Holmes v. Barnhart, 2006 WESTLAW 3165695 (E.D.Pa. 2006) – ALJ erred when relying on testimony of a medical examiner that patient would do better if she worked through her pain in finding residual functional capacity. Further, claimant's obesity was improperly considered a severe impairment, but obesity can be considered as a factor in determining residual functional capacity.

Jolly v. Barnhart, 465 F.Supp.2d 498 (D.S.C. 2006) – Although ALJ was correct to discredit subjective complaints that claimant was virtually helpless due to her arthritis, the ALJ erred in discounting the medical evidence that claimant's ability to grip and grasp is compromised by her impairments. The vocational expert testified that the only jobs claimant was able to perform were jobs that require the ability to use one's hands on a continuous, or at least frequent, basis. If the ALJ was going to find residual functional capacity, he had to explain how he reached this conclusion based on the medical evidence.

Soth v. Shalala, 827 F.Supp. 1415 (S.D.Iowa 1993) – SSDI appeal by male claimant with ulcerative colitis, with pain, bleeding, and diarrhea. He also had gout, dementia, and anxiety disorder. The court stated the rule that, once a claimant shows he cannot perform his past job, the SSA must show that the claimant has residual functional capacity *and* that there are jobs available in the economy that the claimant can perform. The court found that there was no medical evidence confirming the finding of residual functional capacity, and remanded the case for further medical examinations of claimant. In March 1996, the case again came to the court, 937 F.Supp. 840 (S.D. Iowa 1996), after the ALJ again decided against the claimant. The court said that since the SSA was unable to prove on remand that the plaintiff was able to perform medium-level work, the ALJ could not deny benefits.

6. Special Standard for Assessment of Mental Impairments

McCarty v. Barnhart, 2005 WESTLAW 5108536 (N.D. Cal. 2005) – the court stated that, if a claimant has a medically determinable mental impairment, the SSA must rate the degree of functional limitation in four areas: activities of daily living; social functioning; concentration, persistence or pace; and episodes of decompensation. If the mental impairment is severe based on these ratings, SSA then must go on to see if the impairment meets or is equivalent to a listed disorder, or, if not, whether there is residual functional capacity.

Lewis v. Astrue, 2009 WESTLAW 3256018 (N.D. Florida Oct. 6, 2009) – In applying the above test, the ALJ must consider not only all of the medical evidence, but also must consider the lay evidence as to the claimant's ability to perform the activities of daily living. The ALJ must directly evaluate the mental health evidence as bearing up on the issue of the claimant's residual functional capacity.

Appendix J: ADA Rules Relating to Job Interviews

I am grateful to Alisa Arnoff, Esq. at Scalambrino & Arnoff in Chicago, IL for allowing me to include the following materials relating to what an employer can and cannot ask/do/say during a job interview.

I. The Interview

A. An Employer cannot directly ask about existence, or severity of a disability. This ensures an applicant's disability is not considered prior to assessment of applicant's non-medical qualifications.

*An Employer CANNOT ask:

- Are you and alcoholic?
- Do you have HIV/AIDS?
- Do you have a disability that would prevent you from performing the essential functions of this job with or without reasonable accommodation?

*An Employer CAN ask:

- Do you have 20/20 vision?
- How do you handle stress?
- Do you work better or worse under pressure?
- Can you perform: [Insert particular job function]?

*There are certain situations in which you cannot ask even if the disability would allow the employer to legitimately exclude the applicant because of the disability:

> Example: Federal law prohibits epileptics from working as interstate trust drivers. However, a trucking company cannot ask an applicant if they have epilepsy.

B. An employer cannot inquire whether an applicant "needs" reasonable accommodation for the job unless it is open and obvious – then the employer can ask:

- "Would you need reasonable accommodation in this job?"
- "Would you need reasonable accommodation to perform this specific function?"
- A phone company can ask a one-legged applicant applying for a telephone line repair person to describe or demonstrate how they would perform the duties of the position.

C. An employer cannot ask questions that are "likely" to elicit information about a disability.

The following are examples of questions that you reasonably expect would cause the applicant's response to indicate whether the individual has a disability.

- What is your (un)corrected vision?
- Have you sought treatment for your inability to handle stress?
- Do you get ill from stress?

D. An employer cannot ask questions about impairments as they often reveal disability-related information. For example:

- "How extensive in the break in your leg?"
- "How long will it take your broken arm to heal?"
- "Do you expect your condition to get worse?"

E. An employer cannot ask follow-up inquiries concerning the disability or impairment volunteered by the applicant in response to an appropriate, legal, non-disability related question or that are open and obvious to the naked eye. For example:

*The applicant volunteers that she has M.S. The employer cannot ask:

- "How debilitating is your M.S.?"
- "Does the M.S. limit your ability to work?"
- "Do you expect your condition to get worse?"

*An employer cannot ask an applicant in a wheelchair:

- "How did you become disabled?"
- "What effect does being in a wheelchair have on your daily activities?"
- "Do you ever expect to walk again?"

F. An employer cannot ask about the nature or extent of the disability or impairment.

G. An employer cannot ask about the type of reasonable accommodation required to perform the job-related functions of the position [except where the applicant has requested a reasonable accommodation as part of a required pre-offer job demonstration].

H. If the applicant volunteers that he would need a reasonable accommodation to perform the job, the employer cannot ask:

- "What kind of reasonable accommodation would you need for this job?"
- "What kind of reasonable accommodation would you need to perform this specific function?"

*Consistent with other civil rights statutes, such disclosure may be evidence of the employer's knowledge of a disability if the employee later alleges adverse action on account of disability.

*An employer cannot ask how much time off the applicant would need from work on account of a disability: "How often will you require leave for treatment of your disability?"

I. Employers are prohibited from asking an applicant about job-related injuries or worker's compensation history. Nor can third parties be asked the same about the applicant.

J. Employers cannot ask about current or prior lawful use of controlled substances or other medication. Examples of inappropriate questions:

- "What medications are you currently taking?"
- "Have you ever taken AZT?"

K. Questions regarding the applicant's ability to perform a major life activity or whether the applicant is substantially limited in a major life activity can get you into trouble if not phrased correctly. Such questions are borderline because they are likely to elicit information about a disability. These questions can be asked only if specifically linked to the ability to perform a job-related function, so no broad, open-ended questions.

- An employer cannot ask an applicant for a clerical position "Can you stand?" "Can you walk?"

- An employer cannot inquire if applicants can stand for short periods of time or if they can walk average distances when interviewing for a receptionist position that entails sitting behind a desk in an office suite.

- If hiring for a clerical position which requires the employee to load 3 lb. Boxes of paper into a copy machine, the employer can ask "Can you lift 3 lb. boxes?"

- An employer can ask about an applicant's ability to achieve "above average" performance in a major life activity. For example "Can you walk 20 miles without discomfort?" is okay.

- Other borderline questions: An employer can ask the applicant questions concerning lifestyle under the ADA if the inquiries are not likely to elicit information about a disability. For example, with respect to eating habits, an employer can ask "Do you regularly eat 3 meals per day?" but "Do you need to eat a number of small snacks at regular intervals during the day in

order to maintain your energy level?" is inappropriate because it can reveal diabetes or IBD.

L. An employer cannot ask follow-up questions about disabilities volunteered when inquiring about the applicant's lifestyle. For example, in response to a question about eating habits, the applicant responds that he eats six smaller snacks to control diabetes, the employer cannot ask "Is your diabetes under control?" or "Does your diabetes interfere with your ability to work?"

M. An employer cannot exclude an applicant if he or she has completed or is participating in a drug rehab program and no longer uses drugs illegally.

N. Although the employer can ask about use of alcohol, it is not recommended.

Acceptable questions include:

- "Do you drink alcohol?"
- "Have you ever been convicted for DUI?"

Inappropriate questions include:

- "Are you an alcoholic?"
- "How much alcohol do you drink per week?"
- "Do you drink every day?"
- "Do you drink alone?"
- "Have you ever been treated for alcoholism?"
- "Does alcohol interfere with your daily activities?"

O. When inquiring about an applicant's attendance record, the employer cannot ask if the applicant was sick.

*An employer cannot ask:

- "How many days were you sick last year?"
- "How many separate episodes of sickness did you have last year?"

*An employer can ask:

- "Employees' regular hours are 9-5 Monday to Friday. Employees are required to work every other week-end. New employees get 1 week of vacation and 7 sick leave days per year. Can you meet these requirements with our without reasonable accommodation?"
- "How many days were you absent from work last year?"
- "Did you have any unauthorized absences from your job last year?"
- "How many Mondays or Fridays were you absent last year other than approved vacation leave?"

II. The Pre-Offer Stage of the Hiring Process

A. An employer can ask about the applicant's ability to perform specific job related functions with or without reasonable accommodation.

- An employer can state the physical requirements of the job.
- An employer can ask the applicant if they can satisfy these requirements "with or without reasonable accommodation.
- An employer can ask questions about the ability to perform essential and marginal job-related functions with or without reasonable accommodation. An employer cannot reject an applicant because of an inability to perform marginal functions.

B. Receipt of information about a disability that is volunteered by the applicant in response to a non-disability related inquiry is not illegal. Follow-up questions concerning the extent, nature, etc. of the disability are illegal.

- An employer cannot ask what type of reasonable accommodation the applicant would need.

C. In limited circumstances (see below), an employer can ask the applicant to describe or demonstrate how they would perform the job-related tasks with or without reasonable accommodation. Focus on ability, not disability.

- An employer can only ask this of an applicant with a known disability when the employer cannot reasonably believe that the disability will not interfere with the job-related functions if all applicants for the same job category are asked the same question.
- The employer can ask this of a particular applicant with a known disability if the employer reasonably believes that the disability may interfere with the performance of job-related functions.
- "Reasonably believe" is not defined in the ADA or the regulations. According to Black's Law Dictionary, "reasonable belief" generally means that the actor believes that a given set of facts exists and that under the circumstances, an average reasonable person would have that same belief.

*For example, a phone company can ask a one-legged applicant applying to be a telephone repair person to describe or demonstrate how they would perform the duties of the position.

- An employer can ask "Can you distinguish color-coded wires?" if such an ability is a job function of the position.
- An employer can ask "Can you life a 10 lb. box of wood chips?" if such an ability is a job function of the position.

- An employer can ask "Can you retrieve lumber from 4 ft. high shelves?" if such an ability is a job function of the position.

III. Questions About Adherence to Employer's Attendance Policy

A. An employer may state its attendance policy and ask if the applicant can meet them.

B. An employer can ask about the applicant's prior attendance record without inquiring into the specific reasons for the applicant's absences. An employer cannot ask of the applicant was "sick."

C. An employer can ask questions designed to detect whether the applicant abused the leave policy.

*For example, an employer can ask:

- "Employees' regular hours are 9-5 Monday to Friday. Employees are required to work every other weekend. New employees get 1 week of vacation and 7 sick leave days per year. Can you meet these requirements with or without accommodation?"
- "How many days were you absent from work last year?"
- "Did you have any unauthorized absences from your job last year?"
- "How many Mondays or Fridays were you absent last year other than approved vacation leave?"

Appendix K: ADA and FMLA In the Courts

This section includes summaries of cases relating to chronic illness that were brought under the ADA or the FMLA. Expect to see much broader interpretations of the ADA in court decisions that are issued after the 2008 amendments (see pp. 47-58, above). I have not summarized every case in that has arisen out of the ADA or the FMLA. I have selected and summarized the following cases because they may help you to understand the ways in which courts are applying the ADA and FMLA to patients with chronic disease. These case summaries are presented in reverse chronological order within each of the three levels of federal courts (Supreme Court, Courts of Appeals, and District Courts). As is the case with the SSDI court decisions, you should pay particular attention to the decisions that come out of your home state.

In the first edition of this *Handbook*, this section included only cases about patients with IBD. Rather than eliminating them, I am instead building on them, adding cases involving other chronic diseases. Thus, although most of the cases summarized here still relate to IBD, you can just substitute your disease – the law will be the same regardless of the illness. As I said, though, I have expanded the research and am including cases involving illnesses other than IBD here, in addition to the IBD cases summarized in the first edition of this *Handbook*.

A. Supreme Court

Four key Supreme Court decisions of particular importance to understanding the ADA are discussed in Section VIII.A.i.f, above.

B. Courts of Appeals

Anderson v. JPMorgan Chase & Co., 418 F. App'x 881 (11th Cir. 2011) – A discharged employee with reactive airway disease and chronic asthma sued her former employer for violating the ADA. She claimed that her employer did not provide reasonable accommodations when it had the carpets in her work area cleaned and her asthma symptoms began to flare as a result. The court found that her employer engaged fully in the interactive process required by the ADA to accommodate her – for example, they moved her to five different work stations, allowed her to take paid leave, provided her with fans, and offered to remove the carpet from her workspace. The employee, on the other hand, did not identify any reasonable accommodation that would have allowed her to perform the essential functions of her job, which included being physically present at work, even though she bore the burden of doing so. The employee was terminated after she was absent for two weeks and the court concluded that no reasonable juror could find in her favor.

Rynders v. Williams, 650 F.3d 1188 (8th Cir. 2011) – Former employee sued former employer for wrongful termination after he was fired for excessive tardiness and absenteeism. The employee claimed that he was denied information on how to take FMLA, even after he told several administrators that he might be late or absent on

occasion because of his high blood pressure and undiagnosed chronic illness – for which he was seeking medical treatment – that was causing him to vomit and black out. The employer claimed, however, that the employee lost interest in FMLA after discovering that it was unpaid. The court said that a claim under the FMLA cannot succeed unless the employee can show that he gave his employer adequate and timely notice of his need for leave.

Branham v. Snow, 392 F.3d 896 (7th Cir. 2005)[106] – An employee of the IRS with diabetes sued for employment discrimination in connection with his failure to obtain a promotion for which he applied and for which he believed he was qualified. He sued under the Rehabilitation Act, but the analysis of whether he is a qualified person with a disability is, for all intents and purposes, the same as that under the ADA. The employee's diabetes necessitated that he check his blood four times per day and regulate his blood sugar with insulin. The position for which he applied required that applicants meet certain medical requirements. In addition, "any chronic disease or condition affecting the . . . endocrine . . . system that would impair full performance of the duties of the position is disqualifying." The employee was tentatively selected for the position, conditioned on the satisfactory outcome of a physical examination. The physician who examined him said that he was not medically qualified because the job required irregular hours, unanticipated requests, and much flexibility to react to an emergency or crisis. Accordingly, the employee was denied the position, and he then sued. First, the IRS argued that the employee was not disabled under the Rehabilitation Act and, in the alternative, he was unable to perform the essential functions of the job without creating a safety threat to himself or others. The employee argued that he is disabled because his diabetes substantially limits the major life activities of eating and caring for himself. The district court agreed that the employee was not disabled. The court stressed that all people with diabetes cannot be considered disabled simply because they must eat carefully, check their blood and self-administer insulin. The analysis of whether a person is disabled must be individualized. Although the employee can control his condition through the use of insulin, there are restrictions the employee faces as a diabetic and, thus, the court found that he was a qualified person with a disability. In addition, the court found that he could perform the essential functions of the job. The court finally found that the question of whether the employee would create a "direct threat" due to the possibility that his blood sugar levels could become dangerously high or low was debatable, so that the case should be allowed to go to trial before a jury.

Hoffman v. Professional Med Team, 394 F.3d 414 (6th Cir. 2005)[107] – The plaintiff was an emergency medical technician (EMT) who developed migraine headaches. Initially, she was granted intermittent leave under the FMLA. A dispute arose over the sufficiency of the medical certification she submitted. In this case, the medical certification contained an inconsistency, in one place saying that the patient will need intermittent leave, and in another place, the doctor had checked off "no" when asked if the employee will need to work less than a full schedule. Thus, the employer informed

[106] The Seventh Circuit covers Wisconsin, Illinois and Indiana.

[107] The Sixth Circuit covers Ohio, Kentucky, Michigan and Tennessee.

the employee that there was a contradiction and that it would require additional information from the physician to resolve this discrepancy. This dispute led to "heated exchanges" in which the employee used profanity. She was fired, and her employer said it was due to her use of profanity. The court noted that the "FMLA recognizes that chronic illnesses, causing only episodic incapacity, may comprise serious health conditions." However, the employer is not liable if it did not willfully violate the FMLA, or at least act with reckless disregard for the truth. The court found that the employer in this case had consulted its attorney, given the employee an opportunity to resolve the inconsistency, and took other reasonable steps in an effort to ensure its compliance with the FMLA. The court believed that the employee was fired for her use of profanity, not because of anything relating to her FMLA leave.

Doner v. Rockford, 2003 WESTLAW 22345473 (7th Cir. 2003) – Former police officer with multiple sclerosis sued his former employer, the City of Rockford, for failing to engage in an interactive process to fashion an accommodation of his disability after he became bound to a wheelchair. He was placed on light duty for awhile, and ultimately was fired as "unfit for duty." The trial court found that he was not a qualified individual with a disability because he could not perform the essential functions of the job – in particular, apprehending suspects – even with accommodation. The former employee argued that apprehending suspects was not an essential function of the job since many investigators work desk jobs. However, the court relied on the written job description in finding that apprehending suspects is an essential function of the job. The former employee then argued that the city should have engaged in an interactive process in which he might be allowed to apply for a transfer to a position that he could perform. The court stated that, if an open position that he could perform was available, the ADA required such reassignment. However, in the absence of an open position or other accommodation, there was no violation of the ADA.

Oconomowoc Residential Programs, Inc. v. Milwaukee, 300 F.3d 775 (7th Cir. 2002) – After Milwaukee denied a residential program for brain injured and developmentally delayed individuals a zoning variance to operate a residential facility in the city, the program sued under the ADA as well as the Fair Housing Amendments Act. Both statutes require accommodation of persons with disabilities, using almost identical definitions of what constitutes a disability. Zoning ordinances and housing policies must be construed in a manner that consistent with the ADA.

Cotter v. Ajilon Services, Inc., 287 F.3d 593 (6th Cir. 2002) – The plaintiff had ulcerative colitis, and he alleged that this impairment restricts his ability to perform manual tasks such as lifting, bending, standing and carrying things, and his doctor had ordered that he take frequent breaks to avoid stress, as well as to avoid overtime. The employee claimed that this qualified him for the protection of the ADA because it substantially limited his ability to engage in the major life activity of working. To prove that claim, the employee would have to show that he cannot perform a broad class of jobs, not just that he cannot perform the job he has. The inability to perform overtime is not enough to show that the employee is substantially limited in the major life activity of working. The employee also claimed that his employer "regarded" him as a person with a

disability. The court explained that the showing necessary to establish such a claim is very steep. Here, there was no evidence that the employer treated the employee as any more disabled than he himself claimed to be.

Stephenson v. United Airlines, Inc., 2001 WESTLAW 580459 (9th Cir. 2001)[108] – employee with ankylosing spondylitis sued under the ADA. The court said that the employer is obligated to engage in an interactive process to attempt a reasonable accommodation, but employers need not create special light duty positions or comparable work for the purpose of accommodating qualified individuals with a disability. Further, although mitigating measures must be considered, the fact that the employee is attempting to find mitigating measures does not end the inquiry. Temporary, non-chronic impairments with no long-term impact are not generally considered substantially limiting.

West v. Central Valley Regional Center, Inc., 1999 WESTLAW 397705 (9th Cir. 1999) – employee sued under the ADA alleging that she was fired due to the fact that she suffers from lupus and post-concussion syndrome. The court held that the employee was unable to show that she was substantially limited from performing a major life activity because the inability to perform one specific job is not a substantial limitation on the major life activity of working.

Ryan v. Grae & Rybicki, P.C., 135 F.3d 867 (2d Cir. 1998) [109] – Appeals court held that, to establish a *prima facie* case of discriminatory discharge, the employee must prove (1) that his employer is covered; (2) that he or she is disabled within the meaning of the ADA; (3) that the employer had notice of the disability; (4) the employee could perform the job with or without reasonable accommodation; and (5) the employer refused to make such accommodations. The court distinguished between impairments that merely *affect* major life activities from ones that *substantially limit* those activities. The fact that IBD can go into remission for long periods of time indicates that it does not substantially limit a major life activity. The court noted, though, that it was not finding that IBD never could amount to a disability; instead, it was focusing only on the facts of the case before it.

Nesser v. Trans World Airlines, Inc., 160 F.3d 442 (8th Cir. 1998)[110] – Employee with Crohn's disease failed to establish that he was qualified to perform the essential functions of the job as a reservation sales agent because of excessive absences. Although the employee was disabled and suffered an adverse employment action, attendance at work is an essential function of the job, and the employee failed in that regard. Thus, to sustain an ADA claim, the employee had to show that he could do the job with reasonable accommodation. He had been moved to a position as customer service agent, and this required fact-to-face contacts with customers, which the employee could not do

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[108] The Ninth Circuit covers California, Alaska, Nevada, Arizona, Hawaii, Guam, Washington, Oregon, Idaho and Montana.

[109] The Second Circuit covers New York, Connecticut and Vermont.

[110] The Eighth Circuit covers North and South Dakota, Nebraska, Minnesota, Iowa, Missouri and Arkansas.

from home. The employee asked to be reassigned to a position in his previous department, but no vacant position was available, and the ADA does not require reassignment if there is no vacancy.

Patterson v. City of Seattle, 1996 WESTLAW 528267 (9th Cir. 1996) – employee with Crohn's disease sought accommodation to allow him to perform the essential functions of his job. He was provided with more office space and other items he sought as part of his request for accommodation. However, the employee also demanded that he and his former supervisor, whom he previously had sued for sexual harassment, not be located in the same building. There was no showing that the two could have any regular contact and, thus, the refusal of the employer to accommodate the employee by moving him or his former supervisor to another building did not violate the ADA.

Langon v. Department of Health and Human Services, 959 F.2d 1053 (D.C. Cir. 1992) – federal employee with multiple sclerosis had asked for accommodation in the form of working at home. Her employer denied her request, stating that there was not sufficient medical evidence to establish her need to work at home. The court explained that there is no legal requirement that a request for accommodation be accompanied by medical records. The employee's own statements regarding the exacerbation of her illness, along with a letter from her doctor, provided a sufficient basis upon which to decide whether to grant the requested accommodation.

Pendleton v. Jefferson Local School District Board of Education, 1992 WESTLAW 57421 (6th Cir. 1992) – Employee with multiple sclerosis claimed that she was forced to retire by harassment and discriminatory conduct that exacerbated her illness. She brought suit under the Rehabilitation Act; the analysis is nearly identical to that under the ADA. Essentially, the employee relied on a theory of "constructive discharge." She wasn't fired, but she was treated in such a way that a jury could find that she was forced out of her job. The court found that this "constructive discharge" theory applies in the context of disability discrimination.

C. District Courts

Tarver v. Oklahoma, 2011 WL 3626690 (N.D. Okla. 2011) – An employee of the Children's Center at the Office of Juvenile Affairs (OJA) was terminated from her position as a licensed practical nurse (LPN) for failing to return to work without a physician's certification explaining her absence. The employee suffered from hepatitis C and cerebrovascular disease and, at one time, received accommodations that enabled her to perform her normal job duties except for drawing blood. Problems arose when the employee was absent for an extended period of time due to her hepatitis C, and OJA terminated her for being unable to perform an essential function of her job: attendance. Believing that she was discriminated against, the employee sued under Section 504 of the Rehabilitation Act – a statute similar to the ADA that provides that no otherwise qualified individual with a disability shall, solely because of her disability, be subjected to discrimination under any program or activity receiving Federal financial assistance. The employee argued that she did, in fact, submit doctors notes, but that the notes released her

to "light duty" and she was told that there were no such positions available. The court still said that, if reasonable accommodations by OJA in the form of "light duty" would have permitted the employee to perform the essential function of attendance, she was an "otherwise qualified individual" under the Act and, thus, the employer would be liable. *Thomsen v. Stantec, Inc.*, 2011 WL 1901725 (W.D.N.Y. 2011) – A former employee with bowel cancer sued his former employer for violating the ADA and FMLA. The employer's request to dismiss the charges was granted for several reasons. First, the court found that the employee did not meet the ADA's definition of being disabled. A disability under the ADA does not include temporary medical conditions, even if those conditions require leaves of absence, because the impairment required by the Act must be *substantially* limiting. The employee here was able to return to work with no restrictions after recovering from his surgeries, which necessitated several leaves of absence, and provided no evidence to demonstrate that he had an impairment that was significantly restrictive, persistent, or permanent. Second, the court found that the employee never required nor requested accommodations under the ADA in order to perform his job and that the employer had no affirmative duty to investigate whether accommodations were needed. Third, the court disagreed with the employee's claim that his termination violated the FMLA because it prevented him from taking FMLA leaves in the future. There was no evidence that the employee had requested leave under the FMLA at the time he was terminated.

Duncan v. Quality Steel Products, Inc., 2007 WESTLAW 2156289 (E.D.Mich. July 25, 2007) – employee with Crohn's disease fired for excessive absences. Court found that she did not exceed her FMLA leave, so she had a good claim for violation of the FMLA. In addition, she was demoted due to taking FMLA leave, which also raised a legitimate FMLA claim. Whether Crohn's disease is a disability for purposes of the ADA is a question of fact; a jury could find that a disease that "limits the ability to control one's bowel movements" is a disability. The court found that both medical leave and greater access to a bathroom could constitute reasonable accommodation.

Walsh v. AT&T Corp., 2007 WESTLAW 2034426 (N.D.Ohio 2007) – sales employee with ulcerative colitis was terminated for poor performance after taking a medical leave due to a flare of his disease and the employee sued alleging disability discrimination. In considering whether ulcerative colitis is a "disability" under the ADA, the court stated that chronic illnesses that wax and wane require an investigation into their "durational extent" to determine whether the disease substantially limits the employee. An impairment is not substantial if there are long periods of remission with only occasional flares. Because the employee's ulcerative colitis only flared severely, so as to require a medical leave, once in the four years he worked for the employer, his disease did not substantially limit him. The employee also claimed that the employer violated the FMLA by interfering with his rights under the Act. To succeed on an interference claim, the employee must show (1) he was an eligible employee; (2) his employer is covered under the FMLA; (3) he was entitled to leave under the Act; (4) he gave his employer notice of his intent to take leave; and (5) his employer denied FMLA benefits or interfered with FMLA rights to which he was entitled. The employee met the first four elements. On the fifth element, he argued that he was entitled to be restored to

an equivalent position upon return to employment. The court rejected this argument, stating that the employer needn't return the employee to the exact same position especially when, as in this case, there was corporate restructuring that affected the employee's job description. Finally, the employee brought a discrimination claim under the FMLA. To establish such a claim, the employee must show that (1) he engaged in FMLA protected activity; (2) the exercise of his FMLA rights was known to the employer; (3) the employer thereafter committed an adverse employment action; and (4) there was a causal connection between the protected activity and the adverse employment action. In this case, there was no evidence that the employee was fired because he took FMLA leave, so he could not establish the fourth element of his discrimination claim.

Banks v. CBOCS West, Inc., 2005 U.S. Dist. LEXIS 9503 (N.D. Ill. 2005) – Former employee with Crohn's disease sued under both the ADA for demoting him from store manager when he gave notice that he would have to take sick leave, and the FMLA for retaliating against him for taking sick leave. When he was ready to return to work, he was placed in a store 170 miles from his home as an associate manager for a short time, until he was placed in a closer store, but still was associate manager. The employee then violated company policy in one instance, and used profanity towards his supervisor in another instance, after which he was fired. The employee claimed both discrimination and retaliation. The court said that he was substantially limited in performing the major life activity of disposing of bodily waste. Although his disease was worst during flares, and even though the flares are temporary, the court found that the disease is a disability whether or not the employee is in the midst of a flare. Even though attendance is an "essential function" of the job, a single medical leave was not sufficient to disqualify the employee from raising an ADA claim. As to the FMLA claim, the FMLA permits an employer to deny restoration of highly compensated employees when necessary to prevent "grievous economic injury" to the employer, and the employee was a "key" employee, and knew that he had this status before taking his sick leave. The court did a thorough review of the employee's performance ratings, nothing that his ratings went down after he returned to work. However, the employee was unable to provide any evidence to establish that he was treated differently than other similarly situated employees. Thus, the court found that the employer did not retaliate against the employee for taking FMLA leave.

Henzel v. Delaware Otsego Corp., 285 F.Supp.2d 271 (N.D.N.Y. 2003) – To establish a prima facie case of discriminatory discharge, the employee must prove (1) that his employer is covered; (2) that he or she is disabled within the meaning of the ADA; (3) that the employer had notice of the disability; (4) the employee could perform the job with or without reasonable accommodation; and (5) the employer refused to make such accommodations. If the employee satisfies these criteria, and a requested accommodation is rejected, the burden of proof shifts to the employer to show undue hardship. An employee cannot perform the essential functions of the job if he or she is entirely unable to work.

Sacay v. The Research Foundation of the City University of New York, 193 F.Supp.2d 611 (E.D.N.Y. 2002) – woman with colitis, back and neck problems, and a

seizure disorder could not sue for discrimination under the ADA because she failed to show that her impairments substantially limit a major life activity. Although the ability to control elimination of bodily waste is a major life activity, claimant failed to show that she was substantially limited in performing this or other major life activities. Her doctors did not indicate that there were any restrictions to her return to work, and vague claims that the employee can't climb stairs or engage in other strenuous physical activities are not sufficient to establish that the limitations on her functions were substantial. With respect to elimination of bodily waste, the court stated that there was no evidence that her colitis was so severe as to constitute a substantial limitation in performance of a major life activity. She failed to explain how severe her symptoms are, whether she is in pain and, if so, how bad the pain is, "whether she has ever soiled herself," etc. The employee said only that she needs to be near a bathroom. NOTE: This last bit demonstrates the need to be clear and explicit when seeking accommodation or trying to prove disability. It is not enough to say that you need to be near a bathroom; people don't understand that to mean that you may be fecally incontinent.

Farmiloe v. Ford Motor Co., 277 F.Supp.2d 778 (N.D. Ohio 2002) – Employer requested the employee's full medical records on the ground of business necessity. The court found, first, that business necessity is a defense under the ADA as to which the employer has the burden of proof. Second, the employer may not request all of an employee's medical records.

Jiminez v. Velcro USA, Inc., 2002 WESTLAW 337523 (D.N.H. 2002) – Employee with Crohn's disease sued under the FMLA, alleging that he was terminated due to absenteeism when his leave should have been classified as protected FMLA leave. The employer claimed that the employee did not provide a sufficiently detailed medical certification. The court found that the employee was entitled to an opportunity to cure an incomplete medical certification.

Bulos v. Peoplesoft, Inc., 2000 WESTLAW 868532 (N.D.Cal. 2000) – Employee with Crohn's disease was terminated, and brought suit under the ADA. He had taken a number of leaves, despite which he was given a promotion. During his third leave of absence, the employee was told that the company had been reorganized and his position had been eliminated. When he returned to work, the employee was given a "desk job" that the employee claimed to have created for the employee. The employee then took a fourth leave of absence, and during that leave, the company implemented a RIF (reduction in force), eliminating 400 jobs, including the employee's. "Disabilities causing frequent absences from work render an employee unqualified if attendance is an essential function of the job." Extended medical leaves may be a reasonable accommodation if it does not place an undue hardship on the employer.

Mazza v. Bratton, 108 F.Supp.2d 167 (E.D.N.Y. 2000) – In evaluating a claim of disability under the ADA, the court follows a three-step process to determine: (1) whether the employee had an impairment; (2) whether the impairment affected a major life activity; and (3) whether that major life activity was substantially limited by the impairment. Noting that the Second Circuit (NY, VT, CT) has continued to treat working

as a major life activity even after *Sutton* (summarized in the text at section VIII.A.i.f.), the court stated that the ability to control one's elimination of waste is a major life activity, as well. However, if an employee is unable to come to work, he or she is not "qualified" under the ADA.

Davis v. Guardian Life Ins. Co., 2000 WESTLAW 122357 (E.D.Pa. 2000), *and* 2000 WESTLAW 184596 (E.D.Pa. 2002) – employee with Crohn's disease claimed an ADA violation when the employer refused to allow her to work at home full-time, but required that she work at least 2 days a week in the office. At first, she was allowed to be in the office any two days per week, but later, the employer insisted that she be there two nonconsecutive days per week, and the same 2 days each week. However, that never was enforced, and the employee actually retained the flexibility she sought. She also was given a computer, fax, and messenger service between her home and the office. The court explained that attendance can be an essential function of the job. Some deference is given to an employer's determination of what functions are essential. However, in this instance, the accommodation was reasonable, and the employee's failure to continue to engage in an interactive process to negotiate any further accommodation precluded a finding in her favor under the ADA. The employee also brought a claim for retaliation. To establish retaliation, an employee must show that the employee engaged in a protected activity, an adverse action by the employer, and a causal connection between the employee's protected activity and the employer's adverse action.

Bettis v. Dept. of Human Services of the State of Illinois, 70 F.Supp.2d 865 (C.D.Ill. 1999) – maintenance worker whose job required him to perform preventive, routine maintenance of laundry equipment, and who suffers from Crohn's disease, alleged that the employer violated the ADA by not providing him with a promotion that would better accommodate his disability. The court rejected this claim, finding that an employer is not obligated to promote someone in order to accommodate an employee with a disability. "[A]n employer is not obligated to provide an employee the accommodation he requests or prefers, the employer need only provide some reasonable accommodation."

Nelson v. Shoney's, Inc., 1997 WESTLAW 567957 (E.D.La. 1997) – Under the ADA, a person who cannot work at all is not a "qualified person with a disability."

Ryan v. Grae & Rybicki, P.C., 1996 WESTLAW 680256 (E.D.N.Y. 1996) – The trial court referred to the Social Security Administration's Listing of Impairments (see Appendix F) to determine whether the employee had a disability under the ADA. The court rejected the opinion of a doctor who had never examined the employee, in favor of the opinion of the treating physician. However, patient who has been able to feed herself, work steadily, transport herself around, attend social engagements, get married, seek medical attention, and get pregnant and have a baby is not limited in the major life activity of caring for herself.

Panagalos v. Prudential Ins. Co. of America, 1996 WESTLAW 612469 (E.D.Pa. 1996) – In this ADA case, a life insurance salesperson with ulcerative colitis went out on

short-term disability. At the expiration of that time, the employee's requests for long-term disability were denied, and the employer demanded that he return to work or be fired. Ultimately, he was fired. While on short-term disability, the employee and employer conferred about a possible accommodation. The employer made the following efforts to accommodate an employee with Crohn's disease: an offer to provide a portable toilet that could be installed in truck or van; a waiver of company rules relating to relocations; and attempts to find the employee a different position in the company. However, the parties were unable to reach an agreement. The court stated that the plaintiff could have had a total colostomy and eradicate his symptoms, or could wear a diaper or other undergarment. Thus, he was not disabled, and there was no feasible accommodation.

Stopka v. Alliance of American Insurers, 1996 WESTLAW 717459 (N.D. Ill. 1996) – Employee with Crohn's disease and depression went out on disability leave. When she was ready to return, her doctor told the employer that she should not work more than 8 hours a day. As a result, she was not offered a promotion. Later, the employee went out on FMLA leave due to a recurrence of Crohn's disease, and the employer informed her that it could not guarantee her reemployment to the same position when her FMLA leave expired. When the employee's leave expired, and she was unable to return to work, the employer began looking for her replacement. The company then underwent a reorganization, and the employee could not return to work, so ultimately the employee was replaced. The court found that the employer had some obligation to discuss a possible accommodation with the employee, and that the employer should have known that it was requiring her to work more than the 8 hour days that her doctor permitted, and that a jury could have found in her favor, thereby allowing the ADA claim to proceed to trial.

Branch v. City of New Orleans, 1994 WESTLAW 710748 (E.D. La. 1994), *and* 1995 WESTLAW 295320 (E.D.La. 1995) – infrequent "flares" of Crohn's disease is insufficient to establish a disability under the ADA. This coupled with the testimony of doctors that the disease could go in remission for many years, and that the employee could not show that she was limited in any major life activity. Crohn's disease is not inherently limiting; each case must be reviewed individually, on its facts.

Taylor v. Office of Federal Contract Compliance Programs, 1985 WESTLAW 2278 (N.D.Ill. 1985) – In this ADA case, an insurance salesperson went out on long-term disability leave due to ulcerative colitis. He was fully recovered and released to work by his doctor, but did not return to work for about 3 months longer. The employer claimed that complaints from customers and prospective customers who did not wish to have any further dealing with the employee. As a result, the employer required the employee to have a psych evaluation before returning to work. The employee claimed that the employer did this not because of complaints, but because of his ulcerative colitis. The employee returned to work after getting the psych evaluation, and the employer continued to get complaints, so the employer again asked him to have a psych evaluation, and he refused. The employer then put him on disability again and, when disability

benefits expired, the employer discharged him. The court found that there was sufficient evidence that ulcerative colitis was not the cause of the adverse employment actions.