Shiftwork and the Law

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Professors Bird and Mirtorabi examine and describe shiftwork, the growing practice of working non-traditional hours, particularly in the evening and at night. After mining the rich medical, psychological, and social literature that reveals the harmful effects of shiftwork on the body, mental health, and family life, Professors Bird and Mirtorabi provide a broad-ranging legal analysis of shiftwork. They examine possible legal approaches to shiftwork under the Americans with Disabilities Act and then delve into the treatment of shiftwork in federal employment discrimination and retaliation cases. Finally, Professors Bird and Mirtorabi outline recommendations for further research to help remedy the dearth of legal scholarship addressing the shiftwork problem.

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I. INTRODUCTION

What practice contributes to the world’s most devastating industrial accidents, costs employers $206 billion annually, promotes fatigue, depression, flu, infertility, obesity and heart disease, yet receives negligible judicial recognition and attracts little attention from legal scholars? The answer is deceptively mundane: shiftwork.

While most of us rest peacefully, millions of Americans go to work. Long the domain of emergency service and law enforcement, shiftwork has become an increasingly common feature of the American workforce. Shiftwork, the notion of completing one’s working day outside the

1. The phrase "extended hours work" has also been used to describe what is commonly known in literature as shiftwork operations. See, e.g., Circadian Technologies Homepage,
traditional nine-to-five time period, is now required for thirteen percent of all American workers. Many employees work during the evening hours and at least 3.2 million workers toil full-time during the “graveyard” shift.

Shiftwork is unhealthy and dangerous, a fact virtually unacknowledged by legal scholars but almost universally accepted in the medical and psychological fields. When compared statistically to their daytime counterparts, shiftworkers suffer from greater chronic fatigue, depression, colds, flu, gastrointestinal illnesses, infertility issues, menstrual irregularity, obesity, heart disease, high blood pressure, and elevated cholesterol levels.

Some of the world’s most devastating industrial accidents—including the Three Mile Island nuclear leak (five a.m.), the Exxon Valdez oil spill (twelve-thirty a.m.), and the Chernobyl nuclear disaster (one-thirty a.m.)—all occurred during overnight hours, with shift schedule and fatigue playing contributory roles in causes of each disaster. Human error was considered a “major factor” in decisions directly leading to the explosion of the space shuttle Challenger in 1986, as fatigued console operators were working the eleventh hour of their third straight twelve-hour night shift.

Employers also feel the effects of shiftwork. Employers pay over $70 million annually for shiftwork-related accidents and mistakes. Employers shoulder much of the $15.9 billion annually paid in physician visits, prescription drugs, and medical treatment for sleep-deprived workers. Shiftworker fatigue negatively influences workplace morale. Overall costs

http://www.circadian.com (last visited Apr. 4, 2006) (using “extended hours” term). This article will use the term “shiftwork.”


4. See infra Part II.


8. Neal Thompson, Tired of Insomnia, Some Dream of Cure; Employers Awakening to Problem of Insomnia, BALT. SUN, Nov. 17, 2000, at 1A.

for employers have been estimated at $206 billion per year or approximately $8,600 per extended-hours employee.\textsuperscript{10}

Hundreds of articles have been written about the intersection of shiftwork with a variety of fields, including nursing,\textsuperscript{11} business,\textsuperscript{12} medicine,\textsuperscript{13} gender and family studies,\textsuperscript{14} psychology,\textsuperscript{15} economics,\textsuperscript{16} history,\textsuperscript{17} and in popular literature.\textsuperscript{18} Yet virtually no scholarship that examines shiftwork from a legal perspective exists.\textsuperscript{19} This article attempts to fill this significant scholarly gap.

Part II of this Article defines shiftwork. Part III explains the nature of shiftwork and its impact on employers and employees. The subsequent Parts examine the impact of shiftwork on causes of action under specific employment laws. Specifically, Part IV explores the impact of shiftwork on employee claims under the Americans with Disabilities Act. Part V discusses the viability of constructive discharge claims made by shiftworkers. Part VI examines under what conditions, if any, shiftworkers have successfully prosecuted a retaliatory discharge claim. This Article concludes that legal protections for shiftworkers are inadequate given the risks and dangers present in U.S. shiftwork operations.


\textsuperscript{11} See, e.g., Muhammad Jamal & Vishwanath V. Baba, Shiftwork and Department-Type Related to Job Stress, Work Attitudes and Behavioral Intentions: A Study of Nurses, 13 J. ORGANIZATIONAL BEHAV. 449 (1992).

\textsuperscript{12} See, e.g., Randall B. Dunham, Shiftwork: A Review and Theoretical Analysis, 2 ACAD. MGMT. REV. 624 (1977).

\textsuperscript{13} See, e.g., Scott, supra note 9.


\textsuperscript{17} See, e.g., Martha Shiells, Hours of Work and Shiftwork in the Early Industrial Labor Markets of Great Britain, the United States, and Japan, 47 J. ECON. HIST. 497 (1987).

\textsuperscript{18} See, e.g., Joyce Wolkomir & Richard Wolkomir, When Bandogs Howle and Spirits Walk, SMITHSONIAN, Jan. 2001, at 38 (describing nighttime work and life in medieval and pre-industrial society); Scott, supra note 9; see generally PRESSER, supra note 5

\textsuperscript{19} One exception is Robert C. Bird, New Legal Challenges to the Twenty-Four Hour Workplace: An Analysis of Shiftwork and the Americans with Disabilities Act, 34 BUS. L. REV. 21 (2001). This article represents an expansion of one of the co-author's prior work. The few articles that address legal aspects of shiftwork do so within the context of larger issues such as European labor limits on women's work at night. See, e.g., Dagmar Schiek, Lifting the Ban on Women's Night Work in Europe—A Straight Road to Equality in Employment?, 3 CARDozo WOMEN'S L.J. 309 (1996); Christine Haight Farley, Men May Work From Sun to Sun, But Women's Work is Never Done: International Law and the Regulation of Women's Work at Night, 4 CIRCLES: BUFF. WOMEN'S J. L. & SOC. POL'Y 44 (1996). Articles have also focused on shiftwork within a specific sub-industry. See generally Temesha Evans-Davis, Comment, Pilot Fatigue: Unresponsive Federal Aviation Regulations and Increasing Cockpit Technology Threaten to Rock the Nation's Pilots to Sleep and Compromise Consumer Safety, 65 J. AIR L. & COM. 567 (2000).
II.
UNDERSTANDING SHIFTWORK

Shiftwork at its most basic is any schedule of work that occurs outside the widely practiced Monday through Friday diurnal workweek.\(^\text{20}\) Non-standard shift schedules are as varied as the employees who work them. Some employees work a set evening or overnight shift.\(^\text{21}\) Others work rotating shifts that can revolve through day shifts, evening shifts, and night shifts.\(^\text{22}\) Still others work on "split shifts" whereby employees work from ten a.m. to two p.m. and then return to work from four p.m. to seven p.m.\(^\text{23}\) Shiftwork also encompasses compressed workweeks.\(^\text{24}\) Compressed workweeks allow employees to finish their weekly schedule in four or even three days by working ten to twelve hour shifts.\(^\text{25}\) A more recent development is flextime, whereby the employer establishes the required hours and the employee chooses when to fulfill those hours during the week.\(^\text{26}\)

Shiftwork has a long history in selected industries. Manufacturing companies realized decades ago that running an assembly line around the clock was cheaper and more efficient than shutting down production at night and starting it up again every morning.\(^\text{27}\) Instead of investing in expensive capital equipment, employers relieved bottlenecks in an assembly line by running the bottlenecked task with shiftworkers twenty-four hours a day.\(^\text{28}\) Requiring weekend hours helped employers reduce inventory stock that previously needed to be stored for two days out of every seven.\(^\text{29}\) Using shiftwork, employers could respond to customers more quickly by receiving an order on a Friday and fulfilling that order the following day.\(^\text{30}\)

Service companies, with demands from call centers and other global

\(^\text{20}\) Dawson et al., supra note 5, at 10; NAT’L INST. FOR OCCUPATIONAL SAFETY & HEALTH [hereinafter NIOSH], CENTERS FOR DISEASE CONTROL AND PREVENTION, PLAIN LANGUAGE ABOUT SHIFTWORK 18 (1997), Coping with Shiftwork, HEALTH NEWS, Apr. 1998, at 6 (discussing both evening and night shiftworkers but finding the health and other problems facing shiftworkers are most pronounced for overnight shifts).

\(^\text{21}\) Smith et al., supra note 5, at 172-74.

\(^\text{22}\) Id.

\(^\text{23}\) Id.

\(^\text{24}\) Id. at 173-74.

\(^\text{25}\) Id.


\(^\text{28}\) Id.

\(^\text{29}\) Id.

\(^\text{30}\) Id.
operations, found that shiftwork schedules increase profitability. Shiftwork became so necessary and profitable that some firms went to extreme lengths to attract employees. When United Parcel Service could not staff its midnight to three a.m. shift for package processing in its Louisville, Kentucky hub, it offered night employees free tuition at local colleges and constructed a dormitory with rentable rooms.

Demographic and social changes have also increased the prevalence of shiftwork. Harriet Presser has noted that women's increasing participation in the workforce, and hence, the increase in two-income families has increased the demand during non-standard working hours for restaurants, entertainment, and other services. Families now visit restaurants and seek outside entertainment more frequently during the evening hours. Traditionally, female homemakers shopped for their families during the day. Now these tasks are completed upon returning home from work.

In addition, the aging of the American population and the accompanying demand for medical services has increased the need for medical services available twenty-four hours a day, seven days a week. Technological changes have also helped create a demand for around-the-clock employment. Through the use of pagers and cell phones, employees can now be available twenty-four hours a day, no matter their location, at a very low cost. Instant communication between branches of multinational enterprises facilitates communication regardless of time zone.

Shiftwork is now so prevalent that its growth feeds upon itself. Employers demand shiftwork to increase productivity. Increased shiftwork creates demand for twenty-four hour goods and services, as shiftworkers cannot complete personal business during daytime hours. Increased demand for evening and night services generates demand for shiftwork services to satisfy the requirements of shiftworking employees. As a result of having so many shiftworkers, society now needs more shiftworkers to accommodate them.

The result is a modern society dominated by around-the-clock activity. In 1999, the NASDAQ announced that it would extend trading hours in the United States, adding a second evening shift ending as late as ten p.m.

32. PRESSER, supra note 5, at 5.
33. Id. at 4.
34. Id.
35. Id. at 4-5.
36. Id. at 5.
37. Id.
38. NIOSH, supra note 20, at 2.
39. PRESSER, supra note 5, at 5; Noelle Knox, NASDAQ Board Approves Extended Trading Hours, PITT. POST-GAZETTE, May 28, 1999 at E2. The New York Stock Exchange is considering a
Even local librarians offer all-night availability over the Internet to assist local patrons.40 These changes, however, come at the expense of the shiftworker's well-being. Most shiftworkers do not work non-standard hours by choice, but rather because their employers demand it.41 Shiftworkers receive little or no increase in wages.42 The biggest price shiftwork employees pay is the debilitating cost to their health and well-being. The next Part examines how shiftworkers shoulder the burden of maintaining the flexibility and efficiency of a society open around the clock.

III. THE DEBILITATING COSTS OF SHIFTWORK

Shiftwork contradicts the biological cycles upon which our bodies depend. Overwhelming empirical evidence shows that shiftwork increases the incidence of a host of physical and mental ailments.43 This Part explores the well-documented health risks associated with shiftwork and the resulting impact on shiftworkers.

A. Why Does Shiftwork Strain the Human Body?

The human body does not function well during nighttime hours. Daytime activity and nighttime rest is not a mere social preference but an entrenched biological demand. Based in an agrarian economy, humans for millennia rose with the dawn and slept with the setting sun. These rhythms became so ingrained that human physiology anticipates the day and night cycle even in the absence of light and darkness.44 The Earth's twenty-four hour rotation has embedded in humans an internalized body clock called the circadian rhythm.45 The circadian rhythm controls many human functions, including body temperature and alertness levels, making people most active between noon and six p.m. and least active at around four a.m.

40. PRESSER, supra note 5, at 5.
41. Id. at 6.
42. Id.
43. See generally Steven Slon, Night Moves, PREVENTION, June 1, 1997, at 106 (describing various health problems associated with shiftwork); Steve Mardon, Screen Applicants for Shift Compatibility, H.R. MAG., Jan. 1, 1997, at 53 (suggesting that employers screen shiftwork applicants for health problems); Scott, supra note 9.
44. Early studies isolating subjects totally from temporal cues reveal that individuals still wake and rest according to regular periods, usually on a 25 hour rather than a 24 hour cycle. Smith et al., supra note 5, at 164. See generally MICHEL SIFFRE, BEYOND TIME (1964) (describing author's experience living for two months in an underground cave).
The body can adjust to changes in waking time. It does so slowly, however, and may never fully adapt to a new sleep and wake cycle.\textsuperscript{46} This adjustment comes at a physiological price, namely, the feeling of disorientation most people know as jet lag.\textsuperscript{47} For shiftworkers, the results are common: extreme drowsiness, fatigue, and the inability to perform many tasks without falling asleep.\textsuperscript{48} The result is that sleep becomes brief and fitful and offers little rest.\textsuperscript{49}

Whereas travelers can rely on external cues such as sunlight, regular meals, and social arrangements to adjust their biological clocks to a new time zone,\textsuperscript{50} shiftworkers lack these guidelines. When employees work a night shift, for example, most environmental signals and social cues remain on the diurnal cycle. As a result, physiological adjustment to evening and overnight hours is slower and more difficult for the shiftworker than for the traveler.\textsuperscript{51} The adjustment problem is even more difficult for workers on a rotating shift schedule, which moves shiftworkers from evening, night, and day schedules on a periodic basis.\textsuperscript{52} Under these conditions the body clock never fully adjusts to any sleep-wake cycle, leaving employees in a perpetual state of fatigue.

\textbf{B. Fatigue, Sleep Disruption, and Sleep Deprivation}

Sleep disruption and loss is the most obvious effect on a shiftwork employee. The longer the shift lasts the more serious the effects.\textsuperscript{53} Bodily processes such as temperature, heart rate, and blood pressure are lowest at night, so employees who work at night and sleep during the day cannot do either well.\textsuperscript{54} Overnight shiftworkers average four to six hours of sleep per night, significantly less than the seven to nine hours of sleep experienced by the rest of the population.\textsuperscript{55} Not only is shiftworkers' sleep shorter, but it is also of poor quality because regular daytime activities such as city life, road
noise, and telephone calls commonly interrupt daytime rest.\textsuperscript{56} Chronic sleep deprivation can result in chronic fatigue, depression, and anxiety.\textsuperscript{57} Fatigue can compromise social and domestic interaction at home and can become a public health concern in jobs such as piloting, police work, and trucking.\textsuperscript{58}

C. Cardiovascular Disorders

Although the consensus is not unanimous,\textsuperscript{59} most research recognizes a link between shiftwork and cardiovascular disease.\textsuperscript{60} This link includes higher levels of cholesterol and triglycerides that can contribute to cardiovascular illness.\textsuperscript{61} Shiftwork may also exacerbate the body's stress response and result in increased heart rate and cholesterol, elevated blood pressure, and altered glucose metabolism.\textsuperscript{62} The longer an individual works on a non-standard schedule, the more likely one will develop heart disease.\textsuperscript{63} Also, shiftworkers tend to exhibit more risk behaviors, such as smoking, that increase cardiovascular disease.\textsuperscript{64} Bøggild and Knutsson examined a variety of studies studying the intersection between shiftwork and cardiovascular illness.\textsuperscript{65} They found that, on balance, shiftworkers have a forty percent greater risk for cardiovascular mortality or morbidity than their day worker counterparts.\textsuperscript{66}

D. Gastrointestinal Disorders

Gastrointestinal dysfunction is a common complaint associated with shiftwork.\textsuperscript{67} In one study, between twenty percent and seventy-five percent of shift and night workers reported incidents of heartburn, gas, irregular bowel movements, constipation, and appetite irregularities.\textsuperscript{68} Only ten

\begin{itemize}
\item \textsuperscript{56} Costa, supra note 46, at 10.
\item \textsuperscript{57} Smith et al., supra note 5, at 166.
\item \textsuperscript{58} E.g., Scott, supra note 9, ¶ 9.
\item \textsuperscript{59} See e.g., Claude Michèle Poissonnet & Monique Véron, Cardiovascular Risk Factors in Day and Night Shift Hospital Workers, in SHIFTWORK IN THE 21ST CENTURY 181 (Sonia Hornberger & Peter Knauth eds. 2000) (finding no increased cardiovascular risk in population studied).
\item \textsuperscript{60} Smith et al., supra note 5, at 169 (noting general acknowledgement). See also Anders Knutsson & Henrik Bøggild, Shift Work and Heart Disease: Meta Analysis of the Epidemiological Literature, in SHIFTWORK IN THE 21ST CENTURY 189 (Sonia Hornberger & Peter Knauth eds., 2000); Anders Knutsson et al., Increased Risk of Ischemic Heart Disease in Shift Workers, 2 LANCET 89 (1986) (reporting an increased incidence of cardiovascular disease from an impressive fifteen year longitudinal study). But see Claude Michèle Poissonnet & Monique Véron, supra note 59.
\item \textsuperscript{61} Henrik Bøggild & Anders Knutsson, Shiftwork, Risk Factors, and Cardiovascular Disease, 25 SCANDINAVIAN J. OF WORK, ENV’T & HEALTH 85 (1999).
\item \textsuperscript{62} Smith et al., supra note 5, at 169.
\item \textsuperscript{63} NIOSH, supra note 20, at 18.
\item \textsuperscript{64} Smith et al., supra note 5, at 169.
\item \textsuperscript{65} Knutsson & Bøggild, supra note 60, at 189.
\item \textit{Id.}
\item \textsuperscript{67} Smith et al., supra note 5, at 168.
\item \textsuperscript{68} Costa, supra note 46, at 10.
\end{itemize}
percent to twenty-five percent of day shiftworkers reported similar problems. Night workers are two to five times more likely to suffer from digestive tract disorders than those working evening or day shifts. Although shiftworkers frequently cite gastrointestinal problems as a motivation for returning to daytime work, these problems may not completely disappear even after returning to a daytime schedule.

These problems may occur because the food consumption of shiftworkers disrupts internal circadian rhythms. Night workers' meal times conflict with the rise and fall of gastric acidity necessary for effective removal of food from the stomach. If left untreated, gastrointestinal disorders can develop into chronic diseases such as peptic ulcers and chronic gastritis.

E. Reproductive Disorders

Shiftwork may also impair women's reproductive health in a variety of ways. Female shiftworkers report an increased incidence of irregular menstrual cycle length and pattern. Researchers have also found an association between shiftwork and increased risk of spontaneous abortion. Furthermore, female shiftworkers report a lower rate of pregnancies and deliveries. When female shiftworkers successfully carry a pregnancy to term, their babies are more likely to suffer from premature delivery and low birth weight.

F. Diabetes

While shiftwork does not cause diabetes, it disrupts the bodily rhythms necessary for optimal diabetes control. Insulin secretion and glucose tolerance follow a circadian rhythm similar to the sleep and wake cycle. By disrupting these rhythms, shiftwork can result in physical and mental stress negatively impacting glucose control. Variations in the rate and absorption of nutrients in digestion vary according to time, which in turn can impact an individual's responsiveness to insulin. For diabetics,
regular timing of meals is important for managing diabetes and shiftwork may interfere with the type and timing of meals consumed.\textsuperscript{80}

\textbf{G. Epilepsy and Asthma}

Shiftwork may exacerbate asthma. Individuals suffering from chronic asthma may report greater symptoms at night because bronchial reactivity occurs the most during the early morning hours.\textsuperscript{81} Sleep deprivation that so commonly arises from shiftwork practices may also trigger epileptic episodes.\textsuperscript{82}

\textbf{H. Mental Disorders}

The lack of sleep so commonly associated with shiftwork causes symptoms that are often associated with mental problems, such as fatigue, irritability, apathy, poor appetite, and psychosomatic complaints.\textsuperscript{83} Mood changes may also arise from the irregular sleep patterns associated with shiftwork.\textsuperscript{84} One study of more than 1500 nurses and health care staff revealed that non-standard scheduling practices promoted greater fatigue and increased use of antidepressants.\textsuperscript{85} Another study found that the average onset period for mental illness in shiftworkers could be less than four years.\textsuperscript{86}

Shiftwork may trigger the onset of depression because it causes the body's internal circadian system to function abnormally, leading to loss of sleep which in turn can cause depression.\textsuperscript{87} Another study of nurses reported increased scores on depression profile tests during the first months of working rotating night shifts.\textsuperscript{88} The longer an employee stays on a shiftwork schedule, the greater incidence of depression. One study discovered that lengthy exposure to shiftwork (up to twenty years) was associated with an increased lifetime risk of major depressive disorder.\textsuperscript{89} The mental health effects extend into retirement. One study found that

\begin{itemize}
  \item \textsuperscript{80} \textit{Id}.
  \item \textsuperscript{82} Scott, \textit{supra} note 9. In fact, physicians seeking to diagnostically evaluate epilepsy use sleep deprivation to provoke electroencephalographic discharges. \textit{Id}.
  \item \textsuperscript{83} See, e.g., \textit{id}; Smith et al., \textit{supra} note 5, at 166.
  \item \textsuperscript{84} Scott, \textit{supra} note 9.
  \item \textsuperscript{85} M. Estryn-Behar et al., \textit{Stress at Work and Mental Health Status Among Female Hospital Workers}, \textit{47 BRIT. J. INDUS. MED.} 20 (1990).
  \item \textsuperscript{87} Smith et al., \textit{supra} note 5, at 166-67.
  \item \textsuperscript{88} Scott, \textit{supra} note 9.
  \item \textsuperscript{89} Allene J. Scott, Timothy H. Monk & Luann L. Brink, \textit{Shiftwork as a Risk Factor for Depression: A Pilot Study}, \textit{3 INT'L J. OCCUPATIONAL & ENVTL. HEALTH} S2 (1997).
\end{itemize}
retired shiftworkers suffered from a greater incidence of depression than their retired daytime counterparts.\textsuperscript{90}

\section{Degradation of Family Life}

Shiftwork interferes with family relations,\textsuperscript{91} increases marital stress,\textsuperscript{92} and promotes work-family conflict.\textsuperscript{93} Parents shape familial bonds by the time and effort spent with their children and each other, building up "social capital."\textsuperscript{94} Shiftwork weakens these bonds between parent and child by reducing contact time and requiring children to remain quiet when the shiftworker sleeps during daylight hours.\textsuperscript{95} Shiftwork employees also find it difficult to satisfy parenting responsibilities.\textsuperscript{96} While one parent may increase participation in family care when the other parent works a shift, that benefit might be more than offset by a debilitating impact on spousal relations.\textsuperscript{97} A study of male Air Force night-shift security guards revealed that the guards had an increased sense of guilt from not being able to fulfill parenting responsibilities and their children do not understand why their father is sleeping or when he can be available to them.\textsuperscript{98}

Shiftwork may also damage marital relationships. Spouses through time and effort build marriage-specific capital that discourages marital stress and dissolution.\textsuperscript{99} Couples with at least one person working a night

\begin{itemize}
\item[C. Michel-Briand et al.,] The Pathological Consequences of Shift Work in Retired Workers, in NIGHT AND SHIFT WORK: BIOLOGICAL AND SOCIAL ASPECTS 399, 404-05 (A. Reinberg et al. eds., 1981).
\item[James K. Skipper, Fred D. Jung & Luann L. Brink,] Shiftwork as a Risk Factor for Depression, 15 J. ADVANCED NURSING 835, 836 (1990).
\item[See W. Peter Colquhoun et al.,] SHIFTWORK: PROBLEMS AND SOLUTIONS 93-96 (1996).
\item[Id. at 93-95.]
\item[Id. at 501. As one security guard remarked:
My kids don't really know where I am. When I wake up after a [night shift] or something like that, I'll come downstairs and Randy'll say, "Dada's home." I have been home all day, but if I've been in bed, he thinks I'm gone. They think I'm gone all the time. When I do wake up or whatever, they are overjoyed to see me. "Dada's home. Dada's home." I've been there but I haven't been there.
\item[Id. at 495.]
\item[Id.]
\end{itemize}
shift spend less time alone together. Shiftworkers experience decreased marital happiness and increased sexual problems. Shiftwork is tied to the termination of marriages, as shiftwork employees report higher divorce rates than their diurnal counterparts.

**J. Accidents**

Shiftwork causes a higher incidence of on-the-job and off-the-job accidents because of increased difficulty with concentration during the late night hours. These accidents are both more frequent and more serious than daytime accidents. Shiftwork-related fatigue has been connected to both motor vehicle and passenger train accidents. Truckers working long shifts common to the industry report a significantly elevated risk between the seventh and tenth hour of the driving shift and double the risk after twelve hours. One study found that nurses working rotating shifts were twice as likely to nod off while driving to or from work and twice as likely to report an at-work accident or error related to sleepiness.

The available scientific evidence points overwhelmingly to the conclusion that shiftworkers suffer from a variety of increased health risks. Despite the wealth of medical, sociological, and psychological research documenting these effects, shiftworkers rarely receive specific recognition under the law. The next sections discuss the impact of various federal employment laws on shiftwork plaintiffs and shiftwork in general.

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102. Id. See also *Shiftwork Takes its Toll on Families*, 37 INDUS. SAFETY & HYGIENE NEWS 10 (Feb. 2003) (stating that shiftworkers experience a sixty percent higher rate of divorce than non-shiftworkers).


104. Smith et al., supra note 5, at 167.


IV.
DOES THE AMERICAN WITH DISABILITIES ACT PROTECT SHIFTWORKERS?

A. Little Protection for Shiftworkers under the ADA

Congress passed the Americans with Disabilities Act (ADA) in order to eradicate discrimination against a large and vulnerable group. The ADA provides that no covered employer “shall discriminate 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.”108 The ADA also requires that employers reasonably accommodate their disabled employees. “Reasonable accommodation” means that, “in certain instances, employers must make special adjustments to their policies for individuals with disabilities.”109 If an employer fails to make a reasonable accommodation, the employee can recover under the ADA if “(1) she was an individual who had a disability within the meaning of the ADA; (2) that the employer had notice of her disability; (3) that with reasonable accommodations she could perform the essential functions of the position; and (4) that the employer refused to make such accommodations.”110

Shiftwork issues arise under the ADA most frequently when an employee requests a shift-related accommodation and the employer challenges the employee’s disabled status. The frequently-cited definition of a person with an ADA disability is someone who has “[a] physical or mental impairment that substantially limits one or more of the major life activities.”111 Three factors are relevant: “(1) The nature and severity of the impairment; (2) The duration or expected duration of the impairment; and (3) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.”112

109. McAlindin v. County of San Diego, 192 F.3d 1226, 1237 (9th Cir. 1999). See also Shapiro v. Cadman Towers, Inc., 51 F.3d 328, 334-35 (2d Cir. 1995).
Courts frequently reject shiftworker ADA claims based upon this threshold inquiry. A typical example is *Baulos v. Roadway Express, Inc.* In *Baulos*, two truckers claimed that they suffered from sleep disorders that prevented them from working assigned “sleeper duty” shifts. Sleeper duty shifts required truckers to drive in pairs, one driving while the other sleeps. As a result of working sleeper duty and the accompanying fatigue, both truckers developed sleep disorders. One driver began to fall asleep while driving and the other experienced symptoms similar to a heart attack. Their employer rejected their requests to be transferred to short-haul, single-person trucks, claiming that the union’s seniority system prevented members from being exempt from all sleeper duty. The drivers sued their employer under the ADA.

The employer argued, among other things, that the plaintiffs’ maladies only prevented them from performing one job, not a class of jobs, and that was insufficient to classify them as ADA disabled. The court agreed, holding that an inability to perform a particular job for a particular employer is not sufficient to establish a substantial limitation on the ability to work. The impairment must substantially limit employment generally. The court found that the plaintiffs’ impairment preventing them from driving sleeper trucks would not disqualify them from most other driving positions. The court also noted the difficult nature of sleeper duty and commented that non-impaired sleeper truck drivers were also receiving insufficient rest. Nevertheless, it concluded that the

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113. 139 F.3d 1147 (7th Cir. 1998).
114. *Id.* at 1149.
115. *Id.* The court described the sleeper system:

[T]ruck drivers would drive with a partner. One of the partners would drive while the other would sleep for five to eight hours in the adjacent sleeper cab of the truck. The drivers would then switch positions, thereby preventing the need to spend a night in a motel and avoiding the risk of a single individual driving for too long and falling asleep at the wheel.

*Id.*
116. *Id.* at 1149-50.
117. One of the two truckers stated that he would try to continue performing sleeper duties if his employer installed a “Jake brake” and an air-ride suspension for trips crossing the Rocky Mountains. *Id.* at 1150.
118. *Id.* at 1149-50.
119. *Id.* at 1151. Roadway also argued that the plaintiffs’ impairments were not covered by the ADA because they were temporary. *Id.* at 1151 n.4. *See also* Vande Zande v. Wisconsin Dep’t of Admin., 44 F.3d 538, 544 (7th Cir. 1995) (“Intermittent, episodic impairments are not disabilities.”). The court disagreed and concluded that because the plaintiffs’ sleep deprivation problem occurred every time they drove sleeper trucks, their impairments were not temporary. *Baulos*, 139 F.3d at 1151 n.4.
120. *Id.* at 1153.
121. *Id.* at 1151 (citing Homeyer v. Stanley Tulchin Assoc., 91 F.3d 959, 961 (7th Cir. 1996)).
122. *Id.* at 1153.
123. *Id.*
plaintiffs did not have an impairment that substantially limited the major
life activity of working under the ADA.\footnote{124}  

The \textit{Baulos} court is one of several to have rejected ADA claims arising
from shiftwork-based maladies. In \textit{Korzeniowski v. ABF Freight Systems,
Inc.}, the court concluded that the inability to work rotating shifts is not a
disability where many jobs existed that did not involve rotating shifts.\footnote{125} In
\textit{Amos v. Wheelabrator Coal Services, Inc.}, the court decided that the
plaintiff was not disabled under the ADA because, while he was unable to
complete rotating shiftwork, he was able to perform numerous other heavy
labor positions.\footnote{126}  

An examination of these cases reveals why shiftwork plaintiffs fail in
pressing their ADA claims. The most significant, perhaps even
insurmountable, problem is that these plaintiffs are claiming they are
prevented from working a single job or a small class of jobs, while many
other jobs exist without a night shift. Courts view the inability to work a
particular evening shift, rotating shift, or night shift job is simply too
narrow of an impairment to receive ADA protection.\footnote{127}  

The Code of Federal Regulations clarifies this requirement. These
regulations define the term “substantially limits,” at least within the context
of the major life activity of working, as a significant restriction in the ability
to perform a broad range of jobs or a class of jobs compared to the average
person with similar training, skills, and abilities.\footnote{128}  

When construing “substantially limits,” a court may also consider: (1)
the geographical area that is reasonably accessible to the individual; (2) the
job that the individual has been disqualified from because of an impairment,
and the amount and types of positions within the individual’s geographical
area that utilize similar training, knowledge, skills, or abilities, from which
the individual is also disqualified from because of the impairment; and (3)
the job that the individual has been disqualified from because of an
impairment, and the amount and types of other positions within the
individual’s geographical area that do not utilize similar training,

\footnote{124} Id. at 1153.  
\footnote{125} 38 F. Supp. 2d 688, 693 (N.D. Ill. 1999).  
\footnote{126} 47 F. Supp. 2d 798, 803 (N.D. Tex. 1998).  
\footnote{127} See John W. Griffin, Jr. & Bob D. Brown, \textit{Chipping Away at the ADA}, TRIAL, Dec. 2000, at 50 ("[T]o be regarded as substantially limited in the major life activity of working, an employee must be regarded as precluded from more than a particular job. Countless cases are thrown out on summary judgment on this basis."). See also Murphy v. United Parcel Serv., Inc., 527 U.S. 516, 523-24 (1999).  
\footnote{128} 29 C.F.R. § 1630.2 (j)(3). See also Davidson v. Midelfort Clinic, Ltd., 133 F.3d 499, 506 (7th Cir. 1998). The employee must be “precluded from more than one type of job, a specialized job, or a particular job of choice. If jobs utilizing an individual's skills (but perhaps not his or her unique talents) are available, one is not precluded from a substantial class of jobs. Similarly, if a host of different types of jobs are available, one is not precluded from a broad range of jobs.” Sutton v. United Air Lines, Inc., 527 U.S. 471, 492 (1999).
knowledge, skills, or abilities from which the individual is also disqualified because of the impairment.\textsuperscript{129}

Under these requirements, proving that the inability to work a shiftwork job is an ADA disability will be difficult. Exacerbating the problem is that many shiftwork positions are low-level jobs that require easily transferable skills, leaving the worker able to function in a variety of other jobs. In \textit{Mont-Ros v. City of West Miami}, the court rejected the plaintiff's ADA claim that sleep apnea prevented him from working the midnight shift as a dispatcher.\textsuperscript{130} The court concluded outright that the inability to work a certain shift, without more, is insufficient to constitute an ADA disability.\textsuperscript{131} Similarly, the court in \textit{Banacle v. Cox Lumber Co.} rejected the notion that the plaintiff's inability to drive a night shift because of night blindness constituted a significant restriction on sight under the ADA.\textsuperscript{132} As one court stated, the purposes of the ADA would be debased if "the statutory protections available to those truly handicapped could be claimed by anyone whose disability was minor and whose relative severity of impairment was widely shared."\textsuperscript{133}

Another reason why shiftwork plaintiffs fail under the ADA is because attorneys representing shiftwork plaintiffs do not maximize their chances by presenting the specific supporting evidence to show that their plaintiff's aliment limits him or her from a broad class or range of jobs. In \textit{Baulos}, for example, the plaintiffs relied only upon their individual opinions to establish the number and class of jobs that they would be excluded from because of their disability.\textsuperscript{134} The plaintiffs' attorneys failed to present the necessary demographic statistics.\textsuperscript{135} A later court explicitly remarked upon this evidentiary gap in \textit{Baulos}.\textsuperscript{136}

\begin{itemize}
\item \textsuperscript{129} 29 C.F.R. § 1630.2 (j)(3)(ii) (2005).
\item \textsuperscript{130} 111 F. Supp. 2d 1338, 1353 (S.D. Fla. 2000).
\item \textsuperscript{131} Id.
\item \textsuperscript{132} No. 97-113, 1998 WL 469863 at *3 (M.D. Fla. May 18, 1998).
\item \textsuperscript{133} Francis v. City of Meriden, 129 F.3d 281, 286 (2d Cir. 1997) (quoting Forrisi v. Bowen, 794 F.2d 931, 934 (4th Cir. 1986)).
\item \textsuperscript{134} Baulos v. Roadway Express, Inc., 139 F.3d 1147, 1152-53 (7th Cir. 1998). Plaintiffs offered only an unsupported assertion that four of the five largest trucking companies use sleeper teams. \textit{Id.} at 1153. The court responded that, even if this assertion is true, the "information only relates to large trucking companies and thereby excludes all other truck driving positions that would be considered in the same class as their former positions." \textit{Id.} at 1153.
\item \textsuperscript{135} See generally Jeffrey A. Van Detta & Dan R. Gallipeau, \textit{Judges and Juries: Why are So Many ADA Plaintiffs Losing Summary Judgment Motions, and Would They Fare Better Before a Jury? A Response to Professor Colker}, 19 REV. LITIG. 505 (2000) (describing various errors committed by lawyers representing plaintiffs in litigating ADA cases).
\item \textsuperscript{136} England v. ENBI Indiana, Inc., 102 F. Supp. 2d 1002, 1011 n.10 (S.D. Ind. 2000) ("[The plaintiff's] data is considerably more probative than the speculations of \textit{Baulos}.") This problem is not limited to shiftworkers. Other non-shiftwork plaintiffs have failed to provide this demographic evidence and have similarly lost in court. \textit{E.g.}, Skorup v. Modern Door Corp., 153 F.3d 512 (7th Cir. 1998); Davidson v. Midelfort Clinic, 133 F.3d 499 (7th Cir. 1998).
\end{itemize}
Fortunately, the necessary demographic evidence is not burdensome to obtain. The plaintiff must only present general employment demographics or recognized occupational classifications that indicate the approximate number of excluded jobs (for example, "few," "many," "most"). The plaintiff can also present expert testimony wherein the expert reviews the plaintiff's vocational and educational background, compares it to typical qualifications needed for jobs in the region, and determines the percentage of available jobs for which the plaintiff is qualified. This evidence may not have been enough to turn the Baulos case to the truckers' favor, given the limited nature of their impairment. Such demographic evidence, however, may convince a court that a broadly impaired shiftwork plaintiff is excluded from a sufficient class of positions to permit ADA coverage.

B. The Consequences of Failing to Acknowledge Inability to Perform Shiftwork as an ADA Disability

Requiring accommodation of employees who cannot perform a small group of jobs because of shiftwork ailments would expose employers to an overwhelming number of accommodation duties. This does not mean, however, that shiftworkers should be without protection altogether. The following dispute vividly shows how courts' casual treatment of shiftworkers can result in career-ending disasters for unlucky employees.

In Roth v. Lutheran General Hospital, the plaintiff, Stephen Roth, was a recent medical school graduate working in a pediatric residency program. Roth informed the hospital that he suffered from a visual condition that prevented him from working for more than eight to ten hours at a time and asked that this disability be accommodated. The defendant's residency program, however, required thirty-six hour shifts. Roth filed an action under the ADA and claimed that the defendant improperly refused his request to accommodate his disability by limiting his shifts. The court rejected Roth's ADA claim, reasoning that the record did not establish that "each and every pediatric residency program requires 36 hour calls or long shifts." The court also noted that various accrediting

137. Griffin & Brown, supra note 127, at 50 (citing 29 C.F.R. pt. 1630 app. 1630.2(j)).
138. Id.
139. But see Deibele v. USF Reddaway, Inc., No. 98-1597, 2000 WL 968813, at *7 (D. Or. Feb. 16, 2000) (holding statistical abstract showing plaintiff's exclusion from 12.8% of jobs generally because of diabetes was not a sufficient barrier to employment to create a cognizable claim under the ADA).
140. 57 F.3d 1446 (7th Cir. 1995).
141. Id. at 1454.
142. Id.
143. Id.
144. Id.
pediatric entities do not place minimums on resident working hours.\textsuperscript{145} Citing cases that hold the ADA’s definition of “major life activity” does not mean working at the specific job of one’s choice,\textsuperscript{146} the court concluded that Roth’s visual impairment did not constitute an ADA disability.\textsuperscript{147} The court also affirmed the trial court’s reasoning and conclusion on the ground that Roth’s contentions of impairment lacked credibility.\textsuperscript{148}

The facts detailing Roth’s challenge are much more detailed than is discussed here,\textsuperscript{149} and Stephen Roth was not the most sympathetic of plaintiffs.\textsuperscript{150} Nevertheless, the court’s conclusion regarding the plaintiff’s request for disability is problematic. The court interprets the range and class of jobs requirement so broadly that it creates a nearly impossible burden for shiftworkers endeavoring to establish an ADA disability. Roth’s attorney never bothered to proffer specific evidence showing that since most residency programs require long shifts, and Roth’s visual condition prevents him for working more than ten hours in one stretch, Roth is substantially limited in performing the major life activities of seeing and learning.\textsuperscript{151} The court noted the plaintiff’s failure to establish this, and stated that the plaintiff must show he is barred from “a class of jobs or a broad range of jobs in various classes.”\textsuperscript{152} The court quoted language from the Accreditation Council for Graduate Medical Education and the American Board of Pediatrics, which states that part-time residency programs do not require a base number of daily or weekly hours.\textsuperscript{153} Thus, according the court, an inability to work more than ten hours straight in a residency program does not bar a resident from a class or a range of jobs in various classes.

Prevailing medical practice and common sense, however, contradict this notion. As one author writes, “The intensive work schedules of

\textsuperscript{145} Id. (“Indeed, the entities responsible for regulating pediatric residency programs . . . do not prohibit part-time residency programs, nor do they require ‘a stipulated number of weekly hours,’ so long as the part-time resident receives a total of 33 months of training with graduated responsibility.”).

\textsuperscript{146} Id. at 1455 (citing Bolton v. Scrivner, Inc., 36 F.3d 939 (10th Cir. 1994); Jasany v. United States Postal Serv., 755 F.2d 1244 (6th Cir. 1985) (additional citations omitted)).

\textsuperscript{147} Roth, 57 F.3d at 1454-55.

\textsuperscript{148} Id. at 1455-56.

\textsuperscript{149} Id. at 1448-53 (providing lengthy factual history).

\textsuperscript{150} The district court concluded that Roth was “was less than credible with regard to his physical limitations as well as his testimony in general.” Id. at 1453. The appellate court quoted the district court:

Based upon the substantial impeachment of the plaintiff, it appears to me that Dr. Roth has attempted through the past decade or so, since he learned of this impairment, or what he claims to be an impairment, he has attempted to utilize that impairment to his benefit, and when it doesn’t benefit him, he doesn’t tell people about it.

\textsuperscript{151} Id. at 1454.


\textsuperscript{153} Id. at 1454.
Hospital residents, for example, have long been common knowledge among observers even remotely familiar with graduate medical education.\footnote{David Mechanic, \textit{The Functions and Limitations of Trust in the Provision of Medical Care}, 23 J. HEALTH POL., POL'Y & LAW 661, 679 (1998). See also Michael Hochman et al., \textit{Limit the Work Hours of Medical Residents}, BOSTON GLOBE, Nov. 13, 2001, at A19 ("Emergency room residents are seven times more likely to have a motor vehicle accident due to falling asleep at the wheel during their residency than before it.").}

Hospital residents around the country commonly work eighty to one hundred hours a week.\footnote{See All Things Considered (National Public Radio broadcast Sept. 4, 1997).} As one article noted, "Before 1990, the on call standard for most medical specialties was a 70- to 100-hour work week with 36- to 40-hour shifts and every third night on call."\footnote{Dale Alexander & Ian W. Bushell, \textit{Coping With Night Call: Part I: Understanding the Benefits and Challenges of Traditional Call}, HOSP. PHYSICIAN, Nov. 1999, at 54.} Such long hours have produced adverse consequences. For example, in 1984, a young patient, Libby Zion, needlessly died as a result of receiving contraindicated drugs when she was admitted to a hospital.\footnote{Eva M. Panchyshyn, Comment, \textit{Medical Resident Unionization: Collective Bargaining by Non-Employees for Better Patient Care}, 9 ALB. L.J. SCI. & TECH. 111, 128-29 (1998) (describing the Libby Zion tragedy).} Authorities concluded that careless treatment by overworked and exhausted medical residents caused Ms. Zion’s death.\footnote{Mechanic, supra note 154, at 680 ("Although it has never been clear why Libby Zion died, the media attention to the case, and the documentation of the long hours of work among house staff who cared for her, made the claim credible that the exhaustion of house staff contributed to her death.").}

Indeed, the problem of residency overwork was endemic, leading the New York legislature to pass a law limiting the hours that resident physicians may work over a given period.\footnote{N.Y. COMP. CODES R. & REGS. tit. 10, § 405.4 (2005). For example, in hospitals with over 15,000 unscheduled emergency visits a year, residents cannot work more than 12 consecutive hours per on-duty assignment. \textit{Id.} § 405.4(b)(6)(i).}

Although evidence of the overwhelming prevalence of long and difficult shifts for medical residents existed in both the mainstream and scholarly literature, Roth’s attorney failed to present it and the court failed to take notice of it.\footnote{E.g., Dorothy J. McNoble, \textit{Expanded Liability for Hospitals for the Negligence of Fatigued Residents}, 11 J. LEGAL MED. 427 (1990); David Ewing Duncan, \textit{Is This Any Way to Train a Doctor? Medical Residencies: The Next Health-Care Crisis}, HARPER'S MAG., Apr. 1993, at 61. Duncan describes his wife’s travails in medical residency, coping with ninety-hour weeks: [R]esidencies had brutalized people we knew, breaking up two marriages involving close friends, driving two others to contemplate suicide, and leading yet another to become addicted to a narcotic that he said got him through long nights on call. We'd heard stories about minor errors and near misses with the patients, all blamed on fatigue, fear, and lack of proper training—a surgical intern falling asleep on her feet in the operating room, a frazzled resident forgetting to order morphine for a patient in pain, a breathing tube inserted into the wrong person's throat. \textit{Id.}

In this particular case, the plaintiff's failure to receive
an ADA accommodation may have permanently derailed his career, for the
court’s reasoning excluded Roth from most of the programs that served as a
gateway into his chosen profession. As Dr. Michael Greger, the author of
Heart Failure: Diary of a Third Year Medical Student, told to one of the
authors of this article by email: “I know of no program in the country (and
I searched, in trying to find a residency program for myself) that does not
impose shifts of at least 24 hours.” Roth may have encountered extreme
difficulty in finding a program that accommodated an eight to ten hour shift
limit, if he found one at all.

The rippling effects of Roth may be felt beyond the medical profession.
Roth can impact any shiftworker in a specialized field where non-standard
hours are common practice. For example, airline pilots may be placed at
risk. Like medical residents, pilots work long shifts, work overnight, and
must be prepared to assist in any emergency. Although not as extensive
as medical school, pilot training is highly specialized and not easily
transferable to a broad class of positions. Under Roth, a pilot who has a
medical impairment inhibiting performance of non-standard shifts would
likely receive little sympathy from a court reviewing his disability claim.

For example, in Witter v. Delta Airlines, Inc., the court held that a pilot
removed from active flight duty in Atlanta, Georgia because of a psychiatric
diagnosis was not excluded from a sufficiently broad class of jobs to be
disabled for purposes of the ADA. Like the attorneys in Baulos and Roth,
Witter’s attorney did not present vocational evidence proving that Witter’s
disability excluded him from a broad class of jobs. The court filled in the
evidentiary gap and concluded that many non-piloting jobs in the area such
as flight instructor, simulation trainer, and pilot ground trainer were
available to him. In addition, the court took judicial notice of the
availability of many non-piloting jobs in the Atlanta area because of the
high traffic at the Atlanta airport. If the court in Witter can reject ADA
coverage for an employee claiming a psychiatric disability not related to

161. E-mail from Michael Greger, M.D., to author (Mar. 1, 2001, 08:20 EST) (on file with author).
See also Michael Greger, Heart Failure: Diary of a Third Year Medical Student (2000).
162. See Laurie Schoder, Flying the Unfriendly Skies: The Effect of Airline Deregulation on Labor
Relations, 22 TRANSP. L.J. 105, 129-32 (1994) (describing fatigue and mandatory flight attendant duty
time limits).
163. The Americans with Disabilities Act has not yet generated significant litigation from airline
employees. Harry A. Rissetto, Age Discrimination Act and Americans with Disabilities Act Issues
produced a flood of litigation in the airline industry.”).
164. 138 F.3d 1366 (11th Cir. 1998).
165. Id. at 1370-71.
166. See Van Detta & Gallipeau, supra note 135, at 529-30.
167. Id. at 1370.
168. Id.
shiftwork, then a court likely will have little difficulty rejecting a pilot’s ADA claim based upon an impairment tied to a particular shift.\(^{169}\)

In *Witter* and *Roth* the court responded to the lack of factual support for the plaintiffs’ arguments. Specifically, the plaintiffs in both cases should have shown that their alleged impairment excluded them from a broad class of jobs. Future shiftwork-based ADA claimants must present significant factual evidence showing exclusion from jobs for their claims to succeed. This is particularly important for occupations similar to pilot and medical resident where specialized training is required and a shiftwork environment is the norm. These employees could be the ones most likely to prove successful ADA claims against employers’ shift-based decisions.

### C. Opportunities for Recognition of Shiftwork-Based ADA Claims

Although courts dismiss many shiftwork-based ADA suits, a few claimants have succeeded in challenging their employer’s shiftwork-related decisions. This section reviews strategies where shiftwork employees might be most successful in pursuing ADA claims.\(^{170}\)

#### 1. Emphasize the Employer’s Failure to Engage in an Interactive Dialogue

Employers cannot fail to consider shift-related accommodations of impaired workers by completely refusing to engage in an interactive dialogue. For example, in *Gile v. United Airlines, Inc.*,\(^{171}\) the plaintiff, Cheryl Gile, suffered from an anxiety disorder and insomnia while working the night shift.\(^{172}\) A social worker instructed Gile to return to a day shift because working the night shift aggravated her disorder by inhibiting sleep.\(^{173}\) Following this recommendation Gile requested a shift change from

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\(^{169}\) The Supreme Court faced a related challenge in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999). In *Sutton*, two myopic pilot candidates claimed that their employer’s minimum vision requirements for pilot positions violated the Americans with Disabilities Act. *Id.* at 475-76. The Court primarily focused on the controversial issue of whether corrected impairments could be considered disabilities under the ADA. Resolving a circuit split, the court concluded that corrective and mitigating measures should be considered in determining whether an individual is substantially limited in a major life activity and thus ADA disabled. *Id.* at 487-89. More important to shift workers, the court also considered the plaintiffs’ secondary claim that “if one were to assume that a substantial number of airline carriers have similar vision requirements, they would be substantially limited in the major life activity of working.” *Id.* at 493. The Court responded that an employee must articulate more than a theoretical contention that if the employer’s rule was followed by all of its competitors, it would substantially limit the major life activity of working. *Id.* Noting that “[b]ecause the petitioners have not alleged, and cannot demonstrate, that respondent’s vision requirement reflects a belief that petitioners’ vision substantially limited them,” the Court affirmed the lower court’s dismissal of the plaintiffs’ claim that they were regarded as disabled. *Id.* at 494.

\(^{170}\) Portions of this section were originally discussed in Bird, *supra* note 19.

\(^{171}\) 213 F.3d 365 (7th Cir. 2000).

\(^{172}\) *Id.* at 369.

\(^{173}\) *Id.*
her employer United Airlines, Inc. (United). \textsuperscript{174} Although United told Gile that she would be informed of any openings, United did not respond further to Gile’s request. \textsuperscript{175}

Gile eventually suffered from an emotional breakdown. She provided United with medical support for her need to transfer to the day shift. \textsuperscript{176} Even though a United physician believed that “there was something wrong with [Gile] mentally,” the physician concluded that “if [she] was that unhappy, [then] why didn’t [she] just resign and stay home.” \textsuperscript{177} Gile begged for help from United and even asked for a demotion if it would allow her to work daytime hours. \textsuperscript{178} Deeming Gile’s medical problems a personal issue, United placed Gile on unpaid leave and later terminated her. \textsuperscript{179} Gile sued the airline under the ADA for failing to reasonably accommodate her disability by transferring her out of the night shift. The jury agreed and awarded Gile $700,000 in compensatory and punitive damages. \textsuperscript{180}

On appeal, the court concluded that the defendant’s refusal to accommodate Gile violated the ADA. The court characterized Gile’s request for a shift change as “modest” and noted that Gile was flexible in her efforts, presenting no less than five alternative accommodations that would suffice. \textsuperscript{181} United’s only response was that she should “just resign and stay home.” \textsuperscript{182} The court concluded that “under the circumstances, the ADA required that United transfer Gile to a vacant daytime position.” \textsuperscript{183}

The \textit{Gile} court did not focus on the range or class of jobs to which the plaintiff might have been entitled. Rather, the court examined the lack of effort by United to offer Gile an accommodation. Vacancies were available throughout the period during which Gile requested accommodation. \textsuperscript{184} Following Gile’s example, courts may view the permissibility of a shift-based request for an accommodation in the context of the employer’s response. The more stubborn an employer is about refusing a shift-related accommodation, especially when ample vacancies are available, the more likely a court might consider the transfer an ADA obligation.

\textsuperscript{174} Id.
\textsuperscript{175} Id.
\textsuperscript{176} Id.
\textsuperscript{177} Id. at 369-70.
\textsuperscript{178} Id. at 369.
\textsuperscript{179} Id. at 370. United cited a bureaucratic error as the cause of the termination. Id. at 370-71.
\textsuperscript{180} Id. The trial judge reduced the punitive damages so that the total award was within the $300,000 statutory cap. Id. at 371.
\textsuperscript{181} Id. at 373.
\textsuperscript{182} Id.
\textsuperscript{183} Id. at 374. The concurring opinion in the case went further, concluding that the jury’s award of punitive damages was appropriate given United’s reckless conduct and its failure to act in good faith. Id. at 376 (Wood, J., concurring).
\textsuperscript{184} Id. at 374.
2. Determine Whether the Employer Implements Shift Changes as a Punitive Tool

Employers with prejudice against employees with disabilities who transfer workers to a different shift as a way to punishing an employee also risk violating the ADA. For example, in *Haysman v. Food Lion, Inc.*, plaintiff Neil Haysman suffered a debilitating at-work injury that exacerbated a pre-existing psychological disorder. When he returned to work in the defendant grocery store on light duty, the store manager publicly accused Haysman of “snowballing the company” with his disability. The assistant manager struck Haysman and berated him. Haysman was told to work regardless of the pain he suffered and the limitations placed upon Haysman by his doctor, and to work every minute of his shift without break or rest. Haysman was forced to take the night shift, even though his job as a store greeter could have been performed during any shift because it was not a regularly scheduled position.

Haysman sued, claiming that his employer’s actions constituted disability harassment in violation of the ADA. Haysman claimed that the


187. *Id.* at 1097.
188. *Id.* at 1098.
189. *Id.*
190. *Id.*
191. Drawing from the analogous claim of sexual harassment, disability harassment generally requires five elements: (1) plaintiff is a qualified individual with a disability, (2) plaintiff was subjected to unwelcome harassment in the workplace, (3) the harassment was based upon a disability or a request for an accommodation, (4) the harassment was sufficiently severe or pervasive to alter the conditions of plaintiff’s employment and to create a hostile work environment, and (5) the defendant knew or should have known of the harassment and failed to take prompt effective remedial action. *Fosburg v. Lehigh Univ.*, No. CIV. A. 98-CV-864, 1999 WL 124458, at *6 (E.D. Pa. Mar. 4, 1999). Courts have generally reached the conclusion that the employer’s creation or toleration of a hostile work environment for a disabled person constitutes disability harassment and violates the ADA. E.g., *Quiles-Quiles v. Henderson*, 439 F.3d 1, 5 n.1 (1st Cir. 2006) (reviewing favorable judicial treatment of disability harassment claims); *Walton v. Mental Health Ass’n*, 168 F.3d 661, 667 n.2 (3d Cir. 1999) (“[W]e have not discovered any case holding that the claim [of disability harassment] cannot be asserted under the ADA.”). See also *Wallin v. Minn. Dep’t of Corr.*, 153 F.3d 681, 687-88 (8th Cir. 1998) (assuming, without deciding, that a disability harassment claim based on hostile work environment is actionable under the ADA). Relevant regulations also interpret the ADA to include disability harassment protection. 29 C.F.R. § 1630.12 (2005) (“It is unlawful to coerce, intimidate, threaten, harass or interfere with any individual in the exercise or enjoyment of . . . any right granted by this part.”). But see *Vasquez-Ortiz v. PHC Partners, Inc.*, No. 8:04-CV-1570-T-23TBM, 2005 WL 3477553, at *15 (M.D. Fla. Dec. 19, 2005) (“The Eleventh Circuit has not recognized a cause of action for disability harassment.”).
shift-related abuses by his managers, including the transfer to the least desirable night shift, were executed in order to force Haysman to quit his job. The court allowed Haysman’s case to go to trial, holding that the jury could conclude that the actions by Food Lion managers, including the shift-based decisions, could constitute disability harassment and violate the ADA.  

Managers engaged in similarly obnoxious shift-related behavior in *Hudson v. Loretext Corporation*.  

A manager at Loretext Corporation believed that his epilepsy-suffering employee, Robert Hudson, faked his disability to work the day shift. The manager belittled the reason for the doctor-ordered shift change, stating that “[y]ou should be more grateful, we changed your shift because you were supposedly sick, this has affected many people!” Other supervisors criticized Hudson for working the day shift, culminating in Hudson’s termination for allegedly breaking company property, which Hudson denied. The court denied the defendant’s motion to dismiss and concluded that Hudson’s allegations “describe a pattern of harassment that existed throughout his tenure on the day shift.” Both Haysman and Hudson reveal that treating an employee differently by transferring that employee to a less desirable shift, coupled with illegally discriminatory animus, can foster a claim of disability discrimination.  

3. Pursue Claims under Favorable State Disability Laws  

When a narrow interpretation of the ADA excludes otherwise necessary requests for accommodations by shiftworkers, such workers may find opportunities for accommodation under less stringent state laws. In *Failla v. City of Passaic*, William Failla, a New Jersey police captain, suffered a work-related back injury. When he was transferred to the overnight shift as a night captain, his pain began to worsen. Failla claimed that both the night air and a night captain’s more strenuous duties aggravated his back condition. Failla’s employer failed to accommodate

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194. *Id.* at *1*.  
195. *Id.* at *2*.  
196. *Id.* at *3*.  
197. See Michelle A. Travis, *Leveling the Playing Field or Stacking the Deck? The “Unfair Advantage” Critique of Perceived Disability Claims*, 78 N.C. L. REV. 901, 911-12 (2000) (“If the employer treats the employee differently by reassigning the employee to a night shift because of customers’ negative reactions, the employee would have [a claim] of perceived disability [discrimination].”) (citing 29 C.F.R. pt. 1630 app. § 1630.2(l) (2001)).  
198. 146 F.3d 149 (3d Cir. 1998).  
199. *Id.* at 152.  
200. *Id.*  
201. *Id.* An expert testified that cold and dampness of the night and the increased stress associated with Failla’s night position aggravated his back condition. *Id.*
six separate requests over a two year period for a transfer to the day shift. Failla sued under the ADA and the New Jersey Law Against Discrimination (LAD) alleging disability discrimination and that day shiftwork constituted a reasonable accommodation of his disability.

At trial, a jury concluded that Failla was not "disabled" under the ADA. The jury did find that he was "handicapped" under the LAD and that his employer improperly failed to accommodate him. On appeal, Failla's employer challenged the consistency of the two verdicts. The Third Circuit concluded that the LAD definition of "handicapped" was different than the ADA's definition of "disability" because the LAD does not incorporate the requirement that the impairment must cause a substantial limitation on a major life activity. The court stated, "[T]his lower standard under the statutory definition of 'handicapped,' as compared to the definition of 'disability,' negates any inconsistency in the jury's verdict with respect to the ADA and LAD claims." The court concluded that Failla produced sufficient evidence to establish a prima facie case under the LAD.

4. Highlight the Distinction between a "Class of Jobs" and a "Broad Range of Jobs"

Courts rejecting shiftworker impairments as ADA disabilities have done so because the plaintiff's impairments did not prevent them from performing a class of jobs. The problem with these previous claims is that plaintiffs did not distinguish between the exclusion from a "class of jobs" and a "broad range of jobs." For an individual to receive ADA protection, the law requires that he be substantially limited in performing a major life activity such as walking, talking, breathing, or speaking. For the major life activity of working, Equal Employment Opportunity Commission (EEOC) regulations define the substantial limitation requirement by a significant restriction "in the ability to perform either a class of jobs or a

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broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities.²¹⁰

The phrases “class of jobs” and “broad range of jobs” have different meanings that shiftworkers can take advantage of in future claims. In Williams v. Philadelphia Housing Authority Police Department,²¹¹ police officer Edward Williams developed major and recurrent depression that prevented him from carrying a firearm.²¹² Williams’s employer eventually fired him, and Williams sued alleging discrimination and retaliation under the ADA.²¹³

The trial court responded similarly to the Baulos²¹⁴ and Witter²¹⁵ courts. The court stated that Williams’s inability to carry a firearm did not preclude him from performing a broad range of jobs.²¹⁶ Williams testified at a deposition that he could have performed a variety of other jobs such as chauffeur, bus driver, rental car agency worker, tow truck operator, or in the radio room at the Philadelphia Housing Authority.²¹⁷ Therefore, the trial court held that Williams was not disabled within the meaning of the ADA.²¹⁸

The appellate court, on the other hand, highlighted the distinction between a broad range of jobs and a class of jobs. According to the appellate court, a plaintiff may still be disabled in spite of his ability to perform a broad range of jobs. This occurs when a plaintiff is significantly restricted in his ability to perform most of the jobs in the geographical area that utilize training, knowledge, skills and abilities similar to the job from which the employee was disqualified.²¹⁹ The EEOC’s Technical Assistance Manual cited by the court offers the example of a computer programmer who can otherwise see well but who has a vision impairment that prevents her from viewing print on computer screens.²²⁰ According the EEOC, that programmer is substantially limited in the major life activity of working because her impairment prevents her from working in a broad class of jobs requiring the use of a computer.²²¹ The appellate court asserted that the

²¹⁰. See 29 C.F.R. § 1630.2(j)(3)(i) (2005). The regulation also notes that “the inability to perform a single, particular job does not constitute a substantial limitation on the major life activity of working.”

²¹¹. 380 F.3d 751 (3d Cir. 2004).
²¹². Id. at 756.
²¹³. Id. at 758-59.
²¹⁴. 139 F.2d 1147 (7th Cir. 1998).
²¹⁵. Witter, 138 F.3d 1366 (11th Cir. 1998).
²¹⁶. 380 F.3d. at 763.
²¹⁷. Id.
²¹⁸. Id.
²¹⁹. Id.
²²¹. Id.
district court did not answer the question of whether, “[c]ompared to an average person living in the same geographical region as Williams with similar training, knowledge, skills, and abilities, was Williams substantially restricted in his ability to perform jobs in law enforcement?” The appellate court concluded that a reasonable jury could have concluded that he was substantially restricted.222

The Williams court provided a useful explanation as to why the Supreme Court’s decision in Sutton v. United Air Lines, Inc. does not require a contrary result.223 In Sutton, the Court concluded that myopic job applicants excluded from the job of “global airline pilot” were not substantially limited in the major life activity of working because United’s vision requirement only prevented access to a single job with a single employer.224 The Court found that the plaintiffs could have served as a commercial airline pilot, a regional airline pilot, or a pilot for a courier service.225 Williams differed from the Sutton plaintiffs because, as the appellate court concluded, Williams could not work in most law enforcement jobs with his condition, whereas the Sutton plaintiffs could work in most pilot jobs with their condition. Accordingly, the Williams court reversed the district court’s decision granting summary judgment for the Philadelphia Housing Authority with regard to the discrimination claim.226

Although not all courts have agreed with Williams,227 the decision’s reasoning transplants well to shiftwork claims. Just as Williams was excluded from a class of law enforcement jobs and the hypothetical computer programmer was excluded from a class of computer jobs, so the impaired shiftworker is excluded from a class of jobs requiring night work. The Baulos truckers could have argued that their sleep disorders excluded them from a broad class of jobs such as night trucking, night chauffeur, night taxi driver, and any other position that requires driving in the overnight hours. If we further assume that their sleep disorders would arise from simply working at night, their disabilities would exclude them from virtually any night job that required attention, skills, and knowledge similar to night trucking. Thus, the Baulos truck drivers were arguably excluded from a class of jobs—nighttime driving positions—as a result of their shiftwork-sensitive sleep disorder impairment. This line of reasoning is no less useful when applied to Stephen Roth’s visual condition. Roth’s inability to work longer than eight to ten hours prevented him from

222. Id.
223. Id. at 764 (citing Sutton v. United Air Lines, Inc., 527 U.S. 471, 493 (1999)).
224. Id. at 764-65 (citing Sutton, 527 U.S. at 493).
225. Sutton, 527 U.S. at 493.
226. Williams, 380 F.3d at 756.
227. See, e.g., Rossbach v. City of Miami, 371 F.3d 1354 (11th Cir. 2004) (finding that disabled police officers were not prevented from a broad range or “class of jobs” under the ADA).
completing a residency program, thereby excluding him from the class of medical jobs requiring completion of such a program to practice medicine. If a court views shiftwork-based impairments as preventing employment on a class of jobs requiring evening and night work, employees seeking ADA protection should be treated more favorably than the plaintiffs in Baulos, Witter, and Roth.

V.

CAN TRANSFERS TO SHIFTWORK CONSTITUTE CONSTRUCTIVE DISCHARGE?

A constructive discharge occurs when an employer deliberately renders the employee's working conditions intolerable and therefore forces the employee to quit.\textsuperscript{228} The plaintiff must show that the employer created the intolerable conditions intending to force the plaintiff to quit. The plaintiff must also show that a reasonable person would find the conditions intolerable.\textsuperscript{229} Thus, the viability of a plaintiff's cause of action may well depend on whether the plaintiff can show constructive discharge.

These types of discharge claims often arise in shiftwork-related cases under the Age Discrimination in Employment Act (ADEA) and Title VII. When plaintiffs are reassigned from the day shift to shiftwork, the difficulties they face in the new shift may force them to quit. While it is true that the employer does not directly fire the employees, the implementation of the new work schedule compels plaintiffs to quit. Therefore constructive discharge perhaps is the most relevant theory under which to bring a claim.

The following section focuses on constructive discharge cases that directly involve shiftwork plaintiffs, while also reviewing cases in which shiftwork is not involved because the issues are relevant to understanding constructive discharge in a shiftwork context. This discussion helps determine what shiftwork employees face when attempting to prove they were constructively discharged and thereby should be afforded the protections of the ADEA or Title VII.

A. Constructive Discharge and the ADEA

The ADEA was enacted in 1967 to accomplish several objectives.\textsuperscript{230} Congress sought to "promote employment of older persons based on their ability rather than age, to prohibit arbitrary age discrimination in

\textsuperscript{228} Smith v. World Ins. Co., 38 F.3d 1456, 1460 (8th Cir.1994).
\textsuperscript{229} Id. at 1461. Intent can be shown by demonstrating that the employee quit as a "reasonably foreseeable consequence" of the employer's discriminatory actions. Schwarz v Nw. Iowa Cmty. Coll., 881 F. Supp. 1323, 1338 (N.D. Iowa 1995) (citing World Ins. Co., 38 F.3d at 1461).
employment, and to help employers and workers find ways of meeting problems arising from the impact of age on employment.\footnote{Id. § 621(b). See generally Judith J. Johnson, Rehabilitate the Age Discrimination in Employment Act: Resuscitate the "Reasonable Factors Other Than Age" Defense and the Disparate Impact Theory, 55 Hastings L.J. 1399, 1407 (2004) (noting that courts actively sought to put forth and implement the purpose of the ADEA to prevent stereotypical discrimination based on age).}

The ADEA prohibits an employer’s use of age as a determining factor in hiring, discharging,\footnote{EEOC v. Sch. Bd. of Pinellas County, 742 F. Supp. 622, 625 (M.D. Fla. 1990) (citing Pace v. S. Ry. Sys., 701 F.2d 1383, 1388-89 (11th Cir. 1983) (noting that reassignment and demotion may be considered as a discharge).} compensation, and all other terms and conditions of employment for employees over age forty.

To establish a prima facie case of age discrimination, a plaintiff must show that he or she (1) was discharged;\footnote{See generally Judith J. Johnson, Rehabilitate the Age Discrimination in Employment Act: Resuscitate the "Reasonable Factors Other Than Age" Defense and the Disparate Impact Theory, 55 Hastings L.J. 1399, 1407 (2004) (noting that courts actively sought to put forth and implement the purpose of the ADEA to prevent stereotypical discrimination based on age).} (2) was qualified for the position; (3) was within the protected class at the time of discharge; and (4) was either replaced i) by someone outside the protected class, ii) by someone younger, or iii) otherwise discharged because of her age.\footnote{Regardless of how much younger her replacement is, a plaintiff in the protected class may still establish a prima facie case by producing evidence that he or she was otherwise discharged because of his or her age.\footnote{Id. § 621(b). See generally Judith J. Johnson, Rehabilitate the Age Discrimination in Employment Act: Resuscitate the "Reasonable Factors Other Than Age" Defense and the Disparate Impact Theory, 55 Hastings L.J. 1399, 1407 (2004) (noting that courts actively sought to put forth and implement the purpose of the ADEA to prevent stereotypical discrimination based on age).} Regardless of how much younger her replacement is, a plaintiff in the protected class may still establish a prima facie case by producing evidence that he or she was otherwise discharged because of his or her age.\footnote{See Elliot v. Color Box, LLC, No. C03-1042, 2005 WL 174872, at *5 (N.D. Iowa Jan. 26, 2005). The court noted that discharge doesn’t necessarily equate with being fired. A materially adverse employment action suffices to show that a discharge has taken place.\footnote{McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Chambers v. Metro Prop. & Cas. Ins. Co., 351 F.3d 848, 855 (8th Cir. 2003); Longen v. Waterous Co., 347 F.3d 685, 688 (8th Cir. 2003).} The burden then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the employer’s actions.\footnote{Id.} If the employer articulates such a reason,\footnote{See Id.} the burden returns to the employee\footnote{McDonnell Douglas, 411 U.S. at 802.} to show the employer’s justification is a

Without direct evidence of discrimination,\footnote{McDonnell Douglas, 411 U.S. at 802.} ADEA claims are evaluated under the McDonnell Douglas burden-shifting framework.\footnote{Id.} Under this framework, the employee bears the initial burden of establishing a prima facie case of discrimination.\footnote{The Supreme Court has said that it is very unlikely that we would have "eyewitness testimony of the employer's mental processes." Gaworski v. ITT Commercial Fin. Corp., 17 F.3d 1104, 1108 (8th Cir. 1994) (citing United States Postal Serv. Bd. of Governors. v. Aikens, 460 U.S. 711, 716 (1983)).} The burden then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the employer’s actions.\footnote{Id.} If the employer articulates such a reason,\footnote{Id.} the burden returns to the employee\footnote{Id.} to show the employer’s justification is a
pretext. The showing of a pretext is one of the greatest difficulties plaintiffs face. They are often unable to prove with certainty that a pretext exists.

A number of plaintiffs argued that their shiftwork created a workplace so intolerable that it constituted constructive discharge. For example, in *Schwarz v. Northwest Iowa Community College*, sixty-three year old Ruth Schwarz worked as a library clerk. Schwarz worked the eight a.m. to four-thirty p.m. shift up until the College changed her schedule from the day shift to the night shift, which entailed working from twelve-thirty p.m. until nine p.m. In response to this transfer, Schwarz submitted doctors' notes indicating that it was not recommended for her to drive at night due to night blindness. She provided her employer with a written statement from her doctor stating that it was hard for her to judge distances at night and that she was sensitive to the lights of oncoming cars at night. The doctor recommended in his note that Schwarz should only drive in daylight. The record showed that even prior to the production of her doctor's note, the employer had knowledge of Schwarz's night vision condition. At the very least her immediate supervisor had knowledge of her vision problems for some time prior to the change in schedule. As a result of this shift change Schwarz quit her job and sued the College alleging a violation of the ADEA.

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243. Miriam F. Clark & Lewis M. Steel, The Second Circuit's Employment Discrimination Cases: An Uncertain Welcome, 429 PLI/LIT 259, 284 (1992) (discussing that pretext can be very difficult to prove). For example, in Booker v. C.R. Industries, No. 93-1218, 1993 WL 501583 (7th Cir. Oct. 25, 1993), the plaintiff tried to show the defendant's justification for moving him to the night shift and ultimately discharging him was pretextual. The defendants claimed that the individual whom they chose to replace the plaintiff in the day shift was chosen for his extensive project experience and was all around more qualified. The plaintiff argued that he was moved from the day shift to the night shift due to his age. In his deposition testimony, the plaintiff tried to prove that he was the better candidate, based on what he personally believed to be his own and the other employees' qualifications. Such self-serving opinions are not enough to establish pretext. The plaintiff relied exclusively on the fact that Mr. Surowka was a younger employee. Pretext may not be inferred from the mere fact that CRI retained a younger engineer. Therefore, the court granted defendants judgment as a matter of law. *Id.* at *2-4.
245. *Id.* at 1332.
246. *Id.*
247. *Id.* at 1332-33, 1342.
248. *Id.* at 1333.
249. 881 F. Supp. at 1333.
250. *Id.* at 1338.
251. *Id.* at 1338 n.7 ("The parties agreed that Osland had on one or more occasions offered Schwarz rides to evening events or meetings to allay Schwarz's fears of driving at night with her vision difficulties.").
252. *Id.* at 1327. The court noted that Schwarz had established all the elements necessary to establish a prima facie case of age discrimination under the ADEA. *Id.* at 1328. The only question that remained to be determined was whether she was constructively discharged or merely quit. *Id.*
Schwarz argued she was constructively discharged.\textsuperscript{253} She claimed her employer essentially forced her to quit by requiring that she drive home from work at night, a condition she deemed intolerable.\textsuperscript{254} The employer argued that the change in shift was not implemented to force the plaintiff to quit but for legitimate business reasons.\textsuperscript{255} The college first argued that accreditation standards necessitated the shift change.\textsuperscript{256} Later, the employer stated that the first reason given was based on incorrect information and that the real reason behind the shift change was a change in patron demands.\textsuperscript{257} The court concluded that defendants were not entitled to summary judgment because a reasonable person similarly situated could have found it intolerable to work the afternoon to evening shift.\textsuperscript{258}

Historically, courts have not found constructive discharge where there was a mere change in hours.\textsuperscript{259} Schwarz entailed not only a change in hours, but also a change in hours that "placed particular burdens on an employee because of a physical problem."\textsuperscript{260} Generally, a change in hours coupled with burdens placed on an employee due to personal circumstances has also not been enough to constitute constructive discharge. This case, unlike many other cases, not only dealt with a shift change and personal circumstances but also with the implication that the employer knew of the employee’s circumstances and decided to exploit them by changing her shift and essentially forcing her to quit.\textsuperscript{261} If the employer knows that the shift change will force the employee to quit and the underlying intent is to exploit the employee’s personal circumstances to bring about that result, constructive discharge should be implied.

Schwartz introduced the proposition that a showing of intentional exploitation of personal circumstances is sufficient to meet a constructive discharge claim. Other courts, however, have not required quite as high an evidentiary threshold. In Holsey v. Armour Cos.,\textsuperscript{262} the employer’s knowledge of employee circumstances and the deliberateness of causing an intolerable condition were again at issue for the constructive discharge claim. One employee, an African-American male named Jackie Drakeford, was promoted to a supervisory position after filing a complaint with the

\textsuperscript{253} ld. at 1338. 
\textsuperscript{254} ld. 
\textsuperscript{255} ld. at 1341. 
\textsuperscript{256} ld. at 1341 n.10 (indicating that the College did agree at first that this was the reason advanced by Versa Osland, the College librarian and Schwarz’s immediate supervisor, but argues that this misinformation was promptly taken care of when Schwarz contacted another employee). 
\textsuperscript{257} ld. 
\textsuperscript{258} ld. at 1340. 
\textsuperscript{259} ld. at 1339. 
\textsuperscript{260} ld. 
\textsuperscript{261} ld. 
\textsuperscript{262} 743 F.2d 199 (4th Cir. 1984).
EEOC. During his short tenure in this position, the company harassed him by changing his shift several times to accommodate white supervisors and undermining his position by granting leave to individuals under Drakeford’s supervision without advising him. Drakeford was not afforded the same respect and responsibilities as white supervisors. Shortly after taking on the supervisory position, Drakeford resigned and sued the employer claiming that he was constructively discharged.

The defendant employer argued that there was no evidence indicating it intended to cause an intolerable condition and thereby compel Drakeford to quit. The employer argued that the constructive discharge standard was not met because the element of deliberateness was missing; the court disagreed. To act deliberately to cause an intolerable condition, the court reasoned, means only to act with intent. The higher officials knowledge of Drakeford’s circumstances and failure to act to remedy it supported the inference that the company imposed the conditions. The court thus concluded that the plaintiff had established the deliberateness element of the constructive discharge.

Holsey implies that where an employer has knowledge of an employee’s circumstances and makes no effort to accommodate the employee, the deliberateness requirement of constructive discharge is met. Holsey thus requires a lower threshold than Schwarz in terms of the evidence needed to prove the element of deliberateness in a constructive discharge claim. Schwarz required not only knowledge of the circumstances on the part of the employer but an explicit intent to exploit those circumstances to force the employee to quit. While Schwarz requires a more stringent condition of intentional exploitation to prove deliberateness, Holsey only requires a more passive condition of employer knowledge.

The holding in Holsey is consistent with constructive discharge cases outside the shiftwork context. Bradford v. Norfolk Southern Corp. also relies heavily on the element of knowledge to establish constructive
discharge. The plaintiffs in *Bradford*, a group of clerks working for the railway system, were transferred from St. Louis to Roanoke.\footnote{273} After becoming dissatisfied with the working conditions at their new location, plaintiffs quit their jobs and filed suit under the ADEA alleging that they were constructively discharged.

The defendants argued that the change in location was "part of an ongoing long-term accounting consolidation in keeping with the evolution of the corporate entity."\footnote{274} The plaintiffs, however, felt that they had been constructively discharged.\footnote{275} They claimed they had been forced to transfer to the new location solely because of their age.\footnote{276} The district court entered judgment as a matter of law in favor of the defendants, holding that the plaintiffs had failed to establish a prima facie case of age discrimination.\footnote{277}

On appeal, the *Bradford* plaintiffs objected to the denial of admission of evidence of personal circumstances.\footnote{278} On this issue, the court noted, Although under an appropriate set of facts a showing of personal circumstances could conceivably be relevant to a determination of constructive discharge, there was no showing that Norfolk Southern possessed any knowledge of the clerks' personal circumstances or that they were a factor in Norfolk Southern's decision to consolidate work and transfer employees.\footnote{279} Therefore, the defendant's knowledge of personal circumstances was again an important factor in determining whether a viable constructive discharge claim existed.

At least one court has found constructive discharge when an employer transfers an employee to a shift that the employer knows the employee will have difficulty working because of health conditions. In *Pendas v. Runyon*,\footnote{280} sixty-two year old postal service employee was transferred from his normal shift to a shift that started at four a.m., lasted for eight hours, and required extensive standing.\footnote{281} While this shift may not seem out of the ordinary for a postal worker, Pendas had a significant health condition known as osteoarthritis\footnote{282} that made the particulars of this shift

\begin{itemize}
\item \footnote{273}{Id. at 1416.}
\item \footnote{274}{Id. at 1417.}
\item \footnote{275}{See id.}
\item \footnote{276}{Id.}
\item \footnote{277}{Id. at 1416.}
\item \footnote{278}{Id. at 1417.}
\item \footnote{279}{Id.}
\item \footnote{280}{933 F. Supp 187 (N.D.N.Y. 1996).}
\item \footnote{281}{Id. at 190.}
\item \footnote{282}{One source explains osteoarthritis this way:

With aging, the water content of the cartilage increases and the protein makeup of cartilage degenerates. Repetitive use of the joints over the years irritates and inflames the cartilage, causing joint pain and swelling. Eventually, cartilage begins to degenerate by flaking or forming tiny crevasses. In advanced cases, there is a total loss of the cartilage cushion}
difficult for him to endure. His physicians all noted that working these long hours, standing on his feet for extensive periods of time, and working the early shift would be detrimental to his health. After being transferred to the new shift, Pendas resigned from the postal service and filed suit alleging a violation of the ADEA under a claim of constructive discharge.

The record indicated that the postal service was aware of the doctors' recommendations and had spoken to Pendas regarding his health issues, leaving little doubt that the employer knew of Mr. Pendas's special condition. Well aware of the circumstances, the employer still chose to switch Pendas's shift to the early morning hours. Pendas argued that there were other positions available that required walking, driving, and delivering mail during later hours as opposed to having to stand on his feet continually and starting his shift in the very early morning. He alleged that his employer intentionally transferred him to the early morning shift to compel him to quit.

The court refused to grant summary judgment to the defendant, noting that a reasonable fact finder might conclude that Pendas was in fact constructively discharged. Based on the holding in this case, a plaintiff may prove constructive discharge if an he can show that his employer knew of his health condition and that the employer placed him in a shift that made it almost impossible for him to stay in his job considering those health conditions. The Pendas court, like many other courts, held that knowledge of personal circumstances on the part of the employer may lead to a successful constructive discharge claim and thereby invoke the protections of the ADEA.

The cases discussed above provide a look into what factors future courts may consider important in addressing the grievances of shiftwork plaintiffs in ADEA-based constructive discharge claims. While no definite resolution of this issue has evolved to date, shiftwork claimants are more likely to succeed if they meet the higher evidentiary threshold requirement.

between the bones of the joints. Loss of cartilage cushion causes friction between the bones, leading to pain and limitation of joint mobility.


283. Pendas, 933 F. Supp at 196.
284. Id. at 190.
285. Id.
286. See id.
287. Id.
288. Id. at 196.
289. Id.
290. See Holsey v. Armour Cos., 743 F.2d 199, 204 (4th Cir. 1984) (stating employer’s knowledge of employees personal circumstances and lack of action on employers part to accommodate those circumstances allows the deliberateness requirement of constructive discharge to be met). See also Bradford, 54 F.3d at 1417 (stating employer’s knowledge of employees’ personal circumstances important in determining if there is a viable constructive discharge claim).
Shiftwork employees are more likely to prevail in their claims if they are able to show that a reasonable person similarly situated to the plaintiff would find it intolerable to work the particular shift, that the employer knew of his or her condition, and that the employer intentionally exploited those conditions to force the employee to quit by placing her in this shift.\textsuperscript{291} If the employee has a condition such as a sleep disorder, vision problems, or other health condition that seriously inhibits him or her from working a certain shift and the employer, knowing this and intending to play on those circumstances to cause an intolerable condition, transfers him or her to that shift, constructive discharge should be inferred under Schwarz, Holsey, Bradford, and Pendas.

B. Constructive Discharge and Title VII

Title VII of the Civil Rights Act of 1964 prohibits employers from intentionally discriminating against employees with respect to terms or conditions of their employment based on their race, religion, sex, or national origin.\textsuperscript{292} A plaintiff who sues an employer under Title VII bears the burden of proving this discrimination,\textsuperscript{293} and the discrimination can be direct or indirect.\textsuperscript{294} As with ADEA claims, most plaintiffs will attempt to establish discrimination through circumstantial evidence since it is unlikely that plaintiffs will have the evidence to show direct discrimination. One of the methods to accomplish this goal is to use the burden-shifting method described in McDonnell Douglas.\textsuperscript{295} To establish a prima facie case of discrimination under the McDonnell Douglas framework, the plaintiff must show that (1) they are a member of a protected class, (2) they reasonably performed to the employers expectations, (3) they were subject to an adverse employment action, and (4) they were treated differently from similarly situated employees who were outside of their protected group.\textsuperscript{296}

With Title VII claims, the majority of shiftwork-related cases focus on the third element of the prima facie case: the adverse employment action. The following discussion of cases illustrates shiftwork plaintiffs attempting to meet this element by proving constructive discharge. As under the ADEA, a shift change alone, without additional evidence, is not sufficient prove constructive discharge under Title VII.

\textsuperscript{293} Grube v. Lau Indus., 257 F.3d 723, 727 (7th Cir. 2001).
\textsuperscript{294} Montgomery v. John Deere & Co., 169 F.3d 556, 559 (8th Cir. 1999) (citing Beshears v. Ashbill, 930 F.2d 1348, 1353 (8th Cir. 1991)).
\textsuperscript{295} McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).
The leading case on this point is *Grube v. Lau Industries*. In September 1997, Lau Industries asked employee Diann Grube to transfer from the first shift supervisor position to a second shift supervisor position. Lau Industries claimed that this transfer was part of a business decision to retain the strongest supervisors in the first shift and move one of the weaker supervisors to the second shift. The employer felt that Grube was a good candidate for the transfer. Twenty minutes after being informed of this transfer Grube resigned. She later filed suit for violation of Title VII claiming that she was constructively discharged because of her gender.

Grube argued that Lau’s request that she accept the shift transfer would have by itself caused a reasonable employee to quit. Based on this theory, she argued that she was constructively discharged. The appellate court, however, affirmed the district court’s decision to grant summary judgment in favor of the defendants. The court noted,

[W]ere we to hold that a mere change in working hours would rise to the level creating a condition so objectively unbearable as to allow an employee to quit and then bring a claim of constructive discharge, employers would be in a most precarious position in adapting and maintaining employee’s work schedules to fit within the parameters of their business needs.

The court went on to note that because Grube’s job title remained the same, she suffered no significantly diminished job responsibility, and there was no reduction in pay, the circumstances did not rise to the level of constructive discharge. If some of the preceding conditions had been changed in this case, Grube may have been able to show constructive discharge. A shift change alone, however, would not suffice.

*Grube*, together with the ADEA cases discussed above, demonstrates the strength of the principle that a mere change in hours for a shiftwork plaintiff is not sufficient to prove constructive discharge.
VI.

DOES A CHANGE TO SHIFTWORK CONSTITUTE AN ADVERSE EMPLOYMENT ACTION?

A. Adverse Employment Action and Discrimination Claims

In Title VII and ADEA cases, a plaintiff must establish as part of her prima facie case that the employer's action had an adverse effect on the "terms, conditions or privileges" of her employment. When the employer has taken actions against the employee short of actual or constructive discharge, much discussion centers around what factors are considered when addressing whether an adverse employment action has taken place. For Title VII actions, it can be inferred that shiftwork plaintiffs must couple their change in shift with proof of such elements as a reduction in pay, change in job title, or diminished job responsibilities. This, however, is a difficult task to accomplish considering many shiftwork plaintiffs will likely not face such specific discrimination.

Furthermore, even though a change in pay or change in job title may not often occur, sometimes a change in shift may be coupled with a change in job responsibilities. Occasionally, the second shift or night shift inherently encompasses different duties and responsibilities. It is the degree of change in responsibility that will be the determining factor in whether a shiftwork plaintiff will be successful. If the change of shift alters the responsibilities in a significant way, the plaintiff may have a successful claim.

Smith v. Burns International Security Services provides the shiftwork plaintiff with guidance on the degree of change required. In Smith, the plaintiff argued that the shift to which she was transferred lacked prestige and was considered "lower profile." While the court did not disagree with her contentions, they did note that these factors alone were not sufficient. The court held that since the plaintiff did not advance any evidence to show that the shift transfer would affect her career or opportunity for advancement, the shift change alone did not constitute an adverse employment action.

Bright v. Le Moyne College used the same reasoning. Addressing the question of whether a transfer to a new position constituted an adverse employment action.

310. Id. at *4.
311. Id. ("A transfer must be objectively and materially adverse"); see also Smart v. Ball State Univ., 89 F.3d 437, 441 (7th Cir. 1996) ("[N]ot everything that makes an employee unhappy is an actionable adverse employment action.").
312. Id.
313. 306 F. Supp. 2d 244 (N.D.N.Y. 2004).
employment action, the court noted, "A transfer is an adverse employment action if it ‘results in a change of responsibilities so significant as to constitute a set back to plaintiff’s career.’"\textsuperscript{314} Again, when it comes to the degree of change required, the focus is on how the defining event may effect future career advancement. "In essence, the transfer must create a ‘materially significant disadvantage,’ which may be shown by evidence of a transfer to a position that is materially less prestigious, less suited to ones skills, or less conductive to advancement."\textsuperscript{315} Because the plaintiff had failed to show that her transfer had set back her career, the court held that the change did not constitute an adverse employment action.

This provides the future shiftwork plaintiff with some direction on what courts will look to in cases such as these. "Changes in duties or working conditions that cause no material disadvantage will not establish the adverse conduct required to make a prima facie case."\textsuperscript{316} A change in shift coupled with proof that the plaintiff was materially disadvantaged, however, will increase the likelihood of a shiftwork plaintiff’s success. This material disadvantage may occur over a long term where the plaintiff can show that the change in shift will cause physical pain, hinder his or her career, or inhibit career advancement.\textsuperscript{317}

Courts do not recognize that a change to a shiftwork position has a strong impact on an employee. In discussing the plaintiff’s claim in \textit{Austin-Edwards}, the court noted that other than a change in shift, even factors such as a lengthened commute, unfair discipline, difficult assignments, and denial of parking permits did not constitute an adverse action.\textsuperscript{318} The comparison of shiftwork to these factors, however, is in no way a logical one, and shiftwork should not be lumped in with other much less serious actions. The denial of a parking permit, for example, cannot be equated with the shift change of an employee. One involves a mere inconvenience while the other entails a possible serious health risk.

The best approach for shiftworkers may be to emphasize the physical risks of shiftwork rather than the harms to reputation and convenience. In \textit{Ryan v. O’Halloran International, Inc.},\textsuperscript{319} the court deals with the issue of a physical trauma or health risk as it relates to the requirement of an adverse employment action. The plaintiffs in this case alleged that their employer changed their working condition in a way that adversely impacted their

\textsuperscript{314} \textit{Id.} at 253 (quoting Galabya v. N.Y. City Bd. of Educ., 202 F.3d 636, 640 (2d Cir. 2000)).

\textsuperscript{315} \textit{Id.} at 254 (quoting \textit{Galabya}, 202 F.3d at 640).

\textsuperscript{316} \textit{Id.} at 253 (citing Harlston v. McDonnell Douglas, 37 F.3d 379, 382 (8th Cir. 1994)).

\textsuperscript{317} \textit{Ryan v. O’Halloran Int’l}, No. 4:03-CV-90531, 2004 WL 524431, at *3 (S.D. Iowa Mar. 17, 2004) (A change in working conditions that invokes physical pain or injury constitutes an adverse employment action).

\textsuperscript{318} \textit{Austin-Edwards}, 2004 WL 1243940 (citing Griffin v. Potter, No. 03-1342, 2004 WL 193578, at *4 (7th Cir. Feb. 3, 2004)).

\textsuperscript{319} No. 4:03-CV-90531, 2004 WL 524431 (S.D. Iowa, Mar. 17, 2004).
They claimed that their employer removed their workstation chairs, forcing them to work standing for eight hours, which in turn caused them physical pain. Moreover, similarly situated younger employees were permitted to sit while working and did not have their chairs removed. Plaintiffs filed suit under the ADEA alleging that they were discriminated against and argued that an adverse employment action had taken place.

The *Ryan* court analyzed whether a change that resulted in physical pain could constitute an adverse employment action. In reaching its conclusion, the *Ryan* court noted, "Working in the face of unnecessary physical pain and injury most certainly puts one at a material disadvantage in any employment situation." *Ryan* clearly concludes that being faced with physical trauma is sufficient to satisfy the adverse employment action requirement. With this and with knowing that a change in shift carries with it the risk of such physical trauma as cardiovascular, gastrointestinal, reproductive, and even mental disorders, it is easy to deduce that shiftwork cases should be analyzed in light of *Ryan*.

Courts are not yet taking into account the full extent of shiftwork and its implications. This, in part, may be due to the lack of literature on the adverse consequences associated with shiftwork. As a result, courts are undervaluing the trauma that a shift change has on an employee. When twenty percent and seventy-five percent of shift and night workers report incidents of gastrointestinal disorders, as compared to ten percent and twenty-five of day shiftworkers, notice should be taken. When women who perform shiftwork experience increased reproductive problems such as decreased fertility and spontaneous abortions, it should not be ignored. Although increased health risks are not the same as on the job pain, the problems that arise from shiftwork may be material under certain circumstances to constitute a materially sufficient disadvantage of a term or condition of employment.

These disorders are only a few examples of the many negative effects shiftwork may have on employees. It is safe to say these repercussions are in no way equal to the negative effects that may be felt from, say, lengthened commute time. Therefore, it is not reasonable for *Austin-Edwards* to compare those factors to a change in shift. If physical trauma or risk of health problems equates with an adverse employment action as

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320. *Id* at *1.
321. *Id*.
322. *Id*.
323. *Id*.
324. *Id* at *3*.
326. *Id*.
327. Smith et al., *supra* note 5, at 169.
referred in Ryan, then a change in shift should be an adverse employment action as well because it too causes potential health risks.

B. Retaliation and the Adverse Employment Action Requirement

The same requirement of an adverse action also surfaces with claims of retaliation, whether under Title VII, the Family Medical Leave Act ("FMLA"),\textsuperscript{328} or the ADA. Retaliation and discrimination claims constitute different causes of action, thus it is important to note what courts will look at in addressing each type of claim. The shiftwork plaintiff claiming retaliation does not have to prove that discrimination actually occurred, but rather must simply have a good faith belief that discrimination took place.\textsuperscript{329} The shiftwork plaintiff must establish, however, that the employer retaliated against him or her with an adverse employment action. Things are further complicated by the inconsistency of discrimination and retaliation claims in determining what is required to prove an adverse employment action.\textsuperscript{330} Therefore, analyzing both discrimination as well as retaliation claims pertaining to discrimination laws is imperative.

Several cases discuss the shiftwork employee in the context of a retaliation claim. In Hunt v. Rapides Healthcare System,\textsuperscript{331} a registered nurse, Kathy Hunt, worked in the Critical Care Unit (CCU) of a medical center.\textsuperscript{332} After being involved in a car accident that led to chest and lung contusions, she requested and was granted medical leave.\textsuperscript{333} In need of someone to perform her duties while she was gone, the Medical Center assigned her full time day shift position to a different nurse.\textsuperscript{334}

When Hunt returned to work, the full-time day CCU nurse position was no longer available and thus the Medical Center was only able to offer her a full-time night CCU position.\textsuperscript{335} Hunt declined the night position and asked to be placed in the part-time work program that required only day

\textsuperscript{328} 29 U.S.C. § 2601(b)(1)-(2) (2000). The Family and Medical Leave Act of 1993 allows eligible employees working for covered employers to take temporary leave for medical reasons, for the birth or adoption of a child, and for the care of a spouse, child, or parent who has a serious health condition, without the risk of losing employment. \textit{Id.}


\textsuperscript{330} Craven v. Tex. Dep't of Criminal Justice—Institutional Div., 151 F. Supp. 2d 757, 767 n.8 (N.D. Tex. 2001). For example, "[t]he Fifth Circuit has established a higher standard for adverse employment actions to support a Title VII retaliation claim than that required for a Title VII discrimination claim." \textit{Id.} (citing Mattern v. Eastman Kodak Co., 104 F.3d 702, 708-09 (5th Cir. 1997), \textit{cert. denied}, 522 U.S. 932 (1997)).

\textsuperscript{331} 277 F. 3d 757 (5th Cir. 2001).

\textsuperscript{332} \textit{Id.} at 760.

\textsuperscript{333} \textit{Id.}

\textsuperscript{334} \textit{Id.} at 761.

\textsuperscript{335} \textit{Id.}
shifts. She argued that her family situation as a single parent did not allow her to be absent at night and therefore, she could not take the night shift. While working in the part-time day position, Hunt made less money and lost her health, retirement, and leave benefits. She resigned approximately four months after returning to work and filed suit alleging that she had been retaliated against for exercising her FMLA rights.

Hunt’s first hurdle was establishing a prima facie case of retaliation, that is, she had to show that (1) he or she engaged in statutorily protected expression under the FMLA; (2) that he or she was adversely affected by an employment decision; and either (3a) that he or she was treated less favorably than an employee who had not requested leave under the FMLA; or (3b) the adverse decision was made because she took FMLA leave. The causal link between the protected expression and the adverse action must be present to have a viable claim.

The Hunt court, similar to many of the other courts addressing retaliation claims, focused in on the second element of the prima facie case. Hunt noted that the ultimate question came down to whether the employer’s offer of only the full-time night shift position upon Hunt’s return was an adverse employment action. Hunt noted that since no change of job duties, compensation, or benefits took place when assigning the plaintiff to the night CCU position, no adverse employment action could be found. In light of this, according to the court, no violation of the anti-retaliation provision of the FMLA took place.

Hunt concluded that in evaluating whether an adverse employment action occurred, it was imperative to look only at non-trivial factors, as well as to look at those factors in an objective rather than subjective manner. The subjective outlook or feelings of the individual plaintiff would not be considered.

336. Id.
337. Id.
338. Id.
339. Id. at 762.
340. Id. at 768 (citing McDonnell Douglas, 411 U.S. at 792).
342. Hunt, 277 F.3d at 769.
343. Id. (citing Watts v. Kroger Co., 170 F.3d 505, 512 (5th Cir. 1999)).
344. Id.
345. Id. at 770 (citing Sharp v. City of Houston, 164 F.3d 923, 933 (5th Cir. 1999)).
In discussing what factors it found to be non-trivial, the Hunt court referenced Forsyth v. City of Dallas, a case involving a shiftwork plaintiff alleging retaliation. In Forsyth, a police officer was transferred from the intelligence unit to a night patrol position. Addressing the adverse employment action requirement, Forsyth adopted the view that if the new duties involved less interesting work, less responsibility, and less prestige, as well as less favorable working hours, then the transfer could be an adverse employment action. Notably, the department had transferred officers to the night patrol as a form of discipline in the past. The Hunt court agreed with the factors Forsyth used and believed a situation such as the one in Forsyth did in fact constitute an adverse employment action. Notably, the change in hours was coupled with one other major factor that affected employment: Transfer to the night shift had been used as a form of discipline in the past. This likely helped establish that the transfer was an adverse action. In the end, Hunt came out with a similar stance as most other courts: A change in shift, without more, is not enough to constitute an adverse employment action.

Wafer v. Potter exemplifies a similar analysis to Hunt and Forsyth, as it too concentrates on the requirement of an adverse employment action. In this Title VII retaliation case, Linda Wafer, the plaintiff, was reassigned to the night shift. Wafer worked as a distribution clerk for the Postal Service for several years. After the Manager of Customer Service was asked to perform an audit, he determined that it would be most efficient for the Postal Service to do away with the distribution clerk positions. Because of this change, Wafer’s position was altogether eliminated and she was placed on Tour III, which consisted of working from seven p.m. to three-thirty a.m. Wafer filed suit alleging she was retaliated against in violation of Title VII when her initial job was eliminated and when she was put on the night shift.

The court concluded that Wafer did not have a viable retaliation claim because she failed to offer evidence of an adverse employment action. It referenced factors such as her pay, the total number of hours she was employed in a week, and her chances of being promoted. As these

346. 91 F.3d 769, 774 (5th Cir. 1996).
347. Hunt, 277 F.3d at 770 (citing Forsyth, 91 F.3d at 774).
348. Id.
349. Id.
350. See id. at 770-71.
352. Id. at *1.
353. Id.
354. Id.
355. Id. at *2.
356. Id. at *4.
357. Id.
factors were not affected, the court determined that no adverse employment action had taken place and therefore no prima facie case of retaliation was established.

The discussion of the adverse employment action requirement in the retaliation context was further developed with *Khan v. Cook County*.\textsuperscript{358} Anwar Khan, a biochemist employed by Cook County, suffered from carpal tunnel syndrome.\textsuperscript{359} He was first transferred to a position that required more writing, which exasperated his carpal tunnel, and then to the night shift.\textsuperscript{360} After his shift was changed, he sued Cook County under the ADA claiming, among other things, that he was retaliated against after requesting a shift change.\textsuperscript{361}

In evaluating his ADA retaliation claim the court again looked closely at what constituted an adverse employment action. While defendants agreed that the plaintiff had partaken in protected expression, they did not believe they had engaged in any action that materially affected his employment.\textsuperscript{362} The court agreed that a minor change would not suffice to satisfy this burden.\textsuperscript{363} The question that faced the court was whether the change to the night shift would be considered a minor or material change in working conditions. Without much discussion, the court concluded that "[i]t could not be determined as a matter of law that a permanent transfer to the night shift cannot constitute an adverse employment action."\textsuperscript{364} Therefore, the defendants' motion to dismiss was denied.\textsuperscript{365}

*Khan* is one of the few cases that appears to give the shiftwork plaintiff some leeway. Although it too notes that a purely lateral transfer or a minor change is not enough,\textsuperscript{366} the *Khan* court seems somewhat more lenient than the *Hunt* and *Wafer* courts. *Khan* entertains the idea that a transfer to the night shift position may amount to a material change.\textsuperscript{367} This is not a result of the transfer alone, however, but of the combination of the transfer with the change in duties involving more writing. Nevertheless, the evidence required is less stringent.

While retaliation claims involve different standards when it comes to evaluation of whether an adverse employment action has taken place, both discrimination and retaliation claims share one common thread: A change in shift alone is not enough to support the plaintiff's cause of action. The

\textsuperscript{358} No. 96 C 1113, 1996 WL 432410 (N.D. Ill. July 30, 1996).
\textsuperscript{359} Id. at *1.
\textsuperscript{360} Id. at *2.
\textsuperscript{361} Id. at *1.
\textsuperscript{362} Id. at *2.
\textsuperscript{363} Id.
\textsuperscript{364} Id.
\textsuperscript{365} See id. at *2-3.
\textsuperscript{366} Id. at *2.
\textsuperscript{367} Id.
Hunt and Wafer courts clearly held that more than a change in shift is required to be successful. Even the Khan case, which hints that the change to the night shift may be enough to sustain the plaintiff’s retaliation claim, seems to rely chiefly on other factors. Without the additional writing requirements necessary for the night shift position the court in Khan would not have denied the defendants’ motion to dismiss.

A recent U.S. Supreme Court case, Burlington Northern & Santa Fe Railway Co. v White,\textsuperscript{368} supports the notion that personal circumstances should be factored into determining the existence of material adversity in shiftwork cases. In White, the plaintiff claimed she was retaliated against when the company changed her job duties after she filed a claim with the EEOC.\textsuperscript{369} In determining whether an adverse employment action took place the Court stated, “Context matters.”\textsuperscript{370} The majority went on to note, “The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationship which are not fully captured by a simple recitation of the words used or the physical acts performed.”\textsuperscript{371} This supports the argument that a change in shift, at times, may be sufficient in and of itself to constitute a material adverse action when coupled with personal circumstances. The court specifically alluded to a change in hours, stating, “A schedule change in an employee’s work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children.”\textsuperscript{372} Thus, in shiftwork cases, an employee’s personal circumstances should be explored rather than only looking to the specific work situation in addressing material adversity.

We are faced with a looming question: Will future courts alter their view and equate the change of hours with an adverse employment action in called for situations? Courts have continuously rejected the idea that minor changes are sufficient to constitute adverse employment actions. And it is not practical to permit every employee who encounters a minor shift change to bring a retaliation claim. The problem, however, lies in the notion that most courts are treating a shift change as a minor change where in fact it is not. Shiftwork, as discussed throughout this paper, may lead to many major health problems. There is no doubt that courts must limit the law at a certain point. Future courts should look to the White case for guidance on what factors should be addressed in determining the existence or non-existence of a materially adverse action. White gives the shiftwork plaintiff hope, as the decision is a step in the right direction.

\textsuperscript{368} 126 S. Ct. 2405 (2006).
\textsuperscript{369} Id. at 2406.
\textsuperscript{370} Id. at 2415.
\textsuperscript{371} Id. (citing Oncale v Sundowner Offshore Services, Inc., 523 U.S. 75, 80 (1998)).
\textsuperscript{372} Id.
VII.

CONCLUSION AND RECOMMENDATIONS FOR FURTHER RESEARCH

Few widely implemented workplace policies can place an employee at a greater risk of harm of so many different ailments than shiftwork. Shiftwork creates a high incidence of a wide range of physical and mental disabilities. It also disrupts marriages, social relations, and parent-child activities.

Although the problems associated with shiftwork are well understood in other fields, shiftwork has received little attention in the law. As a result, shiftwork plaintiffs receive little protection from the various statutes and regulations that apply to most American workers. Courts reviewing disability claims of shiftworkers give little if any credence to the claim that the inability to complete shiftwork under arduous conditions merits any accommodation protections under the ADA. The most extreme example involves employees like Stephen Roth whose careers may end because of their medical inability to comply with arduous schedules and extensive night work.

Plaintiffs fare little better trying to prove constructive discharge under the ADEA or Title VII. There has been a general refusal by courts to consider a shift change evidence of a constructive discharge. A shift change alone cannot constitute constructive discharge, as this would leave employers vulnerable to legal action whenever routine schedule changes were made. It appears from the majority of cases that courts will be reluctant to consider shiftwork as constructive discharge evidence under virtually any condition, regardless of its effect on the transferred employee. The most promising avenue appears to be the plaintiff who can show her employer was aware of her personal vulnerabilities and exploited them through a shift change in a deliberate effort to make her quit.

An issue for many discrimination and retaliation claims is proof of an adverse employment action. Most courts conclude than an adverse employment action must be a non-trivial event, and that a change to an evening or night shift is a trivial event. These courts fail to take into account the nature and dangers of shiftwork. If at least one court can conclude that working in the face of unnecessary pain and injury can constitute a material disadvantage in employment, 373 certainly transfer to shiftwork, with its host of physical and mental risks, can constitute an adverse employment action under conditions where the effect of shiftwork will be the most severe.

There is much room for further research on shiftwork and the law. Questions regarding suitable accommodations for shiftworkers have yet to

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be addressed. As noted above, shiftwork can be more or less hazardous depending upon the type of shift and the rotation of the shift schedule. A future article could examine under what conditions shiftworkers suffer the least physical and mental strain and whether employer's duty to accommodate should extend to shiftworkers who would benefit from changes in time and working conditions. There is also the possibility for a rich discussion of shiftwork and workplace accidents. The correlation between shiftwork and accidents on the job is well established, although the legal consequences are not. A determination of whether current workplace safety law and regulatory bodies such as the Occupational Safety and Health Administration sufficiently account for the increased risks associated with shiftwork remains unanswered. Moreover, shiftwork has a different impact on women than men. Given that supervisory managers are usually absent from the evening or night shift, shiftwork may be correlated with increased prevalence of sexual harassment that such lack of management might promote. Shiftwork also impacts women's family roles and reproductive roles. A further article might examine these impacts and offer solutions to minimize the deleterious impact of shiftwork on women.

Shiftwork is costly, dangerous, and unhealthy, yet our modern society demands twenty-four hour services. Courts and legislatures have so far failed to recognize the inherent health and well-being risks of shiftwork. Until law and policy towards shiftwork changes, millions of Americans will remain unnecessarily exposed to an increased risk of a wide variety of health and safety problems.

374. See supra Part I.