



Workshop F

ADA AND THE CONSTRUCTION INDUSTRY

Presented by

**Joseph F. Spitzzeri
Shareholder
Johnson & Bell, Ltd.**

At the time of its passage, the Americans with Disabilities Act generated a great deal of concern among both property owners and employers. Today, while they are no longer a source of abnormal anxiety for most people, discrimination claims still pose a threat to the construction industry. This session will review the major requirements of the Act, the ADA claims history, and courts' interpretations of the Act's requirements as they relate to the construction industry. Attendees will learn strategies for avoiding ADA and other discrimination claims, such as what to do when an injured employee returns to work.

Tuesday, November 18, 1:30–3:00 p.m. and 3:30–5:00 p.m.



What's In It For You?

Professional Development & Leadership Opportunities through:

- Chapter Activities & Networking
- Specialized Publications
- Specialized Educational Offerings
- Annual Conference & Exhibition
- Online Job & Resumé Services

*“CFMA helps me do
the best job possible!”
Ray Dauplaise, Rhode Island Chapter*

Take a Step in the Right Direction!

I am so pleased that you are inquiring about CFMA. CFMA is the industry's premier source and resource of news and information for construction financial professionals.

What does that mean to you? Well, if you're looking for:

- A source of quality educational products industry-specific publications, and information-packed conferences, seminars, and workshops;
- A resource that can help make your job easier by providing you with insights, statistics, analysis, and career tools;
- A network of more than 7,000 of your peers from all types of construction companies, and from those important business sectors that serve our industry;

**Then you can stop searching:
CFMA provides its members with all this and more!**

So, now that you know a little about who we are, take a few minutes to browse our website through the links provided below. Get the complete CFMA picture – and learn what we can offer you. If you have any questions, please feel free to e-mail me. I'm looking forward to welcoming you soon into the CFMA family!

Susan Dunham
Director, Member Services
membership@cfma.org

Click on any of the topics below to learn more about CFMA and why you should be a member:

Chapters – Your connection to the CFMA family and your link to the CFMA membership experience

Publications – Your resource for industry surveys, benchmarking data, reference manuals, and other publications produced by CFMA

Education – Specialized workshops, CPE program offerings, our Annual Conference, plus industry events we co-sponsor, and more

Services – The complete menu of traditional and online services available to CFMA members

About CFMA – Who we are and what we pledge to do for our members

THE CONSTRUCTION FINANCIAL MANAGEMENT ASSOCIATION
29 Emmons Drive, Suite F-50, Princeton, NJ 08540 • Ph 609.452.8000 • Fax 609.452.0474
Web site www.cfma.org • E-mail info@cfma.org

Joseph F. Spitzzeri
Shareholder
Johnson & Bell, Ltd.

Mr. Spitzzeri is presenting Workshop F, "ADA and the Construction Industry," on Tuesday. His areas of practice include construction litigation, employers' liability, municipal liability, product liability, and trucking litigation. Since entering private practice in 1987, he has had a varied litigation practice that is currently concentrated in construction, municipal, products liability, transportation, and civil rights litigation. He has tried cases in the circuit courts of Cook, DuPage, and Kane counties. He has also handled appeals before the Illinois Appellate Court for the First and Second Districts, the Illinois Supreme Court, and the United States Court of Appeals for the Seventh Circuit.

Two different Illinois Attorneys General have appointed Mr. Spitzzeri as a Special Assistant Attorney General to represent state employees and departments such as the Illinois Department of Transportation and the Illinois Department of Mental Health and Developmental Disabilities. Mr. Spitzzeri worked as an Illinois Assistant Attorney General from 1983 to 1987 where he tried numerous cases in the circuit courts of Cook, DuPage, Kane, Livingston, and Sangamon counties. He also tried cases in the United States District Court for the Northern and Central Districts of Illinois, including two class actions. He is certified to serve as a chairperson for the Circuit Court of Cook County Court Annexed Mandatory Arbitration Program.

His Bar admissions include the U.S. District Court, Northern District of Illinois, 1983; Federal Trial Bar, 1983; U.S. Court of Appeals, Seventh Circuit, 1984; and U.S. Supreme Court, 1987. Mr. Spitzzeri is a member of the American Bar Association, the Illinois State Bar Association, the Cook County Bar Association, the Kane County Bar Association, the Illinois Association of Defense Trial Counsel, the Kane County Justinian Society of Lawyers, the Trial Lawyers Club of Chicago, and The Construction Management Association of America. He is also a member of the Builders Association of Greater Chicago and the Construction Management Association of America. He served as president of the Kane County Justinian Society of Lawyers and is a member of the board of directors of the Trial Lawyers Club of Chicago. He was also chairman of the 34th Annual Defense Tactics Seminar for the Illinois Association of Defense Trial Counsel.

Frequent lecturing on construction, product liability, and civil practice issues are part of Mr. Spitzzeri's practice. He also conducts on-site seminars for his construction and insurance clients. Mr. Spitzzeri has published articles for the Illinois Association of Defense Trial Counsel, the *DuPage County Bar Journal*, and the Illinois Institute for Continuing Legal Education. His article published in the *DuPage County Bar Journal* titled, "Contribution and the Workers' Compensation Act: Promoting a Harmonious Balance," espoused the position ultimately adopted by the Illinois Supreme Court in *Kotecki v Cyclops Welding Corporation* limiting an employers' contribution liability to its workers compensation liability.

He graduated from John Marshall Law School in 1983 and the University of Illinois in 1981.

Notes

This file is set up for duplexed printing. Therefore, there are pages that are intentionally left blank. If you print this file, we suggest that you set your printer to duplex.

ADA AND THE CONSTRUCTION INDUSTRY

***Joseph F. Spitzzeri
Johnson & Bell, Ltd.***

- I. Introduction**

- II. The Americans With Disabilities Act**

- III. The Implementing Regulations**

- IV. Court Decisions Establishing the Prima Facie Case under the Act**

- V. ADA Court Decisions in the Construction Industry**

- VI. Miscellaneous Employment-Related Court Decisions in the Construction Industry**
 - 1. Race Discrimination**
 - 2. Gender Discrimination**
 - 3. Age Discrimination**
 - 4. Laws Promoting Women- and Minority-Owned Businesses**

- VII. Conclusion**

Notes

This file is set up for duplexed printing. Therefore, there are pages that are intentionally left blank. If you print this file, we suggest that you set your printer to duplex.

ADA AND THE CONSTRUCTION INDUSTRY

I. INTRODUCTION

The Americans with Disabilities Act (42 U.S.C. Section 12101, et seq.), hereinafter referred to as the "Act," provides a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities. The Federal legislation prohibits an employer's discrimination against a qualified individual with a disability because of a disability of such individual in regard to the terms, conditions, and privileges of employment.

On July 26, 1992, Title I, the section covering employment, became applicable to state and local governmental units and private employers with 25 or more employees. On July 26, 1994, Title I, became applicable to state and local governmental units and private employers of 15 or more employees. Title I does not apply to private employers of less than 15 employees. "Employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person.

In order to determine whether a plaintiff is qualified to bring a claim under the Act, courts must turn to the various pertinent statutory definitions and the implementing regulations. *Duda vs. Board of Education of Franklin Park Public School District No. 84*, 133 Fed.3d 1054, 1058 and 1060, n. 12 (7th Cir. 1998). The requirements and limitations of the Act are set forth in the Act itself, the regulations implementing the Act, and case law interpreting both the Act and its regulations. Below is a discussion of the Act, the regulations, and recent court decisions.

II. THE ACT

The Americans with Disabilities Act prohibits discrimination against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment. 42 U.S.C. Section 12112(a). A qualified individual with a disability means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. 42 U.S.C. Section 12111(a). For purposes of this title, consideration is given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, the description shall be considered evidence of the essential functions of the job. 42 U.S.C. Section 12101(8). The term "reasonable accommodation" may include: (a) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (b) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities. 42 U.S.C. 12101(9)(A) and (B).

"Disability" means, with respect to an individual: a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such impairment; or being regarded as having such impairment. 42 U.S.C. Section 12102(2).

An impairment is a physiological disorder affecting one or more of a number of body systems or a mental or psychological disorder. A physical or mental impairment includes such conditions, diseases and infections as: orthopedic, visual, speech and hearing impairments; cerebral palsy;

epilepsy; muscular dystrophy; multiple sclerosis; HIV infection; cancer; heart disease; diabetes; mental retardation; emotional illness; specific learning disabilities; drug addiction; and alcoholism. 29 C.F.R. Section 1630.2(h) and 29 C.F.R. Part 1630 Appendix, Section 1630.2(h).

Disability does not include an individual who is currently engaging in the illegal use of drugs, when action is taken on that basis. An employer may hold an employee who is an alcoholic or drug addict to the same qualification standards for employment or job performance and behavior that such employer holds other employees, even if any unsatisfactory performance or behavior is related to the alcoholism or drug addiction of such employee. 42 U.S.C. Section 12114(c)(4).

The Act authorizes the Commission to issue regulations to carry out the requirements of the Act. 42 U.S.C. Section 12116.

III. THE IMPLEMENTING REGULATIONS

The regulations implementing the Act define "substantially limits" as well as the term "major life activities." "Substantially limits" means unable to perform a major life activity that the average person in the general population can perform; or significantly restricts the conditions, manner or duration under which individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person of the general population can perform that same major life activity. 29 C.F.R. Section 1630.2(j) and the Appendix to the Interpretative Guidelines for the Americans with Disabilities Act, Section 1630.2(j).

The regulations define "major life activities" as functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working, sitting, standing, lifting, and reaching. 29 C.F.R. Section 1630.2(i) and the Appendix to the Interpretative Guidelines, 1630.2(i). Thus, under the implementing regulations, a person is disabled under the Act if they are either unable to or significantly restricted, in their ability to care for themselves, perform manual tasks, walk, see, hear, speak, breath, learn, work, sit, stand, lift and/or reach.

An employer discriminates against a qualified individual with a disability by not making reasonable accommodations unless the employer can demonstrate that the accommodation would impose "undue hardship" on the operation of the employer. 42 U.S.C. 12102(b). The term "undue hardship" means an action requiring significant difficulty or expense, when considered in the light of the following factors: (a) the nature and cost of the accommodation needed under this Act; (b) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodations; (c) the number of persons employed at such facility; (d) the effect on expenses and resources, or the impact otherwise of such accommodation on the operation of the facility; (e) the overall financial resources of the covered entity; (f) the overall size of the business of a covered entity with respect to the number of its employees; (g) the number, type, and location of its facility; (h) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; and (i) the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity. 42 U.S.C. Section 12101(10).

IV. RECENT CASE LAW INTERPRETING THE ACT

Recent decisions in the Federal District, Appellate and Supreme Court have limited the reach of The Americans with Disabilities Act. The following is a review of these recent decisions.

A. PRIMA FACIE CASE

In order to sustain a cause of action under the Act, plaintiff must meet the threshold burden of establishing he is “disabled” within the meaning of the Act. *Roth, M.D. v. Lutheran General Hospital*, 57 F.3d 1447, 1454 (7th Cir. 1995). This inquiry is an individualized one and must be determined on a case-by-case basis. The Seventh Circuit Court of Appeals has recognized that an individual is “disabled” if he has: (1) a physical or mental impairment which substantially limits one or more of the major life activities; (2) a record of such impairment; or (3) if he is regarded as having such an impairment. *Roth* at 1454. The Seventh Circuit has also noted that “major life activities” are defined as functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working, citing to the implementing regulations referred to above.

Not every impairment that affects an individual’s life activities is a substantially limiting impairment. The key is the extent to which the impairment restricts a major life activity. The impairment must be a significant one. *Roth*, 57 F.3d at 1454. See also, *DePaoli v. Abbot Laboratories*, 14 F.3d 668 (7th Cir. 1998) (the plaintiff must establish that he has a “disability” within the meaning of the Act by showing that he is either substantially limited in one or more of life’s major activities, or, regarded as having such impairment, or has a record of such impairment). The implementing regulations, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. *Duda v. Board of Education of Franklin Park Public School District No. 84*, 133 F.3d 1054, 1060 n. 12 (7th Cir. 1998). See also, *Bragdon v. Abbot*, 524 U.S. 624, 633 (1998).

The U.S. Supreme Court recently addressed the definition of “employer” under ADA to determine whether a medical professional corporation had 15 employees for the twenty weeks required by the Act. The issue was whether the four physician shareholders of the professional corporation constituted “employees” under the Act. The Court analyzed the EEOC’s compliance manual for the factors used to determine “control” and the factors set forth in *Nationwide Mutual Insurance Company v. Darden*, 503 U.S.318 (1992) for determining control. The case was remanded for an analysis of the control issues as set forth by the Court. *Clackamas v. Gastroenterology Associates, P.C. v. Wells*, No. 01-1435.

B. REASONABLE ACCOMMODATION CASES

1. The Interactive Process

Recent Seventh Circuit cases have refined the definition of what constitutes “interactive process” between the employer and the employee to determine the employee’s reasonable accommodation. The Act obligates the employer to “engage with the employee in an interactive process to determine the appropriate accommodation under the circumstances”. *Gile v. United Airlines, Inc.*, 213 F.3d 365, 373 (7th Cir. 2000) quoting *Bombard v. Fort Wayne Newspapers, Inc.*, 93 F.3d 560, 563 (7th Cir. 1996). The employer must engage in a flexible, interactive process with the disabled employee needing accommodations so that, together, they might identify

the employee's precise limitations and discuss accommodating them. *Gile*, 213 F.3d at 373.

In *Gile*, the Seventh Circuit held that the employer had "an affirmative obligation to seek the plaintiff out and work with her to craft a reasonable accommodation and that they failed to do so." Upon the employee's request for accommodation, the employer must take an active role in the employee's reassignment. Posting job openings and assisting that employee in obtaining these positions independently does not satisfy the employer's duty under the Act to investigate the possibility of transferring disabled employees. Although the Act does not require the employer to abandon its legitimate policies governing job qualifications and entitlements to company transfers, an employer must sometimes deviate from its procedural requirements.

The Seventh Circuit has also found that the interactive process the Act foresees is not and end in itself. It is merely a means to determine what reasonable accommodations are available for a disabled individual to perform the position's essential job functions. *Rehling v. City of Chicago*, 207 F.3d 1009 (7th Cir. 2000). A plaintiff cannot base a reasonable accommodation claim solely on the allegation that the employer failed to engage in an interactive process. To succeed, a plaintiff must allege that the employer's failure to engage in an interactive process resulted in the failure to identify an appropriate accommodation.

2. Temporary Light Duty

The Seventh Circuit Court of Appeals has held that the Act requires that an injured person be able to perform the essential functions of his or her job with or without an accommodation. The necessary assumption is that a full-time job requires that employee be capable of working full-time. The Act does not require permanent assignment to a temporary light duty job. Job attendance is an essential requirement of the job. *DeVito v. Chicago Park District*, 270 F.3d 532 (7th Cir. 2001).

3. Seniority Policies

The U.S. Supreme Court has held that the Act does not require an employer to violate its seniority policy. On April 29, 2002, in a 5 to 4 decision, the U.S. Supreme Court held that the Act ordinarily does not require an employer to violate a seniority-based system to transfer a qualified disabled employee to another position as a reasonable accommodation. *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002). The Supreme Court held that, in most cases, the Act does not require an employer to violate a bonified seniority system as a reasonable accommodation. However, the Court held that an employee is free to show special circumstances that would make an exception to a seniority system a reasonable accommodation. For example, the Court stated an employee may be able to show the employer made exceptions to the seniority system in the past. If the employee proves such special circumstances, the employer would then have to defend a failure to accommodate by proving the accommodation posed an undue hardship. If an accommodation is reasonable, employers must then determine whether providing an accommodation poses an undue hardship. This decision suggests that employers who make exceptions to generally established policies may be in a more difficult position to argue that requests to bend those policies as an act accommodation are unreasonable.

C. IMPAIRMENT OF MAJOR LIFE ACTIVITIES

1. Carpal Tunnel Syndrome

The U.S. Supreme Court, in a unanimous decision, recently ruled that an assembly line worker with carpal tunnel syndrome, a repetitive motion disorder that interfered with her performing certain activities, wasn't covered by the Act. Justice Sandra Day-O'Connor stated that an individual must have an impairment that prevents or severely restricts an individual from doing activities that are of central importance to most people's daily lives. It is insufficient for individuals attempting to prove disability status to merely submit evidence of a medical diagnosis of an impairment. One quarter of carpal tunnel syndrome cases, Justice O'Connor noted, are resolved within a month even without surgery. *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002).

The Supreme Court noted that the intent of Congress in enacting the Act was not to permit everyone who had a physical impairment but was unable to perform some isolated, unimportant, or particularly difficult manual tasks, to qualify as disabled. The impact of the impairment must also be permanent or long term, prevent or severely restrict the individual from doing activities that are of central importance to most people's daily lives. The Court noted that a diagnosis of carpal tunnel syndrome, since its symptoms and effects vary, was insufficient on its own to establish that an individual has a disability under the Act.

The Court noted that because there was evidence to show that plaintiff was able to attend to her personal hygiene and carry out personal and household chores, which involve manual tasks, the Court of Appeals improperly granted partial summary judgment to the plaintiff.

2. Liver Function Not a Major Life Activity

The Seventh Circuit Court of Appeals recently found that although liver function is integral to one's daily existence in that one needs a healthy liver to remove toxins from the blood, liver function is not integral to one's daily existence under *Bragdon* and its progeny. *Furnish v. SVI Systems, Inc.*, 270 F.3d 445 (7th Cir. 2001). A characteristic of impairment is not sufficient to conclude that an individual is disabled. Rather, major life activities must have been impacted because of the impairment. The Seventh Circuit noted that even a serious illness like Hepatitis B does not necessarily qualify as a disability under the Act unless that impairment substantially limits a major life activity. Since plaintiff offered only liver function as the major life activity that was limited, plaintiff failed to establish that he was disabled as prescribed under the Act.

3. Panic Attacks

The Seventh Circuit was recently called upon to determine whether an employee experiencing panic attacks was a qualified individual under the Act. Specifically, an employee is not a qualified individual if she poses a "significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." 42 U.S.C. Sections 12111(3). Courts are to consider the following factors when determining whether a plaintiff is a direct threat: (1) duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that potential harm will occur; and (4) the imminence of potential harm. The Court found the plaintiff posed a di-

rect threat in her consultant position due to the fact that she would suffer from this condition for one to two years, needed to take unpredictable breaks if she suffered from panic attacks, the serious nature of the calls that she had to handle, and the stress that accompanied the position. The Court found that the employer could not reduce its risk by reasonably accommodating plaintiff. Specifically, allowing plaintiff to take 5-minute breaks increased the uncertainty in handling calls and permitting others to handle the calls would require hiring additional employees, which was not required under the Act. *Emerson v. Northern States Power Company*, 256 F.3d 506 (7th Cir. 2001).

4. Requests for Medical Information

In *Krocka v. City of Chicago*, 203 F.3d 507 (7th Cir. 2000), the Seventh Circuit Court of Appeals held that an employer may require specific medical information from an employee and may require that the employee undergo a physical examination to determine his or her ability to work under the Act. However, inquiries into the psychiatric health of an employee must be job related and reflect a concern for employee safety.

The U.S. Supreme Court recently ruled that an Equal Employment Opportunity Commission regulation permitting companies to bar employment of a person if a job might jeopardize his or her health passed muster under the Act. The Court's decision clears the way for companies to use health and safety as a consideration in certain hiring decisions.

In *Chevron U.S. v. Echazabal*, 536 U.S. 73 (2002), the Court held that the Act's discrimination definition covers a number of things an employer might do to block a disabled person from advancing in the workplace, such as using qualification standards to screen out or tend to screen out such individuals 42 U.S.C. Section 12112(b). Along with Section 12113(a), the definition creates an affirmative defense for actions under qualification standards shown to be job related and consistent with business necessity, which may include a requirement that an individual should not pose a direct threat to the health or safety of other individuals in the workplace. The EEOC's regulation carries the defense one step further, allowing an employer to screen out a potential worker with a disability for risk on the job to his own health or safety.

D. Absenteeism Discharges

In *Feldman v. American Memorial Life Insurance Company*, 196 F.3d 783 (7th Cir. 1999) the Seventh Circuit stated that employers who terminate an employee for absenteeism are not liable under Illinois law for retaliatory discharge, even if those absences stem from a legitimate disability citing *Hartlein v. Illinois Power Company*, 151 Ill.2d 142, 601 N.E.2d 720 (Ill. 1992).

E. Punitive Damages

The U.S. Supreme Court recently ruled that punitive damages may not be awarded in private suits brought under the Act, or the Rehabilitation Act of 1973. In *Barnes v. Gorman*, a paraplegic suffered serious injuries that left him unable to work full-time when, after arrest, he was transported to a Kansas City police station in a van that was not equipped to accommodate the disabled. Over the plaintiff's objection, the officers removed him from his wheelchair and used a seatbelt and his own belt to strap him to a narrow bench in the

rear of the van. During the ride to the police station, the plaintiff released his belt fearing it placed excessive pressure on his urine bag. Eventually, the other belt came loose and he fell to the floor rupturing his urine bag and injuring his shoulder and back. Plaintiff sued under the Act and Section 504 of the Rehabilitation Act of 1973 asserting that the police officials and officers discriminated against him by failing to maintain appropriate policies for the arrest and transportation of persons with spinal cord injuries. The Court held that because punitive damages may not be awarded in private suits under the Title VI of the 1964 Civil Rights Act, it follows that they may not be awarded in suits brought under Section 12202 of the Act and Section 504 of the Rehabilitation Act.

F. The EEOC Charge

Federal Courts have held that an aggrieved employee may not complain to the EEOC of only certain incidences of discrimination, and then seek judicial relief of different incidences of discrimination. *McRush v. McDonalds Corporation*, 966 F.2d 1104, 1110 (7th Cir. 1992). See also, *Maciejewicz v. Oak Park Public Library*, 1996 Westlaw 501, 743 (Northern Dist. Ill. 1996).

G. Construction Industry Cases

- ***Rhodes v. Bob Florence Contractor*, 890 F. supp. 960 (U.S. Dist., Ka, 1995)**

PROCEDURAL POSTURE: Plaintiff employee filed an action against defendant employer, claiming the employer violated the Americans With Disabilities Act of 1990 (ADA), 42 U.S.C.S. § 12201 et seq., when the employer failed to reasonably accommodate his disabilities, laid him off due to his disabilities, and failed to rehire him due to his disabilities. The employer moved for summary judgment.

OVERVIEW: The employee worked in construction for many years with the employer before sustaining a shoulder injury. His physician recommended decreased work hours and other restrictions, and the employer assigned him to light duty and reduced hours. After the employer refused his request to be paid for full-time work despite the reduced hours, and he was laid off due to lack of work, the employee brought an action under the ADA, 42 U.S.C.S. § 12201 et seq. The court granted summary judgment for the employer, noting that nothing in the ADA required the employer to pay the employee above union wages to accommodate his injury. Further, there was no evidence the employee was laid off due to his disability, as other non-disabled workers were also laid off due to the seasonal nature of construction work. The court noted that the ADA did not guarantee a job, and it did not insulate the employee from the marketplace. It was further unrefuted that the employee never applied for reemployment, he had let his union membership lapse, and he was in training full time to pursue another career. Finally, the court questioned whether he was disabled under the ADA, as he had returned to construction work.

OUTCOME: The court granted the employer's motion for summary judgment as to all of the employee's claims under the ADA.

- ***Shedrick Brooks v. Harvest States Cooperative*, 1997 U.S. Dist Lexis 7153 (E.D. La., 1997)**

PROCEDURAL POSTURE: Plaintiff applicant filed a claim against defendant employer, which alleged that the employer refused to hire him on basis of his race and disability, in violation of Title VII of the Civil Rights Act of 1964 (Title VII), 42

U.S.C.S. § 2000e-2(1), and the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C.S. § 12112(a).

OVERVIEW: The applicant, who was African-American, had worked for a company that was the employer's successor-in-interest. He had been promoted to the position of millwright, and his left index finger had been crushed in a work-related accident. The company sold the grain elevator to the employer. The employer hired some of the persons who had been employed by the company, but refused to hire the applicant for the position of millwright. The court held that the applicant had established the first three prongs of the test for prima facie case of racial discrimination because he was a member of a racial minority, he was minimally qualified for the job he applied for, and the employer had not hired him. The court held that the applicant had failed to establish the fourth prong of the test, that the employer filled the millwright position with persons less qualified than the applicant. The employer's reason for not hiring the applicant, that he was less qualified than other applicants, was legitimate and borne out by the evidence. The court denied the applicant's ADA claims because the injury to his hand was not a disability and had not substantially limited a major life activity.

OUTCOME: The court entered judgment in favor of the employer against the applicant and dismissed the applicant's complaints under Title VII and the ADA.

- ***Hurley v. Modern Continental Construction Co.*, 54 F. Supp. 2d 85 (U.S. Dist. Mass., 1999)**

PROCEDURAL POSTURE: Defendants filed a motion for summary judgment in an action in which plaintiff alleged that defendants terminated his employment in violation of the Americans with Disabilities Act, 42 U.S.C.S. § 12101 et seq.

OVERVIEW: Plaintiff filed a two-count complaint naming as defendants his former employer and the senior vice president. Plaintiff claimed that the employer terminated him in violation of the provisions of the Americans with Disabilities Act (ADA), 42 U.S.C.S. § 12101 et seq., and state anti-discrimination law, Mass. Gen. Laws ch. 151B § 4(16). The vice president was alleged to have aided and abetted in the employer's discriminatory action in violation of Mass. Gen. Laws ch. 151B § 4(5). The court found plaintiff failed to adduce sufficient evidence to raise a genuine issue of material fact as to whether he was substantially limited in the major life activity of working. Because this was prerequisite to establishing liability under the ADA, defendants were entitled to the entry of judgment in their favor on plaintiff's federal claim. The state anti-discriminatory claim was dismissed without prejudice to permit plaintiff to bring the claim in state court.

OUTCOME: The court granted defendants' motion for summary judgment on the federal claim because plaintiff failed to put forth sufficient evidence to raise an issue of material fact as to whether he was substantially limited in the major life activity of working. The state law claim was dismissed without prejudice to permit plaintiff to file his claim in state court.

- ***Baltimore Neighborhoods v. Rommel Builders*, 40 F. Supp. 2d 700 (U.S. Dist. Md., 1999)**

PROCEDURAL POSTURE: Plaintiffs, corporation and individual, brought an action against defendants for failure to comply with the accessibility requirements of the

Fair Housing Amendments Act of 1988, 42 U.S.C.S. § 3604(f), and the Americans with Disabilities Act, 42 U.S.C.S. § 12181 et seq.

OVERVIEW: Plaintiffs brought a complaint against defendants on the ground that they were involved with building and developing a condominium complex that was not wheelchair accessible. As a result, plaintiff charged defendants with violating the Fair Housing Amendments Act of 1988 (FHAA), 42 U.S.C.S. § 3604(f), and the Americans with Disabilities Act (ADA), 42 U.S.C.S. § 12181 et seq. The court denied the motion for summary judgment of all defendants except for defendant condominium complex. In denying defendants' motion for summary judgment, the court held that photographic evidence submitted by plaintiffs created issues of material fact as to whether defendants violated the law. The court denied defendant condominium complex's motion for summary judgment in part because it was properly named as a party to the suit, but granted its motion in part as to plaintiffs' FHAA claims because defendant complex's site work was completed prior to the effective date of the FHAA. The court granted plaintiffs' summary judgment motion in regard to their FHAA claims and held that they had established all the requisite allegations as a matter of law, except as to the bathroom reinforcements issue.

OUTCOME: Defendants' motion for summary judgment denied because photographic evidence submitted by plaintiff created triable issues of fact. Defendant condominium complex's motion for summary judgment granted in part as to plaintiff's Fair Housing Amendments Act of 1988 (FHAA) claims because defendant complex's work site was completed prior to the effective date of the FHAA. Plaintiff's motion for summary judgment granted on its FHAA claim.

- ***Allen v. Interior Construction Services, Ltd., 214 F. 3d 978. (8th Cir., 2000)***

PROCEDURAL POSTURE: Plaintiff appealed the order of the United States District Court for the Eastern District of Missouri which granted summary judgment to defendant employer in plaintiff's action alleging that defendant wrongfully failed to contact plaintiff, when carpentry work was available, on account of plaintiff's disability in violation of the Americans with Disabilities Act, 42 U.S.C.S. § 12101 et seq.

OVERVIEW: Plaintiff alleged, inter alia, that defendant employer refused to rehire him for carpentry work when such work was available based on plaintiff's disability or perceived disability from a back injury, in violation of the Americans with Disabilities Act, 42 U.S.C.S. § 12101 et seq. The court held that, because defendant had no affirmative duty to contact plaintiff who was employed on an as-needed basis, the fact that defendant hired numerous other carpenters when plaintiff was available did not raise an inference of discrimination. Further, defendant's failure to contact plaintiff about available work did not constitute a failure to accommodate plaintiff's disability because plaintiff was not precluded from contacting defendant about such work. Defendant consistently maintained that plaintiff was not hired because there was no available work at the times plaintiff contacted defendant, and plaintiff failed to show that such reason was a pretext for discriminatory animus.

OUTCOME: Order was affirmed; defendant employer had no affirmative duty to contact plaintiff when work was available, and defendant's stated reason for its failure to hire plaintiff when contacted by plaintiff, based on lack of work, was not shown to be pretextual nor motivated by discriminatory animus on account of plaintiff's alleged disability.

- ***Smith v. Warren Gregory & Sons, Inc., 2001 U.S. Dist. Lexis 22057 (S.D. In., 2001)***

PROCEDURAL POSTURE: Plaintiff former employee filed a disability discrimination case under the Americans with Disabilities Act (ADA), 42 U.S.C.S. § 12101 et seq., alleging that defendant former employer discharged him from employment because of his disability and failed to accommodate his disability, and that, alternatively, it fired him because it perceived him to be disabled or because he had a record of disability. The former employer sought summary judgment.

OVERVIEW: The former employee was a supervisor for his former employer, a construction company. He injured his back, and a doctor restricted his work activities and gave him a permanent disability rating of five percent. The former employer placed him on restricted duty and later terminated him. The former employee filed an action alleging that he suffered disparate treatment in violation of the ADA due to an actual disability, being regarded as disabled, and having a record of a disability. The court granted the former employer summary judgment, finding that the claims failed at the prima facie stage because the former employee did not present evidence sufficient to raise an inference that he had a disability as defined by the ADA. The court found no ADA case law supporting the contention that a five percent permanent disability rating was substantially limiting and noted that the former employee had testified that he was not substantially impaired in the major life activity of working. The court found that the former employee was not a "qualified individual" with a disability; therefore, even if the former employer had fired him because of his work restrictions, it did not violate the ADA.

OUTCOME: The court granted the former employer's motion for summary judgment as to the former employee's disparate treatment claims.

- ***Roland Breech v. Becon Construction, 2002 U.S. Dist Lexis 19702 (E.D. La, 2002)***

PROCEDURAL POSTURE: Plaintiff former employee filed suit against defendant former employer alleging that the employer failed to rehire him because of his epilepsy in violation of the Americans with Disabilities Act (ADA). The employer moved for summary judgment alleging the employee could not establish a prima facie discrimination case. The matter was referred to the magistrate judge for entry of judgment pursuant to 28 U.S.C.S. § 636(c) upon consent of all parties.

OVERVIEW: The employer's motion for summary judgment was based solely on its argument that the employee did not have a disability as defined by the ADA. The employer argued that the employee's epilepsy was not a disability for ADA purposes because it was controlled by medication and did not substantially limit any of his major life activities, including working. The employee did not make a prima facie showing, as he was required to survive summary judgment, that he was disabled under the ADA. The evidence, consisting of his own testimony, revealed that his epilepsy was controlled by medication and that his infrequent nocturnal seizures did not substantially limit him in the major life activity of working. He consistently worked over the past 10 years and was able to work without any restrictions except that he refrained from working at night. Thus, the employee did not carry his burden to produce evidence that he had a disability as defined by the ADA and the case law. Absent such a showing, he could not establish a prima facie case of discrimination.

OUTCOME: The employer's motion for summary judgment was granted by the magistrate judge and the employee's claims were dismissed with prejudice.

- ***Kurt Klaus v. Builders Concrete Co., 2002 U.S. Dist. Lexis 1919 (N.D. Ill., 2002)***

PROCEDURAL POSTURE: Plaintiff employee sued defendant employer for violations of the Family and Medical Leave Act (FMLA), 29 U.S.C.S. § 2601 et seq., and the Americans With Disabilities Act (ADA), 42 U.S.C.S. § 12101 et seq. The employer moved for summary judgment.

OVERVIEW: The employee claimed that while he was laid off for a seasonal slow down in work, he had medical procedures performed for bad circulation. The employer knew that the employee planned to have the procedures performed. However, the employee was not rehired when the seasonal work picked up. The court held that as to the FMLA claim, the employee had not established that his health condition required him to have time off from work. Further, he never requested or required FMLA leave. Specifically, since both of the medical procedures took place after the employee was laid off, his health condition did not require him to take FMLA leave, or any other type of leave. As to the ADA claim, there was no evidence to suggest that the employee actually had severe difficulty walking after his surgery. However, there was an issue of material fact as to whether the employer regarded the employee as disabled. Specifically, the employer had allegedly stated that the employee was not being returned to work because the employee was "physically all screwed up." The statement inferred that the employer may have refused to rehire the employee because it regarded him as disabled.

OUTCOME: The employer's motion for summary judgment was granted as to the alleged violation of the FMLA, but denied as to the ADA claim

- ***Ongsiako v. City of New York, 199 F. Supp. 2d. 180 (S.D. NY, 2002)***

PROCEDURAL POSTURE: Plaintiff employee filed suit against defendant employer and city, alleging defendants impermissibly discriminated against him because of his national origin and alleged disability, and that they constructively discharged him from his job as a city construction laborer. Defendants moved for summary judgment.

OVERVIEW: The court found that the employee had failed to meet his burden of establishing a prima facie case under the Americans with Disabilities Act (ADA). The employee had not demonstrated that he suffered from a disability within the meaning of the ADA. The employee's back impairment prevented him only from working as a city construction laborer or in other jobs for which heavy lifting was an essential function. Also, the employee had not shown that he could perform the essential functions of a city construction laborer, or that defendants took adverse employment action against him. Furthermore, to the extent the employee contended that the adverse employment action taken against him was a constructive discharge, that conclusion was completely unsupported by the record. The employee's failure to demonstrate that defendants took any adverse employment action against him was also fatal to his national origin discrimination and retaliation claims. Finally, having denied the employee's federal causes of action, the court declined to exercise its discretion to consider the employee's state law discrimination claims.

OUTCOME: Defendants' motion for summary judgment was granted and all of the employee's claims were dismissed.

V. RACIAL DISCRIMINATION

- ***Hameed v. Int'l Assoc. of Bridge, Structural and Ornamental Iron Workers***, 637 F.2d. 506 (8th Cir., 1980)

PROCEDURAL POSTURE: Plaintiff employee class filed an action against defendant union alleging racial discrimination. Employee class appealed the decision of the United States District Court for the Eastern District of Missouri, which enjoined the requirement of a high school diploma as a condition for admission to an apprentice program, awarded back pay to those who would have been selected as an apprentice, and rejected all other claims.

OVERVIEW: Employee class alleged that the trial court erred by (1) failing to find a broad pattern of racial discrimination in the selection criteria, (2) applying incorrect legal standards to assess the admission standards, (3) upholding the referral system, (4) failing to provide an adequate remedy, and (5) denying attorney's fees. The court held that although the district court was correct in enjoining the use of the high school diploma as a condition of eligibility for selection into the apprentice program, the judgment below was required to have been vacated and remanded to the district court on the ground that the relief granted was too narrow. The court further concluded that the district court erred in failing to accord relief to the victims of the discriminatory apprenticeship criteria and failing to award attorney's fees.

OUTCOME: The court vacated the trial court's judgment and remanded the cause to the trial court with instructions to permanently enjoin the selection criteria and to award employee class attorney's fees.

- ***Robinson v. N&C Construction Co.***, 767 F. Supp. 843 (N.D.OH, 1991)

PROCEDURAL POSTURE: Plaintiff filed an action against defendant contractors, alleging that they had failed to hire him due to his race and in retaliation for past charges he had brought with the Equal Employment Opportunity Commission (EEOC), in violation of 42 U.S.C.S. §§ 1981, 2000e-3(a) and Ohio Rev. Code Ann. § 4112.99. One contractor filed a Fed. R. Civ. P. 12(b)(6) motion to dismiss and another filed a motion for partial summary judgment.

OVERVIEW: The contractors did not hire plaintiff on a major construction project. Plaintiff had previously filed charges with the EEOC against at least one of the contractors. Although sketchy, plaintiff's complaint alleged that the contractors failed to hire him because of his race and because of his previous EEOC filings. Both contractors alleged a violation of the statute of limitations. The court held that plaintiff's allegation of retaliatory failure to hire within the two-year limitations period necessarily meant that he had applied for jobs within the period. The contractor that filed for summary judgment failed to present evidence refuting plaintiff's claim that he had applied for a job within the limitations period. The court refused to grant partial summary judgment dismissing one of plaintiff's claims because it held there was an overlap. Both § 1981 and § 2000e-3(a) covered a refusal to hire based upon race. The court held that at this early stage of the proceedings plaintiff had pled sufficient facts to survive both the motion to dismiss and the motion for summary judgment.

OUTCOME: The court denied the contractors' motions to dismiss and for partial summary judgment in plaintiff's action alleging that the contractors failed to hire him due to his race and in retaliation for his filing of charges with the EEOC.

- ***Polote Corp. v. Metric Constructors, Inc.***, 880 F. Supp. 836 (S.D. GA, 1995)

PROCEDURAL POSTURE: Defendant construction company filed a motion for partial summary judgment. Plaintiff minority subcontractor had filed an action against the construction company in the court. The minority subcontractor's complaint alleged that the construction company had engaged in actionable racial discrimination under 42 U.S.C.S. § 1981 and had tortiously interfered with the minority subcontractor's contractual relationships with third parties.

OVERVIEW: The minority subcontractor filed an action in the court against the construction company. The minority subcontractor's complaint alleged that the construction company violated § 1981 in its contractual dealings with the minority subcontractor, breached its subcontract with the minority subcontractor, and tortiously interfered with contractual relationships the minority subcontractor was developing with third parties. The construction company filed a motion for summary judgment with the court on the counts that involved § 1981 and tortious interference. The court denied the construction company's motion for summary judgment as to all of the minority subcontractor's claims under § 1981, except for the claim that encompassed instances of discriminatory contractual interference on certain projects; and granted the construction company's motion for summary judgment on the minority subcontractor's claims of tortious interference with contractual relationships and tortious interference with prospective business relationships.

OUTCOME: The court denied the construction company's motion for summary judgment as to almost of the minority subcontractor's claims under the applicable provision of the Civil Rights Act of 1991, but granted the construction company's motion for summary judgment as to the minority subcontractor's claims of tortious interference with contractual relationships and tortious interference with prospective business relationships.

- ***NAACP Labor Committee v. Laborers' International Union***, 902 F. Supp. 688 (W.D. Vir., 1995)

PROCEDURAL POSTURE: Plaintiffs, African American members of Defendant Union, sued Union and two employers for violations of Title VII, 42 U.S.C. § 2000e and 42 U.S.C. § 1981, claiming the Union operated a racially discriminatory referral system. Defendants moved for summary judgment on all of plaintiff's claims.

OVERVIEW: Plaintiffs, African American members of Defendant Union, sued Union and two employers alleging they operated a racially discriminatory referral system. Defendants claim they did not place plaintiff union members in jobs because there was no work. The Court granted defendant's motions for summary judgments, holding that (1) the NAACP lacked standing as representative of its members because both the claim and relief sought required the participation of its individual members, (2) plaintiff's Title VII claims were barred because plaintiff's failed to file a timely charge of discrimination with the EEOC, (3) § 1981 claims were barred by the statute of limitations and (4) § 1981 claims failed to state a prima facie case of intentional discrimination.

OUTCOME: Court granted defendants' motions for summary judgment as to all of plaintiff's claims where plaintiff had no standing, claims were time barred and plaintiff failed to state a prima facie case of intentional discrimination.

- ***U.S. Equal Employment Commission v. Foster Wheeler Constructors, Inc.***, 1999 U. S. Dist. Lexis 10610 (N.D. Ill., 1999)

PROCEDURAL POSTURE: Plaintiffs, Equal Employment Opportunity Commission and employee, filed a civil rights lawsuit for discriminatory practices against Defendant union, pursuant to § 701(c)(1) of Title VII, 42 U.S.C.S. § 2000e-2(c)(1). Defendant union moved for summary judgment, asserting that it did not contribute to the discriminatory action or intentionally acquiesce in the employer's discriminatory policies and procedures.

OVERVIEW: Plaintiff employee was an African-American member of defendant pipefitters and welders union. The Equal Employment Opportunity Commission and employee filed a complaint against the union and company, alleging that plaintiff was working in a racially hostile work environment at, in that there was racially offensive graffiti at the work site, and union had joint control of the project and failed to take effective action to remove the graffiti and prevent its recurrence. Union filed a motion for summary judgment on the basis that it did not contribute to the discriminatory action. The court denied union's motion for summary judgment, because pursuant to § 701(c)(1) of Title VII, 42 U.S.C.S. § 2000e-2(c)(1), if evidence indicated that union had knowledge of the discriminatory situation, it had an affirmative duty to report the situation to employer and to remedy the problem. The court held that the standard for union liability under Title VII required a showing that the union contributed to or intentionally acquiesced in the discriminatory behavior.

OUTCOME: Court denied defendant union's motion for summary judgment in civil rights suit in which plaintiffs alleged that defendant failed to take action to prevent discriminatory work environment. Court held that pursuant to Title VII, if evidence indicated that union had knowledge of discriminatory situation, it had a duty to report situation to employer and remedy the problem.

- ***Tillmon v. Garnett Corp.***, 1999 U.S. Dist. Lexis 11972 (N.D. Ill., 1999)

PROCEDURAL POSTURE: Plaintiff brought an action against defendants, his former employers, alleging racial discrimination. Defendants moved for summary judgment and moved to strike plaintiff's affidavit submitted in opposition to the motion for summary judgment.

OVERVIEW: Plaintiff, an African American laborer, alleged claims of discrimination against his former employers, general contractor, under 42 U.S.C.S. § 2000 and 42 U.S.C.S. § 1981. Defendant did not employ 15 or more people for 20 or more weeks during the relevant time period, and therefore, was not an employer for the purposes of 42 U.S.C.S. § 2000(e)(b). Therefore, defendant's motion for summary judgment on this count was granted. Plaintiff described eight incidents in a period of twenty-four months wherein defendants made offensive racial remarks. Plaintiff was not physically attacked, nor was he directly threatened or intimidated. Therefore, the court held that the conduct did not constitute discriminatory changes in the terms and conditions of employment as required by 42 U.S.C.S. § 1981. Summary judgment was also granted to defendant on this count.

OUTCOME: Defendants' motion for summary judgment was granted where plaintiff failed to show defendant qualified as an employer on plaintiff's first count of racial discrimination. Defendants' motion for summary judgment was granted on the second count, because plaintiff failed to prove that he was physically attacked, directly threatened, or in-

timidated, to constitute discriminatory changes in the terms and conditions of his employment.

- **Lewis v. The Haskell Co., Inc.**, 108 F. Supp. 2d. 1288 (M.D. Ala. 2000)

PROCEDURAL POSTURE: Defendants, general contractor and its supervisor, moved to compel the arbitration of the claims of plaintiffs, three African-American laborers and their employer, for violation of various federal and state civil rights laws arising out of work done at a construction project pursuant to a subcontract with defendant contractor. Individual plaintiffs argued they were not subject to the arbitration clause in the subcontract.

OVERVIEW: Plaintiffs charged that the defendants discriminated against them because of their race in violation of 42 U.S.C.S. § 1981, and asserted state-law claims, including breach of contract, tortious interference with business contract, general negligence and wantonness, negligent training and supervision, and outrage. In support of their motion to compel arbitration of all issues, defendants relied on an arbitration clause contained in the subcontract, which provided that any disputes arising from or concerning this subcontract shall be arbitrated in accordance with the Construction Arbitration Rule of the American Arbitration Association. Although the individual plaintiffs were not signatories to the subcontract, the court found it enforceable against them. Plaintiffs were seeking to hold their employer's principal liable, not their own employer; thus any claim necessarily went through the subcontract including the arbitration clause, under the theory of agency. Even the civil rights claim under 42 U.S.C.S. § 1981 was a contract claim. The employment was sufficient consideration for the arbitration clause.

OUTCOME: Defendants' motion to compel arbitration and stay proceedings granted because even individual plaintiffs' claims were derived from the subcontract, which identified the subcontractor to include the subcontractor company and its employees.

- **Hall v. Tribo Construction Co.**, 2001 U.S. Dist Lexis 11175 (W.D. Penn., 2001)

PROCEDURAL POSTURE: Plaintiff individual and her company sued defendant construction company and individuals for race discrimination, alleging that terminating a contract violated Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq., 42 U.S.C.S. § 1981, and the Pennsylvania Human Relations Act, 43 Pa. Cons. Stat. § 951 et seq. The construction company and the individuals moved to dismiss the claims.

OVERVIEW: Plaintiff, subcontractor, claimed that the construction company, general contractor, had terminated the contract between them as the result of deliberate acts of racial discrimination. The court concluded that subcontractor lacked standing to bring a claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq., because they were not employees. Rather, they were independent contractors engaged by the construction company to perform a specific part of an apartment complex construction project. The 42 U.S.C.S. § 1981 claim was barred by the applicable statute of limitations because it was brought more than two years after the parties' contract had been terminated and the continuing violation theory was inapplicable. The court declined to exercise jurisdiction over the state discrimination claim because there was little to gain in the way of convenience or judicial economy in having the court hear the case when the federal claims had been dismissed.

OUTCOME: The motion to dismiss was granted.

- **McCowan v. All Star Maintenance, Inc.**, 273 F. 3d 917 (10th Cir., 2001)

PROCEDURAL POSTURE: Plaintiffs appealed from an order of the United States District Court for the District of New Mexico granting defendants summary judgment on racial discrimination, hostile work environment and retaliatory discharge claims in violation of 42 U.S.C.S. § 1981 and Title VII of the Civil Rights Act (Title VII), 42 U.S.C.S. § 2000e-16(c).

OVERVIEW: Plaintiffs, three Mexican-Americans, were hired by defendant, a painting contractor, because the contractor believed its production goals were not being met by its first crew of three painters. After three weeks painting houses, plaintiffs were terminated, triggering the underlying lawsuit for discrimination based on their Hispanic national origin. The district court concluded that plaintiffs had presented a prima facie case but failed to carry their burden to "rebut the presumption that Defendants terminated them for legitimate, nondiscriminatory reasons and granted the defendants' motion for summary judgment. Upon de novo review, the court of appeals found this disposition was premature. The appellate court observed that the record disclosed the defendant was dissatisfied with both painting crews and that the plaintiffs were not told their work was unsatisfactory. With no evidence of the criteria used to evaluate the basis for the decision to retain one painting crew over the other in the face of the inconsistencies and contradictions in the record, the appeals court held the district court improperly resolved questions of fact reserved for the jury.

OUTCOME: The district court's grant of summary judgment in favor of defendants was reversed and remanded.

VI. GENDER DISCRIMINATION

- **Radovanic v. Centex Real Estate Corp.**, 767 F. Supp. 1322 (W.D. NC, 1991)

PROCEDURAL POSTURE: Plaintiff ex-employee commenced an action against defendant ex-employer, alleging that she was terminated because of her gender and her status as a pregnant woman in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq.

OVERVIEW: Although she had satisfactory evaluations, the ex-employee was terminated for her position as project superintendent because the ex-employer believed that she lacked initiative and problem solving skills, which were essential to the position. The ex-employee contended that she was terminated as a result of her pregnancy. The court held that discrimination based on a woman's pregnancy was, on its face, discrimination because of her sex. The court found that the ex-employee had established a prima facie case of discrimination. However, the court found that the ex-employee had not produced sufficient evidence to prove that the ex-employer's legitimate reasons offered for termination were pretextual. The court found that the ex-employer's reasoning that the ex-employee lacked the necessary behavior traits to become an effective superintendent was legitimate and nondiscriminatory. The court held that pretext was not proven by merely producing evidence that the ex-employer's decision was incorrect, but was proven by a showing that the reasons given did not motivate the termination.

OUTCOME: The court dismissed the ex-employee's gender discrimination action with prejudice.

- ***Stair v. Lehigh Valley Carpenters Local Union NO. 600***, 1993 U.S. Dist. Lexis 8668 (E.D. Penn, 1993)

PROCEDURAL POSTURE: Plaintiff, former member of defendant Union, sued Union under Title VII of the Civil Rights Act of 1964 on the basis of sex discrimination. Defendant brought motion for summary judgment. Following a nonjury trial, court issued memorandum opinion.

OVERVIEW: Plaintiff, former member of Union, sued for sexual discrimination and harassment based on pornographic calendars distributed by Union depicting nude and partially nude women. Plaintiff also claimed that the Union failed to refer her for employment opportunities because of her sex and placed her on probation and terminated her participation in the apprentice program. The court found that the Union had violated Title VII by failing to respond to plaintiff's objection over the calendars and enjoined the union to adopt, implement and enforce a policy and procedures for the prevention and control of sexual harassment. Plaintiff was not entitled to compensatory or punitive damages under Title VII. The court held that plaintiff had not sufficiently proven her remaining claims of discrimination on the basis of sex.

OUTCOME: Plaintiff granted injunctive relief against Defendant Union permanently enjoining Defendant Union from creating a work environment that is hostile to women because of their sex.

- ***Kelly v. KD Construction of Florida, Inc.***, 866 F. Supp. 1406 (S.D. FL, 1994)

PROCEDURAL POSTURE: Plaintiff former employee brought an action against defendant former employer under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq., and the Florida Human Rights Act, Fla. Stat. § 760.10. A bench trial was had on her complaint, after which the court issued its judgment.

OVERVIEW: The former employee claimed that she was terminated from her position as a comptroller because of her pregnancy, and thus, alleged that her employer violated both Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C.S. § 2000e et seq., and the Florida Human Rights Act (FHRA), Fla. Stat. § 760.10. After a bench trial, the court found that the former employee had met her burden of establishing a prima facie case of discrimination because as a pregnant woman at the time of her termination, plaintiff was a member of a protected group under § 2000e(k) of Title VII. However, the court entered judgment in favor of the employer, finding that it had a legitimate, nondiscriminatory reason for the termination, namely the former employee's affair with another high-ranking employee. The court noted that the employer terminated both individuals involved in the affair, and that sexual activity, rather than sexual identity, was not a discriminatory basis for employment action under Title VII. The court also found that the case law developed under Title VII was applicable to the FHRA, and thus, that there was no violation of the FHRA.

OUTCOME: The court denied the former employee's claim that her termination from employment was based on sex discrimination in violation of federal and state statutes, instead finding that the former employer had a legitimate reason for the termination.

- ***Carrington v. Carpenters Local 118***, 1997 U.S. App. Lexis 6178 (6th Cir., 1997)

PROCEDURAL POSTURE: Plaintiff carpenters challenged a judgment of the United States District Court for the Eastern District of Michigan, which granted summary judgment in fa-

vor of defendant contractor on the carpenters' claim of race and sex discrimination under Michigan's Elliott-Larsen Civil Rights Act (MELCRA).

OVERVIEW: The carpenters, who were females, were employed to work on two major federal construction projects. The carpenters filed a complaint under MELCRA against 25 construction companies, alleging race and sex discrimination in employment, and against defendant union, alleging a failure to protect African-American members from discrimination. The trial court granted summary judgment, stating that the carpenters had raised no genuine questions of fact that could result in them prevailing under any theory of discrimination. The court affirmed. The carpenters were unable to produce any evidence that they were discriminated against on the basis of their race or gender. None of the carpenters testified that the contractor had engaged in any written or verbal discriminatory behavior or that the contractor had tolerated such behavior from any of its employees. The contractor demonstrated that 40 percent of the carpenters and apprentices hired during a less than one-year period were African-American.

OUTCOME: The court affirmed the judgment, which granted summary judgment in favor of the contractor on the carpenters' claim of race and sex discrimination under MELCRA.

- ***McBurney v. Architectural Wall Systems, Inc.***, 2001 U.S. Dist. Lexis 21855 (S.D. IA, 2001)

PROCEDURAL POSTURE: Defendant corporation, the employer, sought review, before the court, of the corporation's motion for summary judgment in an action brought by plaintiff employee alleging sex discrimination in violation of Iowa and federal law. The employee resisted the motion, and the employer filed a reply.

OVERVIEW: Both parties, in their briefs, addressed the employee's claims under the familiar McDonnell Douglas burden-shifting framework. The court held, that the employee had made a thin prima facie case of sex discrimination for purposes of this ruling on the employer's motion for summary judgment because both she and an operations manager who was not terminated, were accused of a violation of comparable seriousness. However, the court held that the employee's prima facie case was tenuous. The court held that while there was disparate treatment of the two employees, based on the existence of a perceived extramarital relationship between the two of them, this disparate treatment was not enough by itself to demonstrate pretext or intentional discrimination as the employee and manager were not similarly situated in all relevant respects. Thus, the court held that there was not a material issue of fact for trial regarding whether the employee could demonstrate the employer's reasons for her dismissal were pretextual or that the employer intentionally discriminated against her based on her sex.

OUTCOME: The court granted the employer's motion for summary judgment. The court held that there was not a material issue of fact for trial regarding whether the employee could demonstrate the employer's reasons for her dismissal were pretextual or that the employer intentionally discriminated against her based on her sex.

- ***Alvarez Cabrera v. Trataros Construction Co.***, 184 F. Supp. 2d 149 (U.S. Dist. PR, 2002)

PROCEDURAL POSTURE: Plaintiff employee sued defendant employer pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq., alleging that she was terminated because of her pregnancy and sex. The employer moved for summary judgment.

OVERVIEW: The court was skeptical that the employee had stated a prima facie case of discrimination given evidence that she had failed to perform her job as a construction manager to the satisfaction of the employer's client. Nevertheless, the court examined the employer's stated reason for firing the employee, concluding that the employer had presented affirmative proof that its client was dissatisfied with the management of a construction project and that it had discharged all of the employees who were most directly involved with the management of the project. The employee failed to show that the stated reason was a pretext for discrimination because a supervisor's comment in the context of an unrelated construction project was not contemporaneous with the employee's discharge or causally related to the discharge decision making process. Since there was no admissible evidence that the employer had treated the employee differently from the rest of the management team because of her pregnancy, no inference of discriminatory intent was imputed to the employer. Thus, the employee had failed to raise an issue of material fact on the issue of pretext for discrimination.

OUTCOME: The motion for summary judgment was granted.

VII. AGE DISCRIMINATION

- ***Alphonse Boge v. Ringland Johnson Crowley Co.***, 976 F. 2d. 448 (8th Cir., 1992)

PROCEDURAL POSTURE: Appellant former employee sought review of a final judgment from the United States District Court for the Southern District of Iowa, which granted summary judgment in favor of appellee former employer on the ground that appellant did not exhaust his administrative remedies, in appellant's complaint for age discrimination.

OVERVIEW: Appellant former employee filed a claim with the Iowa Civil Rights Commission and the Equal Employment Opportunity Commission against appellee former employer for age discrimination. After appellant received a right to sue letter, he filed a complaint in a lower court. The lower court granted summary judgment in favor of appellee, and appellant sought review. The court affirmed the lower court's judgment. The court determined that under federal law, in order for appellant to have exhausted his administrative remedies, the allegation of his complaint had to have been reasonably related to the administrative charges that were timely brought. The same standard applied under Iowa law. The court agreed with the lower court's finding that appellant had not met this standard. The court found that the lower court's holding was consistent with those from other courts. Further, the court agreed with the lower court that appellant was not entitled to equitable relief because appellant made no attempt to file a new charge or to amend his previous ones. Thus, equitable considerations did not excuse appellant's failure to file a new charge or to amend his previous charge.

OUTCOME: The court affirmed a lower court's summary judgment in favor of appellee former employer on appellant former employee's complaint for age discrimination because appellant had not met the standard required for exhausting his administrative remedies under federal or Iowa law, and appellant was not entitled to equitable relief where he made no attempt to file a new charge or to amend his previous charge.

- ***Murtha v. Forest Electric Corp.***, 1992 U.S. Dist. Lexis 10476 (E.D. Penn., 1992)

PROCEDURAL POSTURE: Plaintiff, project manager for employer, sued former employer Electric Company for age discrimination under the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. Following a jury trial in which plaintiff was awarded \$350,000, de-

defendant moved for court to set aside the jury's verdict and grant defendant a new trial or judgment for defense, or in the alternative to reduce the amount of the verdict.

OVERVIEW: Plaintiff, approx. 70 years old, was employed as a project manager for Defendant. Plaintiff was replaced as project manager by a 26-year-old employee with little electrical experience and was later fired for "business reasons." Defendant later offered plaintiff a demotion instead of termination. Plaintiff complained to EEOC and filed lawsuit charging Defendant with discharging him because of his age. The court upheld the jury's determination that defendant constructively discharged plaintiff by offering a position where the working conditions would be so unpleasant that a reasonable person would resign. The court rejected Defendant's position that plaintiff was discharged for the non-discriminatory reasons, that he was not doing his job well enough and not generating enough business. The court also upheld jury's award of damages, finding that Defendant failed to meet its burden of proving its defense of failure to mitigate damages.

OUTCOME: Jury award for plaintiff upheld in age discrimination suit where evidence showed that Defendant's non-discriminatory reasons for firing plaintiff not sufficient to overcome allegations of age discrimination.

- ***Wittwer v. Maclean Hunter***, 1995 U.S. App. Lexis 37675 (7th Cir., 1995)

PROCEDURAL POSTURE: Plaintiff employee filed an action alleging that defendant company discriminated against him on the basis of his age in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C.S. § 621, et seq. The United States District Court for the Northern District of Illinois, Eastern Division, granted summary judgment to the company. The employee sought review of the district court's decision.

OVERVIEW: The employee was a marketing/sales manager for company. In an attempt to improve the sales department's performance, the company reorganized and consolidated the responsibilities of the department's personnel. The company considered the employee for a new position within the department, but found his qualifications to be lacking. The company fired the employee and hired a substantially younger person to fill the new position. The employee filed suit, alleging that the company terminated him because of his age in violation of the ADEA. The company filed a motion for summary judgment, claiming that it fired the employee because he was not qualified for the new position and because his performance was declining. The district court granted the motion. The court affirmed. The court held that the company was entitled to summary judgment because it proffered legitimate, nondiscriminatory reasons for the employment decision and the employee failed to present sufficient evidence to create a genuine issue of material fact as to whether the reasons proffered by the company were a pretext for unlawful discrimination.

OUTCOME: The court affirmed the grant of summary judgment to the company in the employee's action alleging age discrimination.

- ***Ledbetter v. Koss Construction Co.***, 981 F. Supp. 1394 (U.S. Dist. Kan. 1997)

PROCEDURAL POSTURE: Plaintiff, applicant sued Defendant construction company for age discrimination, sex discrimination under Title VII and violation of the Vietnam Era Veterans Readjustment Assistance Act. Defendant moved for summary judgment and dismissal.

OVERVIEW: Plaintiff, who was over the age of 40, sought employment with Koss as a laborer for a highway construction project. Although the application does not request an ap-

plicants age or date of birth, the defendant could have surmised from plaintiff's application and resume that he was over 40 years old. Plaintiff was not hired. Plaintiff established a prima facie case for discrimination. The burden shifted to defendant to articulate a facially nondiscriminatory reason for not hiring plaintiff. Defendant met this burden by establishing that hiring official thought plaintiff was applying for a different position and the plaintiff did not have the experience necessary for that position. Since the plaintiff was unable to offer any evidence to create a jury question regarding the credence of defendant's reasons for failing to hire him, summary judgment was granted on behalf of defendants.

OUTCOME: Summary judgment granted for defendants because it has established its burden that it failed to hire plaintiff for nondiscriminatory reason. Motion to dismiss also granted for plaintiff's failure to pay sanctions assessed against him for noncompliance with scheduling orders and deadlines.

- **Smith v. Clayco Accurate Construction Co.**, 1997 U.S. Dist. Lexis 23330 (E.D. MO, 1997)

PROCEDURAL POSTURE: Plaintiff employee brought an employment discrimination action against defendant employer based on age, disability, and retaliation, pursuant to the Age Discrimination in Employment Act (ADEA), 29 U.S.C.S. § 621, the Missouri Human Rights Act (MHRA), Mo. Rev. Stat. § 213.010, and the Americans with Disabilities Act (ADA), 42 U.S.C.S. § 12117(a). The case was before the court on the employer's motion for summary judgment.

OVERVIEW: The employee, a boilermaker, contended that the employers' reasons for no longer assigning work to him were pretextual because the issue of his retirement was mentioned several times during a meeting with his supervisor. After the employee injured his back, he was assigned light duty work and no longer given work as a boilermaker. The employers argued the employee had voluntarily mentioned retiring during the meeting under scrutiny and that work for boilermakers had dried up across the board. The court granted the employers' motion for summary judgment. Even assuming the employee had made a prima facie case of age discrimination, the employer demonstrated two legitimate, non-discriminatory reasons for taking the action that it did, and the employee failed to show that the employer's articulated reasons were pretextual. Moreover, the employee failed to produce any evidence supporting his retaliation claims under the ADEA and MHRA. Finally, the court concluded that the employee provided no evidence in support of his ADA claim.

OUTCOME: The court granted summary judgment against the employee and in favor of the employer in the employee's employment discrimination case.

- **Rhoades v. Atchison-Holt Electric Cooperative**, 1997 U.S. Dist. Lexis 21958 (W.D. MO, 1997)

PROCEDURAL POSTURE: Plaintiff, former employee, sued Defendant, electrical construction company and former employer, alleging Defendant terminated him in violation of the federal Age Discrimination in Employment Act, the Missouri Human Rights Act and the Americans with Disabilities Act. Defendant filed a motion for summary judgment

OVERVIEW: Plaintiff was a lineman and crew foreman for electrical company. He had back problems and his physician first restricted him to light duty and later testified plaintiff's injuries were permanent and he was disabled from performing his the duties of an active lineman crew member. Since there was no light duty work available, plaintiff was

placed on inactive duty and later terminated. The court granted Defendant's summary judgment motion with regard to the ADA because no jury could find that plaintiff was a disabled but qualified person since he could not perform the "essential functions" of the Crew Foreman position. Because the court found that plaintiff was not qualified to perform his duties as crew foreman, he was therefore unable to establish a prima facie case of age discrimination. In addition, Defendant articulated a legitimate, non-discriminatory reason for plaintiff's discharge.

OUTCOME: Defendant's motions for summary judgment granted.

- ***Kurincic v. Stein, Inc.***, 30 Fed. Appx. 420 (6th Cir., 2002)

PROCEDURAL POSTURE: Plaintiff employee sued defendant employer in state court for age and national origin discrimination. The employer removed the case to federal court, and moved for summary judgment. The United States District Court for the Northern District of Ohio granted summary judgment to the employer on the age-discrimination, promissory estoppel, and public policy claims, and remanded the conversion claim to state court. The employee appealed.

OVERVIEW: On review, the court found that the employee's failed to offer sufficient direct or indirect evidence of age discrimination. The affidavit offered as direct evidence of age discrimination was inadmissible hearsay. Moreover, the employee failed to show that the employer's legitimate, nondiscriminatory reason for his discharge--his alleged theft--was pretextual. The employer discharged the employee only after taking reasonable steps to confirm that he did not attend the safety meeting despite the contrary notation on his time sheet. Additionally, the court agreed that the employer was entitled to summary judgment on the employee's promissory estoppel claim, as a bargaining unit employee, the employee could not base a promissory estoppel claim on a promise made other than in the collective bargaining agreement. Further, the court found that the employer was entitled to summary judgment on the employee's national-origin discrimination claim, since the employee failed to offer sufficient evidence of national-origin discrimination to withstand summary judgment. The court denied the employer's request for sanctions under Fed. R. App. P. 38.

OUTCOME: The judgment was affirmed.

VIII. Laws Promoting Women- and Minority-Owned Businesses

- ***Contractors Assoc. of Eastern Penn. Inc. v. City of Philadelphia***, 6 F. 3d. 990 (3rd Cir. 1993)

PROCEDURAL POSTURE: Defendant city sought review of the order from the United States District Court for the Eastern District of Pennsylvania that granted summary judgment to plaintiff contractors in their equal protection suit challenging a city ordinance which created preferences in city contracting for businesses owned by racial and ethnic minorities, women, and handicapped persons.

OVERVIEW: The contractors brought suit against the city, claiming that they had been denied equal protection under the law because they were denied construction contracts even though they were the low bidders. The city relied upon an ordinance that created preferences in the city contracting for businesses owned by racial and ethnic minorities, women, and handicapped persons. The district court found that the contractors had standing and granted summary judgment in their favor. On appeal, the court considered three

questions: whether and to what extent contractors had standing to challenge the ordinance, which standards of equal protection review governed the different sections of the ordinance, and whether these standards justified invalidation of the ordinance in whole or in part. The court found that the contractors had standing, but only to challenge those portions of the ordinance that affected them. The court also affirmed the summary judgment for all classifications but black and handicapped contractors. The court reversed with respect to these because the statistical evidence produced by the city was enough to overcome summary judgment.

OUTCOME: The court affirmed the grant of summary judgment on the construction provisions of the ordinance as applied to businesses owned by Hispanic, Asian-American, Native American, or women. As to the handicapped and black contractors, the court reversed the decisions of the district court.

- ***Northeastern Florida Chapter of Assoc. General Contractors v. City of Jacksonville***, 508 U.S. 656 (U.S., 1993)

PROCEDURAL POSTURE: Petitioner contractors association appealed an order from the United States District Court (Florida) granting summary judgment to respondent city in an action in which petitioner challenged the constitutionality of city ordinance granting preferential treatment to minorities in the granting of city contracts. Petitioner claimed trial court erred in finding petitioner lacked standing where petitioner's member had not been denied contract in fact.

OVERVIEW: Petitioner contractor association suffered injury in fact in an equal protection case where a city ordinance gave preferential treatment to certain minority-owned businesses in the award of city contracts because the ordinance imposed a barrier against petitioner to receive the benefit. Both parties brought motions for summary judgment in an action in which petitioner challenged the constitutionality of the ordinance. The trial court entered summary judgment for petitioner, holding that the ordinance violated equal protection. Respondents appealed. The appellate court found for appellants, holding that petitioner lacked standing where it failed to demonstrate it would have bid successfully on any of the contracts. Petitioners appealed. The appellate court reversed and remanded, holding that petitioner was not required to show that one of its members would have received a contract absent the ordinance. Petitioner's injury in fact was shown by imposition of the city's barrier to obtain the benefit, and ultimate inability to obtain the benefit itself was not required.

OUTCOME: The reviewing court reversed the trial court's grant of summary judgment to respondent city in an action challenging the constitutionality of a city ordinance granting city contracts to minorities. Where petitioner contractors association demonstrated injury in fact by imposition of a barrier to receive a benefit, petitioner was conferred standing. Petitioner was not required to show ultimate inability to receive benefit.

- ***Adarand Constructors, Inc. v. Federico Pena***, 515 U.S. 200 (U.S., 1995)

PROCEDURAL POSTURE: Appeal from judgment of the United States Court of Appeals for the Tenth Circuit upholding a federal government racial classification challenged on U.S. Const. amend. V equal protection grounds.

OVERVIEW: Petitioner, low bidder on a federal contract, was denied the contract because a presumptive preference was given to minority business entities; petitioner sued, claiming violation of its U.S. Const. amend. V equal protection rights. Lower federal courts re-

jected claim, relying upon precedent which subjected U.S. Const. amend. V equal protection claims to intermediate scrutiny. The Supreme Court reversed and remanded, holding that (a) petitioner could claim injury owing to a discriminatory classification which prevented it from competing on an equal footing (petitioner need not allege that it would have obtained a benefit but for the discriminatory classification); (b) U.S. Const. amends. V and XIV equal protection claims are analyzed precisely the same way - applying strict scrutiny analysis (that is, government racial classifications must serve a compelling governmental interest and be narrowly tailored to further that interest); and (c) since lower courts applied intermediate scrutiny, remand for strict scrutiny analysis was required.

OUTCOME: The judgment was reversed and remanded; U.S. Const. amend. V equal protection claims are analyzed just like amend. XIV claims when governmental racial classifications are involved - a classification must serve a compelling governmental interest and be narrowly tailored to further that interest.

- ***Engineering Contractors Assoc. of South Florida v. Metropolitan Dade County***, 943 F. Supp. 1546 (S.D. FL, 1996)

PROCEDURAL POSTURE: Plaintiffs, six trade associations, filed an action challenging the constitutionality of three ordinances passed by defendants, Dade County, Florida and various officials. The trade associations contended that the ordinances, which provided for race, ethnic, and gender conscious measures in awarding county construction contracts, violated the Equal Protection Clause of the U.S. Const. amend. XIV.

OVERVIEW: The ordinances, which established programs giving preferences to black, Hispanic, and women owned businesses, were alleged to violate the Equal Protection Rights of non-minority bidders in the county's competitive bidding process. The court found that the ordinances were subject to strict scrutiny. The court held that the county failed to adduce sufficient evidence to support its claim of past discriminatory treatment of minority businesses, as well as show that the ordinances were sufficiently narrowly tailored to meet the county's goals. The court, applying intermediate scrutiny to the ordinances granting preferences based on gender, also held the ordinances to be in violation of the Equal Protection Clause. As such, the court permanently enjoined the enforcement of the ordinances as applied to the bidding process on construction contracts only.

OUTCOME: The court found that the ordinances did violate the Equal Protection Clause and, therefore, enjoined enforcement of the ordinances as applied to construction contracts only.

- ***W.H. Scott Construction Co., Inc. v. City of Jackson***, 199 F.3d. 206 (5th Cir.,1999)

PROCEDURAL POSTURE: Defendant appealed the United States District Court for the Southern District of Mississippi's grant of summary judgment to plaintiff in plaintiff's equal protection challenge to a policy encouraging minority participation in city construction contracts.

OVERVIEW: The Department of Public Works began including a Special Notice to Bidders as part of specifications for city construction contracts. The court found that this notice placed plaintiff and other non-Disadvantaged Business Enterprises (DBEs) contractors at a competitive disadvantage with DBE contractors because it required non-DBEs to show that they maximized the opportunity for DBEs to participate in the performance of the work, something that would not be required of DBEs. Thus the court found that plaintiff made an adequate showing that future injury was imminent, and that plaintiff established causation

and redressability, because removing preferences that cause plaintiff to compete on an unequal basis would alleviate the injury in fact, entitling plaintiff to seek declaratory and injunctive relief. Using the strictly scrutiny standard, the court found that absent particularized findings of discrimination and set participation goals for each, defendant failed to establish a compelling interest justifying the Special Notice.

OUTCOME: The judgment was affirmed, because plaintiff had standing to challenge and defendant failed to establish a compelling interest justifying the program.

- ***Concrete Works of Colorado v. City and County of Denver***, 86 F. Supp. 2d 1042 (U.S. Dist. CO, 2000)

PROCEDURAL POSTURE: Plaintiff filed suit against defendant, alleging that requiring it to use race and gender based preferences as a condition of doing business with defendant violated the Equal Protection Clause of U.S. Const. amend. XIV.

OVERVIEW: Plaintiff, who does concrete construction work on roads, bridges and sidewalks, submitted bids for contracts with defendant city and county as a prime contractor on city contracts. Plaintiff filed this civil action, claiming the loss of three city contracts because plaintiff failed to comply with Denver, Colorado, Ordinance No. 513 (1990), requiring bidders on city construction contracts to use city certified minority business enterprises and city certified woman-owned business enterprises as suppliers or subcontractors according to project goals setting minimum percentage participation of firms fitting these categories. Plaintiff asserted that requiring it to use such race and gender based preferences as a condition of doing business with the city violated the Equal Protection Clause of U.S. Const. amend. XIV. The court held that the three ordinances at issue were invalid because they were in violation of the Equal Protection Clause. Moreover, defendants were enjoined from the enforcement of those ordinances.

OUTCOME: The three city ordinances at issue in this case were declared invalid and defendants were enjoined from the enforcement of those ordinances. Plaintiff's claims for relief under Colorado law dismissed, without prejudice. Plaintiff's motion to strike defendant's additional evidence offered in defendant's closing argument granted.

- ***Builders Assoc. of Greater Chicago v. County of Cook***, 256 F.3d 642 (7th Cir. 2001)

PROCEDURAL POSTURE: Plaintiffs challenged an ordinance that established a minority and women owned business enterprise program, adopted by defendant county as a denial of equal protection of the laws. The United States District Court for the Northern District of Illinois, Eastern Division ruled that the program was unconstitutional and the county appealed.

OVERVIEW: Defendant county adopted an ordinance that required that a minimum of 30 percent of the total value of any construction contract made by the county be awarded to enterprises at least 51 percent owned by members of specified minority groups, and a minimum of 10 percent of the value of the contract to enterprises at least 51 percent owned by women. Plaintiffs challenged the ordinance as a denial of equal protection of the laws. The district court ruled that the program was unconstitutional and defendants appealed. The appellate court held that there was no evidence that prime contractors on the county's projects were discriminating against minorities and that such discrimination was known to the county so the county was not entitled to take remedial action. The ordinance was not carefully designed to achieve the ostensible remedial aim and no more. The remedy had to be "narrowly tailored" to the wrong that it sought to correct. The county failed

to establish the premise for a racial remedy and the remedy went further than was necessary to eliminate the evil against which it was directed. The ordinance was over-inclusive.

OUTCOME: The judgment was affirmed.

IX. CONCLUSION

The June 18, 2002 issue of the *Wall Street Journal* contained an article in which disability rights advocates decried recent rulings of the Supreme Court curbing the Act. This outcry followed the Court's decision in *Barnes v. Gorman*, barring punitive damage awards in private suits. The article suggests that this ruling reflects the Court's departure from an earlier era, when the first President Bush championed the law, when most courts accepted the law and began broadening the notion of who was disabled as a necessary protection for anyone with a physical or mental impairment. Chai Feldblum, a disability rights lawyer at Georgetown University Law Center, stated that its time for Congress to take notice of what the Supreme Court has done to its law and if they don't think its fair, to pass a whole new law or correct the old one. Mrs. Feldman, who helped draft the law, added, that the Supreme Court's carpal tunnel syndrome ruling in *Williams* was one more brick in a tiny house that the Court is building to make employees squeeze into to show they are persons with disabilities.

Business officials on the other hand have hailed the Supreme Court's decisions claiming that too many borderline lawsuits are filed by people who are not entitled to coverage under the Act, which protects disabled people against unfair treatment. Those with legitimate disabilities will still be able to file lawsuits, but those who file what was thought for a long time to be not disabled under the Act either won't file or will lose said Stephen Bokart, senior vice president and general counsel for the United States Chamber of Commerce.

Recently, the 11th U.S. Circuit Court of Appeals in Atlanta reinstated a lawsuit claiming ABC and the producers of "Who Wants to be a Millionaire" discriminate against disabled people who want to be on the show. The Court found that the lawsuit makes a valid claim that the shows touch-tone system violates the Act. Disability rights advocates claim the network should use live operators or a different system for the hearing impaired callers.

Only time will tell whether Congress takes up the call of the disability rights advocates to remedy what they see as a considered effort by the Supreme Court to roll back the Act. In the meantime, employers should regularly consult with their employment counsel before taking any action concerning an employee seeking accommodations under the Act to ensure compliance with the ever-changing landscape of disability law.