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DBTAC great lakes ADA Center

" ADA Coverage Beyond Actual Disabilities: Regarded As, Record Of, and Association Disability"

Three ADA Introductory Scenarios

Barbara has a history of positive performance reviews working as an administrative secretary for Johnson County Community College ("County College"). Then her supervisor, Alicia, starts noticing Barbara exhibiting erratic behavior. This behavior included: leaving strange voice mail messages and then denying it, an inability to get along with supervisors and coworkers, and bringing her underwear to work to show people. Alicia suspects that Barbara is having personal problems, possibly related to her mother's recent death and insists that Barbara see a counselor. At one point, Alicia asks Barbara, "Which Barbara am I speaking to?" and says, "I guess the other Barbara must have left the strange voicemails." After the meeting Alicia notes that Barbara was "rambling and most of the time had no connection with the situation." Alicia continually asks Barbara about her mental health and tells her to undergo a psychiatric evaluation to determine if she needs medical leave. Alicia also limits Barbara's work and provides closer supervision. During this time, Barbara's performance rating goes down and she loses pension benefits. Barbara has a psychiatric evaluation and the doctor finds that Barbara does not have a mental illness or cognitive disorder.[1] *Does Barbara have a claim for discrimination under the Americans with Disabilities Act ("ADA") she was "regarded as" having a disability by her employer?*

Michael, a lab technician, incurs a traumatic brain injury when he falls off his roof while doing repairs on his house. He is on medical leave for one year while recuperating. When Michael returns to work, his doctor explains to Michael's supervisor, Bob, that Michael's brain injury affected his short-term memory and that Michael requires an accommodation; receiving written instructions for all complex tasks. Bob agrees to provide instructions in writing. For the first three years after his return to work, Michael performs his job well and his ability to remember improves. Then, Bob discovers that Michael has not been completing his time cards correctly, indicating that he worked more hours than he actually did. Michael claims that he did not remember how to complete time cards because he did not receive written instructions from Bob. Therefore, Michael claims that any error was inadvertent and a result of his not

being provided the agreed upon reasonable accommodation. Nevertheless, Bob terminates Michael's employment for falsifying the time cards.[2] *If Michael does not currently have an ADA-qualifying impairment, does he still have a claim for discrimination under the ADA based on his "record of" a disability?*

When Veleria interviews for a new job, she tells the interviewers, Robert and Kimberly, that she has a daughter with autism. She explains that her daughter is nonverbal, and that Veleria occasionally needs to take time off to take care of her daughter's needs. Robert and Kimberly explain the attendance and time-off policies. They also explain that they will not give Veleria a reduced schedule or create any additional benefits other than those already offered. Veleria tells them that she is confident that the existing schedule and time-off policies will meet her daughter's needs. Despite this assurance, Robert and Kimberly fear that Veleria will have attendance problems because she will need excessive time off from work to take care of her child. Despite believing that Veleria is the most qualified candidate for the position, Robert and Kimberly hire someone else due to their concerns about her daughter's condition.[3] *Does Veleria, who does not herself have a disability, have a claim for discrimination under the ADA based on her relationship with her daughter?*

At the time of the employment actions described above, Barbara, Michael, and Veleria did not have "a physical or mental impairment that substantially limits one or more of [their] major life activities" under the ADA.[4] However, the protections of the ADA are not limited only to those who currently have disabilities. To effectively combat discrimination based on fear, assumptions, and stereotypes affiliated with disabilities, Congress extended the ADA's protections to individuals who are "regarded as" being disabled by their employer, people with a record of a disability,[5] and those who are discriminated against based on a "relationship" or "association" with a person with a disability.[6]

Overview of the ADA

Congress passed the Americans with Disabilities Act ("ADA") to provide a national mandate to eliminate discrimination against people with disabilities.[7] In passing the ADA, Congress recognized that people with disabilities:

> …[H]ave been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.[8]

To combat these "stereotypic assumptions" Congress defined the term "disability" to include:

a. *[A] physical or mental impairment that substantially limits one or more of the major life activities of such individual;*

b. *[A] record of such an impairment or*

c. *[B]eing regarded as having such an impairment*[9]

To prevent against discrimination based on a "relationship" or "association" with a person with a disability, unlawful ADA discrimination also includes:

> [E]xcluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association.[10]

Prima Facie Case for ADA Discrimination

Title I of the ADA addresses employment situations. Its primary purpose is to protect employees with disabilities who are capable of performing their jobs, with or without a reasonable accommodation, from adverse discriminatory actions by employers who may act based on stereotypes, preconceptions, or erroneous information in asserting that a disability prevents an employee from performing the "essential functions" of their job.[11] To succeed in discrimination suits under Title I of the ADA, employees must show that they:

- Were qualified for the job, with or without accommodation;
- Belong to a class protected by the ADA;
- Experienced adverse employment actions; and
- Experienced the adverse employment actions because they belonged to a class of people protected by the ADA.[12]

Following a brief discussion of how the ADA Amendments Act of 2008, a bill currently pending in Congress, would affect people protected by the ADA, this paper will focus on the second bullet point above, whether an employee belongs to a class protected by the ADA, including those who are "regarded as," have a "record of," or an "association with" a person with at disability.

ADA Amendments Act of 2008

Beginning in 1999, the U.S. Supreme Court limited the number of people protected by the ADA in a series of cases known as the *Sutton* trilogy.[13] In the *Sutton* trilogy, the Supreme Court held that the limitations caused by a disability should be examined after considering the effect of "mitigating measures" such as medication or eyeglasses. As a result of these decisions, people with conditions such as with epilepsy,[14] positive HIV status,[15] diabetes,[16] depression,[17] heart disease,[18] hypertension,[19] cancer,[20] muscular dystrophy,[21] mental retardation,[22] multiple sclerosis,[23] and who are hard of hearing,[24] were often not protected by the ADA as medication or other mitigating measures effectively controlled the effects of their disability. The Supreme Court further narrowed the definition of disability in the case of Toyota v. Wil-

liams.[25] To qualify for ADA protection after these decisions, more employees began using the "regarded as" and "record of" prongs of the ADA's definition of "disability."

Many in the U.S. Congress believe that these court decisions do not reflect Congressional intent in passing the ADA. As a result, there is currently a bill pending in Congress entitled the "ADA Amendments Act of 2008" (formerly the "ADA Restoration Act").[26] If this bill becomes law, the definition of who is protected under the ADA will be expanded. In addition, this bill would shift the focus of ADA litigation from whether a person qualifies as a person with "disabilities" to whether a person was treated unfairly because of the person's actual or perceived disabilities. Putting the focus on the alleged discriminatory conduct rather than the nature of an individual's disability would make the ADA more consistent with other U.S. civil rights laws. If the ADA Amendments Act of 2008 becomes law, it may have a significant impact on all ADA cases including the situations covered in this paper.

"Regarded As" Having an ADA Disability

When employees are regarded by their employers as having an ADA-qualifying disability, they are protected by the ADA even if they do not have a condition that substantially limits a major life activity. Congress included this prong in the ADA's definition of "disability" to protect people from discriminatory actions based on "myths, fears, and stereotypes" about a disability that may occur even when a person does not have a substantially limiting impairment.[27] "Regarded as" cases focus on the employer's subjective perception of the individual, rather than on the individual's actual abilities.[28]

Generally, "regarded as" discrimination cases fall into one of two categories:

1. The employer mistakenly believes that a person has an impairment that substantially limits a major life activity when the person does not have any impairment or
2. The employer mistakenly believes that an actual impairment substantially limits one or more major life activities when it is not so limiting.[29]

To establish a case for discrimination under the "regarded as" prong of the ADA, an employee must show that:

1. The employer believed the individual had an impairment that substantially limited at least one major life activity;
2. The employer took adverse employment action against the employee because of this belief; and
3. The employee was otherwise qualified to perform the essential duties of that position at the time of the adverse employment action. [30]

Regarded as Substantially Limited in a Major Life Activity

To succeed in an ADA-discrimination claim, the employee must show more than that the employer regarded the employee has having an impairment; he or she must show that the employer regarded the impairment as substantially

limiting in one or more major life activities.[31] In addition, if the employer regards the employee as having less than substantially limiting impairments that impact essential job functions, the employer can decide that the individual is not qualified for the job and can take adverse employment action against the employee that may not violate the ADA.[32] This has created a Catch-22 situation for many people with disabilities as they suffer an adverse employment action because of an impairment yet their condition is not protected by the ADA. In order to ascertain practical suggestions for employers and employees involved in ADA "regarded as" situations, several appellate court cases will be examined.

Factors in "Regard As" Cases

In analyzing court cases under the ADA, it should be kept in mind that ADA cases are factually specific and each situation requires an "individualized assessment."[33] Several factors seem to be important in court decisions. Generally, employers do not violate the ADA when the employee demonstrates poor job performance or violates workplace rules that are job-related and consistent with business necessity. In addition, employer actions such as granting a sabbatical, providing accommodations, or providing FMLA leave do not automatically mean that the employer regards the employee as being disabled.[34] Further, employers generally do not violate the ADA when they view an employee as being unable to perform one or more specific essential job functions, making them unqualified under the ADA.[35] This usually would be considered a valid, non-discriminatory reason for an adverse employment action as long as it is job-related and consistent with business necessity. Employers are able to view an employee as being unable to perform specific job functions without necessarily regarding the employee as being substantially limited in the major life activity of working. Employers are on strong ground if there is medical substantiation for the conclusion that the employee cannot perform essential job functions.

However, the nature of the medical evidence relied on by employers is important. When employers rely on the opinion of company doctors and ignore contrary medical opinions, courts are less likely to find in favor of the employer.[36] EEOC Guidance warns employers against such selective reading of medical evidence in the context of direct threat although the reasoning is applicable to other uses of medical information:

> An employer should be cautious about relying solely on the opinion of its own health care professional that an employee poses a direct threat where that opinion is contradicted by documentation from the employee's own treating physician, who is knowledgeable about the employee's medical condition and job functions, and/or other objective evidence.[37]

Employers who view an employee's limitations more broadly are more likely to be found as regarding the employee as being substantially limited in one or more major life activities, and therefore as a person who is "regarded as" having a disability under the ADA.[38] Statements made by employers and employees are also important fac-

tors. Statements or actions by employers may be evidence demonstrating that the employee was "regarded as" having a disability[39] or, on the other hand, that the employer only regarded the employee as being unable to perform certain essential job functions.[40] Employers are generally able to provide accommodations or job modifications to individuals who do not have disabilities under the ADA without being viewed as regarding the employee as being disabled based on those actions alone.[41] While statements by employees or others acting on their behalf, including physicians, regarding medical conditions or the limitations that flow from them, may support adverse employment actions taken by the employer, employers should make sure there is medical support for their position.[42] One final issue that should be noted is that most courts do not hold that reasonable accommodations need to be provided to individuals who are "regarded as" having a disability[43] although at least one court has indicated otherwise.[44]

Cases Finding for the Employer

Many "regarded as" cases arise when an employer makes statements or take actions that raise concerns about the employee's performance and seem related to a perceived disability.

Job Performance Issues and Employer Action and Statements

This was the situation in Hoard v. CHU2A, Inc.,[45] where the Eleventh Circuit Court of Appeals held that CHU2A did not violate the ADA when it terminated its employee for valid performance-related reasons unrelated to the employee's impairment. The performance issue involved the fact that Mr. Hoard was unable to account for 300 hours that he claimed to work, but that resulted in no work product.[46] The company claimed that this made him unqualified even though he was diagnosed with Grave's disease, a thyroid condition, one year prior to his termination. Hoard had a history of favorable performance reviews; however, six months prior to his termination, he began to have consistent problems at work. In addition to being unable to account for 300 hours of work, he also had several altercations with his supervisor and co-workers. During this six-month time period, Hoard's supervisor made comments about Hoard including that he "developed behavioral problems" and that he was "inappropriately aggressive." [47]

The court found the supervisor's comments were motivated by Hoard's admitted behavior and attitude problems at work, and not because the supervisor erroneously perceived Hoard as substantially limited in the activity of working. Further, the court found that CHU2A had a valid reason to terminate Hoard's employment because of his poor behavior and performance. Thus, the court held that CHU2A did not violate the ADA when it terminated his employment.[48]

Similarly, in *Berry v. T-Mobile USA, Inc.* the Tenth Circuit Court of Appeals found that an employee who was terminated for poor performance did not have a claim under the ADA.[49] The court found that neither T-Mobile's knowledge of Berry's multiple sclerosis diagnosis, nor its providing or recommending FMLA leave established that T-Mobile regarded Berry as being disabled. "An

employer's knowledge of an impairment alone is insufficient to establish the employer regarded the employee as disabled."[50] This was especially true as T-Mobile submitted evidence demonstrating that, "the decision to terminate Berry's employment had already been made when she made her request for FMLA leave" due to well-documented performance problems.[51] Although the court held that the T-Mobile did not regard Berry as being disabled, it appears that the court is actually saying that, even if Berry was "regarded as" having a disability, T-Mobile did violate the ADA as there was a valid, non-discriminatory reason for the adverse job actions taken against Berry.

The *Hoard* and *Berry* cases demonstrates that employers can discipline employees who exhibit poor performance regardless of whether the employee has a disability or not. It is important that employer actions and statements focus on the conduct involved and not be based on stereotypes or generalizations concerning disabilities. It is also important that all performance concerns be well documented and that employees be provided opportunities to improve their performance. Reasonable accommodations should also be investigated where appropriate. It should also be noted that courts are reluctant to view an employee as "regarded as" being disabled when there is a workplace adjustment for them even though they do not fit the ADA's definition of disability.[52] However, employers should be clear in such cases that the workplace adjustment is not being provided under the ADA.

As the *Berry* case demonstrates, providing an employee FMLA leave does not mean automatically mean he/she is "regarded as" being disabled. Similarly, referring an employee for a psychiatric evaluation does not necessarily mean that the employer perceives the employee as having an ADA disability. In *Pence v. Tenneco Automotive Operating Co. Inc.*, an employee stated that, "when he leaves here that he will be taking a bunch of people with him" and mentioned that he had AK47s and ammunition. Based on these statements, the employer sent the employee for a psychological evaluation as a result of this conduct and the court held that this did not signify that the employer regarded the employee as having a mental disability under the ADA.[53] Tenneco had a valid, non-discriminatory reason to refer the employee for an evaluation based on the employee's threatening statements. Tenneco was also justified in terminating Pence for violating workplace conduct rules.[54]

The *Pence* case reiterates the point that employees can be disciplined for violating workplace rules. This case also demonstrates the importance of focusing on employee conduct when seeking medical information or when dispensing discipline.

Is the Individual Substantially Limited in the Major Life Activity of Working or Only Unable to Perform a Particular Job?

Courts sometimes have trouble accurately defining when an employee is "regarded as" being disabled in the major life activity of working. To show this, the employee must demonstrate that

they are regarded as being unable to work in a "broad range" or "class" of jobs, not just that they are perceived as being unable to perform select job functions. This generally requires that the employee demonstrate "a significant reduction in meaningful employment opportunities due to his impairment"[55] not just the inability to perform "a particular job."[56]

In *Squibb v. Memorial Medical Center*, the Seventh Circuit Court of Appeals held that Squibb was unable to show that she was regarded as being unable to work in a "broad range" or "class" of nursing jobs, only that she was limited in the types of nursing jobs that she could perform.[57] Memorial Medical Center ("Memorial") did not violate the ADA when it involuntarily placed its employee, Squibb, on administrative leave due to frequent absences and later terminated her employment.[58] Squibb had sustained three back injuries at work and her doctor gave her a permanent restriction from lifting more than 25-30 pounds.[59] Because of this restriction, Squibb could no longer perform the essential duties of her position as a registered nurse and she was reassigned.

However, due to frequent absences, Squibb was involuntarily placed on administrative leave and was later terminated when she refused to return to work after being offered a new position. As she could not perform the functions of her desired position, Memorial did not discriminate in taking adverse employment actions.[60] In this case, the medical restriction instituted by Squibb's physician meant that she was no longer qualified for her position but it did not mean that she was "regarded as" being disabled in the major life activity of working. IN addition to indicating the restrictions, Squibb may have been better served by introducing information that accommodations that would assist in Squibb in lifting more than 25-30 pounds, e.g., having a co-worker assist or using assistive devices.

A medical restriction also made the employee unqualified in the case of *Jones v. United Parcel Service, Inc.*[61] Jones worked as a package car delivery driver with United Parcel Service ("UPS"). His ability to lift 70 pounds overhead was an essential function of the position.[62] After Jones injured his shoulder, UPS's doctor, Dr. Legler, put him on a work restriction that he could not lift anything heavier than 20 pounds, which meant he could no longer perform his job duties. In Jones, the Tenth Circuit Court of Appeals held that UPS did not violate the ADA's "regarded as" provision when it terminated Jones' employment.[63] Although UPS may have regarded Jones as being unable to lift 70 pounds, it did not mistakenly believe that he was substantially limited in the major life activity of working, and only believed he was limited to the extent of the doctor's restriction. The court came to this conclusion despite the fact that there was conflicting evidence regarding whether any restriction was necessary at all.[64] (Other cases discussed below, show that courts may not always be deferential to employers when medical information is cherry-picked to suit the employer's purposes and conflicting medical information is ignored.)

Similarly, in *Pittari v. American Eagle Airlines, Inc.*, the Eighth Circuit Court of Appeals found that an employer did not violate the ADA when it made employment decisions based on

bona fide work restrictions given by a medical professional.[65] American Eagle Airlines, Inc. ("American Eagle") was concerned that the medications that Pittari, a flight attendant, was taking might impair his ability to perform the safety-sensitive duties of his position. American Eagle arranged for a psychologist to measure Pittari's cognitive ability. The test indicated that Pittari's abilities to think and solve problems were below average.[66] Based on this examination, American Eagle removed Jones from his position of flight attendant, but offered him reassignment to other positions that did not require him to perform safety-sensitive duties. However, Pittari did not accept any of these positions. The next month, after Pittari was reevaluated by the same doctor and was found able to return to his job, although he might struggle with how to respond to unique emergencies. American Eagle refused to let Pittari return to his position until three months later when he was given full clearance to work through a third-party evaluation.[67]

The court found that American Eagle did not regard Pittari as being substantially limited in the major life activity of working during the period prior to his reinstatement.[68] This was due to the facts that Pittari was only diagnosed with a temporary impairment and because American Eagle only viewed him as limited in the specific job duties of a flight attendant requiring the ability to respond to unique emergencies, and not limited in the major activity of working. The court stated that "an impairment that disqualifies a person from only a narrow range of jobs is not considered a substantially limiting one." As American Eagle only regarded Pittari as temporarily unable to perform "one particular job," no violation of the ADA occurred.[69] Pittari needed to show that, "in light of his expertise, background, and job expectations" he was regarded as suffering "a significant reduction in meaningful employment opportunities due to his impairment."[70]

Like the Berry case above, the court seems to be saying that even if Pittari is "regarded as" having a disability, the employer did not violate the ADA. The court stated that Pittari was not qualified for his job due to his inability to perform an essential job function, handling emergency situations and looked at this as a limitation affecting a single job. However, as handling emergencies is a legitimate job requirement for all flight attendants, a better reasoned opinion would have held that Berry was either substantially limited or "regarded as" being substantially in the major life activity of working in the "class" of jobs of flight attendants. The court could have then held that even being so regarded, there was no ADA violation as there was a valid non-discriminatory reason for Pittari's discharge, his inability to perform the essential functions of a flight attendant either with or without a reasonable accommodation.

Cases Finding for the Employee

The cases above demonstrate that employers may regard an employee as being unable to perform a particular job without regarding them as being substantially limited in a major life activity such as working. The employers in these cases all based their decision on bona fide medical informa-

tion regarding workplace restrictions. However, if an employer concludes that an employee is unable to do a particular job without supporting medical information other than a diagnosis, this may be a violation of the ADA especially if the employer bases its decision on assumptions, stereotypes, fears, or myths rather than concrete medical information.

This was the situation in *Equal Employment Opportunity Commission v. Heartway Corporation*.[71] In *Heartway*, the employee, Edwards, was terminated from her cooking position at a nursing home after it was learned by the employer that she was being treated for Hepatitis C. After learning of her diagnosis, Edwards' supervisor made comments including, "How would you like to eat food containing her blood, if she ever cut her finger?" and "that if this got out to the clients they … would have a mass exodus from the nursing home."[72] The Tenth Circuit Court of Appeals found that these comments indicated that the supervisor subjectively believed that Edwards was substantially limited in her ability to work because he believed that she should not work in any kitchen. Thus, the court held that even though Edwards' Hepatitis C diagnosis did not necessarily make her disabled-in-fact, a reasonable jury could find that her supervisor's regarded her as being substantially limited in the major life activity of working, unable to work in a class or broad range of jobs.[73] Therefore, Ms. Edwards was protected under the ADA's "regarded as" prong.[74]

Obviously, safety is important in the food service industry, but in this case the employer acted on stereotypes rather than medical information. It should be noted that the EEOC has issued guidance for those in the food service industry titled, "How to Comply with the Americans with Disabilities Act: A Guide for Restaurants and Other Food Service Employers" found at: http://www.eeoc.gov/facts/restaurant_guide.html. This guidance cites which conditions are transmittable via food and explores employers' obligations to provide accommodations to individuals in the food service industry.

The employer took an overly broadly view of the employee's limitations in the case of *Equal Employment Opportunity Commission v. E.I. DuPont de Nemours & Co.*,[75] the Fifth Circuit Court of Appeals held that E.I. DuPont de Nemours & Co. ("DuPont") violated the ADA when it terminated an employee who it regarded as substantially limited in walking. The employee, Barrios, had a number of medical conditions that made it difficult for her to walk.[76] After conducting a functional capacity evaluation, DuPont's physicians decided to put Barrios on a restriction that prevented her from walking anywhere in the plant. DuPont interpreted this to mean that Barrios could not evacuate from the plant independently in the event of an emergency, which it considers an essential job function. Therefore, DuPont put Barrios on temporary disability and, later, permanent disability.[77] Seven years later, after Barrios demonstrated that she could walk the evacuation route without assistance, DuPont still refused to rehire her. The court found that DuPont regarded her as substantially limited in the major life activity of walking because it believed her impairment extended to all parts of

her life; therefore, it held that DuPont violated the ADA when it forced her to take disability leave.[78]

This case demonstrates the danger when employers make overly broad conclusions as to an employee's limitations without adequate medical support. It is important to note that employers have a duty under the ADA to make sure that emergency evacuation procedures provide for the needs of people with disabilities and to provide reasonable accommodations that may assist individuals in evacuating the facility in the event of an emergency. DuPont did not do this, forced Ms. Barrios to go on disability, and refused to reinstate Ms. Barrios after it was shown that she could evacuate the facility and perform her job functions. For these reasons, DuPont was found to violate the ADA.

The *DuPont* and *Heartway* cases demonstrate that employers should base workplace decisions regarding disability on objective medical information and not preconceptions or conjecture regarding the effects of a disability. The case of Taylor v. USF-Red Star Exp. Inc. demonstrates this principle as well.[79] In Taylor, an individual who drove a forklift for USF-Red Star Express, Inc. ("Red Star") experienced two seizures. A neurologist determined that his medical tests were consistent with a seizure disorder. Taylor informed Red Star of his seizure disorder and, according to Red Star, stated that he had been diagnosed with "infantile epilepsy." Based solely on this diagnosis, Red Start did not allow Taylor to return to work for 18 months. During this time, several physicians evaluated Taylor's condition. Twice, Taylor was examined by medical professionals who cleared him to work, but reversed their opinion after speaking with a physician retained by the company.[80] Red Star attempted to justify its refusal to return Taylor to work based on his statement that he had "infantile epilepsy." However, the Third Circuit Court of Appeals found that Red Star's belief that Taylor had a substantially limiting condition was not based on Taylor's alleged comment, but on the assessments of doctors who were reporting to, and retained by, Red Star.[81] Thus, the court held that Red Star violated the ADA when it refused to allow Taylor to return to work because it regarded him as being disabled. This case demonstrates the EEOC Guidance caveat mentioned earlier about the dangers of employers relying solely on company physicians and ignoring contrary opinions. It was clear to the court that Red Star utilized the company doctor to get other doctors to change their medical opinions and the court found for the employee as a result.

A similar situation occurred in *Wysong v. Dow Chemical Company*.[82] In *Wysong*, the employee was put on work restrictions that she could not lift, push, pull, or tug anything over five pounds based on an examination and report by the company medical advisor, Dr. Teter.[83] The examination was requested by Dow Chemical Company ("Dow") after Wysong complained of neck pain in May 2003. Because Wysong was unable to perform her job duties with this restriction, Dow involuntarily put Wysong on FMLA leave telling her that she needed to undergo a complete functional capacity examination in order to determine whether she was capable of performing her job duties before she could return to work. Less than a week later,

Dr. Teter found a note from one of Wysong's physicians in her medical records indicating that her physician believed she was exhibiting drug-seeking behavior. Without contacting this doctor, Dr. Teter refused to let Wysong complete the functional capacity examination unless she stopped taking pain medication for two weeks.[84]

Because Wysong refused to comply with this demand, Dow placed Wysong on unpaid medical leave and, approximately two weeks later, terminated her employment. On summary judgment, the Sixth Circuit Court of Appeals held that a reasonable fact finder could find that Dow regarded Wysong as disabled because of the restrictions Dr. Teter placed on Wysong due to her neck condition and/or because Dr. Teter believed, erroneously or not, that she had some sort of drug addiction. As there was a question of fact as to whether Dow believed Wysong's neck injury or suspected drug-addition were substantially limiting impairments, the court held that Dow's actions may have violated the ADA.[85] In addition to the danger of relying solely on a company doctor, this case also demonstrates the danger of trying to manage an employee's medication. Employers should refrain from making recommendations or demands about treatment as this can lead to a whole host of potential liability issues.

As noted earlier, employers can take adverse employment actions against any employee for valid, non-discriminatory business reasons, whether or not the employee has a disability or any medical conditions. However, if a court does not believe the employer's proffered non-discriminatory reasons for terminating the employee, it may find the employer's reason was pretext and hold that the employer intentionally discriminated against the employee in violation of the ADA. This was the case in *Wilson v. Phoenix Specialty Manufacturing Company, Incorporated*,[86] where the Fourth Circuit Court of Appeals found that the employer's proffered reasons for terminating Wilson were pretext as the reasons given were inconsistent with Phoenix's actions. Wilson, a shipping supervisor at Phoenix, was diagnosed with Parkinson's disease and experienced a "major panic attack" while at work in 2001.87 Later, both personal and Phoenix-employed doctors examined Wilson and released him to return to work with no restrictions. Despite this, Phoenix only allowed Wilson to work half days for two weeks before returning to full-time status, initially relying on the advice of a company doctor who had not personally examined Wilson.[88] After Wilson's return to work, senior management treated him differently; they would no longer meet with him for coffee breaks or make eye contact with him. Two weeks later, Wilson's supervisor emailed the company's human resources assistant stating that Wilson qualified for ADA designation and they would need to consider accommodations for him. However, when Wilson requested the reasonable accommodation of a large computer screen and help with duties involving writing, the company ignored his request for a large computer screen and only provided him with marginal writing assistance. One year later, Phoenix hired a new clerk for Wilson's department and stated that it wanted to eliminate Wilson's position. After Phoenix laid Wilson off, it created a new position that included the same responsibilities as Wil-

son's position and it promoted the new clerk into this position. [89]

The court held that Phoenix discriminated against Wilson in violation of the ADA.[90] This perception of a disability was evidenced by Wilson's supervisor's email stating that Wilson qualified for ADA designation as well as by Phoenix's refusal to return Wilson to work. The court also found fault with Phoenix's reliance on its own doctor, who did not perform an examination, rather than following the advice of Wilson's treating physician. Additional evidence that he was "regarded as" having a disability was found in the change in management's behavior toward Wilson after he returned to work.[91] Though Wilson's impairment was not in fact significantly limiting, the court held that he qualified for protection under the ADA under the "regarded as" due to the fact that Phoenix viewed his impairment as more substantially limiting than it actually was.[92]

Like the previous cases, the *Wilson* case demonstrates that employers may get into trouble by ignoring treating physician's recommendations especially when following the opinion of a company doctor who never examined the employee. In addition, eliminating a position and then creating an identical "new" position can be strong evidence to support a discrimination claim.

The plaintiff was also "regarded as" being disabled in *Justice v. Crown Cork and Seal Co.*[93] In this case, Justice, an electrician, had a stroke causing vertigo, a feeling of movement when there is none. It also caused Justice to appear unsteady to others; but he had no difficulty walking or standing.[94] Essential functions of Justice's job at Crown Cork and Seal Co. ("Crown Cork") included climbing ladders, walk on catwalks, and use power presses and cutters. Justice's supervisor became concerned that Justice may pose a threat to the safety of himself as his imbalance might cause his to fall. At the company's request, Justice went through several medical evaluations to determine his ability to fulfill his job duties. Early opinions by doctors employed by Crown Cork enforced a work restriction preventing Justice from working at unprotected heights over six feet.[96] A second evaluation conducted by a physical therapist initially cleared Justice to work but recommended that he use safety equipment. However, the physical therapist then changed her opinion after visiting the work site, recommending that Justice find employment somewhere else where it would be safer.[97] Finally, Crown Cork's medical director examined Justice's records and restricted Justice from jobs that "require[d] him to maintain balance, work at heights, [or] work near moving equipment."[98]

Based on these results, Crown Cork reassigned Justice to a janitorial position. The Tenth Circuit Court of Appeals found that a reasonable jury could find that Crown Cork believed that Justice was substantially limited in his ability to perform the broad class of jobs for electrical work.[99] Thus, the court held that a reasonable jury could find that Crown Cork regarded Justice as being disabled as he was viewed as being substantially limited in the major life activity of working.

The *Justice* case demonstrates the criteria for assessing a direct threat situation. While employers do not have to hire or retain employees

who pose a direct threat to the health or safety of themselves or other, this is a difficult standard to meet. Employers must make sure to use the best available.

"Record of" Having a Disability

In addition to employees who are "regarded as" being disabled by their employers, employees may have discrimination claims against their employers if they have a "record of" having a disability under the ADA. Such employees are protected if they once had "a physical or mental impairment that substantially limits one or more major life activities" even if the impairment is not substantially limiting at the time of the adverse employment actions.[100] The "record of" prong of the ADA's "disability" definition prevents employers from discriminating against employees who have histories of substantially limiting medical conditions or disabilities, those who have disabilities that are not substantially limiting only because they are controlled by medication or other accommodations; and those with latent episodic conditions that, if active, would limit major life activities.[101]

To establish a prima facie case for "record of" disability discrimination under the ADA, employees must show that:

1. [T]hey had a record of an impairment that substantially limits a major life activity;
2. [T]heir employer was aware of this record;
3. [T]hey suffered adverse employment actions because of the employer's fears, misapprehensions, or assumptions regarding the recorded disability and not for some valid nondiscriminatory reason; and
4. [T]hey were qualified to perform the essential job duties of the position, with or without accommodation, at the time of the adverse action.[102]

Record of A Substantially Limiting Impairment

To establish a case under the "record of" prong of the ADA, employees must show that they have a record of having an impairment that substantially limited at least one major life activity, or that they were misclassified as having such an impairment. The ADA does not protect employees who only have records of impairments that are not substantially limiting. This was the situation in *Zwygart v. Board of County Commissioners of Jefferson County.*[103] Zwygart worked as a truck driver for the Jefferson County Road Department starting in 1986. Beginning in 1990, Zwygart began having attendance problems that culminated in his termination in 2003. These attendance problems were due in part to two heart surgeries Zwygart underwent in 2001 and 2003. The Tenth Circuit Court of Appeals found that Zwygart did not establish that his heart operations substantially limited the major life activity of working because he did not produce evidence that he was restricted from working any job other than "truck driver" in 2003.[104] Thus, the court held that he could not prevail in his ADA discrimination claim because he did not qualify for

protection under the "record of" prong of the ADA's definition of "disability."[105]

To demonstrate a substantial limitation under the "record of" prong, an employee must show more than a record of work restrictions. In *Sarmento v. Henry Schein, Inc.*,[106] the Ninth Circuit Court of Appeals found that the Sarmento did not raise a material issue of fact as to whether he had a record of a disability under the ADA. Although Sarmento submitted records indicating a history of lifting, bending and pushing restrictions, the court found that these restrictions were not evidence of a record of a substantially limiting impairment. Therefore, the court held that Sarmento did not have a "record of" a disability that would qualify him for protection under the ADA.[108]

An employee also must show more than a history of medical diagnoses. In *Kampmier v. Emeritus Corporation*,[109] the Seventh Circuit Court of Appeals found that Kampmeir's record of injuries and surgeries did not indicate that she had been substantially limited in a major life activity.[110] As a result, the court held that she did not fulfill the "record of" prong of the ADA's definition for "disability."

In cases where employees had records of conditions that substantially limited one or more major life activities, courts may find that the employees' "record of" a disability motivated employers to take adverse action. This is demonstrated in *Knight v. The Metropolitan Government of Nashville and Davidson County, Tennessee*.[111] Knight, a police officer, went on disability leave because of back and neck injuries. After taking time to recuperate, Knight was not allowed to return to work by his employer, ("Metro"), even though Knight claimed that his doctor cleared him to work.[112] He presented evidence that one of Metro's police Sergeants told Knight that Metro never reinstated officers who had gone on disability leave. He also presented evidence Metro regarded police officers who took disability leave as "disabled," and that, while he was on leave, he sometimes was unable to work at all.[113] The court found that Knight had a "record of" an impairment that substantially limited his major life activity of working and that Metro refused to reinstate him because of this record.[114] Thus, the court held that Knight was protected by the ADA under its "record of" prong and that Metro violated the ADA when it refused to reinstate him to his position.[115]

A recent "record of" case is *Doe v. The Salvation Army in the U.S.*[116] As the employer is a federal agency, this case was examined under the Rehabilitation Act although the analysis is the same as it is for ADA cases. In Doe, an individual with a history of paranoid schizophrenia was not hired by the Salvation Army.[117] When the applicant admitted that he had used psychotropic medications, the interview was terminated. The court held that Doe may have a claim for discrimination based on his "record of" a disability and that the Salvation Army may have inappropriately asked Doe about the medications that he was taking. While the court admittedly did not fully understand the reasons behind the ADA's protection for people with a "record of" a disability, i.e, to protect people against employment decisions based on myths, stereotypes, and misconceptions regarding disabilities, the court nevertheless held that the Salva-

tion Army's actions in not hiring Doe may have violated the ADA based on his "record of" a disability.[118]

Employer's Knowledge of Employee's Record

Employees must show that their employers knew that they had records of substantially limiting conditions in order to prevail in a discrimination claim under the "record of" prong of the ADA. In *Ainsworth v. Independent School District No. 3 of Tulsa City, Oklahoma*,[119] the Tenth Circuit Court of Appeals found that the school district did not violate the ADA because Ainsworth could not prove that the school district knew that he had a "record of" a disability. When Ainsworth began substitute teaching for the school district, he did not tell anyone that he was diagnosed with a seizure disorder.[120] As he did not require a reasonable accommodation, he was within his rights not to disclose his disability. Several months later, Ainsworth told Price, the School District Substitute Teacher Coordinator, that he had a seizure disorder, but did not describe how it affected him.[121] At around the same time, while Ainsworth was on assignment at Haskell Middle School, the school principal discovered that Ainsworth was exhibiting what the principal considered to be bizarre, inappropriate, and offensive behavior in the classroom. For example, during an eighth grade math class, Ainsworth wrote "sex" on the overhead projector, and instructed students to discuss their experiences with each other. The principal reported this behavior to Price who then decided to remove Ainsworth from the district's substitute teacher list.

The court found that Ainsworth did not introduce enough evidence to infer that the school district decided to remove him from the substitute teacher list because of his "record of" a disability.[122] First, the court found that neither Price nor the principal knew that Ainsworth had a disability that qualified for protection under the ADA. Price did not know how the impairment affected or limited Ainsworth; and the principal had no knowledge that Ainsworth had an impairment. As Ainsworth did not establish the prima facie element that his employer knew he had a disability, the court held that Ainsworth failed to establish a "record of" discrimination case. Furthermore, the court held that the school district had a valid nondiscriminatory reason for removing him from the substitute teacher list because, as Ainsworth agreed, his inappropriate classroom behavior constituted grounds for terminating any teacher's employment.[123]

From these cases, it is clear that employers cannot take adverse job actions against an individual based upon their "record of" a disability. The record must demonstrate a condition that substantially limited one or more major life activities at one time and the employer must have knowledge of this record in order to have potential liability under the ADA. In addition, as in the Ainsworth case, employers are on the safest ground when they make decisions based on current conduct, rather than on medical histories. Also, although there is not much law on the subject, employers may have a duty to provide reasonable accommodations to individuals with a "record of" a disability.[124]

Association With a Person with a Disability

A third category where an employee without a current ADA disability may have protection under the ADA is when the employee is related or closely associated with a person who has an impairment that substantially limits a major life activity.[125] This provision protects relatives and caregivers from adverse employment actions based on misconceptions, fears, or assumptions related to the individual's relationship with a person with a disability.[126] Like the other groups protected by the ADA, the association discrimination clause does not prevent employers from taking adverse employment action against employees for valid non-discriminatory reasons. Thus, employers are not prevented from terminating employees who have poor performance, attendance problems, or who pose a direct threat to the safety of themselves or others even though they have an association with a person with a disability. Employers also are not prevented from terminating employees as a cost-cutting move as long as that decision is made for valid business reasons unrelated to the disability of the person associated with the employee.

Courts have identified three situations in which the association clause of the ADA may apply to adverse employment actions taken by an employer.[127] The first is adverse actions based on expenses that an employer may incur because of an employee's relationship with a person with disabilities.[128] An example of this is when an employer terminates an employee because the employee's spouse has a disability that is costly to the employer due to medical expenses. The second situation occurs when an employee is regarded as being disabled because of her association with a person with disabilities.[129] Courts have identified two examples of this situation: when an employee's companion has HIV and the employer fears that the employee may also become infected, or when an employee's blood relative had a genetic disease and the employer feared that the employee would likely develop that disease as well.[130]

To prevail in an association discrimination claim under these three or any other situations, employees must show that:

- [T]he employer knew that they had a close association with a person with an ADA-qualifying disability;
- [T]he employee was qualified for the job position;
- [T]he employee experienced an adverse employment action; and
- [T]he employer took this action at least in part because of the employee's association with a person with disabilities, not because of some other valid non-discriminatory reason.[131]

Courts will determine whether an impairment is an ADA-qualifying "disability" on a case-by-case basis utilizing an "individualized assessment" to determine whether the impairment substantially limits a major life activity of the individual with a disability.[132] While employees do not need to show that their association with a person with a disability

was the only reason their employers took adverse employment action against them, they do need to show that the relationship was a determining factor in the employer's decision to take action.[133] The employee must show that the person they are associated with has an actual ADA disability and that the employer knew of the employee's association with a person with a disability.

A court applied the "association" criteria in the case of *Ennis v. National Ass'n of Business and Educational Radio, Inc.*[134] In *Ennis*, the Fourth Circuit Court of Appeals found that Ennis could not establish a prima facie case that National Association of Business and Education Radio Inc. ("NABER") violated the ADA when it terminated Ennis. About the same time Ennis began working for NABER in 1990, she adopted a child who was HIV-positive.[135] Ennis' supervisors continually had problems with Ennis' job performance as she failed to perform work in a timely fashion and regularly made errors. Undisputed evidence indicated that NABER had warned her several times about her poor performance.[136] In June 1993, NABER terminated Ennis' employment due to her performance issues. Ennis filed suit for association discrimination claiming that NABER terminated her employment because of the impact her child's medical bills may have caused on NABER's insurance rates. As evidence, Ennis presented a memo that NABER issued in December 1992 warning that a few expensive cases could increase the company's insurance rates dramatically. The court ruled for the employer holding that Ennis did not show that her son had a disability as defined by the ADA. Even though she could show that her son had HIV, she needed to show that her son's HIV substantially limited one of his major life activities which she did not do.[137] The court also found Ennis did not prove that NABER had actual knowledge of her son's HIV status.[138] The court further found the connection between the memo and Ennis' termination was too distant in time to indicate a connection especially as Ennis did not present any evidence indicating that NABER feared that her son with have high medical bills. Finally, the court found that Ennis did not show that NABER terminated her because of her association with her son and not for poor performance, a valid nondiscriminatory reason.[139]

On the other hand, when an employee can show that employer knew that the employee's association with a person with disabilities raised the cost of health insurance, the court may find that an adverse employment action against the employee was motivated by this knowledge in violation of the ADA. This was the situation in *Trujillo v. PacifiCorp*,[140] where the Tenth Circuit found that the Trujillos, two people who were married to each other and who both worked for PacifiCorp, established a prima facie case for association discrimination under the ADA. The Trujillos' son, who was covered by PacifiCorp's health plan, developed a brain tumor. Because of his illness, the Trujillos accumulated tens of thousands of dollars in medical bills. Within weeks after their son experienced a relapse, PacifiCo terminated each of the Trujillo's employment, purportedly for falsifying their time sheets.[141] The court found that PacifiCo may have violated the ADA when it terminated the Trujillos employment because evidence showed that

PacifiCo, and specifically the Trujillos' supervisors, were concerned about the impact of the Trujillos' son's medical bills on their health plan.[142] Further, the temporal proximity between their son's relapse and the investigation into the Trujillos' time sheets suggested a causal relationship between the termination and their son's medical condition.[143] The court also questioned PacifiCo's purported reason for terminating their employment because it used an unreliable method for determining if they had falsified their time sheets and because it treated the Trujillos more severely than it treated other similarly situated employees.[144]

The court in *Trujillo* noted that employers have the right to terminate employees who are associated with a person with disabilities if they have a valid non-discriminatory reason for terminating the employee.[145] They may terminate an employee who, with or without accommodations, is not performing at a satisfactory level. To determine if employers actually terminated employees for a non-discriminatory reason, the court will consider "weaknesses, implausibilities, inconsistencies, or contradictions in the employer's proffered legitimate reasons for its action" to determine if it can "infer that the employer did not act for the asserted non-discriminatory reasons."[146] Under this standard, the court found that PacificCo's reasons for the termination were insufficient to establish valid nondiscriminatory reasons for the terminations.

Similarly, the Seventh Circuit in *Dewitt v. Proctor Hospital*,[148] found that the plaintiff had a cause of action for association discrimination under the ADA. In this case, Dewitt, a registered nurse, had favorable reviews from her staff and a history of promotions at Proctor Hospital ("Proctor"). Dewitt and her husband received their health insurance through Proctor, which was partially self-insured. Before Dewitt began working at Proctor, her husband was diagnosed with prostate cancer. Because Proctor was partially self-insured, it kept records of employees' health insurance bills and was aware of the high price it was paying for Dewitt's husband's medical expenses.[149] In fact, Dewitt's supervisor confronted Dewitt regarding these expenses on several occasions. In May 2005, Proctor informed its employees that Proctor was facing financial troubles and would need to cut its costs. In August 2005, Proctor fired Dewitt for insubordination, but did not elaborate on its reasoning.[150] The court found that the timing of Dewitt's termination, within months after her discussion with her supervisor regarding her husband's health care expenses and within only a few months after they said they wanted to cut costs, suggested that Dewitt's husband's medical bills were a factor in their decision to terminate Dewitt's employment.[151]

These cases demonstrate the importance for employers of documenting all employment decisions in order to establish that actions are taken for legitimate business reasons that do not violate the ADA. Terminating employees whose families are responsible for high health care costs is considered a discriminatory act under the ADA that violates the "association" provision unless there is a non-discriminatory, valid reason for the termination, e.g., downsizing. However, the burden is still on the employee to demonstrate that the reasons for the adverse employment action were discrimi-

natory and not based on valid business reasons.

An employee was unable to show discrimination in the case of *Larimer v. International Business Machines, Inc.*[152] Larimer's employment was terminated shortly after he arrived home from the hospital with two girls who had a "variety of serious medical conditions owing to their prematurity, including respiratory distress, jaundice, apnea, and sepsis." The twins were hospitalized for almost two months costing almost $200,000 which was paid for by IBM's employee health plan. The children apparently did not have disabling conditions at the time of Larimer's termination although there is an unknown probability that the children would develop serious physical or mental conditions as they aged.[154]

The court wrestled with whether the children did in fact have an ADA disability or whether they were "regarded as" being disabled.[155] However the court concluded that, "Larimer must lose even if his daughters are disabled or regarded as disabled." The court felt that this case did not fit any of the categories described at the beginning of this section and found that Larimer presented no evidence demonstrating that IBM was concerned about healthcare costs unlike the *DeWitt* and *Trujillo* cases discussed above. Due to this lack of evidence and the fact that the court found it hard to believe that a company as large as IBM would care about the healthcare costs of one family, the court held that IBM did not discriminate against Larimer when it terminated his employment. The court reached this conclusion seemingly without any evidence from IBM regarding the reason for Larimer's termination.

The result in Larimer may have been different if Larimer introduced evidence of employer fears concerning his need to care for his daughters. This is true as the ADA does prevent employers from making employment decisions based on the fear or assumption that an employee would have to miss work to take care of a disabled relative. The ADA does not require employers to provide reasonable accommodations to employees without disabilities; thus, the ADA does not require employers to give employees time off to care for a relative with disabilities. However, an employer's fear that an employee will miss time to care for a relative with a disability may demonstrate discriminatory intent. For example, in *Erdman v. Nationwide Insurance*,[156] the plaintiff, Erdman, had a child with a heart condition and Downs Syndrome. In 1998, Erdman requested and was granted a part-time schedule so she could meet her daughter's needs. In 2002, this schedule change was revoked and Nationwide Insurance ("Nationwide") asked Erdman to return to full-time status. Around the same time, Erdman requested FMLA leave to care of her daughter.[157] Meanwhile her supervisor, while monitoring Erdman's phone calls, discovered that she was using inappropriate language and making personal calls and terminated her employment the next day.[158] The court held that Erdman established a prima facie case of discrimination and that her termination may have violated the ADA.[159] Erdman presented evidence that Nationwide knew that she had a relationship with a person with disabilities, and that it possibly terminated her employment because it feared that she would miss a lot of work because of this relationship and

the need to personally care for her daughter. However, the court found that the employer did not violate Erdman's rights when it revoked her part-time work schedule because the employer was not responsible under the ADA for providing her with accommodations because she does not have a disability. [160]

In "association" cases, employers should be certain that there are legitimate, non-discriminatory business reasons for its employment decisions that are not based on disability. Otherwise, an employee may show that employer fears or concerns entered into the employment decision in violation of the ADA. Employers do not have to accommodate employees without disabilities based on their relationship with a person with a disability, but they cannot make employment decisions based on an expectation that the employee will need large amounts of leave time.

Practical Tips for Employers

In addressing workplace situations involving individuals in possible "regarded as," "record of," and "association" ADA claims, some practical tips for employers are:

- Base actions on observable conduct, not medical conditions or suspected medical conditions. This will help avoid the appearance of making employment decisions based on assumptions or stereotypes associated with certain medical conditions;
- Perform an "individualized assessment" in every situation;
- Utilize the "best available objective medical evidence" in making a decision and be careful of relying solely on a company doctor's medical opinion especially when it is contrary to the position of a treating doctor.
- Document everything relevant to employment decision;
- Remember that "adverse employment actions" is a broad category under the ADA that includes but is not limited to terminations, demotions, reassignments, and involuntary leave.
- Train managers and supervisors about the ADA and disability awareness so that decisions are not made based on fears, stereotypes, and assumptions.

Practical Tips for Employees

For employees who feel that they may be subject to discrimination under the ADA under the "regarded as," "record of," and "association" provisions of the ADA, some practice tips are:

- Document everything that is relevant including recording any changes in a supervisors' behavior and any comments by supervisors that may indicate that the employer believes the employee falls into one of the groups protected by the

ADA.

- When filing a claim of discrimination, plead all three prongs of the definition of disability, i.e., having a current disability; being "regarded as" having a disability, and having a "record of" disability if the facts support such allegations;
- Request a reasonable accommodation if you are having difficulty performing job functions.

Conclusion

It is important to remember that the ADA not only protects the rights of people with current disabilities, but also extends its protections to employees "regarded as" having a disability, those with a "record of" a disability, and those associated with others who have disabilities. This coverage is designed to help the ADA fulfill its goal of preventing employment discrimination based on assumptions, stereotypes, and fears regarding people with disabilities. It should also be remembered that the ADA does not provide a blanket of immunity for people with disabilities. Employers have the right to terminate or take other adverse employment action against employees as long as there are valid, non-discriminatory motivations for these actions such as poor performance, an inability to fulfill the essential functions of the job, violation of workplace rules or policies, or when an employee poses a "direct threat" to the health or safety of the employee or others. Employers should remember that the ADA imposes a duty to reasonably modify workplace rules, but that employers do not have to modify quantity or quality expectations from employees under the ADA.

Notes

* This legal brief was written by Barry C. Taylor, Legal Advocacy Director at Equip for Equality, Alan M. Goldstein, Senior Attorney with Equip for Equality, and Gwynne Kizer, an Equip for Equality intern. Equip for Equality is the Illinois Protection and Advocacy Agency (P&A) for people with disabilities. Equip for Equality is providing this information under a subcontract with the DBTAC: Great Lakes ADA Center, University of Illinois at Chicago, U.S. Department of Education, National Institute on Disability Rehabilitation and Research Award No. H133A060097.

1. Facts taken in part from *Schnake v. Johnson County Community College*, 961 F.Supp. 1478 (D. Kan. 1997).
2. Facts taken in part from *Mulholland v. Pharmacia & Upjohn, Inc.*, 2001 WL 311241 (6th Cir. 2002).
3. Facts taken in part from *Pittman v. Moseley, Warrant, Prichard & Parrish*, 2002 WL 2007880 (M.D. Fla. 2002).
4. 42 U.S.C. § 12102(2); See also 29 C.F.R. § 1630.2(g).
5. 42 U.S.C. §12102(2).
6. 42 U.S.C. §12112(b)(4).
7. 42 U.S.C. §12101(b)(1).
8. 42 U.S.C. §12101(a)(7).
9. 42 U.S.C. §12102 (2).
10. 42 U.S.C. §12112(b)(4).
11. *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 861 (1st Cir. 1998).
12. *Garg v. Potter*, 521 F.3d 731 (7th Cir. 2008).
13. See *Albertson's, Inc. v. Kirkburg*, 527 U.S. 555 (1999); See *Sutton*, 527 U.S. 471 (1999).; See *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999). See *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002).
14. *Carlson v. Liberty Mutual Insurance Co.*, 2007 WL 1632267 (11th Cir. June 7, 2007).
15. *EEOC v. Lee's Log Cabin, Inc.*, 436 F.Supp.2d 992 (W.D. Wis 2006).

16. *Orr v. Wal-Mart Stores, Inc.*, 297 F.3d 720 (8th Cir. 2002).

17. *Boerst v. General Mills*, 2002 WL 59637 (6th Cir. 2002).

18. *Taylor v. Nimock's Oil Co.,* 214 F.3d 957 (8th Cir. 2000).

19. *Hill v. Kansas Area Transportation Authority*, 181 F.3d 891 (8th Cir. 1999).

20. *EEOC v. R.J. Gallagher Co.*, 181 F.3d 645 (5th Cir. 1999).

21. *McClure v. GMC*, 2003 WL 124480 (N.D. Tex. Jan. 10, 2003).

22. *Littleton v. Wal-Mart*, 2007 WL 2211131, (11th Cir. 2007) (unpublished).

23. *Berry v. T-Mobile USA, Inc.*, 490 F.3d 1211 (10th Cir. 2007).

24. *Godfrey v. New York Transit Authority,* 2006 WL 2505223 (E.D.N.Y. Aug. 28, 2006).

25. *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184, 187 (2002) (adding a requirement that the impairment prevent or severely restrict the individual "from performing tasks that are of central importance to most people's daily lives." Toyota involved an individual with a manual impairment but this analysis has been applied to other impairments by the lower courts). *See also, e.g., Berry v. T-Mobile*, 490 F.3d 1211, 1217 (10th Cir. 2007).

26. See H.R. 3195; See S. 1881.

27. *Sutton,* 527 U.S. at 490 (quoting 29 C.F.R. pt. 1630, App. §1630.2 (*l*)).

28. *Wilson v. Phoenix Specialty Manufacturing Company, Incorporated*, 513 F.3d 378, 385 (4th Cir. 2008).

29.*Wysong v. Dow Chemical Company*, 503 F.3d 441, 451 (6th Cir. 2007) (citing *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489 (1999)); *See also*, 29 C.F.R. § 1630.2(l).

30. *Squibb v. Memorial Medical Center,* 497 F.3d 775 (7th Cir. 2007).

31. *Jacques v. DiMarzio, Inc.*, 386 F.3d 192, 201 (2nd Cir. 2004).

32. *See, Jones v. United Parcel Service, Inc.*, 502 F.3d 1176, 1190 (10th Cir. 2007).

33. *Id.*

34. *See, e.g., Berry v. T-Mobile USA, Inc.*, 490 F.3d 1211 (10th Cir. 2007) (FMLA leave); *Benko v. Portage Area School District*, 2007 WL 2041977 (3rd Cir. 2007) (sabbatical) ; *Lucas v. Methodist Hospital, Inc.,* 2006 WL 1307452, (7th Cir. 2006) (providing assigned parking spaces as a reasonable accommodation).

35. *See, e.g., Jones v. United Parcel Service, Inc.*, 502 F.3d 1176 (10thCir. 2007); *Pittari v. American Eagle Airlines, Inc.*, 468 F.3d 1056 (8thCir. 2006); *Pence v. Tenneco Automotive Operating Co. Inc.,*2006 WL 547831 (4th Cir. 2006) (unpublished); *Butler v. Greif Brothers Service Corp.*, 2007 WL 1244206 (11th Cir. 2007).

36. *See, e.g., Justice v. Crown Cork and Seal Co.,* 527 F.3d 1080 (10th Cir. 2008); *Wilson v. Phoenix Specialty Manufacturing Company, Incorporated,* 513 F.3d 378 (4th Cir. 2008); *Taylor v. USF-Red Star Exp. Inc.*, 2006 WL 3749598 (3rd Cir. 2006); *Equal Employment Opportunity Commission v. Heartway Corporation,* 466 F.3d 1156 (10th Cir. 2006); *Equal Employment Opportunity Commission v. E.I. DuPont de Nemours & Co.,* 480 F.3d 724 (5th 2007); *Wysong v. Dow Chemical Company,* 503 F.3d 441 (6th Cir. 2007).

37. *EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA),* Question 12, Number 915.002, July 27, 2000, http://www.eeoc.gov/policy/docs/guidance-inquiries.html.

38. *See, e.g., Taylor v. USF-Red Star Exp. Inc.*, 2006 WL 3749598 (3rd Cir. 2006); *Wilson v. Phoenix Specialty Manufacturing Company, Incorporated,* 513 F.3d 378 (4th Cir. 2008); *Equal Employment Opportunity Commission v. Heartway Corporation,* 466 F.3d 1156 (10th Cir. 2006); *Equal Employment Opportunity Commission v. E.I. DuPont de Nemours & Co.,* 480 F.3d 724 (5th 2007); *Wysong v. Dow Chemical Company,* 503 F.3d 441 (6th Cir. 2007).

39. *See, e.g., Taylor v. USF-Red Star Exp. Inc.*, 2006 WL 3749598 (3rd Cir. 2006); *Wilson v. Phoenix Specialty Manufacturing Company, Incorporated,* 513 F.3d 378 (4th Cir. 2008); *Equal Employment Opportunity Commission v. Heartway Corporation,* 466 F.3d 1156 (10th Cir. 2006); *Equal Employment Opportunity Commission v. E.I. DuPont de Nemours & Co.,* 480 F.3d 724 (5th 2007).

40. *See, Benko v. Portage Area School District*, 2007 WL 2041977 (3rd Cir. 2007); *Lucas v. Methodist Hospital, Inc.,* 2006 WL 1307452, (7th Cir. 2006).

41. *See,* EEOC Informal Guidance Letter dated 8/6/01 from Sharon Rennert, Senior Attorney Ad-

viser stating that the ADA "is not intended to discourage employers from assisting employees in an effort to foster good relations, improve morale and avoid confrontation and litigation. These objectives would be undermined if "regarded as" coverage could result solely from an employer providing accommodation." *See also, e.g.*, *Plant v. Morton International, Inc.*, 212 F. 3d 929 (6th Cir. 2000).

42. *See, e.g., Taylor v. USF-Red Star Exp. Inc.*, 2006 WL 3749598 (3rd Cir. 2006), discussed below.

43. *See*, *e.g.*, *Kaplan v.City of North Las Vegas*, 323 F.3d 1226 (9th Cir. 2003); *Shannon v. New York City Transit Authority*, 332 F. 3d 95 (2nd Cir. 2003).

44. *See*, *Williams v. Philadelphia Housing Authority Police Department*, 380 F.3d 751 (3rd Cir. 2004).

45. *Hoard v. CHU2A, Inc.,* 2007 WL 1828269 (11th Cir. 2007).

46. *Id.* at 958.

47. *Id.* at 959.

48. *Id.* at 960.

49. *Berry v. T-Mobile USA, Inc.*, 490 F.3d 1211 (10th Cir. 2007).

50. *Id*. at 1219. *See also, Benko v. Portage Area School District*, 2007 WL 2041977 (3rd Cir. 2007) (affirming summary judgment for the employer, holding that an employee who was granted a sabbatical was not "regarded as" having a disability under the ADA); *Lucas v. Methodist Hospital, Inc.,* 2006 WL 1307452, (7th Cir. 2006) (Evidence that the defendant gave plaintiff a pass to use parking spaces reserved for disabled employees was not sufficient to prove that she was regarded as disabled).

51. *Id*. at 1220-21.

52. *See, e.g., Plant v. Morton International, Inc.*, 212 F. 3d 929 (6th Cir. 2000) (Plaintiff was not "regarded as" being disabled even though the employer knew of his medical restrictions regarding lifting, stooping, bending, and driving and reassigned him to a position that fit these restrictions); *Linser v. Ohio Department of Mental Health,* 2000 U.S. App.LEXIS 25644,(6th Cir. 2000). But see, *Holihan v. Lucky Sotres, 87 F.3d 362* (9th Cir. 1996), *cert. denied,* 117 S.Ct. 1349 (1997) (Employee may have been "regarded as" being disabled where the employer asked whether the employee had problems and requested and reviewed medical reports diagnosing the employee's mental illness).

53. *Pence v. Tenneco Automotive Operating Co. Inc.,*2006 WL 547831 (4th Cir. 2006) (unpublished).

54. *Id.* at 3.

55. *Pittari v. American Eagle Airlines, Inc*., 468 F.3d 1056, 1062 (8thCir. 2006).

56. *Murphy v. United Parcel Service*, 527 U.S. 516, 523 (1999).

57. Id. at 783.

58. *Squibb v. Memorial Medical Center,* 497 F.3d 775 (7th Cir. 2007).

59. *Id.* at 779.

60. Id. at 783.

61. *Jones v. United Parcel Service, Inc*., 502 F.3d 1176 (10thCir. 2007). *See also*, *Butler v. Greif Brothers Service Corp.*, 2007 WL 1244206 (11th Cir. 2007) (an employee with a work restriction of "no bending" was not regarded as being substantially limited in working. At most, his employer perceived him as unable to perform the particular job of machinist-electrician).

62. *Id.* at 1181.

63. *Id.* at 1193.

64. *Id.* at 1181.

65. *Pittari v. American Eagle Airlines, Inc*., 468 F.3d 1056 (8thCir. 2006).

66. *Id.* at 1158-59.

67. *Id.* at 1059.

68. *Id.* at 1063.

69. *Id.* at 1062. *See also, Murphy v. United Parcel Service*, 527 U.S. 516, 523 (1999) ("[T]o be regarded as substantially limited in the major life activity of working, one must be regarded as precluded from more than a particular job.").

70. *Id.* at 1062.

71. *Equal Employment Opportunity Commission v. Heartway Corporation,* 466 F.3d 1156 (10th Cir. 2006).

72. *Id.* at 1159-60.

73. *Id.* at 1167.

74. *Id.* at 1168.

75. *Equal Employment Opportunity Commission v. E.I. DuPont de Nemours & Co.,* 480 F.3d 724 (5th 2007).

76. *Id.* at 727.

77. *Id.* at 728.

78. *Id.* at 731.

79. *Taylor v. USF-Red Star Exp. Inc.,* 2006 WL 3749598 (3rd Cir. 2006). *See also*, *Rodriguez v. ConAgra Grocery Products Co.,* 436 F.3d 468 (5th Cir. 2006) (an employer regarded a plaintiff with diabetes as disabled and violated the ADA by denying him a job based on wrongful and stereotypical assumptions about his diabetes. The employer's doctor, as well as the person making the hiring decision, believed the plaintiff would experience dizziness and black-outs, based not on his past history, which they had never reviewed, but based on assumptions about "uncontrolled" diabetes).

80. *Id.* at 104.

81. *Id.* at 108.

82. *Wysong v. Dow Chemical Company,* 503 F.3d 441 (6th Cir. 2007).

83. *Id.* at 444.

84. *Id.* at 445.

85. *Id.* at 452-53.

86. *Wilson v. Phoenix Specialty Manufacturing Company, Incorporated,* 513 F.3d 378 (4th Cir. 2008).

87. *Id.* at 381.

88. *Id.*

89. *Id.* at 382.

90. *Id.* at 385.

91. *Id.*

92. *Id.* at 386.

93. *Justice v. Crown Cork and Seal Co.,* 527 F.3d 1080 (10th Cir. 2008).

94. *Id.* at 1082.

95. *Id.*

96. *Id.* at 1083.

97. *Id.* at 1084.

98. *Id.* at 1085.

99. *Id.* at 1091.

100. 42 U.S.C. §12102 (2); 29 C.F.R. § 1630.2(k).

101. *Arnold v. United Parcel Service, Inc.,* 136 F.3d 854 (1st Cir. 1998)

102. *Smith v. Federal Express Corporation*, 2006 WL 1995726, 854 (11th Cir. 2006).

103. 483 F.3d 1086 (10th Cir. 2007).

104. *Id.*at 1092.

105. *Id.*

106. 2007 WL 4553408 (9th Cir. 2007).

107. *Id.* at 27.

108. *Id.*

109. 471 F.3d 930 (7th Cir. 2007).

110. *Id*. at 938.

111. 2005 WL 758239 (6th Cir. 2005).

112. *Id.* at 758.

113. *Id.* at 760.

114. *Id.* at 761.

115. *Id.*

116. *Doe v. The Salvation Army in the U.S.,* 2008 WL 2572930, (6th Cir. 2008).

117. *Id.* at 1.

118. *Id.* at 2-3.

119. 2007 WL 1180420 (10th 2007).

120. *Id.* at 767.

121. *Id.* at 768.

122. *Id.* at 771.

123. *Id.* at 773-74.

124. *See, e.g., Davidson v. Midlefort Clinic, Ltd*., 133 F.3d 499 (7th Cir. 1998) (a "record of" plaintiff could "demand reasonable accommodations to ongoing or recurrent limitations.")

125. 42 U.S.C. 12112(b)(4).

126. *O'Connell v. Isodor Corp.*, 56 F. Supp. 2d 649 (E.D. Va. 1999).

127. *Trujillo v. PacifCorp*, 542 F.3d 1149, 1155 (10th Cir. 2008).

128. *Id.*

129. *Id.*

130. *See also*, the Genetic Information Nondiscrimination Act of 2008, 42 U.S.C. §2000ff.

131. *Trujillo,* 542 F.3d at 1154.

132. *Ennis v. National Ass'n of Business and Educational Radio, Inc*., 53 F.3d 55, 59 (4th Cir. 2008).

133. *Id.*

134. 53 F.3d 55 (4th Cir. 1995).

135. *Id.* at 56.

136. *Id.* at 61.

137. *Id.* at 60.

138. *Id.* at 60-61.

139. *Id.* at 62.

140. 524 F.3d 1149 (10th Cir. 2008).

141. *Id.* at 1153.

142. *Id.* at 1156-57.

143. *Id.* at 1157.

144. *Id.* at 1158.

145. *Id.* at 1154

148. *Id.* at 1158.
147. *Id.* at 1159.
148.517 F. 3d 944 (7th Cir. 2008).
149. *Id.* at 946.
150. *Id.* at 947.
151. *Id.* at 949.
152. *Larimer v. International Business Machines Corp.*, 370 F.3d 698 (7th Cir. 2004).
153. *Id.* at 699.
154. *Id.*
155. *Id.*
156. *Erdman v. Nationwide Insurance,* 510 F. Supp.2d 363 (M.D. Pa. 2007).
157. *Id.* at 368
158. *Id.*
159. *Id.* at 374
160. *Id.*

ADA Coverage Beyond Actual Disabilities:
Regarded As, Record Of, and Association Disability