulted in fewer hours, less pay, less distinguished jobs, and less responsibility) because of her actual or perceived impairment. The court noted that unlike the ameliorative effects of mitigating measures, negative side effects of medications used to ameliorate an impairment remain relevant under the ADAAA to determining disability. The court emphasized that under the ADAAA, plaintiff "no longer is required to prove that the employer regarded her impairment as substantially limiting a major life activity," citing 29 C.F.R. § 1630.2(g)(3). Although counsel for both parties had used the indirect evidence burden-shifting analysis under McDonnell Douglas in arguing the question of whether the adverse action was "because of" plaintiff's perceived impairment, the court held that the hospital's stated reason for not reinstating plaintiff to the unit -- fear she would repeat her past errors or revert to the past behaviors -- constitutes direct evidence that the failure to reinstate was because of plaintiff's actual or perceived impairment. The remaining issue on the merits of the unit reinstatement claim was whether plaintiff was qualified, and if so, whether the hospital could meet its burden to prove any defense, such as direct threat to the health or safety of patients. With respect to the denial of accommodation claim, the court held plaintiff was not entitled to accommodation because she was only proceeding under the "regarded as" prong of the definition of disability.

Davis v. NYC Dept. of Education, 2012 WL 139255 (E.D.N.Y. Jan. 18, 2012). Plaintiff, a teacher diagnosed with c-spine injury, right shoulder injury, and lumbar back disorder, alleged that she was discriminated against based on disability when, following a medical leave, she received an unsatisfactory performance rating and a reduction in her bonus. Denying the employer's motion to dismiss, the court held the allegations in the complaint that plaintiff was "regarded as" disabled during a period when she was on unpaid disability leave were sufficient. The court noted that although the plaintiff's three-month disability period appears to be "transitory," it was not apparent from the complaint that the impairment was minor. Thus, the exception to "regarded as" coverage for impairments that are both "transitory" and "minor" did not provide a basis for dismissal. The court also noted that an unsatisfactory performance rating, alone, does not amount to an adverse employment action, but that the reduction in bonus could. Nevertheless, the court did not appear to require that plaintiff identify a prohibited action taken because of her impairment; rather, the court simply found "regarded as" coverage alleged because plaintiff had been granted leave for an impairment that was transitory but not minor.

Gaus v. Norfolk Southern Ry. Co., 2011 WL 4527359 (W.D. Pa. Sept. 28, 2011). Plaintiff alleged employer regarded him as an individual with a disability based on effects of his chronic pain (related to a variety of impairments) and his pain medication. With respect to the employer's actions occurring prior to January 1, 2009, the court granted summary judgment for the employer, finding under the pre-ADAAA standard that there was insufficient evidence for a jury to conclude that the employer perceived plaintiff as substantially limited in a major life activity. However, applying the ADAAA definition

of "regarded as" to events occurring on or after January 1, 2009, the court denied summary judgment on coverage. Relying on examples in EEOC's revised regulations at 29 C.F.R. § 1630.15(f) and the accompanying appendix, the court noted that an employee is "regarded as" having a disability post-ADAAA even if the employer subjectively believed the impairment was transitory and minor, and held that there was no evidence that the impairment at issue was objectively both transitory and minor.

Fleck v. Wilmac Corp., 2011 WL 1899198 (E.D. Pa. May 19, 2011). Denying employer's motion to dismiss complaint under Rule 12(b)(6), the court ruled that a physical therapist who alleged discriminatory termination after surgery for an ankle injury could have been "regarded as" an individual with a disability under the amended definition. Quoting the amended statute, the court noted that "[i]n contrast to the pre-amendment ADA, an individual is 'regarded as' disabled under the ADAAA 'whether or not the impairment limits or is perceived to limit a major life activity.'" The court cited plaintiff's allegations that during her employment she wore a plainly visible "cam boot" to aid her in standing and walking, she notified her employer of her need for additional surgery on her ankle and subsequently requested FMLA leave, and that a week before her FMLA leave ended, she advised her supervisor of her continuing medical restrictions. The court concluded these allegations raised a plausible inference that the employer regarded her as an individual with a disability under the amended standard. Since the ADAAA makes clear that individuals covered solely under the "regarded as" provision are not entitled to accommodation, the court noted that it would only consider coverage under this prong with respect to plaintiff's discrimination claims.

Chamberlain v. Valley Health System, Inc., 2011 WL 560777 (W.D. Va. Feb. 8, 2011). Plaintiff, a hospital pharmacy technician, alleged that she was placed on involuntary leave and subsequently terminated in violation of the ADA after she began experiencing blurred vision in her right eye and was diagnosed with a visual field defect which made fine visual tasks more difficult. The employer moved for summary judgment, contending plaintiff could not be "regarded as" an individual with a disability because the employer believed plaintiff's vision impairment was "transitory and minor." The court denied the motion, ruling, inter alia, that whether the employer believed the impairment was "transitory and minor" was a disputed issue of fact in this case that must be decided by a jury, given plaintiff's contention that the employer's Corporate Director of Pharmacy insisted plaintiff was completely unable to work at the hospital as a result of her vision problem and required her to apply for disability leave.

Powers v. USF Holland, Inc., 2010 WL 1994833 (N.D. Ind. May 13, 2010), aff'd, 667 F.3d 815 (7th Cir. 2011). Plaintiff, a truck driver who experienced pain and restrictions due to a herniated disc, challenged his employer's requirement that he be 100% healed before returning to work. While holding that the ADA Amendments Act does not apply retroactively to the claims at issue, the court explained that even if the Amendments Act did apply, plaintiff would not be able to prove he is qualified because he argued that he was an "individual with a disability" solely under the "regarded as" prong, yet needed an accommodation in order to be qualified. The ADA as amended, 42 U.S.C. § 12201(h), states: "[a] covered entity… need not provide a reasonable accommodation… to an

individual who meets the definition of disability in section 12102(1) . . . solely under subparagraph (C)…." "By excluding the requirement to accommodate individuals who are only regarded as disabled, the ADAAA recognizes the obvious: if an individual is not actually disabled, then he or she does not need the accommodation in the first place. Thus, while an employer may not discriminate against persons it perceives as disabled, the law does not impose a duty on that employer to accommodate what turns out to be a fictional impairment." Affirming, the Court of Appeals also noted, however, that "it would be risky" after the ADAAA took effect for the company to apply the "100% healed policy" it was alleged to have maintained.

Not "Regarded as"

Impairment Was "Transitory and Minor"

White v. Interstate Distributor Co., 2011 WL 3677976 (6th Cir. Aug. 23, 2011) (unpublished). The "transitory and minor" exception was applied by the court to preclude "regarded as" coverage of an employment action allegedly taken because of plaintiff's leg injury. The court reasoned that his lifting and other restrictions following a motorcycle accident were expected to last for only a month or two.

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

Zick v. Waterfront Commission of New York Harbor, 2012 WL 4785703 (S.D.N.Y. Oct. 4, 2012). Plaintiff, an attorney for a state commission who sustained two broken bones in her right leg requiring a cast and use of crutches, and her doctor recommended that she telework for 8-10 weeks and keep her right leg elevated. The request was granted after having initially been denied, but plaintiff alleged that during this period, she was unfairly reprimanded, excluded from meetings and phone conferences, and told by co-workers that the executive director did not want her to return. When she subsequently met with him about returning to work, she resigned under threat of termination after having been advised that she had been observed running errands when she was purportedly working from home. Holding that plaintiff was not "regarded as" an individual with a disability without separately analyzing "transitory" and "minor," the court ruled that a broken leg with an expected duration of 8 to 10 weeks was "transitory" or "minor" and therefore not covered.

Risco v. McHugh, 868 F. Supp. 2d 75 (S.D.N.Y. 2012). "Even under the expanded definition of disability set forth in the ADA Amendments Act of 2008, Pub.L. No. 110–325, 122 Stat. 3553 (Sept. 25, 2008), Risco's assertions that Byrd referred to her inability to do a task as a 'mental thing' and described her inappropriate behavior as 'erratic' (Pl.'s Mem. 9), do not demonstrate that Byrd regarded Risco as having a mental impairment within the meaning of the statute."

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

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

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

Dube v. Texas Health and Human Services, 2011 WL 3902762 (W.D. Tex. Sept. 6, 2011), reconsideration denied, 2011 WL 4017959 (W.D. Tex. Sept. 8, 2011). Denying employer's motion to dismiss the complaint, the court ruled that "it is not apparent from the face of the complaint that plaintiff's impairment lasted less than six months or was otherwise 'transitory' and 'minor' as defined by the regulations," and denying reconsideration ruled that the employer has the burden to prove plaintiff's impairment was "transitory and minor" under 29 U.S.C. § 1630.15(f), an affirmative defense to "regarded as" coverage. (Summary judgment for employer subsequently granted in Dube v. Texas Health and Human Services Commission, 2012 WL 2397566 (W.D. Tex. June

25, 2012) (ruling that plaintiff had merely relied on her subjective belief and conclusory statements that she was regarded as disabled).

Neumann v. Plastipak Packaging, Inc., 2011 WL 5360705 (N.D. Ohio Oct. 31, 2011). The court concluded that plaintiff was not "regarded as" an individual with a disability when he was terminated following alleged failure to submit his FMLA paperwork in timely fashion. The court held that because his surgery and recuperation period for a back injury was only 6-8 weeks, the impairment was transitory and minor, even though his impairment had existed for three years prior and caused pain (though no work limitations) during that time.

Lewis v. Florida Default Law Group, P.L., 2011 WL 4527456 (M.D. Fla. Sept. 16, 2011). Plaintiff, who alleged she had or her employer perceived her to have, the H1N1 virus, could not demonstrate she was "regarded as" an individual with a disability, because her actual or perceived impairment was both "transitory and minor." Granting summary judgment for the employer, the court held: "According to the CDC, the symptoms of the 2009 H1N1 virus included fever, cough, sore throat, runny or stuffy nose, body aches, headache, chills, fatigue and, for some, vomiting and diarrhea …The duration of Influenza A can run from five to fifteen days and most patients with Influenza A 'recover rather well' …. These short-term symptoms (i.e., impairments) are specifically the type of impairments that the 'transitory and minor' exception was intended to cover. See 2008 House Judiciary Committee Report, p. 18 (explaining that 'absent this exception, the third prong of the definition would have covered individuals who are regarded as having common ailments like the cold or flu, and this exception responds to concerns raised by members of the business community regarding potential abuse of this provision and misapplication of resources on individuals with minor ailments that last only a short period of time')." See also Valdez v. Minnesota Quarries, Inc., 2012 WL 6112846 (D. Minn. Dec. 10, 2012) (plaintiff argued that his termination due to swine flu formed the basis for "regarded as" coverage because, although it turned out to be minor, at the time it was not perceived to be minor because "there was widespread panic about the possibility of a deadly pandemic"; rejecting this approach, the court held that "transitory and minor" must be determined on an objective basis," and that from an objective standpoint swine flu is the "paradigmatic example" of a transitory and minor impairment).

Dugay v. Complete Skycap Services, Inc., 2011 WL 3159171 (D. Ariz. July 26, 2011). Plaintiff, who was employed by an airport skycap services company, was required to provide a doctor's authorization after a one-day absence for neck and back injuries sustained in a car accident. When plaintiff submitted a note from his doctor authorizing return to work, his supervisor stated that the note was too vague and required another doctor's note. The new note plaintiff provided stated that he could return to work on light duty, provided he did not lift over 25 pounds. Plaintiff was then advised that for liability reasons he could not be permitted to return until he had a full release from his doctor. When he subsequently received a full release, was informed no work was available. Plaintiff claimed he was discriminated against in violation of the ADA when he was placed on involuntary leave due to his neck and back injuries, asserting coverage

under the "regarded as" prong of the definition of disability. Granting the employer's motion to dismiss, the court concluded the "transitory and minor" exception barred coverage because the dates identified in the complaint of the plaintiff's car accident and his clearance for return to work indicated the injuries lasted fewer than 6 months.

George v. TJX Cos., 2009 WL 4718840 (E.D.N.Y. Dec. 9, 2009). Plaintiff, a back room associate at a retail store whose position entailed lifting, stacking, and processing approximately 400 to 450 boxes of merchandise per day, was terminated after abandoning his position, in part, according to plaintiff, because of how he was treated by the company when he sustained a fractured upper arm. Granting summary judgment for the employer on plaintiff's claims of disparate treatment and denial of accommodation, the court found that the ADAAA did not apply retroactively but nevertheless noted that plaintiff could not meet the amended definition of "regarded as." The ADAAA "regarded as" prong does "not apply to impairments that are transitory and minor" and defines "transitory" as an impairment with an actual or expected duration of six months or less. Because the record evidence "overwhelmingly support[ed] the inference that plaintiff's impairment lasted only two months," plaintiff "presented no evidence to dispute that [the employer] saw him as having a temporary injury without permanent or long-term impact."

Employer's Action Not "Because of" Impairment

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

Jenkins v. Medical Laboratories of Eastern Iowa, 2012 WL 2989660 (N.D. Iowa July 20, 2012). Plaintiff could not show she was "regarded as" an individual with a disability when she was terminated for refusal to attend the EAP program as directed by her employer. Granting summary judgment for the employer, the court ruled that employer-required EAP counseling was not an "action prohibited by" the ADA, nor was there evidence to support plaintiff's contention that she was sent to EAP because of a perceived mental impairment.

Bellamy v. General Dynamics Corp., 2012 WL 1987171 (D. Conn. June 4, 2012). Plaintiff, a plant foreman, was terminated for alleged violations of the company's workplace violence policy following an altercation with a co-worker. Granting summary

judgment for the employer on plaintiff's ADA discrimination claim that the real motivation for his termination was his heart attack ten months earlier, the court ruled that plaintiff could not show his termination was "because of" a perceived impairment so as to establish "regarded as" coverage, given that he conceded his assertion that his heart attack played a role in the discharge decision was "merely speculation."

Sibilla v. Follett Corp., 2012 WL 1077655 (E.D.N.Y. March 30, 2012). Plaintiffs, book store employees who weighed approximately 400 pounds and 271 pounds respectively, alleged that they were discriminated against based on perceived disability when new management of the bookstore at which they worked hired them for lower-paying positions. Granting summary judgment for the employer on plaintiffs' ADA claims on the ground that they could not establish "regarded as" coverage, the court held "even after the passage of the ADAAA," the "fact that an employer regards an employee as obese or overweight does not necessarily mean that the employer regards the employee as suffering a physical impairment."

Harris v. Reston Hospital Center, 2012 WL 1080990 (E.D. Va. March 26, 2012). Granting summary judgment for the employer on plaintiff's claim that she was subjected to discriminatory termination based on a perceived alcoholism drug addiction, the court held "regarded as" coverage could not be established because plaintiff's supervisor's statement "you're drunk," observations of plaintiff being impaired at work, and knowledge that plaintiff had previously gone to a rehabilitation facility to be treated for depression and a suicide attempt were insufficient to show that management perceived plaintiff as having an impairment.`

Becker v. Elmwood, 2012 WL 13569 (N.D. Ohio Jan. 4, 2012). The court granted the defendant school district's motion for summary judgment on a disability discrimination claim brought by a teacher with obsessive compulsive disorder (OCD), finding that plaintiff did not suffer an adverse employment action because the circumstances of his resignation did not constitute a constructive discharge. However, in its analysis, the court rejected the defendant's reliance on pre-ADAAA cases requiring that for "regarded as" coverage, the employer must have perceived the employee to have a disability that substantially limits a major life activity, ruling instead that "[t]he ADA now includes perceived disabilities 'whether or not the impairment limits or is perceived to limit a major life activity.' 42 U.S.C. § 12102(3)(A)."

Wallner, et al. v. MHV Sonics, Inc., 2011 WL 5358749 (M.D. Fla. Nov. 4, 2011). Granting summary judgment for the employer on plaintiffs' ADA claim, the court rejected plaintiffs' assertion that they were "regarded as" individuals with disabilities when they were terminated due to their perceived fear that their lives were in danger due to workplace robberies.

Wurzel v. Whirlpool Corp., 2010 WL 1495197 (N.D. Ohio April 14, 2010) (court ruled that plaintiff, a materials handler with prinzmetal angina who was transferred and then placed on involuntary leave due to safety concerns, was not subjected to an action prohibited under the ADA "because of an actual or perceived physical or mental

impairment," since he posed a direct threat to safety, as well as because it was the consequences of plaintiff's condition, not the condition itself, which motivated the employer's decision), aff'd on other grounds, 2012 WL 1449683 (6th Cir. April 27, 2012) (unpublished) (finding plaintiff posed a direct threat to safety without addressing the coverage issue, but explaining at n.12 why the EEOC and NELA in amicus briefs challenged the district court's ADAAA "regarded as" analysis as flawed).

IV. Retroactivity

The federal courts of appeals have uniformly concluded that the ADA Amendments Act is not retroactive, and therefore it only applies to claims arising on or after January 1, 2009. See, e.g., Thornton v. United Parcel Serv., Inc., 587 F.3d 27, 35 n.3 (1st Cir. 2009); Ragusa v. Malverne Union Free Sch. Dist., 2010 WL 2490966 (2d Cir. June 21, 2010) (unpublished); Lander v. Air Freight Sys., 2012 WL 208047 (3d Cir. Jan. 25, 2012) (unpublished); Reynolds v. American Nat. Red Cross, 701 F.3d 143 (4th Cir. 2012); EEOC v. Argo Distribution, L.L.C, 555 F.3d 462 (5th Cir. 2009); Milholland v. Summer Cnty. Bd. of Educ., 569 F.3d 562 (6th Cir. 2009); Fredricksen v. United Parcel Serv., 581 F.3d 516, 521 n.1 (7th Cir. 2009); Nyrop v. Independent Sch. Dist. No. 11, 616 F.3d 728, 734 n.4 (8th Cir. 2010); Becerril v. Pima Cnty. Assessor's Office, 587 F.3d 1162 (9th Cir. 2009); Johnson v. Weld Cnty., Colo., 594 F.3d 1202 (10th Cir. 2010); Fikes v. Wal-Mart, Inc., 2009 WL 961774 n.1 (11th Cir. April 10, 2009); Lytes v. D.C. Water & Sewer Auth., 572 F.3d 936 (D.C. Cir. 2009). However, various courts have held that if a continuing violation occurred that spanned before and after the ADAAA's effective date of January 1, 2009, the amended standard of disability would apply.

In Jenkins v. National Board of Medical Examiners, 2009 WL 331638 (6th Cir. Feb. 11, 2009) (unpublished), however, the Sixth Circuit held, in a non-employment ADA accommodation case, that the ADA Amendments Act applied to a case pending on its effective date where the relief sought was only prospective in nature (i.e., a reasonable accommodation) rather than damages for past conduct. A third-year medical student with dyslexia sought extra time to take the national medical licensing examination. Although the initial accommodation request was made and denied prior to the effective date of the Amendments Act, the court found that since the relief sought was limited to prospective injunctive relief (extra time on the test when it is administered in the future), the Amendments Act standards should be applied in determining whether the plaintiff's dyslexia met the ADA definition of disability. See also Strolberg v. U.S. Marshals Serv., 2010 WL 1266274 (D. Idaho Mar. 25, 2010) (ADAAA standards did not apply as plaintiffs were seeking injunctive relief in the form of reinstatement to remedy terminations that occurred prior to the effective date of the ADAAA, whereas in Jenkins the ADAAA applied to accommodation in the administration of a medical licensure examination to be taken in the future).

Selected Recent Cases on "Qualified" and "Reasonable Accommodation"

Wardia v. Justice and Pulic Safety Cabinet Dept. of Juvenile Justice, 2013 WL 28094 (6th Cir. Jan. 3, 2013) (ability to physically restrain juveniles held to be essential function of youth worker at juvenile detention center, where the potential for physical confrontation exists on a daily basis, notwithstanding that the function may only actually have to be performed in rare circumstances).

Keith v. County of Oakland, 703 F.3d 918 (6th Cir. Jan. 2013) (deaf individual who passed employer's own lifeguard training and certification program may be qualified as life guard with accommodations; county may have violated the ADA by rescinding its conditional offer of employment based on recommendation of doctor it hired to conduct post-offer medical exam, who without an individualized assessment stated "he's deaf; he can't be a lifeguard"; expert witnesses explained that in noisy swimming areas, recognizing a potential problem is almost completely visually based; testimony was also offered by an associate professor from Gallaudet University who had certified 1,000 deaf lifeguards through American Red Cross programs, and who noted that the world record for most lives saved by a lifeguard is held by a deaf man, who saved over 900 lives in his lifeguarding career).

Scavetta v. King Soopers, Inc., 2013 WL 316019 (D. Colo. Jan. 28, 2013) (in denial of accommodation claim brought by pharmacist with rheumatoid arthritis who sought to be excused from giving immunizations, the court ruled that giving immunizations might not be essential function of the position where at least ten other pharmacists had been excused on medical grounds from performing this task, and plaintiff herself was excused from doing so for more than one year preceding her termination).

Johnson v. Cleveland City School District, 2011 WL 5526465 (6th Cir. Nov. 15, 2011) (teacher who could not verbally control students due to disability was not qualified).

Syndor v. Fairfax County, Va., 2011 WL 836948 (E.D. Va. Mar. 3, 2011) (individual does not have to call medical condition a disability; inadequate notice is when employee does not say enough for employer to know a medical condition is at issue).

Kravits v. Shinseki, 2012 WL 604169 (W.D. Pa. Feb. 24, 2012) (oral request for accommodation is legally sufficient despite contrary employer policy).

Cox v. Wal-Mart Stores, Inc., 441 Fed. Appx. 547 (9th Cir. 2011) (employer's failure to tell employee that request submitted on wrong form, or to provide time to return paperwork, can render the employer responsible for the breakdown in the interactive process).

Valle-Arce v. Puerto Rico Ports Auth., 651 F.3d 190 (1st Cir. 2011) (employer's denial of request on ground that information provided was not specific enough, without advising employee and asking for the additional details needed, can render the employer responsible for the breakdown in the interactive process).

Colwell v. Rite Aid Corp., 602 F.3d 495 (3d Cir. 2010) (if the employer flatly turns down requested accommodation and fails to offer an available alternative that did not pose an undue hardship, the employer is responsible for the breakdown in the interactive process).

Zombeck v. Friendship Ridge, 2011 WL 666200 (W.D. Pa. Feb. 14, 2011) (employer at its peril simply ignores accommodation request because it believes employee does not have a disability).

McElwee v. County of Orange, 700 F.3d 635 (2d Cir. 2012) ("…under the ADA, workplace misconduct is a legitimate and nondiscriminatory reason for terminating employment, even when such misconduct is related to a disability. A requested accommodation that simply excuses past misconduct is unreasonable as a matter of law.")

EEOC v. Creative Networks, LLC, ___ F. Supp. 2d ___, 2013 WL 6127311 (D. Ariz. Sept. 20, 2012) (employer cannot have arbitrary cap on amount it will spend for employee accommodation; standard is significant difficulty or expense).

Goonan v. Federal Reserve Bank of New York, 2013 WL 69196 (S.D.N.Y. Jan. 7, 2013) (denying employer's motion to dismiss, court ruled that claim for ADA violation was stated based on allegations that employer denied telework accommodation on ground that employee had poor performance, and failed to consider alternatives when put on notice that the alternative accommodations it provided instead of telework were ineffective).

Carter v. Pathfinder Energy, 662 F.3d 1134 (10th Cir. 2011) (employer cannot deny accommodation because co-workers may be resentful).

Ekstrand v. School Dist. Of Somerset, 2012 WL 2382313 (7th Cir. June 26, 2012) (reasonable accommodation may require providing a change that the employer denies to other employees who request it for non-medical reasons).

Jones v. Walgreen Co., 679 F.3d 9 (1st Cir. 2012) (employer not required to accommodate manager by allowing her to delegate to subordinates tasks that constitute essential functions).

Samper v. Providence St. Mary Vincent Medical Center, 675 F.3d 1233 (9th Cir. 2012) (neonatal intensive care nurse's need for unpredictable leave or late arrival rendered her not qualified because of specialized work and equipment; "NICU nurses require special training such that the universe of nurses that can be called in at the last minute is limited").

Thomas v. Bala Nursing and Retirement Center, 2012 WL 2581057 (E.D. Pa. 2012) (distinguishing Samper, the court ruled employer failed to show undue hardship posed by nurse's need for unpredictable leave, e.g., unavailability of temporaries with requisite skills); see also Garcia-Ayala v. Lederle Parentals, Inc., (1st Cir. 2000) (because of company's ability to fill positions with temporary workers, not an undue hardship to hold employee's secretarial job for lengthy period; also holding "[s]ome employees, by the nature of their disability, are unable to provide an absolute assured time for their return to employment, but that does not necessarily make a request for leave indefinite").

Wandersee v. Farmers State Bank, 2012 WL 1666391 (D. Minn. May 9, 2012) (bank compliance officer with multiple sclerosis was denied a flexible work schedule, including working outside normal banking hours, to average a 40-hour work week; denying summary judgment for the employer, the court ruled that it "cannot find as a matter of law that Wandersee was required to work specific hours at the bank as an essential function of her job").

McMillan v. City of New York, ___ F.3d ___, 2013 WL 779742 (2d Cir. March 4. 2013) (employee's request for flexible arrival time and departure times could be reasonable and would not pose an undue hardship in light of the nature of the job and his work history; in reversing summary judgment for the employer and remanding for trial, the court held: "A court must avoid deciding cases based on 'unthinking reliance on intuition about the methods by which jobs are to be performed.' …Instead, a court must conduct 'a fact-specific inquiry into both the employer's description of a job and how the job is actually performed in practice.' … The district court appears to have relied heavily on its assumption that physical presence is 'an essential requirement of virtually all employment' and on the City's representation that arriving at a consistent time was an essential function of McMillan's position. While the district court's conclusion would be unremarkable in most situations, we find that several relevant factors here present a somewhat different picture: one suggesting that arriving on or before 10:15 a.m.—or at any consistent time—may not have been an *essential* requirement of McMillan's particular job. For many years prior to 2008, McMillan's late arrivals were explicitly or implicitly approved. Similarly, the fact that the City's flex-time policy permits all employees to arrive and leave within one-hour windows implies that punctuality and presence at precise times may not be essential. Interpreting these facts in McMillan's favor, along with his long work history, whether McMillan's late and varied arrival times substantially interfered with his ability to fulfill his responsibilities is a subject of reasonable dispute. This case highlights the importance of a penetrating factual analysis. Physical presence at or by a specific time is not, as a matter of law, an essential function of all employment. While a timely arrival is normally an essential function, a court must still conduct a fact-specific inquiry, drawing all inferences in favor of the non-moving party. Such an inquiry was not conducted here. The City and district court relied on cases that are distinguishable, because the plaintiffs' positions in those cases absolutely required plaintiffs' presence during specific business hours.")

Feldman v. Olin Corp., 2012 WL 3641774 (7th Cir. Aug. 27, 2012) (summary judgment for employer reversed on issue of whether flextime and overtime were essential functions of various jobs sought by plaintiff; the job descriptions did not contain these requirements, and plaintiff showed that workers in these jobs rarely worked overtime).

Kallail v. Alliant Energy Corporate Services, Inc, 691 F.3d 925 (8th Cir. 2012) (plaintiff sought and was denied a straight day shift rather than rotating shifts in order to accommodate her diabetes; affirming summary judgment for the employer, the court held that working rotating shifts was an essential function of a resource coordinator position, noting that it was listed as a requirement in the job description, and it spread undesirable shifts among all resource coordinators).

EEOC v. Interstate Distributor Co., Civil Action No. 12-cv-02591-RBJ (D. Colo. consent decree entered November 2012) (nearly $5 million settlement of nationwide class action on behalf of Interstate Distributor employees who were automatically terminated under company's "no restrictions" leave policy if they could not return to full duty without any limitations after 12 weeks of leave).

Core v. Champaign County Bd. of County Commissioners, 2012 WL 3073418 (S.D. Ohio July 30, 2012) (noting that working from home is not an unreasonable accommodation as a matter of

law and that, with the technological advances that have taken place, it may no longer take an extraordinary case to create a triable issue on an employer's failure to provide such an accommodation).

EEOC v. Ford Motor Co., 2012 WL 3945540 (E.D. Mich. Sept. 10, 2012) (granting summary judgment for employer on claim that resale buyer was denied telework for up to four days per week, the court found that plaintiff's job, which required "spur-of-the-moment, group problem-solving," did not "lend itself to frequent, unpredictable workdays out of the office").

EEOC v. United Airlines, Inc., 693 F.3d 760 (7th Cir. 2012) (overruling long-standing 7th Circuit precedent, the court ruled that the ADA requires employers to provide reassignment as the accommodation of last resort, even if the individual with a disability is not the best qualified).

Sanchez v. Vilsack, 2012 WL 4096250 (10th Cir. Sept. 19, 2012) (employee may be entitled to reassignment to vacancy needed to be in location where medical treatment for her disability is available).

Hoback v. City of Chattanooga, 2012 WL 3834828 (E.D. Tenn. Sept. 4, 2012) (police officer who returned with PTSD from his National Guard duty deployment in Iraq was found by a jury to be terminated in violation of the ADA; the "direct threat to safety" defense was not met because the employer's determination that officer was not fit for duty was not based on the best available objective medical evidence; for example, it did not consider two other psychological evaluations that had found the plaintiff fit for duty).

EEOC v. AutoZone, Inc., ___ F.3d ___, 2013 WL 561587 (7th Cir. Feb. 15, 2013) (in ADA failure to accommodate case, punitive damages award of $200,000 was supported by evidence; rational jury could have (1) found that employer acted with reckless indifference to employee's federal employment rights, (2) imputed liability to employer through manager acting in scope of employment, and (3) concluded that employer did not engage in good faith efforts to enforce antidiscrimination policy).