

Selected ADA Cases Decided in The Last Year

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I. Who Can Sue

- A. **Class Standing:** *Bates v. United Parcel Service, Inc.*, 511 F.3d 974, 985-987 (9th Cir. 2007) (en banc) (plaintiff class had standing even if the named plaintiff was no longer eligible for the relevant driver jobs, because other class members were eligible).
- B. **Immigration Issues:** *EEOC v. Convergys Customer Management Group, Inc.*, 491 F.3d 790, 794 n.2 (8th Cir. 2007) (rejecting claim that Turkish immigrant was not entitled to relief under the ADA, because he had work authorization [thus refusing to decide whether unauthorized workers are entitled to relief under the ADA]).
- C. **Private clubs:** *Rasmussen v. Central Florida Council Boy Scouts of America, Inc.*, 2008 WL 681055 (M.D. Fla. March 7, 2008) (not covered).

II. Who can be sued

- A. Recipients of federal financial assistance for § 504 claims - *Starr v. Hawaii*, 2007 WL 3254831, at *4-5 (D. Hawai'i Nov. 2, 2007) (employer's office was recipient; the department it was attached to, and that its budget was part of, was recipient because it disbursed federal disaster relief; partial summary judgment for the plaintiff on this issue).

III. Procedural issues

- A. Administrative exhaustion
 - 1. *Motsay v. Pennsylvania American Water Co.*, 2008 WL 376298, at *5 (M.D. Pa. Feb. 11, 2008) (charge timely because even though it was not filed for 444 days, plaintiff sent EEOC a letter with all the relevant information within four weeks).
 - 2. *Norden v. Samper*, 503 F. Supp. 2d 130, 148-149 (D.D.C. 2007) (fact issue whether employee knew about 45-day requirement precluded summary judgment on limitations issue).
 - 3. *Tomao v. Abbott Laboratories, Inc.*, 2007 WL 2225905, at *7 (N.D. Ill. July 31, 2007) (despite failing to specifically mention retaliation in the charge, plaintiff may have sufficiently exhausted administrative remedies if the supporting facts are mentioned in the charge).

4. *Curtis v. Tyco Retail Healthcare Group, Inc.*, 2007 WL 1545613 (E.D. Pa. May 24, 2007)
 - a. plaintiff submitted a number of verified questionnaires to the EEOC well within the 300-day limitations period, so he timely exhausted even though they were not formal charges;
 - b. plaintiff had grounds for equitable tolling because EEOC told him that employer could not raise timeliness issue.
 5. *Demshick v. Delaware Valley Convalescent Homes, Inc.*, 2007 WL 1244440, at *12 (E.D. Pa. April 26, 2007) (retaliation claim sufficiently exhausted because although box not checked or the word used, the supporting facts were alleged).
- B. Court-appointed counsel - *Taylor v. Team Broadcast, LLC*, 2007 WL 1201640, at *4 (D.D.C. April 23, 2007):
1. court appointed lawyer for plaintiff after former attorney withdrew;
 2. in determining whether to appoint counsel in a civil case, court considered ability of plaintiff to afford attorney, merits of case, efforts to secure counsel, and capacity to present adequately without aid of counsel;
 3. plaintiff's medical condition, which was at the heart of case, and which the defendant argued prevented him from performing the essential job functions, would also prevent him from representing himself adequately;
 4. plaintiff's case was sufficiently complex in that it dealt with medical testimony and would involve interviewing and questioning doctors to warrant court-appointed counsel.
- C. Pleadings
1. *Ruiz Rivera v. Pfizer Pharmaceuticals, LLC*, ___ F.3d ___, 2008 WL 802730, at *5 (1st Cir. March 27, 2008) (mere inclusion of the word "perceived" in the complaint was not enough to put defendant on notice of a regarded-as claim).
 2. *McNa v. Communications Inter-Local Agency*, 2008 WL 686924, at *2 (M.D. Fla. March 12, 2008) (plaintiff sufficiently pled she had regarded-as disability by alleging that her supervisors told her to "go work at Wal-Mart with the rest of the retards," implying that she was only suited for work that could be performed by a person with mental retardation, and thus that she was perceived as having a mental impairment that substantially limited ability to work).

3. *Quitto v. Bay Colony Golf Club, Inc.*, 2007 WL 2002537, at *13 (M.D. Fla. July 5, 2007)
 - a. complaint sufficiently stated regarded-as claim because it referred to disability, and the statutory definition of disability “includes the principal of ‘regarded as.’”
 - b. complaint sufficiently pleaded reasonable-accommodation claim because it referenced discrimination, and statutory definition of discrimination includes the failure to accommodate.
 4. *Stubbs v. Regents of University of California*, 2007 WL 1532148, at *8 (E.D. Cal. May 25, 2007) (after-acquired evidence is an affirmative defense that was waived by failing to plead it in answer).
- D. Plaintiff cannot use § 1983 to enforce ADA claim. *McNa v. Communications Inter-Local Agency*, 2008 WL 686924, at *3-5 (M.D. Fla. March 12, 2008).
- E. Class actions - *Hohider v. United Parcel Service, Inc.*, 243 F.R.D. 147 (W.D. Pa. 2007)
1. private class action can be brought as pattern-or-practice suit
 2. plaintiff satisfied commonality requirement in claims about employer’s 100%-healed policy, ADA policy, and use of uniform pretextual job descriptions;
 3. commonality not met with respect to claims based on policy prohibiting employees from returning to work with restrictions and using seniority rights, or withdrawal of previously provided accommodations claim;
 4. back pay claims would be allowed in class action seeking predominantly declaratory or injunctive relief, but not compensatory or punitive damages.
- F. Inspection of the premises - *Rooney v. Sprague Energy Corp.*, 495 F. Supp. 2d 135 (D. Me. 2007) (court granted plaintiff’s motion for inspection of premises to refresh his recollection, but denied defendant’s motion for jury view).
- G. Summary judgment
1. For Plaintiff
 - a. Recipient of federal financial assistance for § 504 claims - *Starr v. Hawaii*, 2007 WL 3254831, at *4-5 (D. Hawai’i Nov. 2, 2007).

b. Disability

(1) *Norden v. Samper*, 503 F. Supp. 2d 130 (D.D.C. 2007)

(a) actual - dengue infection caused PTSD and severe depression, fatigue, susceptibility to bruising, compromised immune and capillary systems, an inability to have sexual intercourse (itself a major life activity); in combination, various problem rendered plaintiff “unable to function as a normal person and to live free from constant pain and fear.” *Id.* at 150-152.

(b) record of - employer knew plaintiff had dengue fever in 2000, nearly died from the acute infection, and was on full medical disability for over a year, during which she suffered from severe confusion and her cognitive abilities were markedly impaired; she attempted to return to work in 2001, but it proved too difficult and she returned to disability status; she attempted another return to work in 2002, but once more the lingering effects of DHF caused her considerable pain and resulted in year-long medical leave of absence; when the employer proposed to terminate her employment in November 2003, it cited her “medical limitations” as the exclusive reason; “Thus, it is beyond dispute that when Dr. Norden attempted to return to work a third time in 2003 she had a well-documented history of a major disability that substantially restricted her in the major life activities of learning and working, and that the Smithsonian had relied on her record of impairment in making several employment decisions. This is sufficient to render her disabled under the Rehabilitation Act.” *Id.* at 152.

(2) *Russo v. Sysco Food Services of Albany, L.L.C.*, 488 F. Supp. 2d 228, 235 (N.D.N.Y. 2007) (positions requiring the operation of all vehicles and heavy equipment constitutes a class of jobs; company physician concluded that plaintiff’s epilepsy precluded him from holding CDL or operating forklift or driving company vehicle until he could show that he was on medication and seizure-free for two years; this indicated that employer regarded plaintiff as unable to work in any job requiring the operation of trucks, forklifts, or any other company vehicle).

- c. Failure to accommodate - *Norden v. Samper*, 503 F. Supp. 2d 130, 154, 155-156 (D.D.C. 2007) (“Contrary to its argument, the Smithsonian did not provide the accommodations that Dr. Norden requested. . . . In short, the Smithsonian offered Dr. Norden an ersatz version of the accommodations suggested by her physicians. One of the accommodations that Dr. Norden requested was met with a sham proposal (a “flexible” schedule that was actually inflexible), and the other two requests were simply ignored (reducing or eliminating her exposure to naphthalene and assigning her intellectually stimulating work). Providing a respirator was the only arguable accommodation that the Smithsonian made, although that would have done nothing more than return Dr. Norden to the same unacceptable situation she faced when she returned on a part-time schedule in 2002 (the only difference being that under the RTWP she would have been required to work full time under inflexible deadlines that could not be extended if she should take ill.”).

2. For employer

- a. *Peterson v. AT & T Services, Inc.*, 2007 WL 2109566 (E.D. Mich. July 23, 2007) (court denied summary judgment because discovery not completed).
- b. *Quitto v. Bay Colony Golf Club, Inc.*, 2007 WL 2002537, at *13 (M.D. Fla. July 5, 2007) (because local rule required leave to file reply brief, and employer did not seek such leave, to the extent that portions of employer’s motion to strike constitute a reply, they are stricken).
- c. *Singh v. George Washington University School of Medicine and Health Sciences*, 508 F.3d 1097, 1106-1108 (D.C. Cir. 2007) (ADA Title III case) (remanded in part because trial court mischaracterized the testimony of defense expert).

- H. ADA Title II - *Fleming v. State University of New York*, 502 F. Supp. 2d 324, 329-334 (E.D.N.Y. 2007) (holding that Title II does not apply to employment actions).

IV. Proving Disability

A. Major life activities

1. Lifting: *Wysong v. Dow Chemical Co.*, 503 F.3d 441, 452 n.7 (6th Cir. 2007) (lifting is a major life activity separate from working).
2. Sitting: *Jenkins v. Cleco Power LLC*, 487 F.3d 309, 315 (5th Cir. 2007).

3. Sexual relations. *Norden v. Samper*, 503 F. Supp. 2d 130, 151 (D.D.C. 2007).
4. Controlling one's bladder: *Wirtz v. Ford Motor Co.*, 2008 WL 565260, at *2 (E.D. Mich. Feb. 28, 2008).
5. Pumping and circulating blood: *Motsay v. Pennsylvania American Water Co.*, 2008 WL 376298, at *2 (M.D. Pa. Feb. 11, 2008).
6. Ability to accurately perceive reality or to behave in a rational manner: *Broberg v. Illinois State Police*, 537 F. Supp. 2d 960, 964 (N.D. Ill. 2008) (regarded-as case involving state vehicle inspection officer/trooper diagnosed with major depressive and paranoid personality disorders).
7. Test-taking is not a major life activity: *Singh v. George Washington University School of Medicine and Health Sciences*, 508 F.3d 1097, 1104 (D.C. Cir. 2007) (ADA Title III case) (test-taking is a subclass of the major life activity of learning).

B. “Actual” Disability

1. Substantially limited in activities other than working
 - a. Insufficient evidence
 - (1) Plaintiff with intellectual disability (“mental retardation”) failed to argue that he was limited in thinking and communicating; assuming those are major life activities, he produced insufficient evidence of a substantial limitation. *Littleton v. Wal-Mart Stores, Inc.*, 231 Fed. Appx. 874 (11th Cir. 2007) (unreported), *cert. denied*, 128 S. Ct. 302 (2007).
 - (2) *Maclin v. SBC Ameritech*, ___ F.3d ___, 2008 WL 852582, at *4 (7th Cir. April 1, 2008) (inability to sit more than two hours at time without severe pain not a substantial limitation).
 - b. Sufficient evidence
 - (1) sitting - plaintiff was substantially limited in sitting because he could only sit for three hours a day (not three hours *at a time*, as the trial court suggested). *Jenkins v. Cleco Power LLC*, 487 F.3d 309, 315 (5th Cir. 2007). *But cf. Maclin v. SBC Ameritech*, ___ F.3d ___, 2008 WL 852582, at *4 (7th Cir. April 1, 2008) (inability to sit more than two hours at time without severe pain not a substantial limitation).

(2) standing:

- (a) inability to stand longer than 15 minutes at a time a substantial limitation. *Lennex v. Wal-Mart Stores East, LP*, No. 06-877 (Magistrate's Report Feb. 29, 2008), *adopted*, 2008 WL 763740 (W.D. Pa. March 20, 2008);
- (b) pain after a few minutes of standing, and could not stand more than three hours in an eight-hour shift. *EEOC v. Sharp Mfg. Co. of America*, 534 F. Supp. 2d 797, 802 (W.D. Tenn. 2008).
- (c) *Street v. Ingalls Memorial Hosp.*, 2008 WL 162761 (N.D. Ill. Jan. 17, 2008) (fact that other cases involving same diagnosis found no disability does not bar this claim because of requirement for individualized assessment).
- (d) *Demshick v. Delaware Valley Convalescent Homes, Inc.*, 2007 WL 1244440 (E.D. Pa. April 26, 2007) (issue of fact whether Meniere's disease substantially limited walking and standing; while plaintiff could typically walk two blocks, she could not walk at all during a severe attack, which at the relevant time she had three to four time week, lasting from half an hour to several hours; it also affected her ability to stand, particularly after walking to the second floor, because that made her feel dizzy, shaky, unable to concentrate, and like she was going to vomit).

(3) walking

- (a) *Street v. Ingalls Memorial Hosp.*, 2008 WL 162761 (N.D. Ill. Jan. 17, 2008) (inability to walk more than 100-300 feet at a time is evidence of a substantial limitation in walking).
- (b) *Lien v. Kwik Trip, Inc.*, 2007 WL 4820967, at *4 (W.D. Wis. Nov. 29, 2007) (plaintiff with fibromyalgia could not walk for more than a few blocks at a time without assistance from a walker; when walking for exercise, plaintiff used walker with a seat, so she could rest every couple of blocks).

- (c) *Quick v. Albert Einstein Healthcare*, 2007 WL 3085868, at *12 (E.D. Pa. Oct. 23, 2007) (plaintiff could not walk beyond three houses without stopping, used a cane, needed help shopping, etc).
- (d) *Schultz v. University of Wisconsin Hospitals and Clinics Authority*, 513 F. Supp. 2d 1023, 1034 (W.D. Wis. 2007) (“to suggest that a person [who uses crutches and wheelchair] who is unable to use her legs to bear any of her body weight is not substantially limited in her ability to ‘walk’ stretches the notion of ‘walking’ too far. Although plaintiff’s crutches allow her to move about in an upright position and function in a similar manner as if she were moving about using her feet, the fact remains that she relies upon her upper body strength alone to do so. Given plaintiff’s inability to support any of her body weight with her legs and complete reliance on upper body strength for ambulation, plaintiff’s use of her crutches no more allows her to ‘walk’ in a traditional sense than her use of a wheelchair does;” plaintiff able to travel no more than a half-mile on her crutches and faced a greater risk of falling than other crutch-users [and presumably a much greater risk of falling than a person not using crutches at all]).
- (e) *Miller v. Pilgrim’s Pride Corp.*, 2007 WL 2007548, at *3 (W.D. Va. July 6, 2007) (employer’s own expert testified that plaintiff’s impairments met the requirements of an ADA disability, including a substantial limitation in walking, because some days he would have chest pain after walking a short distance).
- (f) *Demshick v. Delaware Valley Convalescent Homes, Inc.*, 2007 WL 1244440, at *7 (E.D. Pa. April 26, 2007) (issue of fact whether Meniere’s disease substantially limited walking and standing; while plaintiff could typically walk two blocks, she could not walk at all during a severe attack, which at the relevant time she had three to four time week, lasting from half an hour to several hours; it also affected her ability to stand, particularly after walking to the second floor, because that made her feel dizzy, shaky, unable to concentrate, and like she was going to vomit).

- (4) lifting - *Marziale v. BP Products North America, Inc.*, 2007 WL 4224367, at *5 (S.D. Ohio Nov. 27, 2007) (15-pound lifting restriction, together with description of day-to-day effects).
- (5) performing manual tasks - *Marziale v. BP Products North America, Inc.*, 2007 WL 4224367, at *5 (S.D. Ohio Nov. 27, 2007) (plaintiff testified that she was permanently restricted from performing household chores such as vacuuming and mopping; could not pull the vacuum cleaner toward her without pain, move furniture to vacuum, or bend over to vacuum under furniture; had to get down on hands and knees to clean the floor, could not wash her car; and was restricted in her ability to cook and wash dishes because bending over the sink caused her back pain).
- (6) sleeping
 - (a) *Marziale v. BP Products North America, Inc.*, 2007 WL 4224367, at *7 (S.D. Ohio Nov. 27, 2007) (plaintiff testified she had difficulty getting to sleep and remaining asleep; doctor testified problems were caused by back condition and were long term; even with medications, it took her twenty minutes to fall asleep, and then she awakened again within twenty minutes to an hour; she averaged two to three hours of sleep per night; and her problems were consistent).
 - (b) *Starr v. Hawaii*, 2007 WL 3254831, at *7 (D. Hawai'i Nov. 2, 2007) (doctor testified that plaintiff had **severe insomnia with considerably delayed sleep onset**, frequent awakenings, very poor sleep quality, and no documented stage 3 sleep or significant REM sleep without the use of a positive-airway-pressure device, which she did not tolerate; plaintiff testified that she was still tired when she woke up during the week, and had to fight to stay awake during the day).
- (7) hearing - *EEOC v. Centura Health Corp.*, 2007 WL 2788836 (D. Colo. Sep. 21, 2007)
 - (a) *Sutton* requires that disability be assessed in light of the mitigating measures actually used at the time of the discrimination; at that time plaintiff did not wear

hearing aids because she could not afford them, *id.* at *3-4;

- (b) plaintiff was substantially limited in hearing because she could only hear 24% of speech, and could not comfortably hear one-on-one conversation, *id.* at *4.
- (8) breathing - *Schmidt v. Mercy Hosp. of Pittsburgh*, 2007 WL 2683826, at *2 (W.D. Pa. Sep. 7, 2007) (although plaintiff was never hospitalized for her asthma, and the problems she had were limited to employer's lab, peak flow monitoring tests showed that over a one-month period she had a severe degree of airway obstruction and wheezing that alarmed her doctor, and suffered two asthmatic episodes over the next year; doctor testified that she could potentially experience symptoms for the rest of her life if she were exposed to high-enough levels of mold).
- (9) controlling one's bladder - *Wirtz v. Ford Motor Co.*, 2008 WL 565260, at *2 (E.D. Mich. Feb. 28, 2008).
- (10) pumping and circulating blood - *Motsay v. Pennsylvania American Water Co.*, 2008 WL 376298, at *2 (M.D. Pa. Feb. 11, 2008) (functions that plaintiff cannot do are relevant to whether he is substantially limited in pumping and circulating blood, regardless of whether those functions are themselves major life activities).
- (11) learning - *Stubbs v. Regents of University of California*, 2007 WL 1532148, at *9 (E.D. Cal. May 25, 2007) (fact issue whether dyslexia substantially limited learning for plaintiff with GED; "fact that plaintiff learned how to dance, took community college classes, and once took a forklift safety class, does not demonstrate that no reasonable fact-finder could construe substantial learning impairment in other areas of life.").
- (12) concentrating - *Miller v. Pilgrim's Pride Corp.*, 2007 WL 2007548, at *3 (W.D. Va. July 6, 2007) (employer's own expert testified that plaintiff's impairments met the requirements of an ADA disability, including a substantial limitation in concentrating and avoiding distraction; "he had difficulty interacting with others [] and difficulty focusing on multiple tasks.").

- (13) ability to accurately perceive reality or behave rationally - *Broberg v. Illinois State Police*, 537 F. Supp. 2d 960, 964 (N.D. Ill. 2008) (employer's consideration of off-work incidents "belies their claim that the limitation as they perceived it was circumscribed and isolated.").
- (14) interacting with others - *Hatzakos v. Acme American Refrigeration, Inc.*, 2007 WL 2020182, at *6 (E.D.N.Y. July 6, 2007) (depression and bipolar disorder).
- (15) other impairments may be substantially limiting
 - (a) Hepatitis C. *DeAngelo v. Entenmann's, Inc.*, 2007 WL 4378159, at *2 (E.D.N.Y. Dec. 12, 2007).
 - (b) gastroenteritis and supraventricular tachycardia (SVT). *Graci v. Independent Health Ass'n, Inc.*, 2007 WL 2403723, at *5-6 (W.D.N.Y. Aug. 20, 2007) (SVT was permanent, and plaintiff "has and will always be subject to continued flare-ups or reoccurrences of these symptoms at any time, even with the use of medications").
 - (c) Crohn's disease. *Moore v. Epperson Underwriting Co.*, 2007 WL 2332755, at *12 (D. Minn. Aug. 15, 2007) (under state law following ADA precedent, sufficient evidence based on plaintiff's testimony of bloody bowel movements, abdominal pain, fatigue, nausea, insomnia, difficulty concentrating, and headaches; plaintiff also testified that he had to carefully monitor his eating to alleviate these symptoms); *Duncan v. Quality Steel Products, Inc.*, 2007 WL 2156289, at *7, n.3 (E.D. Mich. July 25, 2007) (citing other cases involving Crohn's).
 - (d) dengue fever. *Norden v. Samper*, 503 F. Supp. 2d 130, 151-152 (D.D.C. 2007)
 - i) "If an employee's ability to return to work, with accommodations, constituted proof that the employee was not disabled, the Rehabilitation Act would be a dead letter;"
 - ii) dengue infection caused PTSD and severe depression, fatigue, susceptibility to bruising,

compromised immune and capillary systems, or inability to have sexual intercourse;

- iii) inability to have sexual relations due to propensity to bleed easily is sufficient evidence by it;
- iv) in combination, various problem rendered plaintiff “unable to function as a normal person and to live free from constant pain and fear.”

c. Medical evidence

- (1) *Soto v. Casiano Communications, Inc.*, 2008 WL 312682, at *5 (D.P.R. Feb. 1, 2008) (court found substantial limitation in absence of medical records).
- (2) *EEOC v. Sharp Mfg. Co. of America*, 534 F. Supp. 2d 797, 802-803 (W.D. Tenn. 2008) (one doctor’s mildly worded note may be explained by plaintiff’s desire to try to keep working).
- (3) *Lehman v. U.S. Steel Corp.*, 2007 WL 2728659, at *4 (W.D. Pa. Sep. 17, 2007) (lack of medical evidence does not guarantee summary judgment for employer)

d. Comparators

- (1) *Singh v. George Washington University School of Medicine and Health Sciences*, 508 F.3d 1097, 1100-1104 (D.C. Cir. 2007) (Title III case) - learning disability is not measured by comparing to fellow medical students or others of similarly elite educational background, but to the “average person in the general population.”
- (2) *Singh, supra*, 508 F.3d at 1103 - average person comparison does not mean comparing a person with others of extreme age or youth; the medical definition of an impairment frequently refers to age (e.g., “mental development of a six-year-old is fine for six-year-olds, but not for their parents”), and impairment must be the cause of the plaintiff’s limitation (e.g., “a newborn with a malformed foot cannot walk as well as the average person, but he is not disabled under the ADA because even perfectly healthy newborns cannot walk”).

- (3) *Jenkins v. Cleco Power LLC*, 487 F.3d 309, 315 (5th Cir. 2007) - note that court did not require explicit comparator evidence of how long the average person can sit per day.
 - (4) *Schmidt v. Mercy Hosp. of Pittsburgh*, 2007 WL 2683826, at *2 (W.D. Pa. Sep. 7, 2007) (plaintiff not required to specifically set forth how her ability to breathe compared with the average person's).
- e. Mitigating measures
- (1) *Starr v. Hawaii*, 2007 WL 3254831, at *7 (D. Hawai'i Nov. 2, 2007) (severe insomnia prevented stage 3 sleep or significant REM sleep without a positive-airway-pressure device, but plaintiff did not tolerate it).
 - (2) *Lennox v. Wal-Mart Stores East, LP*, No. 06-877 (Magistrate's Report Feb. 29, 2008), *adopted*, 2008 WL 763740 (W.D. Pa. March 20, 2008) (evidence that plaintiff with heart disease smoked was irrelevant; "this line of argument appears most inappropriately directed at Plaintiff's moral character. For while it is certainly true that an individual suffering from coronary disabilities should not smoke cigarettes, it is also resoundingly self-evident that continued patterns of addiction do not belie disabilities.").
- f. Time of disability assessment
- (1) *Taylor v. Team Broadcast, LLC*, 2007 WL 1201640, at *3 (D.D.C. April 23, 2007) (although plaintiff did not know full extent of limitations from sleep apnea until after termination, it was employer's own actions that prevented resolution of plaintiff's diagnosis, because he was fired before he could fully discern the extent of his condition and any treatments or cures that might be available).
- g. Summary judgment standard - appeals court remanded because trial court mischaracterized the testimony of defense expert (essentially taking it in the light most favorable to the defense). *Singh v. George Washington University School of Medicine and Health Sciences*, 508 F.3d 1097, 1106-1108 (D.C. Cir. 2007) (ADA Title III case).
2. Substantially limited in working
- a. Insufficient evidence:

- (1) *Dovenmuehler v. St. Cloud Hosp.*, 509 F.3d 435, 440-441 (8th Cir. 2007) - plaintiff did not show substantial limitation in working because she was steadily employed as a nurse both before and after her firing; she was only precluded from a particular nursing job that had special patient concerns not present in most nursing jobs.
- (2) *Littleton v. Wal-Mart Stores, Inc.*, 231 Fed. Appx. 874, 877 (11th Cir. 2007) (unreported), *cert. denied*, 128 S. Ct. 302 (2007) - plaintiff failed to show he was substantially limited in working because he, his mother, and caseworker all testified that there were no jobs he could not perform despite his intellectual disability (mental retardation).

b. Sufficient evidence:

- (1) *Christensen v. Titan Distribution, Inc.*, 481 F.3d 1085, 1094 (8th Cir. 2007) (plaintiff could not engage in prolonged walking, standing more than two hours at a time, frequent bending or stooping, or jumping from heights over one foot; knee injury caused 35% impairment rating of his leg and 15% impairment of his body as a whole; plaintiff was not permitted to return to work for two or three months, and had to abide by doctor's restrictions concerning walking and bending knee; and plaintiff could only perform 50% of the jobs in the job market, and was prevented from performing jobs of "medium and above strength demands" that required lifting 50 pounds or more).
- (2) *Quick v. Albert Einstein Healthcare*, 2007 WL 3085868, at *13 (E.D. Pa. Oct. 23, 2007) (vocational expert supported plaintiff's claim even though plaintiff was not limited in the class of food service jobs that her position was a part of, and even though the vocational evaluation was done long after the date of discrimination).
- (3) *Lehman v. U.S. Steel Corp.*, 2007 WL 2728659, at *5 (W.D. Pa. Sep. 17, 2007) (focus is on what plaintiff is limited in doing, not all the things he can do; need not have medical records to prove disability).

C. "Record of" Disability

1. *Norden v. Samper*, 503 F. Supp. 2d 130, 152 (D.D.C. 2007) - employer knew plaintiff dengue fever in 2000, nearly died from the acute infection, and was on

full medical disability for over a year, during which her cognitive abilities were markedly impaired; she attempted to return to work in 2001, but it proved too difficult and she returned to disability status; she attempted another return to work in 2002, but once more the lingering effects of DHF caused her considerable pain and the employer again placed her on a year-long medical leave of absence; when the employer proposed to terminate her employment in November 2003, it cited her “medical limitations” as the exclusive reason; “Thus, it is beyond dispute that when Dr. Norden attempted to return to work a third time in 2003 she had a well-documented history of a major disability that substantially restricted her in the major life activities of learning and working, and that the Smithsonian had relied on her record of impairment in making several employment decisions. This is sufficient to render her disabled under the Rehabilitation Act.”

D. “Regarded As” Disability

1. Standard of proof - under the regarded-as prong of the ADA, disability is question of intent rarely susceptible to resolution at summary judgment. *Wysong v. Dow Chemical Co.*, 503 F.3d 441, 451-452 (6th Cir. 2007).
2. Sufficient evidence (non-working)
 - a. *Wysong v. Dow Chemical Co.*, 503 F.3d 441 (6th Cir. 2007):
 - (1) company doctor’s restriction on plaintiff’s lifting, pushing, pulling, or tugging more than five pounds indicated doctor regarded plaintiff as substantially limited in her ability to lift, despite argument that restrictions were temporary and done only to prevent injury. *Id.* at 452.
 - (2) although company doctor’s restrictions were for work only (as doctor had no authority to restrict plaintiff’s movement outside of the workplace), a jury could make the obvious inference that, based on the work restrictions, the doctor believed the plaintiff could not safely lift five pounds outside of work. *Id.* at 453.
 - b. *EEOC v. E.I. Du Pont de Nemours & Co.*, 480 F.3d 724, 729-730 (5th Cir. 2007) - employer believed plaintiff was incapable of walking and ordered that she not walk anywhere at the company site, suggesting it also regarded her as restricted her from walking anywhere.
 - c. *Scott v. BP Amoco Chemical Co.*, 2008 WL 819043, at *9-10 (S.D. Tex. March 25, 2008) - regarded as substantially limited in speaking and/or thinking.

- d. *Lennox v. Wal-Mart Stores East, LP*, No. 06-877 (Magistrate’s Report Feb. 29, 2008), *adopted*, 2008 WL 763740 (W.D. Pa. March 20, 2008) - failure to engage in flexible interactive process may support regarded-as claim.
 - e. *Serwatka v. Rockwell Automation, Inc.*, 2007 WL 2441565 (E.D. Wis. Aug. 23, 2007) - sufficient evidence employer regarded plaintiff as substantially limited in walking, based on perceived sedentary restriction and unwillingness to listen to doctor who said plaintiff had no such restriction. *See also Serwatka v. Rockwell Automation, Inc.*, 2007 WL 4305545 (E.D. Wis. Dec. 7, 2007) (similar).
 - f. *Hatzakos v. Acme American Refrigeration, Inc.*, 2007 WL 2020182, at *6 (E.D.N.Y. July 6, 2007) (supervisor testified that plaintiff’s behavior resembled that of his former business partner, who had also suffered from depression, in that he would occasionally seem to be “in his own world,” and would stand by himself, refusing to interact with his co-workers).
 - g. *Quitto v. Bay Colony Golf Club, Inc.*, 2007 WL 2002537, at *9 (M.D. Fla. July 5, 2007) (employer asked plaintiff to go home after seeing him walk with a cane, interpreted doctor’s note for light duty as stating that plaintiff was unable to stand or perform his job, and fired him; general manager had also “stated that an attempt should be made to accommodate Quitto, which a reasonable jury could find to mean that he regarded Quitto as disabled.”).
3. Sufficient evidence (working)
- a. *Wysong v. Dow Chemical Co.*, 503 F.3d 441, 452-453 (6th Cir. 2007) - evidence that defendant believed there was no job for plaintiff at the plant supports a perceived substantial limitation in working because it is an indication of employer’s perception about plaintiff’s suitability for the class of relevantly similar employment.
 - b. *Wysong v. Dow Chemical Co.*, 503 F.3d 441, 453 (6th Cir. 2007) - employer’s refusal to permit plaintiff to go back to work until she was completely off all pain medications, plus fact that employer did not offer plaintiff any other position at its Hanging Rock facility, allowed reasonable fact finder to conclude that employer perceived plaintiff as being substantially limited in working because of a perceived drug dependency.

- c. *Chalfant v. Titan Distribution, Inc.*, 475 F.3d 982, 989 (8th Cir. 2007), *cert. denied*, 128 S. Ct. 98 (2007) - employer said plaintiff could not pass the physical, even though evidence suggested his position did not require unique or strenuous lifting, and vocational expert testified that if employer believed plaintiff was unable to perform the duties of his job (which was classified as having light to medium strength demands), the plaintiff would have been prevented from performing 70% of jobs in the Dictionary of Occupational Titles.
- d. *Haynes v. City of Montgomery, Ala.*, 2008 WL 695023, at *4 (M.D. Ala. March 12, 2008) - based on belief that medication side effects precluded hazardous jobs.
- e. *Motsay v. Pennsylvania American Water Co.*, 2008 WL 376298, at *4 n.3 (M.D. Pa. Feb. 11, 2008) - employer's fear that plaintiff might have heart attack while on light duty supported regarded-as claim.
- f. *Johnston v. Morton Plant Mease Healthcare, Inc.*, 2008 WL 191026, at *3 (M.D. Fla. Jan. 22, 2008) - evidence that employer withdrew long-term accommodation.
- g. *Johnston v. Mid-Michigan Medical Center-Midland*, 2008 WL 82227, at *8-9 (E.D. Mich. Jan. 8, 2008) - evidence that employer regarded plaintiff's diabetes as substantially limiting because employer linked performance problems and dependability issues to the disease without seeking any medical input; also, pretext evidence existed in the form of documents describing employer's fears, even though employer later indicated that such fears did not factor into its decisions.
- h. *DeAngelo v. Entenmann's, Inc.*, 2007 WL 4378159, at *2 (E.D.N.Y. Dec. 12, 2007) - evidence that employer believed plaintiff's Hepatitis C prevented any kind of work at the plant while he was still sick and appeared weak and tired.
- i. *Conto v. Norfolk Southern Corp.*, 2007 WL 4370906, at *13-15 (W.D. Pa. Dec. 11, 2007):
 - (1) plaintiff need not show that employer knew or believed that the group of jobs from which it viewed the plaintiff as restricted constituted a class or broad range of jobs;
 - (2) narcotics ban policy could be seen as reflecting belief that plaintiff was precluded from a broad range or class of jobs.

- j. *Quick v. Albert Einstein Healthcare*, 2007 WL 3085868, at *14 (E.D. Pa. Oct. 23, 2007) - testimony indicated that employer was aware that plaintiff had some physical impairment regardless of her full-duty status. and that this awareness affected their employment decisions.

- k. *Wilson v. Alamosa School Dist.*, 2007 WL 2381408 (D. Colo. Aug. 17, 2007)
 - (1) reasonable basis for a jury to conclude that supervisor's statements went far beyond generalized, humanitarian statements of concern about plaintiff's depression, *id.* at *5;
 - (2) supervisor encouraged plaintiff to resign and to take extended medical leave, indicating that he considered her incapable of working at all, and he told her that he would prevent her from seeking jobs in other school districts, *id.* at *6;
 - (3) supervisor's sudden belief that he could no longer trust plaintiff's decisionmaking, adopted only after learning of her anxiety and treatment, supported inference that he viewed her as incapable of working a broad range of jobs involving responsibility and decisionmaking, *id.* at *6;
 - (4) in view of the extreme restrictions employer placed on plaintiff, including prohibiting her from finishing the semester or even appearing at school, supported belief that it thought she was incapable of performing any work at the school, *id.* at *6.

- l. *Russo v. Sysco Food Services of Albany, L.L.C.*, 488 F. Supp. 2d 228, 235 (N.D.N.Y. 2007) (positions requiring operation of all vehicles and heavy equipment constitutes a class of jobs; company physician concluded that plaintiff's epilepsy precluded him from holding CDL, operating forklift, or driving company vehicle until he could show that he was on medication and seizure-free for two years; this indicated that employer regarded plaintiff as unable to work in any job requiring the operation of trucks, forklifts, or any other company vehicle).

- m. *Hicks v. Tech Industries*, 512 F. Supp. 2d 338, 355-356 (W.D. Pa. 2007):
 - (1) employer admitted it fired plaintiff for absences, and many of those were disability-related; moreover, although plaintiff had been warned about absenteeism and tardiness in the past, employer did not discharge him until after absences and tardies

related to cancer; there was also documentary evidence expressing concern about plaintiff's health-related absences;

- (2) "reasonable jury could conclude that Defendant regarded him as having an impairment that foreclosed his ability to regularly and reliably attend workCa restriction that would preclude success in almost any position or class of jobs."
 - (3) although employer argued it could not have regarded plaintiff as unable to work because it reinstated him without restrictions following his return from cancer treatment, and he remained employed until his discharge over ten months later, this was not dispositive, because employer's reaction to leave may have been cumulative.
- n. *See also McNa v. Communications Inter-Local Agency*, 2008 WL 686924, at *2 (M.D. Fla. March 12, 2008) (plaintiff sufficiently pled she had regarded-as disability by alleging that her supervisors told her to "go work at Wal-Mart with the rest of the retards," implying that she was only suited for work that could be performed by a person with mental retardation; thus she was perceived as having a mental impairment that substantially limited ability to work).
4. Insufficient evidence (working)
- a. *Christensen v. Titan Distribution, Inc.*, 481 F.3d 1085, 1093-1094 (8th Cir. 2007) (employer's belief that plaintiff could not work as third shift supervisor, together with fact that supervisory position required that person to perform all the duties of the workers who reported to him, did not necessarily indicate a belief that plaintiff was unable to perform all of the duties of all those positions).
 - b. *Ruiz Rivera v. Pfizer Pharmaceuticals, LLC*, ___ F.3d ___, 2008 WL 802730, at *6-7 (1st Cir. March 27, 2008) (fact that employer implemented doctor's restrictions is not by itself enough to establish a regarded-as claim, nor does the failure to provide an accommodation prove regarded as).
5. "100% healed" policy as evidence - *Wysong v. Dow Chemical Co.*, 503 F.3d 441, 453 (6th Cir. 2007) (employer's refusal to permit plaintiff to go back to work until she was completely off all pain medications, plu fact that employer did not offer plaintiff any other position at its Hanging Rock facility, allowed reasonable fact finder to conclude that employer perceived plaintiff as being substantially limited in working because of a perceived drug dependency).

- E. Current Drug Use - Illegal behavior, even if “consistent with” a claimed disability, is not protected by the ADA; “individual with a disability” does not include an individual who is currently engaging in the illegal use of drugs. *Dovenmuehler v. St. Cloud Hosp.*, 509 F.3d 435, 440 (8th Cir. 2007).

V. Qualified Individuals

A. Essential Job Functions

1. Definition - essential functions are basic job duties (as opposed to qualification standards, which are personal and professional attributes that may include physical, medical, and safety requirements). *Bates v. United Parcel Service, Inc.*, 511 F.3d 974, 990 (9th Cir. 2007) (en banc).
2. Burden of proof
 - a. If employer asserts plaintiff is *not* qualified, it bears the burden of proving what the essential job functions are. *Bates v. United Parcel Service, Inc.*, 511 F.3d 974, 991 (9th Cir. 2007) (en banc).
 - b. Employer’s view of essential functions is entitled to “substantial weight,” but it is not conclusive. *Holly v. Clairson Industries, LLC*, 492 F.3d 1247, 1258 (11th Cir. 2007); *Lennex v. Wal-Mart Stores East, LP*, No. 06-877 (Magistrate’s Report Feb. 29, 2008), *adopted*, 2008 WL 763740 (W.D. Pa. March 20, 2008) (essential functions are not whatever the employer says they are).
 - c. Proving ability to perform essential functions
 - (1) Fact that plaintiff had been satisfactorily performing them. *Wishkin v. Potter*, 476 F.3d 180, 187 (3d Cir. 2007) (Rehabilitation Act) (plaintiff performed functions for many years, and there was no evidence of recent changes to health status or ability to work); *Chalfant v. Titan Distribution, Inc.*, 475 F.3d 982, 990 (8th Cir. 2007), *cert. denied*, 128 S. Ct. 98 (2007) (performed duties briefly, and in subsequent employment); *Leuzinger v. County of Lake*, 2008 WL 323870, at *4 (N.D. Cal. Feb. 5, 2008) (sufficient evidence plaintiff qualified because she did job for nine months without problem, and got good evaluations and reviews from co-workers and supervisors during that time); *Lennex v. Wal-Mart Stores East, LP*, No. 06-877 (Magistrate’s Report Feb. 29, 2008), *adopted*, 2008 WL 763740 (W.D. Pa. March 20, 2008) (fact that employer wrongly claimed functions were essential, and fact that plaintiff had successfully done the job for several months,

showed pretext); *Johnston v. Mid-Michigan Medical Center-Midland*, 2008 WL 82227, at *9 (E.D. Mich. Jan. 8, 2008) (fact that plaintiff did job for 16 years); *Leuzinger v. County of Lake*, 2007 WL 1280582, at *6 (N.D. Cal. April 30, 2007) (“fact that she did the job for nine months without problem belies any contention that she is not able to do the job. Such an empirical fact would seem to seriously undermine the County’s contrary position.”).

- (2) Other ways:
- (a) *Leuzinger v. County of Lake*, 2008 WL 323870 (N.D. Cal. Feb. 5, 2008):
 - i) functions not outside plaintiff’s medical restrictions because those limitations were equivocal, more in the nature of suggestions, and the doctors’ testimony supported plaintiff. *Id.* at *6. *See also Leuzinger v. County of Lake*, 2007 WL 1280582 (N.D. Cal. April 30, 2007).
 - ii) employer’s claim that on two occasions plaintiff’s wrist injury interfered with a takedown was a ‘shifting explanation,’ created after the fact, and inconsistent with the reports from the time. *Id.* at *8.
 - (b) *Motsay v. Pennsylvania American Water Co.*, 2008 WL 376298, at *3 and 5 (M.D. Pa. Feb. 11, 2008) (not true that plaintiff could not wear safety equip, but employer rejected plaintiff’s offer to get medical clarification).
 - (c) *Lentos v. Hawkins Const. Co.*, 2007 WL 3376760, at *6 (D. Neb. Nov. 7, 2007) (fact that plaintiff passed the post-offer physical exam supported finding that he could perform essential job functions).
 - (d) *Norden v. Samper*, 503 F. Supp. 2d 130, 153 (D.D.C. 2007)
 - i) no dispute that, before contracting dengue fever, plaintiff received outstanding performance evaluations and was well-regarded within her department;

- ii) afterwards, her doctors informed the employer that she could return to full-time work with accommodations, and there is nothing contrary in the record because the employer never tested her ability to return to work;
 - iii) employer's only argument was that plaintiff was not qualified because she rejected the offered accommodations, but those were "patently unreasonable" and plaintiff was well within her rights to reject them.
- (e) *Miller v. Pilgrim's Pride Corp.*, 2007 WL 2007548, at *3-4 (W.D. Va. July 6, 2007) (fact issue because quality of plaintiff's performance was disputed).
- (f) *Stubbs v. Regents of University of California*, 2007 WL 1532148, at *10 (E.D. Cal. May 25, 2007)
 - i) "if the interpersonal problems experienced by plaintiff were a result of ostracism or shunning, it would be unfair to deem him unqualified on this basis."
 - ii) there was evidence that alleged insubordination was the result of contradictory instructions from supervisor (which had the potential to unravel the training conducted by others), and lack of proper training; there was evidence that plaintiff's supervisor was impatient, had poor personal skills, and was not a good person to train new employees.
- (g) *Russo v. Sysco Food Services of Albany, L.L.C.*, 488 F. Supp. 2d 228, 237 (N.D.N.Y. 2007) (fact issue whether plaintiff could operate pallet jack and forklift, based on conflicting testimony between his neurologist and employer's doctor; EEOC found opinion of employer's doctor arbitrary and capricious).
- (h) *Leuzinger v. County of Lake*, 2007 WL 1280582, at *6 (N.D. Cal. April 30, 2007) (fact that plaintiff's doctor suggested that she was limited to lifting no more than

seven pounds with her left wrist did not mean that she could not lift up to fifty pounds using both hands).

- (3) Plaintiff given benefit of the doubt if employer refuses to try
 - (a) *Hohn v. BNSF Ry. Co.*, 2007 WL 2822754, at *2 and 7 (D. Neb. Sep. 26, 2007) (fact issue on whether plaintiff could perform essential job functions; employer rejected a field test by vocational rehabilitation agency).
 - (b) *Norden v. Samper*, 503 F. Supp. 2d 130, 153 (D.D.C. 2007) (plaintiff's doctors informed employer that she could return to full-time work with accommodations, and A[t]here is nothing contrary in the record because the Smithsonian never tested her ability to return to work.”).
 - (c) *Demshick v. Delaware Valley Convalescent Homes, Inc.*, 2007 WL 1244440, at *11 (E.D. Pa. April 26, 2007) (“While an employer is not liable for a failure to accommodate if no reasonable accommodation is possible, ‘the employer will almost always have to participate in the interactive process to some extent before it will be clear that it is impossible to find an accommodation that would allow the employee to perform the essential functions of a job.’”).
 - (d) *Taylor v. Team Broadcast, LLC*, 2007 WL 1201640, at *3 (D.D.C. April 23, 2007) (although plaintiff did not know full extent of limitations from sleep apnea until after termination, it was employer’s own actions that prevented resolution of plaintiff’s diagnosis, because he was fired before he could fully discern the extent of his condition and any treatments or cures that might be available; question whether plaintiff could have been reasonably accommodated remained open).
- (4) Time of assessment important. *Moore v. Epperson Underwriting Co.*, 2007 WL 2332755, at *12 (D. Minn. Aug. 15, 2007) (under state law following ADA precedent, fact that plaintiff testified two years later that he could not drive did not prove that he could not do so at the time of the discrimination).
- (5) Fact that plaintiff sought an accommodation did not mean that she could not do essential job functions without an

accommodation. *Leuzinger v. County of Lake*, 2007 WL 1280582, at *8 (N.D. Cal. April 30, 2007) (assuming it were true that employer could not pair plaintiff with an experienced correctional officer when assigned to the graveyard shift, “[t]he problem with this is that merely because the County could not accommodate a particular request, it did not follow that Leuzinger could not perform the essential functions of her position. It is not clear that Leuzinger ever took the stance that if her request was not granted, she would refuse to continue in her job. It appears that the County jumped from the mere fact of the request being made to the conclusion that Leuzinger was disabled and this disability was one that could not be accommodated.”).

3. Sufficient evidence that these were NOT essential job functions:
 - a. DOT standards were not essential job functions because employer permitted exceptions to them for others. *Bates v. United Parcel Service, Inc.*, 511 F.3d 974, 991 (9th Cir. 2007) (en banc).
 - b. Ability to pass a certain hearing-acuity test is not a job function but rather a qualification standards based on personal attributes. *Bates v. United Parcel Service, Inc.*, 511 F.3d 974, 992 (9th Cir. 2007) (en banc).
 - c. Evacuating chemical refinery plant was not essential job function. *EEOC v. E.I. Du Pont de Nemours & Co.*, 480 F.3d 724, 730-731 (5th Cir. 2007). [Note that the trial court opinion on summary judgment contains more of the facts on point. *See EEOC v. E.I. DuPont de Nemours*, 347 F. Supp. 2d 284, 296-297 (E.D. La. 2004) (evacuation not listed in job description; is rarely, if ever, required; the position does not exist to perform the function; plaintiff was not hired for expertise in it, nor is it highly specialized; and the responsibility of evacuating can be distributed to other employees).]
 - d. Claimed productivity standards were not were not essential job functions - they were not referenced in any writing, were not adopted until after plaintiff’s termination, and there was no evidence that any employee was ever evaluated in comparison to them. *Matos v. MTA Bridges and Tunnels*, 2008 WL 858995, at *6-7 (E.D.N.Y. March 31, 2008).
 - e. Continuous presence on assembly line. *Wirtz v. Ford Motor Co.*, 2008 WL 565260, at *3 (E.D. Mich. Feb. 28, 2008).

- f. Reading handwritten material and visually inspecting freight. *Tidwell v. Exel Global Logistics, Inc.*, 2008 WL 360999, at *2 (N.D. Tex. Feb. 8, 2008).
- g. Standing. *EEOC v. Sharp Mfg. Co. of America*, 534 F. Supp. 2d 797, 807 (W.D. Tenn. 2008) (not essential because plaintiff did the job seated for a long time, and rotation could have been limited to seated positions).
- h. Performing takedowns. *Johnston v. Morton Plant Mease Healthcare, Inc.*, 2008 WL 191026, at *3 (M.D. Fla. Jan. 22, 2008) (fact that plaintiff worked for over four years without performing function).
- i. Routinely working overtime. *Marziale v. BP Products North America, Inc.*, 2007 WL 4224367, at *9-10 (S.D. Ohio Nov. 27, 2007) (although managers work forty-eight hours per week or more on some occasions, that did not mean that working forty-eight hours was essential).
- j. Firefighting. *Chesak v. Orange County Government*, 2007 WL 4162942, at *3 (M.D. Fla. Nov. 20, 2007) (sufficient evidence that firefighting duties were not essential functions of lieutenant position based on the lack of mention in the job description, and the fact that another lieutenant had not been required to perform such duties in the five years he held the job).
- k. Driving trucks. *Russo v. Sysco Food Services of Albany, L.L.C.*, 488 F. Supp. 2d 228, 236-237 (N.D.N.Y. 2007) (because job description listed truck-driving as “principal accountability,” but also stated that it was only an occasional duty, question of fact existed as to whether truck-driving truly is an essential function of the transportation supervisor position).
- l. Lifting up to 50 pounds. *Leuzinger v. County of Lake*, 2007 WL 1280582, at *6 (N.D. Cal. April 30, 2007) (ability to lift up to fifty pounds listed as a “typical” function on job description, “but ‘typical’ physical requirement is not quite the same as a “fundamental job dut[y] of the employment position the individual with a disability holds or desires.”).
- m. *See also Haynes v. City of Montgomery, Ala.*, 2008 WL 695023, at *5 (M.D. Ala. March 12, 2008) (finding pretextual a requirement that plaintiff meet certain industry medical standards adopted by NFPA that were not required by federal law).

4. Punctuality as an essential function
 - a. *Holly v. Clairson Industries, LLC*, 492 F.3d 1247, 1257-1260 (11th Cir. 2007) - fact issue whether strict punctuality was an essential job function because of the nature of the job, the lack of hard evidence, and the fact that the employer had accommodated brief instances of tardiness by allowing the plaintiff to make up any lost time on the same business day.
 - b. Note that even if punctuality *is* an essential job function, it may be easily accommodated. *See EEOC v. Convergys Customer Management Group, Inc.*, 491 F.3d 790, 796 (8th Cir. 2007) (giving additional 15 minutes for lunch break, or assigning parking place and workspace).
5. Attendance as an essential function
 - a. *Rios Jimenez v. Principi*, 520 F.3d 31, 42 (1st Cir. 2008) (“At the risk of stating the obvious, attendance is an essential function of any job.”)
 - b. *Rask v. Fresenius Medical Care North America*, 509 F.3d 466, 469-470 (8th Cir. Dec. 6, 2007)
 - (1) attendance as an essential function - “regular and reliable attendance is a necessary element of most jobs,” and was so here because, although there was evidence that employer had sufficient staff to cover, plaintiff failed to show that the employer would be able to do so on short notice, and the plaintiff did not have the type of job that could be performed from another site or put off until another time (she cared for patients in need of dialysis).
 - (2) plaintiff “admitted that she was unable to come to work on a regular and reliable basis when she told her supervisors, “I’m having problems with my medication and . . . I might miss a day here and there because of it;” she therefore failed to show that she was qualified to perform the essential functions of her job without an accommodation.
 - c. *Brannon v. Luco Mop Co.*, ___ F.3d ___, 2008 WL 878289, at *4 (8th Cir. April 3, 2008) (employer not required to grant third extension of return-to-work date because by that point leave became indefinite)

B. Judicial Estoppel

1. Most cases are about Social Security or other disability benefits, but compare *Wishkin v. Potter*, 476 F.3d 180, 186 (3d Cir. 2007) (Rehabilitation Act) (although plaintiff procured letter from his physician stating he was unable to continue working, there was evidence it was produced under duress and as a result of a calculated attempt to force similarly situated employees with disabilities to take disability retirement); *Quick v. Albert Einstein Healthcare*, 2007 WL 3085868, at *8-10 (E.D. Pa. Oct. 23, 2007) (refusing to bar plaintiff's ADA claim for her failure to list it in bankruptcy action).
2. Rejecting estoppel:
 - a. *Smyth v. Wawa, Inc.*, 2008 WL 741036, at *10 (E.D. Pa. March 19, 2008) (sufficient explanation based on differing time periods; jury could find that statements made in SSDI application almost a year after termination, after she had sustained additional knee injuries, did not necessarily contradict allegation that plaintiff was able to perform her work with reasonable accommodation at the time of her termination).
 - b. *EEOC v. Sharp Mfg. Co. of America*, 534 F. Supp. 2d 797, 803-804 (W.D. Tenn. 2008) (sufficient explanation because SSDI application was made several months later, after condition worsened due to lack of accommodation).
 - c. *Quick v. Albert Einstein Healthcare*, 2007 WL 3085868, at *8-10 (E.D. Pa. Oct. 23, 2007)
 - (1) rejecting judicial estoppel based on SSDI application because statements were "lacking the qualifier of reasonable accommodation. They therefore should be read as 'I am unable to work *without reasonable accommodation* to pay my bills' and 'I became unable to work *without reasonable accommodation* because of my disabling condition.' Read as such, these statements are not irreconcilably inconsistent with plaintiff's present ADA claims."
 - (2) Factual statement about the inability to do functions of one job will not estop claim based on a separate job.
 - (3) Refusing to bar plaintiff's ADA claim for her failure to list it in bankruptcy action.
 - d. *Quitto v. Bay Colony Golf Club, Inc.*, 2007 WL 2002537, at *7 and n.4 (M.D. Fla. July 5, 2007) (plaintiff sufficiently explained that conflict in unemployment application was based on his fear of losing

employment; with regard to his worker's compensation application, those statements referred to a different time period).

- e. *Leuzinger v. County of Lake*, 2007 WL 1280582, at *4-5 (N.D. Cal. April 30, 2007) (plaintiff explained that she applied for disability retirement because she needed income, and knew she could withdraw her application if she employer allowed her back to work; application stated that she had some trouble performing take-downs, but she also said she could do the job but was fired anyway; statement that she had to "limit the amount of time I have to restrain a juvenile," is not the same as flat declaration that she could not do it; reasonable for plaintiff to apply for disability benefits "given that at the time it was the County's position that she was disabled and would not be allowed to return to her former employment. There is nothing in Leuzinger's statements suggesting that she is attempting to work a fraud upon the Court. Therefore it is more appropriate to engage in a more traditional summary judgment analysis rather than invoke an equitable doctrine to preclude Leuzinger from asserting her claim.").
3. Estoppel limiting remedies - *Boice v. Southeastern Pennsylvania Transp. Authority*, 2007 WL 2916188, at *16 (E.D. Pa. Oct. 5, 2007) (plaintiff's failure to explain contradictions estopped him from asserting he was qualified to perform the functions of the job during the period he received disability benefits, and court would not award reinstatement or lost wages after discharge).
4. Motion in limine - *Rogers v. Wal-Mart Stores East, L.P.*, 2008 WL 656078 (E.D. Tenn. March 6, 2008) (court denied plaintiff's motion to exclude judicial estoppel facts, but would instruct jury that with regard to plaintiff's application for SSDI benefits and workers' compensation, it is possible for a plaintiff to qualify for those programs and still be protected under the ADA; and that even if plaintiff's claims did conflict, the jury may, if convinced by the evidence, find that plaintiff's other claims are erroneous and find for plaintiff in ADA action).

VI. Causation

A. Causation standard

1. Proof of "sole cause" not required in ' 501 or ADA cases. *Pinkerton v. USDOE*, 508 F.3d 207, 210-214 (5th Cir. 2007) (sole cause not required for ADA or ' 501 claims, but it *is* required in § 504 cases in this circuit); *Davenport v. State of Idaho Department of Environmental Quality*, 2007 WL 2021972 (D. Idaho July 11, 2007) (ADA does not require proof of sole cause). *See also Gambini v. Total Renal Care, Inc.*, 486 F.3d 1087, 1094 (9th Cir. 2007) ("a decision motivated even in part by the disability is tainted and entitles

a jury to find that an employer violated antidiscrimination laws;” failure to instruct jury accordingly “plainly requires reversal”); *Stubbs v. Regents of University of California*, 2007 WL 1532148 (E.D. Cal. May 25, 2007) (discriminatory animus need not be the only reason for the decision; it need only be “a motivating factor.”).

2. Under past precedent, ADA plaintiffs in the 6th Circuit must prove “sole cause,” in contrast to the “motivating factor” standard used in almost every other circuit. *Macy v. Hopkins County School Bd. of Educ.*, 484 F.3d 357, 363 and n.2 (6th Cir. 2007), *cert. denied*, 128 S. Ct. 201 (2007).

B. Disability-related misconduct

1. *Dovenmuehler v. St. Cloud Hosp.*, 509 F.3d 435, 440 (8th Cir. 2007):
 - a. Illegal behavior, even if “consistent with” a claimed disability, is not protected by the ADA; “individual with a disability” does not include a person currently engaging in the illegal use of drugs.
 - b. Plaintiff admitted that she diverted Vicodin for her own use; the ADA does not protect her from the consequences of that conduct; defendant’s actions stemmed directly from her unprotected, illegal conduct, not from status as a person with a chemical dependency.
2. *Gambini v. Total Renal Care, Inc.*, 486 F.3d 1087 (9th Cir. 2007)
 - a. Conduct resulting from a disability is part of the disability and not a separate basis for termination. *Id.* at 1093.
 - b. Court’s decision “in no way provides employees with *absolute* protection from adverse employment actions based on disability-related conduct. . . . Even if a plaintiff were to establish that she’s qualified, under the ADA the defendant would still be entitled to raise a ‘business necessity’ or ‘direct threat’ defense against the discrimination claim. Defendant may also raise the defense that the proposed reasonable accommodation poses an undue burden. Here [the employer] would be able to raise any analogous defenses available to it under Washington Law. Our holding is thus far less controversial and sweeping than [the employer] and the amici proclaim.” (citations omitted). *Id.* at 1090.
3. *Macy v. Hopkins County School Bd. of Educ.*, 484 F.3d 357, 366 (6th Cir.), *cert. denied*, 128 S. Ct. 201 (2007) - “[T]his court has repeatedly stated that an employer may legitimately fire an employee for conduct, even conduct that occurs as a result of a disability, if that conduct disqualifies the employee from

his or her job. Accordingly, the Board has offered a legitimate, nondiscriminatory reason for firing [plaintiff].”

4. *EEOC v. Centura Health Corp.*, 2007 WL 2788836, at *5 (D. Colo. Sep. 21, 2007)
 - (1) jury could find that five of eight reasons for plaintiff’s dismissal would be or could be caused by impaired hearing, and may not have occurred if proper hearing aids or accommodations were made; employer knew of impairment and that it might explain plaintiff’s problems
 - (2) “ADA protects against a termination decision based on problems that arise from a lack of accommodation for a disability.”
 - (3) fact issue as to whether employer knew about the disability’s impact on plaintiff’s work and whether employer refused accommodation.
5. *Hatzakos v. Acme American Refrigeration, Inc.*, 2007 WL 2020182, at *8 (E.D.N.Y. July 6, 2007) (“plaintiff may establish that the employment decision was motivated by his disability by ‘demonstrating that the disability caused conduct that, in turn, motivated the employer’s decision.’ Thus, if the jury believes plaintiff’s assertion that his absences from work were due to his inability to get out of bed and face the prospect of interacting with others, it could reasonably find causation because his depression caused conduct that, in turn, motivated the employer’s decision.”) (citations omitted).

C. Direct evidence

1. *Demshick v. Delaware Valley Convalescent Homes, Inc.*, 2007 WL 1244440, at *8-9 (E.D. Pa. April 26, 2007) (case presented direct evidence, not mere stray remarks; when plaintiff pointed out that she had been scheduled to work on the second floor, outside of her medical restrictions, her supervisor told her “Well, it doesn’t matter because we don’t have to honor your disability anyways [because] it’s not in your application.” supervisor also told plaintiff she “had researched Meniere’s disease and learned the Demshick could fly in a plane and scuba dive despite her diagnosis.” “Parell’s statements are not stray remarks. They are direct evidence of discriminatory animus from which a jury could find that disability discrimination was more likely than not a motivating factor in Silver Lake Center’s decision to terminate Demshick. Parell was a decision maker with authority to terminate employees and ultimately did terminate Demshick. Moreover, Parell’s statements are unambiguous. Parell references Demshick’s disability, expresses doubt that this

is a valid disability, and expressly states that Silver Lake Center will not accommodate this disability. This is sufficient evidence for Demshick to survive summary judgment.”).

D. Pretext analysis

1. Prima facie case
 - a. *Miller v. Pilgrim’s Pride Corp.*, 2007 WL 2007548, at *6 (W.D. Va. July 6, 2007) (dispute over quality of plaintiff’s performance creates fact issue on prima facie case).
 - b. *Stubbs v. Regents of University of California*, 2007 WL 1532148, at *11 (E.D. Cal. May 25, 2007) (employer telling plaintiff that it is letting him go because it got tired of him, and having to tell him what to do over and over again, “is sufficient, at this initial stage of the analysis, to satisfy plaintiff’s burden of demonstrating a nexus between plaintiff’s disability and his subsequent termination”).
2. Legitimate nondiscriminatory reasons - *Macy v. Hopkins County School Bd. of Educ.*, 484 F.3d 357, 366 (6th Cir.), *cert. denied*, 128 S. Ct. 201 (2007) (“[T]his court has repeatedly stated that an employer may legitimately fire an employee for conduct, even conduct that occurs as a result of a disability, if that conduct disqualifies the employee from his or her job. Accordingly, the Board has offered a legitimate, nondiscriminatory reason for firing [plaintiff].”).
3. Proof of pretext
 - a. *Macy v. Hopkins County School Bd. of Educ.*, 484 F.3d 357 (6th Cir.), *cert. denied*, 128 S. Ct. 201 (2007):
 - (1) Plaintiff may prove pretext by showing that the reason had no basis in fact; the reason did not actually motivate action; or the reason was insufficient to motivate the action. *Id.* at 366.
 - (2) Plaintiff argued all three grounds, but the court found evidence insufficient to survive summary judgment. *Id.*
 - (3) Although plaintiff’s testimony that the incidents did not occur might normally show pretext, issue preclusion foreclosed such testimony here because earlier state court proceedings determined they had occurred. *Id.* at 366-368.
 - (4) Plaintiff was not fired on the basis of a collection of incidents newly brought to her attention and for which she had never

been disciplinedCa situation that might very well show pretextCbut instead was fired on the basis of a significant incident and a resulting investigation showing the incident was not an isolated occurrence. *Id.* at 368-369.

- (5) Showing that a proffered reason was insufficient to motivate the decision ordinarily consists of evidence that other employees outside the protected class were not fired even though they engaged in substantially similar conduct; this does not require showing identical conduct, but merely conduct of “comparable seriousness;” although there was evidence here that the misconduct of another (who was not fired) was “similar in many relevant respects,” there was no evidence that the other teacher had made her threatening comments to, or in front of, students. *Id.* at 369-371.
- b. *Wishkin v. Potter*, 476 F.3d 180, 187 (3d Cir. 2007) (Rehabilitation Act) - fact that supervisor required fitness for duty examinations of all employees with disabilities, and routinely warned them regarding their job status, supported contention that the adverse action was motivated by discrimination.
 - c. *Chalfant v. Titan Distribution, Inc.*, 475 F.3d 982, 991 (8th Cir.), *cert. denied*, 128 S. Ct. 98 (2007) - although employer’s doctor actually passed the plaintiff, employer told plaintiff he could not work because he failed the physical exam, providing sufficient evidence that decision not to hire plaintiff was discriminatory.
 - d. *Scott v. BP Amoco Chemical Co.*, 2008 WL 819043, at *11 (S.D. Tex. March 25, 2008) (favorable supervisor testified that final incident did not really violate company policy; even if it did, supervisor also indicated that decisionmaker had obvious bias against plaintiff because of his speech impairment).
 - e. *Stodola v. Finley & Co., Inc.*, 2008 WL 835709 (N.D. Ind. March 24, 2008)
 - (1) shifting explanations, *id.* at *12;
 - (2) suspicious timing - although employer previously issued warnings to plaintiff, it was only after charge was filed that employer found it necessary to take action, which was substantial. *Id.* at *13.

- f. *Lennex v. Wal-Mart Stores East, LP*, No. 06-877 (Magistrate's Report Feb. 29, 2008), *adopted*, 2008 WL 763740 (W.D. Pa. March 20, 2008) - pretext shown by claim that functions were essential to the job when they were not, failure to accommodate, and fact that plaintiff had successfully done the job for several months).
- g. *Haynes v. City of Montgomery, Ala.*, 2008 WL 695023, at *5 (M.D. Ala. March 12, 2008) (NFPA standards were not a federal requirement).
- h. *Tidwell v. Exel Global Logistics, Inc.*, 2008 WL 360999, at *1 (N.D. Tex. Feb. 8, 2008) (RIF may not be defense if plaintiff was not really in the job position that was eliminated).
- i. *Gross v. General Motors Corp.*, 533 F. Supp. 2d 1128, 1136 (D. Kan. 2008) (pretext in retaliation claim shown by evidence that employer's asserted nondiscriminatory reason, failing to return by RTW date, was untrue because employer misstated that date).
- j. *Soto v. Casiano Communications, Inc.*, 2008 WL 312682, at *5 (D.P.R. Feb. 1, 2008) (employer never confronted plaintiff with evidence of supposed performance problems).
- k. *Conto v. Norfolk Southern Corp.*, 2007 WL 4370906, at *16-18 (W.D. Pa. Dec. 11, 2007) (shifting explanations; at trial employer claimed plaintiff fired for lying on medical history after conditional job offer).
- l. *Lien v. Kwik Trip, Inc.*, 2007 WL 4820967, at *5 (W.D. Wis. Nov. 29, 2007) (pretext evidence included fact that performance evaluations changed with new supervisor, disparate treatment in discipline, comments about disability, and employer's desire that employees have fewer breaks than plaintiff's doctor recommended).
- m. *Lentos v. Hawkins Const. Co.*, 2007 WL 3376760, at *11 (D. Neb. Nov. 7, 2007) (supervisor's statement that plaintiff was fired because of past medical record and because of disability was sufficient to suggest that plaintiff's lying on medical form was pretextual).
- n. *Starr v. Hawaii*, 2007 WL 3254831, at *8-9 (D. Hawai'i Nov. 2, 2007) (pretext evidence based on admissions that supervisor thought accommodations given plaintiff were unfair to the employer).
- o. *Wright v. Cor-Rite, Inc.*, 2007 WL 2907947, at *4 (M.D. Pa. Oct. 2, 2007) (evidence that RIF was pretext included employer's admission that it felt plaintiff with ataxia could not get around well enough, and

because of subsequent newspaper ad mentioning quickness requirement for the job).

- p. *EEOC v. Centura Health Corp.*, 2007 WL 2788836, at *5 (D. Colo. Sep. 21, 2007)
 - (1) Jury could find that most of plaintiff's performance problems would be or could be caused by known hearing impairment, and may not have occurred with proper hearing aids or if accommodations were made.
 - (2) "ADA protects against a termination decision based on problems that arise from a lack of accommodation for a disability."
 - (3) fact issue as to whether employer knew about the disability's impact on plaintiff's work and whether employer refused accommodation.
- q. *Schultz v. University of Wisconsin Hospitals and Clinics Authority*, 513 F. Supp. 2d 1023, 1036 (W.D. Wis. 2007) (pretext shown in failure-to-promote case because employer incorrectly wrote down plaintiff's interview answers).
- r. *Serwatka v. Rockwell Automation, Inc.*, 2007 WL 2441565, at *4-5 (E.D. Wis. Aug. 23, 2007) (economic downturn did not occur until after firing, and only in one product line; employer continued to assert that plaintiff could only work sedentary positions despite contrary medical evidence to contrary, which employer refused to discuss with doctor; fact that employer never informed plaintiff that it was conducting a job analysis, and never sought to involve her in it, raises some doubt about its purpose and its thoroughness; "odd" that author of report concluded that plaintiff's medical restrictions precluded her from any manufacturing position she had done for many years; employer emails predating internal analysis referred to likelihood that plaintiff would not remain with the company and the need to document the unavailability of alternative positions available to her).
- s. *Graci v. Independent Health Ass'n, Inc.*, 2007 WL 2403723, at *6-7 (W.D.N.Y. Aug. 20, 2007) (disparate treatment and employer's misapplication of its "no fault" six-months-and-you're-out leave policy).
- t. *Moore v. Epperson Underwriting Co.*, 2007 WL 2332755, at *13 (D. Minn. Aug. 15, 2007) (under state law following ADA precedent,

pretext shown by at least two occasions when supervisor told plaintiff that he would need to choose between keeping his job and missing work for medical appointments, and termination soon after returning from third leave of absence; as to allegation plaintiff was fired because of his complaints about having to travel, plaintiff disputes much of that conversation, and supervisor could not recall another trainee who had been terminated for raising travel concerns; regarding plaintiff's failure to follow employer's procedures for returning to work from medical treatment, there is no evidence that he was counseled about it the first time, and he submitted the necessary paperwork the second time; jury could find that plaintiff's alleged improper expense reports were insignificant issues because plaintiff disputes he was ever confronted about it, or even knew about it, until after firing).

u. *Tomao v. Abbott Laboratories, Inc.*, 2007 WL 2225905, at *9-10 (N.D. Ill. July 31, 2007):

- (1) factual dispute as to real reason for failure to promote plaintiff, based on interview which focused not on her experience or resumé, but on her physical abilities;
- (2) jury could doubt explanation that new "business plan" required hiring someone with particular skills, because the plan was in flux, both the job description and plan description did not reflect the supposed new focus, nor was it consistent with duties of person ultimately hired.
- (3) jury could reject explanation that employer favored applicants who were permanent employee over applicants who were temporary, because this reason was given by one who did not do the hiring, and was not given as a reason by those who did the hiring.

v. *Miller v. Pilgrim's Pride Corp.*, 2007 WL 2007548, at *6 (W.D. Va. July 6, 2007) (fact issue on pretext based on disputed evidence about the quality of plaintiff's job performance, and because of employer's health-related comments).

w. *Hatzakos v. Acme American Refrigeration, Inc.*, 2007 WL 2020182, at *7-8 (E.D.N.Y. July 6, 2007)

- (1) although supervisor claimed he initiated a meeting to fire plaintiff before knowing of his depression and bipolar disorder, evidence was that he did not fire him then, but instead asked about depression and medications, and then asked to contact

plaintiff's treating psychiatrist to ensure there was no threat; employer put plaintiff on unpaid leave during this time; despite fact that doctor later told employer that plaintiff was OK, plaintiff was fired; "these allegations are sufficient to satisfy plaintiff's burden of claiming that his disability was a motivating factor in his termination."

(2) reasonable trier of fact could find that plaintiff's absences did not violate employer's rules of conduct because they were excused.

x. *Guglielmo v. Kopald*, 2007 WL 1834740, at *3-4 (S.D.N.Y. June 26, 2007)

(1) following more than two years since her last annual evaluation, plaintiff received highly negative one, prepared by an attorney rather than the board as in the past; "The timing of these events in juxtaposition to the dates in her disclosure of the disability are alone enough to survive a motion."

(2) board engaged in micro management of plaintiff's work, which it had not done.

(3) an individual remarked that plaintiff's arm looked "disgusting" following chemotherapy

(4) board voted on fifty-five disciplinary charges, although at least one member never saw or discussed them; "Jurors could infer that these charges were drafted by an attorney without input from the individual Defendants as pretext in order to implement a prior decision to remove Plaintiff from office. It does seem that at least some of the disciplinary charges not yet adjudicated after this long-elapse of time are petty, unfounded or both. Charges 3 to 16 concern hiring of unqualified teachers. These teachers were not certified. The Board members knew this at the time they were hired, and the final hiring decision is made by the Board, not the Plaintiff."

y. *Stubbs v. Regents of University of California*, 2007 WL 1532148, at *12 (E.D. Cal. May 25, 2007) (after firing, plaintiff's supervisor told another that plaintiff was "dumb" and "stupid," and plaintiff was told that his supervisors "got tired of you, telling you what to do over and over again;" a reasonable inference is that these comments were directed toward plaintiff's dyslexia).

- z. *Demshick v. Delaware Valley Convalescent Homes, Inc.*, 2007 WL 1244440, at *9 (E.D. Pa. April 26, 2007) (scheduling plaintiff to work outside of medical restrictions, then firing her for not showing up).
 - aa. *Taylor v. Team Broadcast, LLC*, 2007 WL 1201640, at *4 (D.D.C. April 23, 2007) (fact issue whether plaintiff fell asleep at job on two occasions, because of evidence that he was not at work either day).
4. *Cat's paw - Stubbs v. Regents of University of California*, 2007 WL 1532148, at *12 n.11 (E.D. Cal. May 25, 2007) (although supervisor was not a decisionmaker, he might have influenced the ultimate decision to terminate plaintiff, given that he had previously met with one of the decisionmakers).
5. Same-actor presumption
- a. *Stodola v. Finley & Co., Inc.*, 2008 WL 835709, at *13-14 (N.D. Ind. March 24, 2008) - Seventh Circuit precedent casts doubt upon the assumptions underlying the same-actor doctrine because a manager might hire a member of a protected class expecting that person to work or behave a certain way, only to find out that the employee does not conform to the manager's preconceived stereotypes; same-actor inference unlikely to be dispositive in very many cases; here, court finds the same-actor doctrine unpersuasive because plaintiff may not have met performance expectations of hiring official due to her visual impairment.
 - b. *Stubbs v. Regents of University of California*, 2007 WL 1532148, at *12 (E.D. Cal. May 25, 2007) (same actor inference did not disprove pretext; it is not irrebuttable; "For instance, it is possible that, while Short and Walgenbach recognized that plaintiff had dyslexia, they did not fully appreciate that they would also have to accommodate the condition, or what that entailed. Furthermore, the same actor inference can be rebutted by showing that a non-decisionmaking employee was biased and inappropriately influenced the decisionmaker's employment decision under a cat's paw theory of liability.").
6. Honest belief defense
- a. *Lentos v. Hawkins Const. Co.*, 2007 WL 3376760, at *7 and 11 (D. Neb. Nov. 7, 2007) (honest belief that plaintiff lied on his medical form was a legitimate nondiscriminatory reason, but employer's statement that it fired him because of his disability was sufficient to suggest pretext).

- b. *Stubbs v. Regents of University of California*, 2007 WL 1532148, at *12 and n.13 (E.D. Cal. May 25, 2007) (with regard to employer’s supposed honest belief that plaintiff had made a threat, when plaintiff asked why he was being released, he was only told about performance-related problems with no mention of the alleged threat; “fact that no one ever discussed the allegation with plaintiff is a relevant fact from which a trier of fact could infer that defendant seized upon an ostensibly plausible reason to terminate plaintiff. . . . Short stated that she ‘did not provide [plaintiff] with each and every reason for his release because [she] was afraid it would provoke him.’ Nevertheless, if it was to form the central grounds for his release, presumably some fact-checking would be appropriate.”).
- 7. Not applicable to failure-to-accommodate claims. *Kleiber v. Honda of America Mfg., Inc.*, 485 F.3d 862, 868-869 (6th Cir. 2007) - such claims necessarily involve direct evidence of discrimination, for if the fact-finder accepts plaintiff’s version of the facts, no inference is necessary to conclude plaintiff has proven this form of discrimination.

VII. Particular Types of Claims

A. Failure to accommodate

- 1. Equal treatment is not enough
 - a. *Gambini v. Total Renal Care, Inc.*, 486 F.3d 1087, 1090, 1095 (9th Cir. 2007) (“[T]he law often does provide more protection for individuals with disabilities. Unlike other types of discrimination where identical treatment is the gold standard, identical treatment is often not equal treatment with respect to disability discrimination . . . That’s why the ADA and Washington Law require employers to make reasonable accommodations for disabilities.”).
 - b. *Starr v. Hawaii*, 2007 WL 3254831, at *9 (D. Hawai’i Nov. 2, 2007) (allowing nine o’clock start time is not necessarily a reasonable accommodation because all employees could do that under employer’s policy).
 - c. *Quick v. Albert Einstein Healthcare*, 2007 WL 3085868, at *17 (E.D. Pa. Oct. 23, 2007) (uniform policy that employees on light duty had to find another position to transfer to within six months is not necessarily a defense to a failure-to-accommodate claim, which instead depends on what efforts the employer took to reassign).

2. Neutral policies do not always control - “Allowing uniformly-applied, disability-neutral policies to trump the ADA requirement of reasonable accommodations would utterly eviscerate that ADA requirement. . . . In sum, the fact that [the plaintiff]’s non-disabled co-workers were equally subjected to [the employer]’s punctuality policy is not relevant to the question whether [the employer] discriminated against [the plaintiff] by failing to reasonably accommodate his disability, and it was error for the district court to hold otherwise.” *Holly v. Clairson Industries, LLC*, 492 F.3d 1247, 1263 (11th Cir. 2007).
3. Accommodations in regarded-as cases
 - a. *Shannon v. Verizon New York, Inc.*, 519 F. Supp. 2d 304 (N.D.N.Y. 2007) (failure-to-accommodate claim can be based on regarded-as prong).
4. Disclosure of disability and request for accommodation
 - a. *Rask v. Fresenius Medical Care North America*, 509 F.3d 466, 470 (8th Cir. Dec. 6, 2007):
 - (1) Employer had no duty to accommodate plaintiff because she failed to provide sufficient notice of her need.
 - (2) If “the disability, resulting limitations, and necessary reasonable accommodations, are not open, obvious, and apparent to the employer,” plaintiff must specifically identify the disability and resulting limitations, and suggest the reasonable accommodation.
 - (3) Even assuming plaintiff told her employer that she was diagnosed with depression, the most she said to her supervisors was to “let them know that I'm having problems with my medication and, you know, would you stand by me, I might miss a day here and there because of it.”
 - (4) Court doubted that medication problems are a specific identification of a disability, but stated that even if it were, and even if “I might miss a day here and there” were a suggestion of what a reasonable accommodation might be, the plaintiff did not identify the specific limitations that her depression caused, so the employer had no duty to accommodate.
 - b. *Singh v. George Washington University School of Medicine and Health Sciences*, 508 F.3d 1097, 1105 (D.C. Cir. 2007) (Title III case)

- plaintiff's request for accommodation was timely, even though she did not notify the school of her diagnosis or disability until a faculty committee had already recommended her dismissal, because she disclosed the information before the Dean made the final decision, "when the University was in a position to respond;" "no major commitment of resources that would be wasted as a result of its having to consider [plaintiff's] accommodation claim at the time she raised it."

- c. *EEOC v. Convergys Customer Management Group, Inc.*, 491 F.3d 790, 795-796 (8th Cir. 2007) - requesting an accommodation because of limitations created by his wheelchair is sufficient, and employee need not request a specific accommodation.
- d. *Motsay v. Pennsylvania American Water Co.*, 2008 WL 376298, at *4 (M.D. Pa. Feb. 11, 2008) - request for accommodation by asking whether there is anything I can do to keep my job, and filling out form for requesting light duty.
- e. *Quick v. Albert Einstein Healthcare*, 2007 WL 3085868, at *16 (E.D. Pa. Oct. 23, 2007) - sufficient evidence that plaintiff requested accommodation based on discussion with supervisor about other food service jobs after released to work.
- f. *Boice v. Southeastern Pennsylvania Transp. Authority*, 2007 WL 2916188, at *13-15 (E.D. Pa. Oct. 5, 2007) - sufficient request for accommodation even though plaintiff did not use company form, and his deposition testimony was contradictory.
- g. *Wright v. Cor-Rite, Inc.*, 2007 WL 2907947, at *4-5 (M.D. Pa. Oct. 2, 2007) - sufficient evidence of request for accommodation because plaintiff asked that paper be moved closer to him to minimize walking.
- h. *Hatzakos v. Acme American Refrigeration, Inc.*, 2007 WL 2020182, at *9 (E.D.N.Y. July 6, 2007) - "The interactive process is triggered by either the disabled employee's request for accommodation or by the employer's recognition of the need for such an accommodation."
- i. *Quitto v. Bay Colony Golf Club, Inc.*, 2007 WL 2002537, at *10 (M.D. Fla. July 5, 2007)
 - (1) request for accommodation need not be made directly by the employee, but can be made by a representative.
 - (2) fact question as to whether plaintiff requested an accommodation by faxing his doctor's note about light duty,

and then referring employer to his doctor for any follow up questions.

(3) request is further supported by manager's instruction to others to try to accommodate plaintiff.

j. *Demshick v. Delaware Valley Convalescent Homes, Inc.*, 2007 WL 1244440, at *11 (E.D. Pa. April 26, 2007) - asking to work only on the first floor was sufficient request.

5. Nexus

a. Requiring nexus between major life activity that is substantially limited, and the accommodation sought: *EEOC v. Sharp Mfg. Co. of America*, 534 F. Supp. 2d 797, 803 (W.D. Tenn. 2008).

b. Not requiring nexus: Questions and Answers About Blindness and Vision Impairments in the Workplace and the Americans with Disabilities Act, Question 14 and Ex. 25 (EEOC Oct. 24, 2005), <http://www.eeoc.gov/facts/blindness.html> (employer must provide a reasonable accommodation for an impairment that does not rise to the level of a disability but results from an underlying disability).

6. Reasonableness

a. Jury question. *Starr v. Hawaii*, 2007 WL 3254831, at *9 (D. Hawai'i Nov. 2, 2007).

b. *Wiechelt v. United Parcel Service, Inc.*, 2007 WL 2815755, at *2 (W.D.N.Y. Sep. 24, 2007) (offered reassignment was not reasonable accommodation if it exceeded plaintiff's medical restrictions).

c. *Quitto v. Bay Colony Golf Club, Inc.*, 2007 WL 2002537, at *9 (M.D. Fla. July 5, 2007) ("accommodation is reasonable, and therefore may be required under the ADA, only if it enables the employee to perform the essential functions of the job").

7. Types of Accommodations

a. Flexible schedule

(1) *Rask v. Fresenius Medical Care North America*, 509 F.3d 466, 470-471 (8th Cir. Dec. 6, 2007):

- (a) In this context, sudden unanticipated absences on the few days that plaintiff was scheduled to work would not be a reasonable accommodation.
 - (b) Duty to accommodate does not extend to the provision of adjustments or modifications that are primarily for the personal benefit of the individual with a disability.
 - (c) If an adjustment or modification is job-related, e.g., specifically assists the individual in performing the duties of a particular job, it will be considered a type of reasonable accommodation, but if it assists the individual throughout his or her daily activities, on and off the job, it is a personal item that the employer is not required to provide.
 - (d) Ability to take sudden, unscheduled absences would not have assisted plaintiff in performing the duties of her particular job but instead would have been for her personal benefit.
- (2) *EEOC v. Convergys Customer Management Group, Inc.*, 491 F.3d 790, 796-797 (8th Cir. 2007) - even if punctuality is an essential job function, an extra 15 minutes to return from lunch is a reasonable accommodation because it would merely create a different time for the plaintiff's return (rather than an open-ended and unpredictable schedule), it would have eliminated almost all of the plaintiff's tardies, and the ADA itself recognizes extra time as a reasonable accommodation.
- (3) *Woodruff v. Peters*, 482 F.3d 521, 528 (D.C. Cir. 2007) - fact issue existed as to whether accommodations sought (telecommuting and flexible schedule) were reasonable, based on company policy allowing telecommuting "as frequently as five days a week," the fact that the employer allowed another employee to telecommute, plaintiff's description of the work as mostly self-directed, and the fact that the employer had allowed the plaintiff to work with the proposed accommodations for months, casting doubt on the suggestion that accommodations would be an undue hardship, or would not allow plaintiff to perform the essential job functions.

- (4) *Starr v. Hawaii*, 2007 WL 3254831, at *9 (D. Hawai'i Nov. 2, 2007) - later start and end time may be reasonable accommodation.
 - (5) *Norden v. Samper*, 503 F. Supp. 2d 130, 153 (D.D.C. 2007) - one of requested accommodations was a flexible work schedule to account for plaintiff's physical limitations, especially her propensity to experience severe migraines; this was a "categorically reasonable" request.
- b. Medical leave
- (1) *Brannon v. Luco Mop Co.*, ___ F.3d ___, 2008 WL 878289, at *4 (8th Cir. April 3, 2008) (employer not required to grant third extension of return-to-work date because by that point leave became indefinite).
 - (2) *Rios Jimenez v. Principi*, 520 F.3d 31, 42 (1st Cir. 2008) (plaintiff not qualified because of unpredictable attendance).
 - (3) *Duncan v. Quality Steel Products, Inc.*, 2007 WL 2156289, at *8 (E.D. Mich. July 25, 2007) (intermittent medical leave as reasonable accommodation for Crohn's disease).
- c. Telecommuting: *Woodruff v. Peters*, 482 F.3d 521, 528 (D.C. Cir. 2007) - fact issue existed as to whether accommodations sought (telecommuting and flexible schedule) were reasonable, based on company policy allowing telecommuting "as frequently as five days a week," the fact that the employer allowed another employee to telecommute, plaintiff's description of the work as mostly self-directed, and the fact that the employer had allowed the plaintiff to work with the proposed accommodations for months, casting doubt on the suggestion that accommodations would be an undue hardship, or would not allow plaintiff to perform the essential job functions.
- d. Light duty assignment: *Motsay v. Pennsylvania American Water Co.*, 2008 WL 376298, at *4 and n.2 (M.D. Pa. Feb. 11, 2008) (where employer maintained light-duty status).
- e. Limited job rotations: *EEOC v. Sharp Mfg. Co. of America*, 534 F. Supp. 2d 797, 807 (W.D. Tenn. 2008) (even if employer's ergonomic job-rotation policy was an essential function, plaintiff's rotation could have been limited to the two seated jobs).
- f. Other accommodations:

- (1) *Leuzinger v. County of Lake*, 2008 WL 323870, at *10 (N.D. Cal. Feb. 5, 2008) (assigning to work shift with more, or more experienced, back-up help, or use of wrist brace).
- (2) *Matos v. MTA Bridges and Tunnels*, 2008 WL 858995, at *9 (E.D.N.Y. March 31, 2008) (reassignment to a slower location; use of carrying bag or straps; use of traffic escort).
- (3) *Lennex v. Wal-Mart Stores East, LP*, No. 06-877 (Magistrate's Report Feb. 29, 2008), *adopted*, 2008 WL 763740 (W.D. Pa. March 20, 2008) (doing assembly work while seated; assistance with heavy lifting because of employer's team-lifting policy).
- (4) *Wirtz v. Ford Motor Co.*, 2008 WL 565260, at *3 (E.D. Mich. Feb. 28, 2008) (using supervisors or other employees to cover plaintiff's bathroom break).
- (5) *Shannon v. Verizon New York, Inc.*, 519 F. Supp. 2d 304, 309 (N.D.N.Y. 2007) (lifting restrictions could have been accommodated by using a bucket truck or by sliding objects rather than lifting them).
- (6) *EEOC v. Centura Health Corp.*, 2007 WL 2788836 (D. Colo. Sep. 21, 2007) (asking supervisors to face hearing-impaired plaintiff when speaking; written descriptions of complicated procedures; leave until hearing aids acquired; reassignment as last resort).
- (7) *Norden v. Samper*, 503 F. Supp. 2d 130, 153-154 (D.D.C. 2007) (avoiding contact with naphthalene, and protection from retaliation and hostility such as being assigned work that was less intellectually demanding than before, were "categorically reasonable" requests).
- (8) *Duncan v. Quality Steel Products, Inc.*, 2007 WL 2156289, at *9 (E.D. Mich. July 25, 2007) (fact dispute whether employer provided reasonable accommodation of bathroom breaks for Crohn's disease).
- (9) *Stubbs v. Regents of University of California*, 2007 WL 1532148, at *13 (E.D. Cal. May 25, 2007) (transferring to a different crew).

- (10) *Demshick v. Delaware Valley Convalescent Homes, Inc.*, 2007 WL 1244440, at *11 (E.D. Pa. April 26, 2007) (assigning plaintiff to working on first floor only).

g. Reassignment to vacant position

- (1) *Jenkins v. Cleco Power LLC*, 487 F.3d 309, 313, 316 (5th Cir. 2007):

(a) plaintiff lost failure-to-accommodate claim because it appeared that when the company tried to reassign him to a job he thought paid too little, he rejected it too quickly; plaintiff also appeared to misrepresent to his doctor the physical requirements of the job

(b) in reassignment-as-accommodation cases, the plaintiff “has no right to a promotion, to choose what job to which he will be assigned, or to receive the same compensation as he received previously.”

- (2) *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480 (8th Cir. 2007), *reh. & reh. en banc denied (with dissent)*, 493 F.3d 1002, *cert. granted*, 128 S. Ct. 742, *cert. dismissed because of settlement*, 128 S. Ct. 1116 (2008) - the ADA only requires an employer to allow the plaintiff to compete for the job, but does not require the employer to turn away a superior applicant.

- (3) *Kleiber v. Honda of America Mfg., Inc.*, 485 F.3d 862 (6th Cir. 2007)

(a) Absent any evidence that employer continued to hire production associates, seek out applicants, or accept applications during the relevant time period, reasonable jury could not find that a vacancy existed. *Id.* at 870.

(b) If the requested accommodation is reassignment, employers have a duty to locate suitable positions, but to overcome summary judgment, plaintiff generally must identify specific job sought and that he/she is qualified for that position. *Id.* at 870.

(c) Plaintiff’s functional capacity evaluation indicated that his difficulties with balance precluded him from working on uneven surfaces, and job he sought was in

an area with uneven surfaces, including gratings and raised platforms. *Id.* at 870.

- (d) Although plaintiff argued that some of his medical personnel concluded that he was capable of general factory work, he did not indicate whether this translated to an ability to perform the essential job functions of any position at his employer's. *Id.* at 870-871.
- (4) *Ragusa v. United Parcel Service*, 2008 WL 612729, at *6 (S.D.N.Y. March 3, 2008):
- (a) Although plaintiff resigned rather than take a demotion to an Associate position, a jury could find that transfer to an inferior position was not a reasonable accommodation if a lateral position was also available;
 - (b) Fact issue whether there was a vacant Supervisor position into which Ragusa could have been transferred, whether plaintiff's bilateral carpal tunnel syndrome would have prevented him from performing the essential functions of the Supervisor job (or any other position) and whether offer of Associate position was a reasonable accommodation.
- (5) *EEOC v. Sharp Mfg. Co. of America*, 534 F. Supp. 2d 797 (W.D. Tenn. 2008):
- (a) evidence that reassignment was possible because although employer indicated there were no openings, plaintiff testified that he saw some, and there was also evidence that employer hired people within a few months of plaintiff's request for reassignment *id.* at 805;
 - (b) although employer argued reassignment would require bumping other employees, that was not clear given the number of positions open, *id.* at 805 n.3;
 - (c) sufficient evidence that employer could have reassigned plaintiff without violating CBA *id.* at 806-807.
- (6) *Marziale v. BP Products North America, Inc.*, 2007 WL 4224367, at *10 (S.D. Ohio Nov. 27, 2007) (evidence plaintiff could have been reassigned to an assistant manager job with

accommodations, or even without accommodations based on the fact that she was already performing such a job).

- (7) *Shannon v. Verizon New York, Inc.*, 519 F. Supp. 2d 304, 309-310 (N.D.N.Y. 2007) (employer's offered reassignment may not be reasonable, even if the new position pays the same salary, if the plaintiff would lose opportunities for overtime and for training leading to advancement).
- (8) *Quick v. Albert Einstein Healthcare*, 2007 WL 3085868, at *16 (E.D. Pa. Oct. 23, 2007)
 - (a) reassignment to another food service job may be a reasonable accommodation;
 - (b) sufficient evidence that plaintiff was qualified for certain open positions;
 - (c) "Because Wimmersberger may have prohibited or discouraged plaintiff from applying for any and all open food service worker positions on this basis, including those which defendant now concede were available and suited to plaintiff's qualifications, I conclude that plaintiff's failure to interview and apply for any open positions is not a proper basis for summary judgment."
- (9) *Wiechelt v. United Parcel Service, Inc.*, 2007 WL 2815755, at *2 and n.5 (W.D.N.Y. Sep. 24, 2007)
 - (a) reassignment not reasonable if it exceeds medical restrictions;
 - (b) reassignment means placing plaintiff in vacant job, not just allowing him to compete.
- (10) *Norden v. Samper*, 503 F. Supp. 2d 130, 161-162 (D.D.C. 2007):
 - (a) reassignment means more than simply inviting plaintiff to apply for another job;
 - (b) reassignment should be considered only if other "accommodations requested by the employee for her original position would pose an undue hardship on the

employer;” otherwise, plaintiff is not obligated to accept the reassignment

- (c) fact that plaintiff was not qualified for other job supports the conclusion that it was suggested in bad faith, and indicates that the invitation was itself retaliatory; plaintiff’s refusal to apply for that job was not a legitimate reason to fire her; “employer cannot condition an employee’s continued employment on her acceptance of retaliatory employment conditions and then use her rejection of those conditions as a basis for an adverse employment action. Defendant’s contrary view of the law would eviscerate the Rehabilitation Act and other statutes protecting employees from discriminatory employment decisions.”

8. Things that are not reasonable accommodations

- a. Later start time, if it is no different from what other employees can choose. *Starr v. Hawaii*, 2007 WL 3254831, at *9 (D. Hawai’i Nov. 2, 2007).
- b. Allowing plaintiff to take accrued leave for disability-related “tardies,” because the plaintiff should not have to use up leave as a result of employer’s refusal of flexible schedule. *Starr v. Hawaii*, 2007 WL 3254831, at *9 (D. Hawai’i Nov. 2, 2007).
- c. Reassignment that exceeds medical restrictions. *Wiechelt v. United Parcel Service, Inc.*, 2007 WL 2815755, at *2 and n.5 (W.D.N.Y. Sep. 24, 2007).
- d. Last-chance agreement, if the employer has no grounds for termination. *Norden v. Samper*, 503 F. Supp. 2d 130, 161 (D.D.C. 2007) (“A ‘last chance agreement’ is offered by the grace of the employer, but that was not the situation facing the Smithsonian when Dr. Norden sought to return to work. Rather than having the right to fire her, which it could suspend as a matter of grace, the Smithsonian had a *legal obligation to return Dr. Norden to work* if she could perform the essential functions of her job with or without accommodations. Dr. Norden had engaged in no misconduct: she had contracted a near-fatal disease while on work-related travel and had fought for years to recover from its impact on her bodily systems. She had a legal right to be restored to her job unless the Smithsonian could legitimately demonstrate that the requested accommodations would cause it undue hardship. It has made no such showing.”).

9. Elements and burden of proof in failure-to-accommodate claims
 - a. Elements
 - (1) *Holly v. Clairson Industries, LLC*, 492 F.3d 1247, 1262-1263 and nn.16-17 (11th Cir. 2007) - in a failure-to-accommodate claim the plaintiff has the initial burden of showing that proposed accommodation would enable plaintiff to perform the essential job functions; it appears to be reasonable in the run of cases; employer failed to reasonably accommodate the disability, leading to an adverse employment decision; and this discrimination occurred because of the disability (e.g., but for the failure to accommodate, the plaintiff would not have been terminated).
 - (2) *EEOC v. Wal-Mart Stores, Inc.*, 477 F.3d 561, 569 (8th Cir. 2007):
 - (a) if plaintiff cannot perform essential job functions without an accommodation, he or she need only make a facial showing that a reasonable accommodation is possible; burden of production then shifts to employer to show that it is unable to accommodate the employee;
 - (b) fact that experts did not observe plaintiff using accommodations or performing job duties did not defeat the “facial showing.”
 - b. Proof that accommodation was necessary - *Tidwell v. Exel Global Logistics, Inc.*, 2008 WL 360999, at *2 (N.D. Tex. Feb. 8, 2008) (employer’s argument that accommodation was not needed to do job depends on which job plaintiff really held).
 - c. Proof that accommodation would work - *Tidwell v. Exel Global Logistics, Inc.*, 2008 WL 360999, at *2 (N.D. Tex. Feb. 8, 2008) (plaintiff’s expert testified JAWS software would work with employer’s computer system).
 - d. No need for comparator evidence (that employer treated plaintiff differently than non-disabled coworkers) in failure-to-accommodate claims. *Holly v. Clairson Industries, LLC*, 492 F.3d 1247, 1261-1262 (11th Cir. 2007).
 - e. No pretext analysis

- (1) In failure-to-accommodate claims, there is no burden on the employer to show a legitimate non-discriminatory reasons, nor a burden on the plaintiff to prove these reasons were pretextual. *Holly v. Clairson Industries, LLC*, 492 F.3d 1247, 1262 (11th Cir. 2007).
 - (2) *Kleiber v. Honda of America Mfg., Inc.*, 485 F.3d 862 (6th Cir. 2007):
 - (a) Failure-to-accommodate claims necessarily involve direct evidence of discrimination, for if the fact-finder accepts plaintiff's version of the facts, no inference is necessary to conclude plaintiff has proven this form of discrimination. *Id.* at 868.
 - (b) In direct evidence cases, "we jettison the familiar *McDonnell Douglas* burden-shifting framework." *Id.* at 869.
 - (c) Instead, plaintiff bears the burden of proving disability, and that he/she is "qualified" for the position despite the disability (either without accommodation, with an alleged "essential" job requirement eliminated, or with a proposed reasonable accommodation). Employer then must prove that a challenged job criterion is essential, and therefore a business necessity, or that a proposed accommodation will impose an undue hardship upon the employer. *Id.* at 869.
- f. Failure-to-accommodate claims necessarily involve direct evidence of discrimination, for if the fact-finder accepts plaintiff's version of the facts, no inference is necessary to conclude plaintiff has proven this form of discrimination. *Kleiber v. Honda of America Mfg., Inc.*, 485 F.3d 862, 868 (6th Cir. 2007); *Boice v. Southeastern Pennsylvania Transp. Authority*, 2007 WL 2916188, at *12 (E.D. Pa. Oct. 5, 2007).
- g. Adverse action
- (1) *Lennex v. Wal-Mart Stores East, LP*, No. 06-877 (Magistrate's Report Feb. 29, 2008), *adopted*, 2008 WL 763740 (W.D. Pa. March 20, 2008) (placing plaintiff on unpaid leave and doing nothing in response to accommodation request is adverse action)

- (2) *Khalil v. Rohm and Haas Co.*, 2008 WL 383322, at *18 (E.D. Pa. Feb. 11, 2008) (unreasonable accommodation may be adverse action).
- (3) *Boice v. Southeastern Pennsylvania Transp. Authority*, 2007 WL 2916188, at *15 (E.D. Pa. Oct. 5, 2007) (failure to accommodate is itself actionable adverse action).

10. Interactive process

- a. *EEOC v. Convergys Customer Management Group, Inc.*, 491 F.3d 790, 797 (8th Cir. 2007) - reasonable jury could find that employer failed to prove the “good faith accommodation” defense to damage liability; “prudent management decisions and common courtesy among co-workers may well have avoided this claim.”
- b. *Jenkins v. Cleco Power LLC*, 487 F.3d 309, 313, 316 (5th Cir. 2007) - plaintiff lost failure-to-accommodate claim because it appeared that when the company tried to reassign him to a job he thought paid too little, he rejected it too quickly; plaintiff also appeared to misrepresent to his doctor the physical requirements of the job.
- c. *Kleiber v. Honda of America Mfg., Inc.*, 485 F.3d 862 (6th Cir. 2007):
 - (1) even though interactive process is not described in the statute’s text, it is mandatory, and both parties have a duty to participate in good faith. *Id.* at 871.
 - (2) when party obstructs interactive process or otherwise fails to participate in good faith, courts should attempt to isolate the cause of the breakdown and assign responsibility. *Id.* at 871.
 - (3) parties conducted interactive process through plaintiff’s vocational rehabilitation caseworkers; although there is nothing wrong with involving such representatives, the process is designed to encourage direct participation on behalf of employee and employer. *Id.* at 871.
 - (4) no evidence of bad faith on employer’s part, where rehabilitation counselor testified he had no reason to believe that employer was not attempting in good faith to accommodate plaintiff, and described employer’s personnel with whom he interacted as very professional and open to talking about things; additionally, two employer reps visited the production line to try to identify appropriate jobs for plaintiff;

as to plaintiff's claim that employer refused to provide information on other jobs, there was no evidence that plaintiff requested any information during the interactive process. *Id.* at 872.

- d. *Lennox v. Wal-Mart Stores East, LP*, No. 06-877 (Magistrate's Report Feb. 29, 2008), *adopted*, 2008 WL 763740 (W.D. Pa. March 20, 2008) - failure to engage in flexible interactive process may support regarded-as claim.
- e. *Street v. Ingalls Memorial Hosp.*, 2008 WL 162761, at *9 (N.D. Ill. Jan. 17, 2008) - there was evidence of failure to engage in interactive process in good faith because employer never looked at the medical records that it had access to.
- f. *Quick v. Albert Einstein Healthcare*, 2007 WL 3085868, at *16-17 (E.D. Pa. Oct. 23, 2007) - sufficient evidence that employer failed to engage in process in good faith; supervisor may have prohibited or discouraged plaintiff from applying for other jobs, including those that employer later conceded were available and suited to plaintiff's qualifications.
- g. *Wiechelt v. United Parcel Service, Inc.*, 2007 WL 2815755, at *2 (W.D.N.Y. Sep. 24, 2007) - evidence supported failure-to-accommodate claim because employer failed to mention two positions that opened up one month after plaintiff rejected employer's first offer that was outside her medical restrictions.
- h. *Lehman v. U.S. Steel Corp.*, 2007 WL 2728659, at *5 (W.D. Pa. Sep. 17, 2007) - delay in accommodating may indicate employer's lack of good faith.
- i. *Schmidt v. Mercy Hosp. of Pittsburgh*, 2007 WL 2683826, at *3 (W.D. Pa. Sep. 7, 2007)
 - (1) fact issue as to whether plaintiff returned medical authorization and participated in interactive process;
 - (2) employer gave shifting explanations for its failure to accommodate.
- j. *Norden v. Samper*, 503 F. Supp. 2d 130, 154-156 (D.D.C. 2007) - "Contrary to its argument, the Smithsonian did not provide the accommodations that Dr. Norden requested. . . . In short, the Smithsonian offered Dr. Norden an ersatz version of the

accommodations suggested by her physicians. One of the accommodations that Dr. Norden requested was met with a sham proposal (a “flexible” schedule that was actually inflexible), and the other two requests were simply ignored (reducing or eliminating her exposure to naphthalene and assigning her intellectually stimulating work). Providing a respirator was the only arguable accommodation that the Smithsonian made, although that would have done nothing more than return Dr. Norden to the same unacceptable situation she faced when she returned on a part-time schedule in 2002Cthe only difference being that under the RTWP she would have been required to work full time under inflexible deadlines that could not be extended if she should take ill.”

- k. *Hatzakos v. Acme American Refrigeration, Inc.*, 2007 WL 2020182, at *10 (E.D.N.Y. July 6, 2007) - employer argued that it tried to find a part-time position for plaintiff, but none was available; fact issue exists as to employer’s participation in process in good faith because when plaintiff called employer’s office as instructed, “he never received an update on his employment status, and merely was told to call back at a later date.”
- l. *Demshick v. Delaware Valley Convalescent Homes, Inc.*, 2007 WL 1244440, at *11 (E.D. Pa. April 26, 2007) - “While an employer is not liable for a failure to accommodate if no reasonable accommodation is possible, ‘the employer will almost always have to participate in the interactive process to some extent before it will be clear that it is impossible to find an accommodation that would allow the employee to perform the essential functions of a job.’”

11. Sufficient proof of a failure to accommodate

- a. *Stubbs v. Regents of University of California*, 2007 WL 1532148, at *13 (E.D. Cal. May 25, 2007)
 - (1) genuine dispute whether training plaintiff received was sufficient, given that supervisor “had poor training skills, gave contradictory instructions, and potentially harbored discriminatory animus that undermined his relationship with plaintiff.”
 - (2) plaintiff also contended that he was entitled to transfer to a different crew as a reasonable accommodation, a request to which employer did not respond, and which might have cured the training deficiencies noted above.

12. Defense of undue hardship
 - a. *Matos v. MTA Bridges and Tunnels*, 2008 WL 858995, at *9 (E.D.N.Y. March 31, 2008) (not enough for employer to refuse accommodation because it does not think it is required).
 - b. *Starr v. Hawaii*, 2007 WL 3254831, at *9 (D. Hawai'i Nov. 2, 2007) (inefficiency does not mean undue hardship).
 - c. *Quitto v. Bay Colony Golf Club, Inc.*, 2007 WL 2002537, at *10 (M.D. Fla. July 5, 2007) (fact question whether excusing plaintiff from lifting heavy weights would be an undue hardship; employer admitted that “other hands in the kitchen who could assist in lifting,” and plaintiff testified that he never had to lift anything if he did not want to).
 - d. *See also Demshick v. Delaware Valley Convalescent Homes, Inc.*, 2007 WL 1244440, at *11 (E.D. Pa. April 26, 2007) (record strongly suggests that employer could have accommodated plaintiff by limiting her to working on the first floor, because it did so for some time until scheduling changes).
13. Disparate treatment may exist even if accommodation claim fails - *Johnston v. Morton Plant Mease Healthcare, Inc.*, 2008 WL 191026, at *3 n.25 (M.D. Fla. Jan. 22, 2008) (disparate treatment claim supported by fact that others did not have to do takedowns).

B. “Qualification standards” claims - *Bates v. United Parcel Service, Inc.*, 511 F.3d 974 (9th Cir. 2007) (en banc):

1. Plaintiffs first have to prove that they are “qualified,” meaning able to do the essential job functions. *Id.* at 989.
2. Essential functions are basic duties, but qualification standards are personal and professional attributes that may include physical, medical, and safety requirements. *Id.* at 990.
3. Plaintiffs do not need to prove they satisfy the “qualification standards” to prove they are “qualified.” *Id.* at 990.
4. Employer has the burden of proving the business necessity defense. *Id.* at 992.
5. A hearing test is a *facially discriminatory* qualification standard because it focuses directly on an individual’s disabling or potentially disabling condition, so the burden-shifting protocol is not necessary, and the standard violates the

ADA *unless* the employer can prove a valid defense like business necessity. *Id.* at 998.

6. Ability to pass a certain hearing-acuity test is not a job function but rather a qualification standards based on personal attributes. *Id.* at 992.
7. To successfully assert the business necessity defense, employer must prove that the qualification standard is “job-related,” “consistent with business necessity,” and that “performance cannot be accomplished by reasonable accommodation” *Id.* at 995.
8. To show “job-relatedness,” employer must demonstrate that the qualification standard fairly and accurately measures the individual’s actual ability to perform the essential functions of the job; generally, the greater the test’s adverse impact, the higher the correlation that will be required. *Id.* at 996.
9. To show “consistent with business necessity,” employer must show that standard “substantially promotes” the business’s needs; the “business necessity” standard is quite high, and is not to be confused with mere expediency. *Id.* at 996.
10. In evaluating business necessity for a safety-based qualification standard, the court should take into account the magnitude of possible harm as well as the probability of occurrence. *Id.* at 996.
11. To show that “performance cannot be accomplished by reasonable accommodation,” employer must demonstrate either that no reasonable accommodation currently available would cure the performance deficiency, or that such reasonable accommodation poses an “undue hardship” on the employer. *Id.* at 996-997.
12. *But cf. EEOC v. Schneider*, 481 F.3d 507, 510 (7th Cir. 2007) - employer is free to decide that physical characteristics or medical conditions that do not rise to the level of an impairment are preferable to others, just as it is free to decide that some limiting, but not substantially limiting, impairments make individuals less than ideally suited for a job.

C. Medical inquiries

1. Need not prove disability. *Haynes v. City of Montgomery, Ala.*, 2008 WL 695023, at *6 n.8 (M.D. Ala. March 12, 2008).
2. Medical inquiries include requests oral information as well as written. *EEOC v. Ford Motor Credit Co.*, 531 F. Supp. 2d 930, 937 n.6 (M.D. Tenn. 2008).

3. No defense that person making inquiry was acting outside of job duties. *EEOC v. Ford Motor Credit Co.*, 531 F. Supp. 2d 930, 941 n.10 (M.D. Tenn. 2008).
4. Volunteered disclosures
 - a. Medical inquiry claims cannot be based on employee volunteering information; rather, the information must be in response to an inquiry. *EEOC v. Ford Motor Credit Co.*, 531 F. Supp. 2d 930, 937 (M.D. Tenn. 2008).
 - b. Finding actionable medical inquiry, not merely volunteered information - *EEOC v. Ford Motor Credit Co.*, 531 F. Supp. 2d 930, 937-939 (M.D. Tenn. 2008) (plaintiff had to fill out form for medical leave and was written up when sought leave before disclosing HIV; did not matter that form did not reference FMLA, or that employer had a policy that employee did not have to disclose).
 - c. *Willer v. Tri-County Metropolitan Transp. Dist. of Oregon*, 2007 WL 2156375, at *9 (D. Or. July 25, 2007) (motion to dismiss denied; too early to tell if plaintiff's disclosure of Hepatitis C status was casual or required).
5. Preemployment inquiries
 - a. *Conto v. Norfolk Southern Corp.*, 2007 WL 4370906, at *18-19 (W.D. Pa. Dec. 11, 2007) (fact issue whether a conditional job offer was made, and thus whether medical inquiry was lawful).
 - b. *St Clair v. City of Plano, Texas*, 2007 WL 1297168, at *3-4 (N.D. Tex. May 3, 2007) (sufficient evidence of unlawful preemployment inquiries in the form of medical questionnaire, and polygraph and interviews asking questions about medical conditions and medical discharge from military).
6. Post-offer exams
 - a. *Lentos v. Hawkins Const. Co.*, 2007 WL 3376760, at *8 (D. Neb. Nov. 7, 2007) (sufficient evidence supported plaintiff's medical inquiry claim because he was asked for information that was not sought from other employees, and the exam led to employer's withdrawal of its job offer because of reaction to his disability).
7. Exams of current employees must be job-related and consistent with business necessity

- a. Finding medical exam proper - *Thomas v. Corwin*, 483 F.3d 516, 527-528 (8th Cir. 2007):
 - (1) employer's request for a fitness-for-duty evaluation of police officer was "job-related and consistent with business necessity"
 - (2) exam was consistent with business necessity because plaintiff had visited the emergency room for an anxiety attack attributed to "work-related stress and anxiety," and which necessitated a three-week leave of absence, and the plaintiff did not explain the cause of her work-related stress
 - (3) it was also job-related because it was no broader or more intrusive than necessary.
 - b. Finding medical exam improper - *Haynes v. City of Montgomery, Ala.*, 2008 WL 695023, at *6 (M.D. Ala. March 12, 2008) (overbroad).
 - c. Compare *Bates v. United Parcel Service, Inc.*, 511 F.3d 974, 996 Cir. 2007) (en banc) (deciding business necessity in the context of a qualifications standard case):
 - (1) To show that the disputed qualification standard is "consistent with business necessity," employer must show that it "substantially promotes" the business's needs.
 - (2) "Business necessity" standard is quite high, and is not to be confused with mere expediency.
8. Confidentiality requirements
- a. Harm - *EEOC v. Ford Motor Credit Co.*, 531 F. Supp. 2d 930, 943 (M.D. Tenn. 2008) (HIV-positive plaintiff's shame, embarrassment, and depression were sufficient tangible injury for actionable medical-inquiry claim).
 - b. Sec. 504 claims - *Fleming v. State University of New York*, 502 F. Supp. 2d 324, 334-337 (E.D.N.Y. 2007) (Title I's confidentiality provisions constitutes employment discrimination under § 504).
 - c. Volunteered information:
 - (1) *Fleming v. State University of New York*, 502 F. Supp. 2d 324, 338 (E.D.N.Y. 2007) (employer's suggestion that phone call from supervisor was merely a "friendly conversation," rather

than an “inquiry,” was unpersuasive because the supervisor asked why plaintiff was in the hospital, rather than plaintiff merely volunteering the information.

(2) *Willer v. Tri-County Metropolitan Transp. Dist. of Oregon*, 2007 WL 2156375, at *9 (D. Or. July 25, 2007) (motion to dismiss denied; too early to tell if plaintiff’s disclosure of Hepatitis C status was casual or required).

d. Applies to all inquiries, whether or not they are otherwise proper - *Fleming v. State University of New York*, 502 F. Supp. 2d 324, 339 (E.D.N.Y. 2007) (employer implied that because questioning was not “narrowly tailored” and therefore may have been impermissible under the ADA, confidentiality provisions did not apply; “The perverse consequences of defendants’ interpretation of the statute are obvious. Essentially, on their view, the statute would say to employers: If you have acquired your employees’ medical information unlawfully, you are free to disclose that information in any manner you see fit.”).

D. Retaliation

1. Protected activity

a. Requesting accommodation as protected activity. *Jenkins v. Cleco Power LLC*, 487 F.3d 309, 317 and n.13 (5th Cir. 2007) (implicitly finds that requesting an accommodation is protected activity sufficient to state a prima facie retaliation claim).

b. Opposing a requested medical exam that is job-related and consistent with business necessity is not protected conduct. *Thomas v. Corwin*, 483 F.3d 516, 531 (8th Cir. 2007).

c. Complaints to managers about harassment, discrimination, and the need for accommodation. *Torres-Alman v. Verizon Wireless Puerto Rico, Inc.*, 522 F. Supp. 2d 367, 399 (D.P.R. 2007) (continuing comments that employer is going to fire plaintiff because of her complaints supported constructive discharge claim).

d. *Zeigler v. Potter*, 510 F. Supp. 2d 9, 18 (D.D.C. 2007) (repeated requests for accommodation were protected activity).

e. *Zubkov v. Arizona Health Care Cost Containment System*, 2007 WL 2288019, at *6 (D. Ariz. Aug. 9, 2007) (complaint to HR was protected activity).

2. Adverse action

a. *Norden v. Samper*, 503 F. Supp. 2d 130 (D.D.C. 2007) - employer's accommodation plan was materially adverse to plaintiff because:

- (1) "It is easy to conclude that a reasonable employee would be dissuaded from filing an EEO complaint in the face of" the employer's ersatz accommodation plan. *Id.* at 157.
- (2) Accommodation plan's requirement that plaintiff "waive her right to challenge future adverse employment actions was oppressive and illegal." *Id.* at 157.
- (3) Work deadlines were unreasonably short, and "represented a dramatic change from the way in which Dr. Norden's work was supervised before she fell ill with DHF." *Id.* at 158.
- (4) Accommodation plan would have prohibited plaintiff from using medical absences as a reason to extend the deadlines, despite her well-documented illness, was "objectively unreasonable, especially given that lack of evidence that the tasks assigned to [plaintiff] were time sensitive." *Id.* at 158.
- (5) Relegating plaintiff, a Fulbright Scholar with several publications, to the full-time cataloguing of insect specimens was "demeaning and transparently punitive," citing *Burlington* ("[r]etaliatory work assignments' [are] a classic and 'widely recognized' example of 'forbidden retaliation.'"). *Id.* at 158.
- (6) Frequent performance evaluations represented drastic change from before plaintiff contracted dengue fever, and created atmosphere of pressure and mistrust. *Id.* at 158.
- (7) Finally, stripping plaintiff of her seniority and tenure were clearly recriminatory actions for which there is no evident reason. *Id.* at 158.
- (8) Modified accommodation offer after charge was filed is not settlement offer privileged under FRCP 408; not only was it not an offer to compromise within the meaning of Rule 408, it was itself a retaliatory, adverse act. *Id.* at 158.
- (9) Employer cannot immunize its prior adverse conduct with a *post hoc* change of heart, and even if it could, the amended accommodation offer still contained several provisions that

were materially adverse to plaintiff, including a *de facto* demotion. *Id.* at 159.

(10) Employer’s return-to-work plan was not a valid “last chance agreement;” “Rather than having the right to fire her, which it could suspend as a matter of grace, the Smithsonian had a *legal obligation to return Dr. Norden to work* if she could perform the essential functions of her job with or without accommodations. Dr. Norden had engaged in no misconduct: she had contracted a near-fatal disease while on work-related travel and had fought for years to recover from its impact on her bodily systems. She had a legal right to be restored to her job unless the Smithsonian could legitimately demonstrate that the requested accommodations would cause it undue hardship. It has made no such showing. As a result, Dr. Norden has proved a retaliation claim based on the [employer’s return-to-work plan].”). *Id.* at 161 (emphasis on original).

b. *Carr v. Morgan County School Dist. RE-3*, 2007 WL 2022055, at *8 (D. Colo. July 9, 2007) (negative reference made with retaliatory intent can constitute an objectively material adverse action; assistant school principle acted as agent for school district).

3. Causal connection

a. *Lennex v. Wal-Mart Stores East, LP*, No. 06-877 (Magistrate’s Report Feb. 29, 2008), *adopted*, 2008 WL 763740 (W.D. Pa. March 20, 2008) (causal connection shown by timing and pretext evidence).

b. *Smyth v. Wawa, Inc.*, 2008 WL 741036, at *15 (E.D. Pa. March 19, 2008) (sufficient evidence of causal link between termination and protected activity [complaint of disability discrimination against supervisor, and request for laptop as an accommodation] included plaintiff’s fear of informing supervisor about her need to take leave [based on previous reactions], prompting her to consult her co-workers about the best way to break the news, plus e-mail to supervisor confronting her with her suspicion that her performance assessment was based in part on her medical conditions, combined with supervisor’s involvement in termination; and the arguable implausibility of employer’s stated reason for termination).

c. *Warpenburg v. Target Corp.*, 2007 WL 2993988, at *18 (S.D. Ind. Oct. 11, 2007) (close monitoring after incident, and temporal proximity between incident and lower evaluations [despite employer’s alleged alternative chronology]).

- d. *Graci v. Independent Health Ass'n, Inc.*, 2007 WL 2403723, at *7 (W.D.N.Y. Aug. 20, 2007) (sufficient evidence based on fact that employer could have permitted plaintiff to leave early for unexpected family emergency, plus temporal proximity between her return from disability leave and termination).
- e. *Moore v. Epperson Underwriting Co.*, 2007 WL 2332755, at *14 (D. Minn. Aug. 15, 2007) (under state law following ADA precedent, causal connection shown by fact that in response to requests for leave, supervisor suggested plaintiff had to choose between missing work for medical appointments and his job, and employer offered a severance package less than two weeks after he complained that supervisor's attitude toward his medical absences was belittling).
- f. *Zubkov v. Arizona Health Care Cost Containment System*, 2007 WL 2288019, at *5-6 (D. Ariz. Aug. 9, 2007) (adverse action close in time to protected activity of complaining to HR).
- g. *Norden v. Samper*, 503 F. Supp. 2d 130, 159-160 (D.D.C. 2007):
 - (1) by acknowledging that its modified accommodation offer was its response to plaintiff's EEO complaint after she requested accommodations, employer concedes a causal connection between the two.
 - (2) in addition, the modified offer "contained a blatantly unlawful provision conditioning Dr. Norden's return to work on her agreement to waive her right to file a future EEO claim challenging any adverse employment action taken against her pursuant to the terms of the [accommodation plan]. This also conclusively demonstrates that the [plan] was a response to Dr. Norden's EEO activities."
 - (3) employer's argument that there was no causation because the person who "drafted" the accommodation plan was unaware of plaintiff's EEO activity is "wholly without merit," because the drafter had knowledge that the legal department was involved, the plan was drafted at the request of those with knowledge, and it was tendered with other documents drafted by those with knowledge as part of a comprehensive return-to-work proposal.
- h. *Tomao v. Abbott Laboratories, Inc.*, 2007 WL 2225905, at*8 (N.D. Ill. July 31, 2007) (there was a factual dispute whether the decision to

terminate was really made months before plaintiff's complaints of discrimination; plaintiff renewed her complaints shortly before termination).

- i. *Zwygart v. Board of County Com'rs of Jefferson County*, 2007 WL 2155654, at *4 (D. Kan. July 26, 2007) (fact issue as to when employer learned of protected activity and therefore on temporal proximity).
- j. *Duncan v. Quality Steel Products, Inc.*, 2007 WL 2156289, at *9 (E.D. Mich. July 25, 2007) (being fired or demoted upon return-to-work from leave is temporal proximity).
- k. *Demshick v. Delaware Valley Convalescent Homes, Inc.*, 2007 WL 1244440, at *13 (E.D. Pa. April 26, 2007) (employer "twists the facts to argue there is no temporal proximity because Demshick requested an accommodation in October 2003 and was terminated nine months later in July 2004. While Silver Lake Center initially honored Demshick's request for an accommodation, this changed in May 2004. On July 22, 2004, Demshick learned she was scheduled to work on the second floor on July 27, 2004. Demshick renewed her request for an accommodation, which was denied. Silver Lake Center terminated Demshick within a week of this request, which establishes a causal connection for her retaliation claim.").

4. Legitimate non-discriminatory reason

- a. *Thomas v. Corwin*, 483 F.3d 516, 531 (8th Cir. 2007) - refusing to provide certain medical history was legitimate reasons for firing.
- b. *Norden v. Samper*, 503 F. Supp. 2d 130, 160 (D.D.C. 2007):
 - (1) employer prohibited from offering any legitimate, non-retaliatory reason for it bad accommodation offer because it failed to respond to plaintiff's discovery requests on this subject.
 - (2) plaintiff's interrogatory specifically asked employer to "Explain and Describe any legitimate, nondiscriminatory reasons for the clauses in the" accommodation plan.
 - (3) employer objected on the ground that the accommodation plan was a settlement offer, a position the court found "legally indefensible."

- (4) because the employer refused to respond to a clear, unobjectionable discovery request asking it to provide a legitimate reason for the adverse provisions in the accommodation plan, it is barred from giving such a reason, and in any event, there is no evidence of any such reason.
5. Pretext
 - a. *Duncan v. Quality Steel Products, Inc.*, 2007 WL 2156289, at *10 (E.D. Mich. July 25, 2007) (sufficient evidence of pretext; “rummaging” in supervisor’s desk was normal, and plaintiff got permission for other supposed misconduct in remaining on phone call).
6. Sufficient evidence. *Burns v. Air Liquide America, L.P.*, 515 F. Supp. 2d 748, 759 (S.D. Tex. 2007) (temporal proximity).
7. Rehabilitation Act incorporates ADA retaliation claim. *Zeigler v. Potter*, 510 F. Supp. 2d 9, 17 (D.D.C. 2007); *Norden v. Samper*, 503 F. Supp. 2d 130, 156 (D.D.C. 2007).
8. Retaliation claims may be brought by former employees. *Carr v. Morgan County School Dist. RE-3*, 2007 WL 2022055, at *7 (D. Colo. July 9, 2007).

E. Disability-based harassment

1. *Rood v. Umatilla County*, 526 F. Supp. 2d 1164, 1176-1177 (D. Or. 2007) - sufficient evidence of harassment based on supervisor failing to return, or not timely returning, leave requests to attend physical therapy; refusing to sign leave slips; yelling at plaintiff; not allowing plaintiff to participate in staff meetings by phone; telling others not to share information with plaintiff about meetings she could not attend; telling co-worker (within earshot of plaintiff) that supervisor would find a way to get rid of her; calling plaintiff and telling that she would be required to drive to a distant location five days a week despite her doctor’s recommendation, and that she could go look for another job.

F. Associational discrimination

1. *Dewitt v. Proctor Hosp.*, 517 F.3d 944, 948-949 (7th Cir. 2008) (fact issues as to whether partially self-insured employer was motivated to terminate employee by association discrimination; employer had unusually high “stop-loss” coverage so it felt the heavy bite; employer discussed the issue several times; it terminated plaintiff a few months after adopting a wait-and-see policy that cost it several thousand dollars).

2. *Erdman v. Nationwide Ins. Co.*, 510 F. Supp. 2d 363, 374 (M.D. Pa. 2007) (plaintiff was fired the very day on which she had asked to be notified of employer's decision on her FMLA leave, and just two months after she was forced to take a full-time position after five years as part-time; reasonable jury could find that employer "harbored a certain degree of antagonism towards modified work schedules of the type required by Erdman to care for her disabled daughter," and that it fired her "because of a belief that she would be required to miss work in order to care for her disabled daughter.").

VIII. Adverse action

- A. *Haynes v. City of Montgomery, Ala.*, 2008 WL 695023, at *5 (M.D. Ala. March 12, 2008) (fact issue whether plaintiff resigned voluntarily).
- B. *Lennex v. Wal-Mart Stores East, LP*, No. 06-877 (Magistrate's Report Feb. 29, 2008), *adopted*, 2008 WL 763740 (W.D. Pa. March 20, 2008) (placing plaintiff on unpaid leave and doing nothing in response to accommodation request is adverse action).
- C. *Street v. Ingalls Memorial Hosp.*, 2008 WL 162761, at *7 (N.D. Ill. Jan. 17, 2008) (100% healed policy is a per se ADA violation).
- D. *Torres-Alman v. Verizon Wireless Puerto Rico, Inc.*, 522 F. Supp. 2d 367, 394-395, 399 (D.P.R. 2007) (constructive discharge actionable under the ADA; continuing comments that employer is going to fire plaintiff because of her complaints supported constructive discharge claim).
- E. *Schmidt v. Mercy Hosp. of Pittsburgh*, 2007 WL 2683826, at *3 (W.D. Pa. Sep. 7, 2007) (fact issue whether employer's failure to participate in interactive process resulted in constructive discharge).
- F. *Leuzinger v. County of Lake*, 2007 WL 1280582, at *4-5, and 8 (N.D. Cal. April 30, 2007) (forcing to take retirement).

IX. Remedies

A. Back pay

1. *Wiechelt v. United Parcel Service, Inc.*, 2007 WL 2815755, at *3 (W.D.N.Y. Sep. 24, 2007) (fact issue on whether plaintiff took reasonable steps to mitigate damages because his health condition may have impeded job search).
2. *Tomao v. Abbott Laboratories, Inc.*, 2007 WL 2225905, at *25 (N.D. Ill. July 31, 2007) (court refused to offset Social Security benefits).

B. Lost benefits

- a. *Tomao v. Abbott Laboratories, Inc.*, 2007 WL 2225905, at *26 (N.D. Ill. July 31, 2007)
 - (1) sufficient evidence to accept plaintiff's valuation of fringe benefits because employer introduced no evidence that the values for the first two years (for which plaintiff had information) in later years;
 - (2) plaintiff entitled to recover money to repay Medicaid for the medical expenses they incurred for her, because she was legally responsible for reimbursing the state.

C. Compensatory damages

1. *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1190-1204 (11th Cir. 2007) - non-economic compensatory damages (e.g. for mental anguish) are available under § 504.
2. *EEOC v. Convergys Customer Management Group, Inc.*, 491 F.3d 790, 797-798 (8th Cir. 2007) - court rejected remittur because jury's award of \$100,000 for emotional damages did not shock the conscience.
3. *Tidwell v. Exel Global Logistics, Inc.*, 2008 WL 360999, at *3 (N.D. Tex. Feb. 8, 2008) - fact question on mitigation of damages because although plaintiff enrolled in college, he continued to look for work.

D. Punitive damages

1. Punitive damages can be awarded in absence of compensatory damages, at least if there is a back or front pay award. *EEOC v. E.I. Du Pont de Nemours & Co.*, 480 F.3d 724, 733-734 (5th Cir. 2007). [N.B.: The 5th Circuit has since held that punitive damages are also supported by nominal damages without any other damage award. *The Kansas City Southern R.Co.*, 513 F.3d 154 (5th Cir. 2008) (Title VII case)].
2. Sufficient evidence shown:
 - a. *Christensen v. Titan Distribution, Inc.*, 481 F.3d 1085, 1096 (8th Cir. 2007) - employer was aware that federal law prohibited disability discrimination, and none of the employer's decision-makers were willing to take responsibility for the refusal to hire plaintiff.
 - b. *EEOC v. E.I. Du Pont de Nemours & Co.*, 480 F.3d 724, 733 (5th Cir. 2007) - cruel remarks, employer's years-long effort to get plaintiff to

take disability retirement, and placing her printer 100 feet from her desk despite knowing her walking difficulties and despite fact others had printers at their desks.

- c. *Chalfant v. Titan Distribution, Inc.*, 475 F.3d 982, 991-992 (8th Cir. 2007), *cert. denied*, 128 S. Ct. 98 (2007) - employer was familiar with the law, engaged in inconsistent behavior at the time of decision, and was unable to explain its behavior until a “sudden memory improvement at trial.”

E. Apportionment of damages

1. *Tomao v. Abbott Laboratories, Inc.*, 2007 WL 2225905, at *13-15 (N.D. Ill. July 31, 2007)
 - a. jury awarded \$300,000 in compensatory damages, and \$2.4 million in punitive damages
 - b. in applying the damage caps, court should award highest reasonable amount as compensatory damages, and apportion the balance to punitive damages
 - c. here, full \$300,000 cap was reasonable for compensatory damages, based on the testimony of plaintiff and her daughter, and based on fact that she was forced to seek welfare and was out of work for five years

X. Defenses

A. Direct threat

1. *EEOC v. E.I. Du Pont de Nemours & Co.*, 480 F.3d 724, 731 (5th Cir. 2007) - plaintiff did not pose “direct threat” because she was able to safely ambulate the evacuation route without assistance.
2. *EEOC v. Wal-Mart Stores, Inc.*, 477 F.3d 561, 571-572 (8th Cir. 2007) - burden of proof on affirmative defense of direct threat is on the employer.
3. *Hatzakos v. Acme American Refrigeration, Inc.*, 2007 WL 2020182, at *9 (E.D.N.Y. July 6, 2007) (“To the extent defendants argue that they were entitled to fire plaintiff when Dr. Tsiouris did not guarantee that plaintiff’s medications did not pose a danger to himself or others, defendants’ argument fails. ... To constitute a ‘direct threat’, the probability of significant harm must be substantial, constituting more than a remote or slightly increased risk. Defendants’ allegations here fall short of this standard.”).

4. *But cf. EEOC v. Schneider*, 481 F.3d 507 (7th Cir. 2007):
 - a. Absent evidence that employer exaggerated the severity of plaintiff's impairment and the risk it posed to truck driving, employer did not violate ADA by following "zero tolerance" policy for that condition. *Id.* at 510-511.
 - b. Employer is free to decide that physical characteristics or medical conditions that do not rise to the level of an impairment are preferable to others, just as it is free to decide that some limiting, but not substantially limiting, impairments make individuals less than ideally suited for a job. *Id.* at 510.
- B. Issue preclusion** - *Khalil v. Rohm and Haas Co.*, 2008 WL 383322, at *4-7 (E.D. Pa. Feb. 11, 2008) (worker's comp litigation did not collaterally estop ADA claims).

XI. Immunity

- A. Plaintiff cannot use ' 1983 to enforce ADA claim. *McNa v. Communications Inter-Local Agency*, 2008 WL 686924, at *3-5 (M.D. Fla. March 12, 2008).
- B. Plaintiff can use *Ex parte Young* to sue the state. *Starr v. Hawaii*, 2007 WL 3254831, at *3-4 (D. Hawai'i Nov. 2, 2007) (reinstatement and reasonable accommodation are prospective relief available under *Ex parte Young* theory).
- C. Employer waived 11th Amendment immunity by waiting too long to assert it. *Stubbs v. Regents of University of California*, 2007 WL 1532148, at *7 (E.D. Cal. May 25, 2007).
- D. State employer that receives federal financial assistance has waived immunity from § 504 claims. *Haybarger v. Lawrence County Adult Probation and Parole*, 2007 WL 2464483, at *2-3 (W.D. Pa. Aug. 25, 2007).