No. _____

In The
Supreme Court of the United States

DELIA RUIZ-RIVERA,

Petitioner,

v.

PFIZER PHARMACEUTICAL LLC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This petition presents two questions on which the courts of appeals are in conflict:

1. Whether an employer's recognition of medical restrictions imposed by an employee's personal physician must be disregarded, as a matter of law, in determining whether the employer "regarded" the employee as having a substantially limiting impairment for purposes of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101(2)(C).

2. Whether allegations that an employer "regarded" the plaintiff as having a substantially limiting impairment for purposes of the ADA are subject to a heightened pleading standard.

PARTIES TO THE PROCEEDING

Petitioner Delia Ruiz-Rivera and Respondent Pfizer Pharmaceuticals, LLC., were the only parties to the proceeding below.

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Delia Ruiz-Rivera respectfully petitions for a writ of certiorari to the United States Court of Appeals for the First Circuit in the above-entitled case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, at 1-25) is reported at 521 F.3d 76. The opinion of the district court denying defendants' motion for summary judgment (App., *infra*, at 26-53) is reported at 463 F. Supp.2d 163. The district court's order granting reconsideration and issuing final judgment against the plaintiffs (App., *infra*, at 54-55) is unreported.

JURISDICTION

The court of appeals entered its judgment on March 27, 2008. App., *infra*, at 1. This petition is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 42 U.S.C. § 12102(2) provides:

§ 12102. Definitions

As used in this chapter:

* * *

(2) Disability

The term "disability" means, with respect to an individual –

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

Title 42 U.S.C. § 12112(a) provides:

§ 12112. Discrimination

(a) General rule

No covered entity 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.

———♦———

STATEMENT OF THE CASE

This case involves Petitioner Delia Ruiz-Rivera's claim that Respondent Pfizer Pharmaceuticals terminated her on the basis of disability in violation of the Americans with Disabilities Act. See 42 U.S.C. § 12112(a) (prohibiting disability-based employment discrimination). Because the case arises from the grant of summary judgment to Pfizer, the record must be considered in the light most favorable to Ms. Ruiz. See *Scott v. Harris*, 127 S. Ct. 1769, 1774-1775 (2007).

1. Ms. Ruiz began working for Pfizer as a packing operator in 1997. App., *infra*, at 27. In the last half of 1999, while she was pregnant with her second child, she developed a herniated disc and began to experience numbness in her extremities; the company granted her disability leave for those conditions. *Id.* at 28-29. Ms. Ruiz went on maternity leave after she gave birth on December 31, 1999, and she was scheduled to return to work on February 25. *Id.* at 29. But her rehabilitation physician, Dr. Oscar Ramos, submitted a certificate that stated that Ms. Ruiz had been diagnosed with carpal tunnel syndrome and a herniated disc. *Id.* Dr. Ramos stated that Ms. Ruiz could return to work only if she adhered to certain restrictions on her activities. *Id.* Based on Dr. Ramos's report and the report of another doctor who diagnosed Ms. Ruiz with depression secondary to her physical conditions, the company sent her home for another month. *Id.*

At a return-to-work examination on March 27, Ms. Ruiz insisted to the company doctor, a Dr. Félix, that Pfizer "implement[ ] the restrictions specified by" her physician. *Id.* at 30. But the company doctor responded "that there was no opportunity for her to remain working at the plant with these limitations." *Id.* He sent Ms. Ruiz home pending a further report from her doctor. *Id.* Three days later, Ms. Ruiz returned with Dr. Ramos's additional report. *Id.* In that report, Dr. Ramos stated that he had diagnosed Ms. Ruiz with carpal tunnel syndrome, tendonitis, and herniated discs, and that "[s]he should have some restrictions at her work area so she can do her job with minimal deterioration of her condition." *Id.* at 30-31. Those restrictions included avoiding repetitive motions and the "hands-over-the-shoulders position," not lifting more than 25 pounds at a time, and limiting "lifting-carrying-pushing-pulling-holding-bending." *Id.*

Reviewing those restrictions with Ms. Ruiz's supervisor, the company doctor concluded that Ms. Ruiz could no longer do her job and should not return to work. *Id.* at 31. And Frances Guzman, who worked as the company's Assistant Personnel Manager, "advised plaintiff that with the conditions imposed by her physicians she had no chance of working either at Pfizer or at any other pharmaceutical company in the industry." *Id.* Ms. Ruiz refused to return to work unless the company heeded the restrictions her physician had imposed, and the company terminated her. *Id.* at 31-32.

2. Ms. Ruiz filed this lawsuit in the United States District Court for the District of Puerto Rico on June 5, 2001. C.A. Dkt. #1. As relevant here, Ms. Ruiz claimed that the company had discriminated against her on the basis of an actual or perceived disability in violation of the ADA. C.A.J.A. 7-8 (Amd. Cplt. ¶¶ 41-51). Among other things, the complaint specifically alleged that "Pfizer terminated plaintiff because of her *perceived* disability." *Id.* at 7 (Amd. Cplt. ¶ 45) (emphasis added). The complaint included a number of allegations that touched on the company's knowledge of and perceptions about the extent of Ms. Ruiz's impairments. See *id.* at 4 (Amd. Cplt. ¶ 23) (Ms. Ruiz's obstetrician "informed her that someone from Pfizer had called making inquiries as to her leg[ ] conditions"); *id.* at 5 (Amd. Cplt. ¶ 26) (the company required Ms. Ruiz "to report on a weekly basis for medical evaluation with the company's physician"); *id.* at 6 (Amd. Cplt. ¶ 36) (company doctor "confirm[ed] the work restrictions that Ms. Ruiz-Rivera had" and then "told her that with those restrictions she could not stay there because there was no position available to her").

On January 31, 2003, Pfizer filed a motion for summary judgment. C.A.J.A. 20-56. The company argued that Ms. Ruiz did not have a "disability" as defined in the ADA and therefore could not invoke the protection of the statute. *Id.* at 28-30. The district court granted that motion in part and denied it in part. App., *infra*, at 52. In particular, the court concluded that Ms. Ruiz's impairments did not actually

substantially limit any of her major life activities, *id.* at 47-48, but that Ms. Ruiz had created a triable issue as to whether the company "regarded" her impairment as so limiting, *id.* at 48-51. See 42 U.S.C. § 12102(2) (defining "disability" as "a physical or mental impairment that substantially limits one or more of the major life activities," a "record of such an impairment," or "being regarded as having such an impairment").

The court concluded that "[a]ccording to the evidence presented, Pfizer mistakenly believed that plaintiff's impairment substantially limited her ability to work in the entire pharmaceutical industry." App., *infra*, at 50. The court pointed to the company doctor's statement that "with these limitations [plaintiff] cannot stay in the plant" as well as the company Assistant Personnel Manager's statement that Ms. Ruiz's restrictions prevented her from "working either at Pfizer or at any other pharmaceutical company." *Id.* at 50-51. Accordingly, the district court permitted Ms. Ruiz's ADA claim to proceed on the basis that the company perceived her impairment as substantially limiting. *Id.* at 51.

Pfizer filed a motion for reconsideration. C.A.J.A. 376-386. The company argued, for the fist time in this litigation, that an employer's response to the recommendations of an employee's treating physician cannot establish a perceived disability. *Id.* at 383. In a one-page order without any explanation, the district court granted the motion to reconsider on January 8,

2007, and entered final judgment for the company. App., *infra*, at 54-55.

3. The First Circuit affirmed, App., *infra*, at 25. In an opinion by Judge Smith (sitting by designation from the District of Rhode Island), joined by Judges Lipez and Howard, the court offered two reasons for affirming the grant of summary judgment.

First, the court concluded that "regarded as claims under the ADA require an even greater level of specificity [in pleading] than other claims." *Id.* at 16. "In order to allege an actionable regarded as claim," the court continued, "a plaintiff must select and identify the major life activity that she will attempt to prove the employer regarded as being substantially limited by her impairment." *Id.* Applying those principles, the court found Ms. Ruiz's complaint to have been deficient because the complaint did not allege specific facts "to explain any false perception on Pfizer's part" or to identify "any non-limiting impairment which Pfizer mistakenly believed to be substantially limiting." *Id.* at 15-16. The complaint's allegation that the company "terminated plaintiff because of her *perceived* disability," C.A.J.A. 7 (Amd. Cplt. ¶ 45) (emphasis added), and the factual allegations describing Pfizer's knowledge of and response to Ms. Ruiz's impairments, *id.* at 4-6 (Amd. Cplt. ¶¶ 23, 26, 36), were apparently insufficient. See App., *infra*, at 17 ("It simply will not do for a plaintiff to fail to plead with adequate specificity facts to support a regarded as claim, all-the-while hoping to play that card if her initial hand is a dud.").

Second, and turning to the summary judgment record, the court concluded that all of the evidence supporting the perceived-disability allegations involved the company's implementation of the recommendations of Ms. Ruiz's own doctors. *Id.* at 18-22. But the court held, as a matter of law, that a plaintiff "may not rely exclusively on her employer's recognition or implementation of the restrictions imposed by her own physician to establish a regarded as claim." *Id.* at 20. Applying that rule, the court held that neither the statements of the company doctor nor the statements of the company's Assistant Personnel Manager could support Ms. Ruiz's claim, because those statements were "based entirely on Ruiz Rivera's own doctor's recommendations." *Id.* at 21.

REASONS FOR GRANTING THE WRIT

The First Circuit's decision in this case exacerbated one conflict in the circuits and created another. And it did so by imposing limitations on ADA perceived-disability claims that appear nowhere in the statutory text (or, for that matter, the legislative history). That result is especially troubling, because the "regarded as" prong of the ADA's disability definition is "particularly important for individuals with stigmatic conditions." S. Rep. No. 101-116 at 24 (1989). See also *Vande Zande v. Wisconsin Dept. of Admin.*, 44 F.3d 538, 541 (7th Cir. 1995) (explaining that the ADA's coverage of people with perceived disabilities, "although at first glance peculiar, actually makes a better fit

with the elaborate preamble to the Act, in which people who have physical or mental impairments are compared to victims of racial and other invidious discrimination").

There is a longstanding conflict in the circuits regarding whether a plaintiff may rely on her employer's recognition of the restrictions imposed by her doctor to show that the employer "regarded" her as having a substantially limiting impairment under 42 U.S.C. § 12102(2)(C). In its decision here, the First Circuit joined the Sixth, Eighth, and Tenth Circuits in holding that, as a matter of law, the employer's recognition of such restrictions may not establish a perceived disability. But the Third and Ninth Circuits have ruled directly to the contrary. Because the reports of and restrictions imposed by an employee's personal physician will often be crucial in informing the perceptions of the employer, and because the statutory text draws absolutely no distinction among the various sources of information on which an employer's perception of an employee's impairment may be based, the First Circuit's holding calls out for this Court's review.

Moreover, by holding that plaintiffs must plead ADA "regarded as" claims with unusual specificity, the First Circuit created a conflict with decisions of the Sixth, Seventh, and Ninth Circuits – all of which have held that courts have no power to impose a heightened pleading standard on ADA plaintiffs. On this issue, as well, the First Circuit's holding has absolutely no basis in the statute, and it is flatly

inconsistent with this Court's cases. This Court's review is necessary to resolve the conflict the First Circuit created and to clarify that ADA claims are not subject to a heightened pleading standard.

A. By Holding, as a Matter of Law, that an Employer's Recognition of Limitations Imposed by an Employee's Doctor Must Be Disregarded in a "Regarded As" Case, the Court of Appeals Exacerbated a Circuit Conflict and Contravened the Plain Text of the ADA

1. It is undisputed that Pfizer's company doctor determined that Ms. Ruiz's impairments barred her from returning to her position at the bottling plaint. See p. 4, *supra*. And Ms. Ruiz testified that the company's Assistant Personnel Manager "told her that because of the conditions imposed by her physicians, there was no opportunity for her to work at Pfizer or at any other pharmaceutical company." App., *infra*, at 6. Under the standards this Court set forth in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), that evidence should suffice to create a genuine issue of material fact on the question whether the company regarded Ms. Ruiz's impairments as substantially limiting the major life activity of working. See *id.* at 491-493 (individual is regarded as substantially limited in working if employer perceives her impairment as disqualifying her from "a broad class of jobs").

But the court of appeals affirmed the grant of summary judgment to the company while explicitly

refusing to consider either the company doctor's determinations or the Assistant Personnel Manager's statements. The court did so because it held, as a matter of law, that an employee "may not rely exclusively on her employer's recognition or implementation of the restrictions imposed by her own physician to establish a regarded as claim." App., *infra*, at 20. See also *id.* at 21 ("Any reliance on Dr. Felix's statements or opinion, based entirely on Ruiz Rivera's own doctor's recommendations, cannot support a regarded as claim."). In so holding, the First Circuit relied on the Eighth Circuit's decision in *Breitkreutz v. Cambrex Charles City, Inc.*, 450 F.3d 780 (8th Cir. 2006), and the Tenth Circuit's decision in *Lusk v. Ryder Integrated Logistics*, 238 F.3d 1237 (10th Cir. 2001).

In *Breitkreutz*, 450 F.3d at 783, the Eighth Circuit held that the plaintiff had not presented sufficient evidence to overcome summary judgment on the "regarded as" question, because his employer merely implemented the restrictions imposed by the plaintiff's own physician: "If a restriction is based upon the recommendations of physicians, then it is not based upon myths or stereotypes about the disabled and does not establish a perception of disability." In *Lusk*, 238 F.3d 1242, the Tenth Circuit similarly held that the plaintiff could not overcome summary judgment on the "regarded as" question, because "Defendant's perception of Plaintiff was not based on speculation, stereotype or myth, but on the doctor's written evaluations of Plaintiff's condition." See also *id.* at 1241 ("Where the recognition of Plaintiff's

limitations is not an erroneous perception, but is instead a recognition of fact, a finding that Plaintiff was regarded as disabled is inappropriate."). Although the First Circuit did not cite the case, the Sixth Circuit adopted the same rule in *Gruener v. Ohio Casualty Insurance Co.*, 510 F.3d 661, 665 (6th Cir. 2008) (because defendant's "understanding of [plaintiff's] impairments and how they limited her simply tracked the specific and valid restrictions prescribed by her own doctor," the plaintiff's "evidence failed to warrant a regarded-as-disabled instruction").

But the holdings of the Sixth, Eighth, and Tenth Circuits, along with that of the First Circuit here, conflict with holdings of the Third and Ninth Circuits on the same question. Judge Becker's opinion for the Third Circuit in *Taylor v. Pathmark Stores, Inc.*, 177 F.3d 180 (3d Cir. 1999), is particularly close to this case. There, as here, the defendant employer concluded that the restrictions imposed by the plaintiff's physician would disqualify the plaintiff from performing a wide range of positions. Holding that the plaintiff had presented sufficient evidence that his employer regarded him as disabled, the court observed that "the statement in Pathmark's May 1996 letter that he was unable to perform *any* Pathmark job, even with accommodation, suggests a perception of limits that would likely constitute substantial limitation in many major life activities" – including the major life activity of working. *Id.* at 188. The court specifically rejected the argument that, because

the defendant relied on the report of the plaintiff's own doctor, it could not be held to have regarded the plaintiff as having a disability. See *id.* at 190-191. In *Holihan v. Lucky Stores, Inc.*, 87 F.3d 362, 366 (9th Cir. 1996), cert. denied, 520 U.S. 1162 (1997), the Ninth Circuit reversed a grant of summary judgment and held that the plaintiff employee had submitted sufficient evidence from which a jury could conclude that his employer regarded him "as suffering from a disabling mental condition that substantially limited his ability to work." In support of that ruling, the court noted that the employer had "received several doctors' reports diagnosing Holihan with depression, including the reports of Drs. Strickler and Cramer" – two of the plaintiff's treating professionals. *Id.*[1]

These decisions squarely conflict with the court of appeals' holding here. This Court's intervention is necessary to resolve the conflict.

2. The court of appeals did not just exacerbate a conflict in the circuits. It also contravened the plain text of the ADA. The statute provides no support for the First Circuit's rule that an "employer's recognition or implementation of the restrictions imposed by [the plaintiff's] own physician" must be ignored in determining whether an employer regarded an

[1] See also *Riemer v. Illinois Dept. of Transportation*, 148 F.3d 800, 807 (7th Cir. 1998) (sufficient evidence that employer regarded employee as disabled where, based on an examining doctor's recommendation, supervisor concluded that employee could not safely work around dust and fumes).

employee as having a disability. The statute defines "disability" as "having a physical or mental impairment that substantially limits one or more of the major life activities," "a record of such an impairment," or "being regarded as having such an impairment." 42 U.S.C. § 12102(2). When an employer perceives an individual as having an impairment that substantially limits major life activities, the "regarded as" language is, by its plain terms, satisfied – regardless of the facts on which the employer's perception is based. Nothing in the statute excludes cases in which the employer relies on a report of the plaintiff's physician from the "regarded as" provision, and the court of appeals therefore had no power to read such an exception into the statute. See *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 211-212 (1998) (refusing to read unexpressed exceptions into the ADA's plain text).

Absent a basis in the text, a court has no power to erect *per se* rules barring particular classes of evidence from, or requiring particular classes of evidence in, a statutory cause of action. This Court made that point clear in *Desert Palace v. Costa*, 539 U.S. 90 (2003). *Desert Palace* held that courts could not require plaintiffs to provide direct evidence of discrimination to obtain a "mixed-motive" instruction under 42 U.S.C. § 2000e-2(m), a provision of the Civil Rights Act of 1991. The Court explained that "Section 2000e-2(m) unambiguously states that a plaintiff need only 'demonstrat[e]' that an employer used a

forbidden consideration with respect to 'any employment practice,'" and that "[o]n its face, the statute does not mention, much less require, that a plaintiff make a heightened showing through direct evidence." *Id.* at 98-99 (quoting 42 U.S.C. § 2000e-2(m)). And the Court held that "where, as here, the words of the statute are unambiguous, the judicial inquiry is complete." *Id.* at 98 (internal quotation marks omitted).[2] The same analysis applies here. The ADA's "regarded as" language, on its face, applies to *any* case in which the plaintiff is "regarded as having such an impairment," 42 U.S.C. § 12102(2)(C), without mentioning – much less excluding – cases in which the employer's perception is based on a report of the plaintiff's physician. The court of appeals erred by going beyond the words of the statute.

The First Circuit offered absolutely no justification for its rule that a plaintiff "may not rely exclusively on her employer's recognition or implementation of the restrictions imposed by her own physician to establish a regarded as claim." App., *infra*, at 20. And the cases on which the court relied offered only the slimmest of justifications at best. In *Lusk*, for example, the Tenth Circuit suggested that an employer's perception of an

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[2] See also *Sprint/United Management Co. v. Mendelsohn*, 128 S. Ct. 1140, 1147 (2008) (explaining that it would be an abuse of discretion for a district court to "appl[y] a *per se* rule excluding" evidence of alleged acts of discrimination by defendant's supervisors who played no part in the alleged discrimination against plaintiff).

employee's disability can satisfy the "regarded as" language only in cases where that perception is "based on speculation, stereotype, or myth." *Lusk*, 238 F.3d at 1242. A perception that rests "on the doctor's written evaluations of Plaintiff's condition," the court seemed to conclude, cannot meet that requirement. *Id.* The Eighth Circuit in *Breitkreutz* was more explicit on the point. That court asserted that the "provision addressing perceived disabilities is intended to combat the effects of archaic attitudes, erroneous perceptions, and myths that work to the disadvantage of persons with or regarded as having disabilities," and it concluded that "[i]f a restriction is based upon the recommendations of physicians, then it is not based upon myths or stereotypes about the disabled." *Breitkreutz*, 450 F.3d at 784 (internal quotation marks omitted).

These courts may well be correct that the *goal* of the "regarded as" provision is to "combat the effects of archaic attitudes, erroneous perceptions, and myths." *Id.* See also *Sutton*, 527 U.S. at 489 (stating that, where individuals are covered by the "regarded as" prong "it is necessary that a covered entity entertain misperceptions about the individual – it must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting," and that these "misperceptions often 'resul[t] from stereotypic assumptions not truly indicative of . . . individual ability.'") (quoting 42 U.S.C. § 12101(7)). But nothing in the

statute requires a plaintiff to *prove* that the employer misperceived the limitations imposed by her condition *to establish coverage under the "regarded as" prong*. All a plaintiff must show to establish coverage under that prong is that the employer "regarded" her as having a substantially limiting impairment. 42 U.S.C. § 12102(2)(C). Nothing in the "regarded as" provision turns on whether the employer's perception of the plaintiff's impairment was correct.[3] Rather, the statute addresses the correctness or incorrectness of the employer's perception in a separate provision that requires the plaintiff to show that she was a "qualified individual with a disability," *id.* § 12112(a) – that is, that "with or without reasonable accommodation," she "can perform the essential functions of the employment position," *id.* § 12111(8).

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[3] In *Sutton*, the Court turned to the "regarded as" prong only after it held that the plaintiffs did not *in fact* have impairments that substantially limited major life activities; it is therefore unsurprising that the language of the Court's opinion presumes that an individual seeking coverage under the "regarded as" prong does not actually have a substantially limiting impairment. But nothing in *Sutton* or the statutory language makes the ADA's present- and perceived-disability prongs mutually exclusive, or requires resort to one only if the other is disproved. Indeed, both the legislative history and the EEOC's enforcement guidance are directly to the contrary. See H.R. Rep. No. 101-485, Pt. 3, at 31 (1990) (stating that a "person who is covered because of being regarded as having an impairment is not required to show that the employer's perception is inaccurate"); EEOC Compliance Manual § 902.8(a) ("The legislative history to the Act makes clear that the individual does not have to demonstrate that the employer's perception is wrong.").

The reports of an employee's doctor will often be the key source of information on which an employer relies in developing its perception about an employee's impairment. Although an employer's reaction to those reports will not *always* demonstrate that the employer "regarded" the employee as having a disability, the court of appeals utterly disregarded the statutory text in concluding that the employer's reaction may *never* be considered *as a matter of law*. This Court's intervention is necessary to vindicate the supremacy of the text Congress adopted.

B. By Holding That "Regarded As" Allegations Are Subject to a Heightened Pleading Standard, the Court of Appeals Contravened the Holdings of Other Circuits and of This Court

1. A second aspect of the First Circuit's decision calls out for this Court's review. The court of appeals read this Court's opinion in *Sutton* for the proposition "that regarded as claims under the ADA require an even greater level of specificity [in pleading] than other claims." App., *infra*, at 16. "In order to allege an actionable regarded as claim," the court of appeals held, "a plaintiff must select and identify the major life activity that she will attempt to prove the employer regarded as being substantially limited by her impairment." *Id.* The court did not deny that the complaint contained a number of specific allegations concerning Ms. Ruiz's interactions with Pfizer officials and their response to her diagnoses. See p. 5, *supra*. And the court acknowledged that Ms. Ruiz's

complaint specifically alleged that "'Pfizer terminated plaintiff because of her *perceived* disability.'" *Id.* at 15 (quoting Amd. Cplt. ¶ 45, emphasis in court of appeals' opinion). Although the court recognized that "this paragraph could signal to a defendant that plaintiff is asserting a regarded as claim," it concluded that the complaint did not allege sufficiently specific facts to support such a claim: "with no facts alleged to explain any false perception on Pfizer's part, and no facts alluding to any non-limiting impairment which Pfizer mistakenly believed to be substantially limiting, this allusion falls far short of the mark." *Id.* at 15-16. Because Ms. Ruiz "fail[ed] to plead with adequate specificity" the "facts [that] support[ed]" her allegation that Pfizer regarded her as having a disability, the court of appeals concluded that her complaint should have been dismissed. App., *infra*, at 17.

By adopting a heightened pleading standard for a plaintiff's allegations that she is covered by the ADA, the First Circuit created a conflict with decisions of the Sixth, Seventh, and Ninth Circuits. See *EEOC v. J.H. Routh Packing Co.*, 246 F.3d 850, 854 (6th Cir. 2001) (holding that ordinary notice pleading principles apply to the "disability" question under the ADA); *Mattice v. Memorial Hosp.*, 249 F.3d 682, 685 n.3 (7th Cir. 2001) (rejecting "heightened pleading standard for ADA claims"); *Skaff v. Meridien North America Beverly Hills LLC*, 506 F.3d 832, 841-842 (9th Cir. 2007). Indeed, the Sixth Circuit in *J.H. Routh* expressly rejected the notion, adopted by the

First Circuit here, that the plaintiff's complaint must specifically "identify the major life activity that she will attempt to prove the employer regarded as being substantially limited by her impairment." App., *infra*, at 16. To the contrary, the Sixth Circuit held, "so long as the complaint notifies the defendant of the claimed impairment, the substantially limited major life activity need not be specifically identified in the pleadings." *J.H. Routh Packing*, 246 F.3d at 854. The court reasoned that "[a]n accusation of discrimination on the basis of a particular impairment provides the defendant with sufficient notice to begin its defense against the claim." *Id.* And the Seventh Circuit in *Mattice* expressly rejected the notion, adopted by the First Circuit here, that this Court's decision in *Sutton* adopted a heightened pleading standard. See *Mattice*, 249 F.3d at 685 n.3 ("agree[ing] with the EEOC that *Sutton* did not create a heightened pleading standard"). This Court's intervention is necessary to resolve these conflicts.

The decision of the court of appeals also implicates the significant confusion in the lower courts regarding the scope of this Court's decision in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007). As one leading court of appeals decision has explained, "[t]he issues raised by *Twombly* are not easily resolved, and likely will be a source of controversy for years to come." *Phillips v. County of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008). In particular, the lower courts have expressed uncertainty about the continued vitality of this Court's previously consistent

rejection of heightened pleading requirements outside of the specific contexts in which Fed. R. Civ. P. 9(b) or a federal statute imposes such a requirement. See *Jones v. Bock*, 127 S. Ct. 910, 919-920 (2007); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002); *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993).

The First Circuit here appeared to read *Twombly* as dictating a heightened pleading standard. App., *infra* at 16. But the Third, Ninth, and District of Columbia Circuits have specifically refused to read *Twombly* as departing from this Court's consistent rejection of judicially imposed heightened pleading requirements. See *Phillips*, 515 F.3d at 233 (Third Circuit: "The Court emphasized throughout its opinion that it was neither demanding a heightened pleading of specifics nor imposing a probability requirement. Indeed, the Court cited *Twombly* just days later as authority for traditional Rule 8 and 12(b)(6) principles."); *Skaff*, 506 F.3d at 841-842 (Ninth Circuit: citing *Twombly*, among other cases, for the proposition that "the Supreme Court has repeatedly instructed us not to impose such heightened standards in the absence of an explicit requirement in a statute or federal rule"); *Aktieskelsabet AF 21. November 2001 v. Fame Jeans Inc.*, 525 F.3d 8, 2008 WL 1932768 at *5 (D.C. Cir., Apr. 29, 2008) (holding that "[a]fter decades of such consistency, we will not lightly assume the Supreme Court intended to tighten pleading standards" and that *Twombly* "indicated quite clearly that it meant no such thing"). This

Court's intervention is necessary to resolve that disagreement.[4]

2. The First Circuit's imposition of a heightened pleading standard is flatly inconsistent with this Court's cases. To support its holding, the Court of Appeals relied on this Court's rulings in *Sutton*, *supra*, and *Twombly*, *supra*. Neither case supports imposing a heightened pleading standard on complaints alleging that the defendant "regarded" the plaintiff as having a disability under the ADA.

Nothing in *Sutton* even purports to address the proper standard for pleading claims under the ADA. In upholding dismissal of the complaint there, the

[4] This Court recently granted certiorari to address the application of *Twombly* to suits under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). See *Ashcroft v. Iqbal*, 128 S. Ct. ___ (June 16, 2008). But this Court's decision in that case will not resolve the pleading question presented here. As this Court has recognized, pleading standards in suits against public officials must take account of the qualified immunity defense. See *Crawford-El v. Britton*, 523 U.S. 574, 597-598 (1998) (stating that district courts could "protect[ ] the substance of the qualified immunity defense" in cases against public officials by "insist[ing] that the plaintiff 'put forward specific, nonconclusory factual allegations' that establish improper motive causing cognizable injury in order to survive a prediscovery motion for dismissal or summary judgment") (quoting *Siegert v. Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring in the judgment)). But this case raises no qualified immunity issue; it raises the question whether *Twombly* authorizes a heightened pleading standard *outside* of the context of cases against public officials – a question on which the courts of appeals have also divided.

Court did *not* reason that the complaint failed to allege sufficiently *specific* facts or to meet a heightened pleading standard. The Court simply held, accepting the plaintiffs' allegations as true and applying the ordinary analysis under Fed. R. Civ. P. 12(b)(6), that the plaintiffs' complaint failed to state a claim. See *Sutton*, 527 U.S. at 491 ("Considering the allegations of the amended complaint in tandem, petitioners have not stated a claim that respondent regards their impairment as substantially limiting their ability to work.").

Unlike *Sutton*, this Court's decision in *Twombly* plainly does address pleading standards. But contrary to the First Circuit's apparent interpretation, the *Twombly* Court made clear that it did "not require heightened fact pleading of specifics." *Twombly*, 127 S. Ct. at 1974. The Court specifically reaffirmed its earlier decisions in *Leatherman*, *supra*, and *Swierkiewicz*, *supra*, which rejected any heightened pleading standard outside of the contexts specified in Rule 9(b) or federal statutes. See *Twombly*, 127 S. Ct. 1973-1974. And the Court specifically stated that "we do not apply any heightened pleading standard, nor do we seek to broaden the scope of Federal Rule of Civil Procedure 9, which can only be accomplished by the process of amending the Federal Rules, and not by judicial interpretation." *Id.* at 1973 n.14 (internal quotation marks omitted). And two weeks later, in *Erickson v. Pardus*, 127 S. Ct. 2197 (2007) (*per curiam*), the Court summarily reversed a lower court decision that had applied a heightened pleading

standard. The *Erickson* Court cited *Twombly* for the proposition that "[s]pecific facts are not necessary; the statement need only '"give the defendant fair notice of what the . . . claim is and the grounds upon which it rests."'" *Id.* at 2200 (quoting *Twombly*, 127 S. Ct. at 1964, in turn quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). Especially in light of *Erickson*, the First Circuit's holding can find no support in this Court's cases. This Court's intervention is necessary.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 07-1595

DELIA RUIZ RIVERA,
Plaintiff-Appellant,
v.
PFIZER PHARMACEUTICALS, LLC
Defendant-Appellee.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO
[Hon. Raymond L. Acosta, U.S. District Judge]

Before
Lipez and Howard, Circuit Judges.
and Smith,* District Judge.

Wilma Reveron Collazo, with whom Alberto J. Torrado Delgado was on brief, for appellant.

Mariela Rexach, with whom Carl Schuster and Schuster Aguilo LLP were on brief, for appellee.

March 27, 2008

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* Of the District of Rhode Island, sitting by designation.

SMITH, District Judge. This case presents as a so-called "regarded as" disability claim under the Americans with Disabilities Act ("ADA"). However, as the discussion below reveals, once the layers of argument are stripped away, the regarded as claim is revealed to be a chimera. Thus, the District Court's grant of summary judgment, on reconsideration, as to the regarded as claim was appropriate, and the judgment is affirmed.

I. Facts and Background

In late 1997, appellant Delia Ruiz Rivera ("Ruiz Rivera") began working, on a temporary basis, as a packaging operator in appellee Pfizer Pharmaceutical LLC's ("Pfizer") Puerto Rico facility. Nearly one year later, Ruiz Rivera achieved regular employee status when she was assigned to Pfizer's bottling department. Ruiz Rivera's position as a packaging operator in the bottling department involved pouring pills, bottles, and caps, monitoring the conveyor, packing and inspecting the product, and cleaning machinery.

Ruiz Rivera became pregnant several months after becoming a regular employee. As her pregnancy progressed, she submitted several notes from her doctor to Pfizer informing it of certain medical-related limitations, including a recommendation that she avoid walking long distances, that her shifts be limited, and that she work only in a seated position.

In August 1999, Ruiz Rivera informed Pfizer of several medical problems, including edema, numbness, and continued effects of a potentially herniated disc. Based on her doctor's recommendations, Pfizer, through its in-house physician, Dr. Felix, authorized a short leave of absence. Soon after Ruiz Rivera returned from leave, she submitted to Dr. Felix another medical certificate from Dr. Ramos, her physiatrist, asking that she be excused from work from August 30, 1999 through November 1, 1999, citing her herniated disc-related medical problems. Accordingly, Pfizer granted her temporary non-occupational disability leave until November. Come November, Ruiz Rivera sought and was provided another medical leave until January 1, 2000. She gave birth in late December, at which time her eight-week maternity leave commenced.

At the completion of her maternity leave, Ruiz Rivera submitted to Dr. Felix at Pfizer a medical certificate from Dr. Ramos indicating that she was being treated for carpal tunnel syndrome and lumbo sacral disc herniation. Dr. Ramos indicated that Ruiz Rivera was fit to return to work, with specific limitations, recommended that she avoid repetitive hand motions, placing her hands over her shoulders, lifting, pushing, holding, and bending, and placed a twenty-five pound limitation on how much she could lift. At the same time, Ruiz Rivera presented to Dr. Felix a medical certificate from a different doctor diagnosing her with major depression. Based on these two submissions, Pfizer granted an additional month

of leave benefits to Ruiz Rivera. On March 27, 2000, after Ruiz Rivera had been on authorized leave for nearly seven straight months, she returned to work and insisted that Pfizer implement her doctor's earlier recommendations and restrictions. Dr. Felix informed Ruiz Rivera that there were no opportunities available where she could work with such stringent limitations; however, Dr. Felix agreed to confer with Dr. Ramos, and prepared for him a consultation form regarding Ruiz Rivera's condition, treatment options, and rehabilitation opportunities.

After an additional week of leave, Ruiz Rivera reported back to work at Pfizer. At that time, she provided to Dr. Felix a consultation report which provided, in pertinent part:

> *Diagnosis*
> Left Carpal Tunnel Syndrome
> Both Wrists Tendinitis
> L(subscript 5)S(subscript 1)Discs
> Herniation
>
> These are progressive diseases and may deteriorate her condition. She uses wrists splints at night and gets anti-inflammatory and muscle relaxants, and needs to protect the affected areas from damage. . . . She should have some restrictions at her work area, so she can do her job with minimal deterioration of her condition. These restrictions should last at least six months, but may be longer.

– Avoid repetitive motions of hands
– Avoid hands-over-the shoulders position
– Do not lift over 25 lbs.
– Limit lifting – carrying – pushing – pulling – holding – bending.

Based on the information provided and the restrictions imposed by Dr. Ramos, Dr. Felix concluded that, "[i]n view of this [sic] recommendations and after conversation with [plaintiff's] work area supervisor where she can not perform the essential tasks of her job and needs her hands I do not recommend a RTW [return to work] to prevent further aggravation or lesion. Case discussed [with] HR [Human Resources] for plan of action."

Ruiz Rivera later spoke to Frances Guzman, Pfizer's Assistant Personnel Manager, who advised her that Pfizer did not have to accommodate the restrictions imposed by her doctor because, in Guzman's view, Ruiz Rivera was not disabled under the ADA.[1] Guzman testified at her deposition that she explained to Ruiz Rivera that because she wasn't entitled to accommodation, she should pursue medical leave and again seek temporary non-occupational

[1] At her deposition, Guzman testified as follows:

> [B]ecause there is no permanent disability, and this is exactly how I explained it to her, and it's based on what her physician is saying, I don't have to make an accommodation under the ADA. . . . And then I explained that what her doctor is writing, in fact she cannot perform the duties of a packaging operator . . . but that this is not a qualified condition.

disability insurance. Ruiz Rivera asserts that Guzman also told her that because of the conditions imposed by her physicians, there was no opportunity for her to work at Pfizer or at any other pharmaceutical company. While Pfizer took no action to terminate her at this point, Ruiz Rivera did not return to work after these conversations.

Approximately three months later, in a letter dated June 21, 2000, Pfizer requested that Ruiz Rivera return for a meeting to discuss her health and status. Ruiz Rivera responded by letter shortly thereafter, but did not accept Pfizer's request for a meeting. Approximately six months later, Pfizer again wrote to Ruiz Rivera requesting that she return to work. Ruiz Rivera did not respond. After Ruiz Rivera rebuffed this request, Pfizer officially terminated her employment.[2]

The Amended Complaint (the "Complaint") in this matter alleged numerous violations of federal and Puerto Rico law, including the Americans With Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-12213; the Puerto Rico law counterpart to the ADA, Law No. 44 of July 2, 1985 ("Law 44"); Title VII of the Civil Rights Act, 42 U.S.C. § 2000 *et seq.*; the Pregnancy Discrimination Act; the Puerto Rico Pregnant

[2] By this point, Ruiz Rivera already had begun to pursue her discrimination claims against Pfizer. She filed a formal administrative complaint before the Puerto Rico Labor Department Anti-Discrimination Unit and the Equal Employment Opportunity Commission in May, 2000.

Mothers Protection Act (Act No. 3 of March 13, 1942); the Puerto Rico Sex Discrimination in Employment Act (Act No. 69 of July 6, 1985); the Puerto Rico Discrimination in Employment Act (Act No. 100 of June 30, 1959); and Puerto Rico's Law 80 of May 30, 1976. Through summary judgment, Pfizer moved for dismissal of the Complaint. Soon after, the parties stipulated to dismissal with prejudice of all but the ADA and Law 44 claims. In support of its motion for summary judgment, Pfizer argued that Ruiz Rivera was not disabled within the meaning of the ADA, that she thus could not establish a prima facie case of disability discrimination, and as a result, she was not entitled to any accommodations. In response, Ruiz Rivera asserted that she was disabled under the ADA insomuch as she was "substantially limited in the major life activity of sitting and standing," and that Pfizer's failure to accommodate her disability violated the ADA. In the alternative, she argued in her summary judgment opposition papers that she was not disabled in the sense that she was not "substantially limited on the major life activity of working" but that Pfizer regarded her as such when it refused to accommodate the restrictions imposed by her doctors. Notably, as we discuss in more detail below, this was the first time that Ruiz Rivera raised the regarded as claim with any degree of specificity.[3]

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[3] The claims we discuss herein – failure to accommodate a disability, termination because of one's disability, and termination of employment based on a perceived disability – are all

(Continued on following page)

The District Court conducted a thorough analysis of Ruiz Rivera's failure to accommodate claim. *See generally Ruiz Rivera v. Pfizer Pharm. LLC,* 463 F. Supp. 2d 163 (D.P.R. 2006). The District Court determined that the record was devoid of evidence showing that Ruiz Rivera was disabled in any major life activity, and, accordingly, found that she was not entitled to accommodation. *See id.* at 172-75. The District Court then went on to assess Ruiz Rivera's purported parallel claim that she was not disabled, but that Pfizer terminated her because it mistakenly regarded her as disabled. Based on statements allegedly made by Dr. Felix and Ms. Guzman, the District Court denied summary judgment, stating that Ruiz Rivera had "proffered sufficient evidence to establish a prima facie case that Pfizer regarded her as having an ADA-covered impairment which prevented her from going back to work and which led to her eventual termination." *Id.* at 176-77.[4]

Pfizer filed a Motion for Reconsideration on December 14, 2006, arguing that Ruiz Rivera's regarded as claim was legally insufficient if based solely on statements made in connection with her request

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cognizable causes of action under the ADA. For simplicity, we will refer collectively to the claims dismissed by the District Court as the failure to accommodate claim and to the remaining claim as the regarded as claim.

[4] The District Court simultaneously granted in part and denied in part Pfizer's motions for summary judgment on Ruiz Rivera's Law 44 claims, as Law 44 mirrors the ADA and required no separate analysis.

for reasonable accommodation. Rather than rebut Pfizer's legal argument, in her opposition Ruiz Rivera asserted only that reconsideration was inappropriate. The District Court, in response, reversed course and issued an Order granting Pfizer's Motion for Reconsideration and dismissing the regarded as claim.[5] Ruiz Rivera timely appealed that ruling to this Court, though she did not appeal the District Court's grant of summary judgment on the failure to accommodate claim.

II. Standard of Review

We review a district court's decision to grant or deny a motion for reconsideration under Rules 59(e) and 60(b) of the Federal Rules of Civil Procedure for manifest abuse of discretion. *See Kansky v. Coca-Cola Bottling Co. of New England,* 492 F.3d 54, 60 (1st Cir. 2007); *DiMaio Family Pizza & Luncheonette, Inc. v. Charter Oak Fire Ins. Co.,* 448 F.3d 460, 462 (1st Cir. 2006). This is the case because the district court has substantial discretion and broad authority to grant or deny such a motion. *United States v. 5 Bell Rock Rd.,*

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[5] The January 8, 2007 Order stated, in full:

> Defendant's Motion for Reconsideration (docket No. 67) is GRANTED. Accordingly, the claims for termination due to Plaintiff's perceived disability under the Americans with Disabilities Act and Puerto Rico Law No. 44 of July 2, 1985, as amended, are hereby DISMISSED based on the arguments presented by defendant in its request for reconsideration.

896 F.2d 605, 611 (1st Cir. 1990). A court appropriately may grant a motion for reconsideration "where the movant shows a manifest error of law or newly discovered evidence." *Kansky,* 492 F.3d at 60. Likewise, a motion for reconsideration should be granted if the court "has patently misunderstood a party . . . or has made an error not of reasoning but apprehension." *Sandoval Diaz v. Sandoval Orozco,* No. 01-1022, 2005 WL 1501672, at *2 (D.P.R. June 24, 2005) (quoting *Bank of Waunakee v. Rochester Cheese Sales, Inc.,* 906 F.2d 1185, 1191 (7th Cir. 1990)).[6]

We review the district court's entry of summary judgment de novo. *Desrosiers v. Hartford Life & Accident Co.,* 515 F.3d 87, 92 (1st Cir. 2008). Summary judgment is proper where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). As was the case in the District Court, we must take the facts of record in the light most flattering to the

[6] In her appellate brief, Ruiz Rivera explicitly sets forth as issues on appeal *only* the propriety of the district court's decision to reconsider its denial of summary judgment on the regarded as claims under the ADA and Law 44. Her argument in support, however, addresses primarily the substantive issue of whether summary judgment on these claims was appropriate. We consider the appeal to be both a challenge to the reconsideration and the entry of summary judgment. As to Ruiz Rivera's appeal of the district court's granting of Pfizer's motion for reconsideration, we find no manifest abuse of discretion. As to Ruiz Rivera's appeal of the district court's decision, on reconsideration, to grant Pfizer's motion for summary judgment on the regarded as claims, our discussion follows herein.

nonmovant (here, Ruiz Rivera) and draw all reasonable inferences in her favor. *See Iverson v. City of Boston,* 452 F.3d 94, 98 (1st Cir. 2006); *Dávila v. Corporación De Puerto Rico Para La Difusión Pública,* 498 F.3d 9, 12 (1st Cir. 2007). "Once the moving party avers the absence of genuine issues of material fact, the nonmovant must show that a factual dispute does exist." *Velázquez-Fernández v. NCE Foods, Inc.,* 476 F.3d 6, 10 (1st Cir. 2007). Summary judgment cannot be defeated, however, "by relying on improbable inferences, conclusory allegations, or rank speculation." *Id.*

III. The Regarded As Claim

The ADA provides "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." *Katz v. City Metal Co.,* 87 F.3d 26, 30 (1st Cir. 1996) (quoting 42 U.S.C. § 12101(b)(1)). To establish a prima facie case of disability discrimination under the ADA, a plaintiff must prove: (1) that she was "disabled" within the meaning of the ADA; (2) that she was able to perform the essential functions of her job with or without accommodation; and (3) that she was discharged or adversely affected, in whole or in part, because of her disability. *Id.*; *see also Orta-Castro v. Merck, Sharp & Dohme Química P.R., Inc.,* 447 F.3d 105, 111 (1st Cir. 2006). For purposes of the ADA, one is considered disabled if she (a) has a physical or mental impairment that substantially limits one or more of her major life activities; (b) has a record of

such an impairment; or (c) is regarded as having such an impairment. *Bailey v. Georgia-Pacific Corp.,* 306 F.3d 1162, 1166 (1st Cir. 2002); *see also* 42 U.S.C. § 12102(2). The regarded as prong of the ADA exists to cover those cases "in which 'myths, fears and stereotypes' affect the employer's treatment of an individual," *Plant v. Morton Int'l, Inc.,* 212 F.3d 929, 938 (6th Cir. 2000) (quoting 29 C.F.R. § 1630.2(*l*)), because Congress has recognized that "society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment." *Sullivan v. Neiman Marcus Group, Inc.,* 358 F.3d 110, 117 (1st Cir. 2004) (citations omitted).

Regarded as claims primarily fall into one of two categories: "(1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities." *Sullivan,* 358 F.3d at 117 (citing *Sutton v. United Air Lines, Inc.,* 527 U.S. 471, 489 (1999)).

"A plaintiff claiming that he is 'regarded' as disabled cannot merely show that his employer perceived him as somehow disabled; rather, he must prove that the employer regarded him as disabled within the meaning of the ADA." *Bailey,* 306 F.3d at 1169. When "working" is the major life activity at issue, a plaintiff "must demonstrate not only that the employer thought that he was impaired in his ability

to do the job that he held, but also that the employer regarded him as substantially impaired in 'either a class of jobs or a broad range of jobs in various classes as compared with the average person having comparable training, skills, and abilities.'" *Sullivan,* 358 F.3d at 117 (quoting *Murphy v. United Parcel Serv., Inc.,* 527 U.S. 516, 523 (1999)).

Because Ruiz Rivera did not appeal the District Court's dismissal of her failure to accommodate claim, that issue is not before us. *Ruiz Rivera,* 463 F. Supp. 2d at 177. Therefore, it is the law of the case that for the periods of time relevant to this inquiry Ruiz Rivera was not disabled within the meaning of the ADA, did not have an impairment that substantially limited a major life activity, and Pfizer was not obligated to accommodate her. On appeal, however, Ruiz Rivera appears to continue to press her argument that her impairment renders her disabled and entitles her to accommodation, while simultaneously arguing that Pfizer mistakenly believed her to be substantially limited in a major life activity, regarded her as disabled, and terminated her as a result of this perception of disability.

From our review of Ruiz Rivera's submissions, from the Complaint to her papers on appeal, it is apparent that her regarded as claim is really nothing more than a poorly disguised version of her failure to accommodate claim. In fact, the initial pleading of her regarded as claim was so indistinct that Pfizer did not even move for summary judgment on that claim, apparently because it was unaware it had even been

raised.[7] Indeed, the first time Ruiz Rivera spells out her regarded as theory is in her Opposition to Pfizer's Motion for Summary Judgment, something that Pfizer strenuously, but unsuccessfully objected to as being an "11th Hour" claim. On appeal, with the failure to accommodate claim not on review, the only issue is whether the District Court erred in granting summary judgment on the regarded as claim, on a motion for reconsideration, after initially finding material facts in dispute and denying the motion. We can understand how the District Court may have been tripped up over this issue given the way in which Ruiz Rivera has plead and argued the case. But in the end, we think the District Court got to the right result, as we will explain.

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[7] The Complaint states, in pertinent part:

> 41. Plaintiff alleges that the employer's termination because of plaintiff's disability was in violation of 42 USCA sec. 12112(a).
>
> . . .
>
> 43. Plaintiff is "disabled" as defined by ADA, 42 USCA sec. 12102(2), in that she has a record of a physical and mental impairment that substantially limits one or more of her major life activities in that plaintiff's disability, to wit: a herniated disc and carpal tunnel syndrome. . . .
>
> . . .
>
> 45. On March 27, 1999, Pfizer intentionally discriminated against plaintiff because of her disability as described above in that Pfizer terminated plaintiff because of her perceived disability.

We begin with the Complaint itself. As noted above, Ruiz Rivera's Complaint does not separate her failure to accommodate claim and her regarded as claim into distinct causes of action. The "First Cause of Action," which alleges that Pfizer's "termination because of plaintiff's disability was in violation of" the ADA, contains nothing that would signal to a reader that it intended to raise a regarded as claim. Instead, it affirmatively declares that Ruiz Rivera is "disabled," because "she has a record of a physical and mental impairment that substantially limits one or more of her major life activities." There is no factual allegation that Ruiz Rivera had any non-limiting impairment which Pfizer wrongly regarded as limiting a major life activity; any allegation that Pfizer had "stereotyped" her; or anything in fact that could remotely be characterized as a description of an impairment being mischaracterized or misperceived. Rather, the only indication that a regarded as claim might have been lurking in the shadows of the Complaint was the inclusion of the word "perceived" in one paragraph of her eleven paragraph First Cause of Action.

Paragraph 45 of the Complaint alleges: "On March 27, 1999, Pfizer intentionally discriminated against plaintiff because of her disability as described above in that Pfizer terminated plaintiff because of her *perceived* disability." (Emphasis added). While this paragraph could signal to a defendant that plaintiff is asserting a regarded as claim, with no facts alleged to explain any false perception on

Pfizer's part, and no facts alluding to any non-limiting impairment which Pfizer mistakenly believed to be substantially limiting, this allusion falls far short of the mark. As recently clarified by the Supreme Court, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions," *Bell Atl. Corp. v. Twombly,* 127 S. Ct. 1955, 1965-66 (2007) (citations omitted), and "[t]o survive Rule 12(b)(6) dismissal, [a plaintiff's] well-pleaded facts must 'possess enough heft to sho[w] that [plaintiff is] entitled to relief.'" *Clark v. Boscher,* 514 F.3d 107, 112 (1st Cir. 2008) (quoting *Twombly,* 127 S. Ct. at 1959). The fundamental purpose of our pleadings rules is to protect a defendant's "inalienable right to know in advance the nature of the cause of action being asserted against him." *Rodriguez v. Doral Mortgage Corp.,* 57 F.3d 1168, 1171 (1st Cir. 1995). We do not think that the mere inclusion in the Complaint of the word "perceived" was enough to put Pfizer on notice that Ruiz Rivera was making a regarded as claim against it. On this basis alone, the regarded as claim was subject to dismissal.

Moreover, the Supreme Court has implied that regarded as claims under the ADA require an even greater level of specificity than other claims. *Sutton,* 527 U.S. at 489-91. In order to allege an actionable regarded as claim, a plaintiff must select and identify the major life activity that she will attempt to prove the employer regarded as being substantially limited by her impairment. *See Sutton,* 527 U.S. at 491

(dismissing ADA regarded as claim in part for inadequacy of its pleading, wherein the petitioners failed to state "a claim that respondent regard[ed] their impairment as substantially limiting their ability to work"); *see also Amadio v. Ford Motor Co.,* 238 F.3d 919, 925 (7th Cir. 2001); *Kaiser v. Banc of Am. Inv. Servs., Inc.,* 296 F. Supp. 2d 1219, 1221 (D. Nev. 2003).

It is apparent from our review that at the time Ruiz Rivera filed her Complaint, regarded as disability discrimination was barely an afterthought – a throwaway line in one paragraph of a lengthy complaint. Faced with a well-reasoned and convincing motion for summary judgment on her ADA claim, however, Ruiz Rivera shifted legal theories and sought to re-characterize her Complaint in a way that might parry Pfizer's blow. It simply will not do for a plaintiff to fail to plead with adequate specificity facts to support a regarded as claim, all-the-while hoping to play that card if her initial hand is a dud. *See Fleming v. Lind-Waldock & Co.,* 922 F.2d 20, 24 (1st Cir. 1990) ("[S]ummary judgment is not a procedural second chance to flesh out inadequate pleadings.").

Ruiz Rivera's regarded as claim also fails on substantive grounds. The undisputed facts[8] reveal

[8] From our review of the record, it appears that both Pfizer and Ruiz Rivera submitted, without translation, Spanish language documents as exhibits to their briefs at the summary judgment stage. Documents may not be submitted in a foreign language without translations. *See* L.R.P.R. 10, 43; First Circuit

(Continued on following page)

that, in late March 2007, Ruiz Rivera presented to Dr. Felix at Pfizer a list of workplace restrictions imposed by her doctor based on her various ailments. Her doctor's note indicated that the restrictions should remain in place for at least six months, perhaps longer. Based on these restrictions – and these restrictions alone – Pfizer determined that Ruiz Rivera could not perform the essential tasks of her job as a packaging operator in the bottling department. Ruiz Rivera maintains that she then sought accommodation for her limitations and in doing so requested that she be given a different job at the facility.[9] Pfizer denied Ruiz Rivera's request, and, according to the testimony of Frances Guzman, Assistant Personnel Manager, informed Ruiz Rivera that Pfizer did not

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L.R. 30(d) ("The court will not receive documents not in the English language unless translations are furnished."). As is our policy, we cannot consider materials, or facts adduced solely in reliance on those materials, that have not been translated. Along with its appellate briefing, Pfizer provided translations of relevant exhibits and those portions of Ruiz Rivera's deposition upon which it has relied. However, the record may not be supplemented on appeal in order to cure a defect below. *See Estades-Negroni v. Assocs. Corp. of N. Am.,* 359 F.3d 1, 2 (1st Cir. 2004) ("Depositions that have not been translated into English are not – and cannot on appeal become – part of the record.").

[9] Ruiz Rivera requested a move from the position of packaging operator to one of the following: inspecting blisters, filling out documentation, or entering a lot with a finger machine. She provides no support for her contention that these jobs were available at the plant, or that the restrictions imposed by her doctor would not impact the work performed in these positions.

consider her to be disabled within the meaning of the ADA and Pfizer was under no obligation to accommodate her.

These undisputed facts, of course, were the basis for Ruiz Rivera's now-dismissed claims for termination and failure to accommodate. She asserted that the impairments upon which her doctor's restrictions were based constituted a disability under the ADA which Pfizer was required to reasonably accommodate. Pfizer disagreed, concluding that Ruiz Rivera was not disabled within the meaning of the ADA, and thus not entitled to any accommodation, and the District Court concurred.[10] Now, Ruiz Rivera uses Pfizer's lawful refusal to provide her with the sought-after accommodation as the primary basis for her regarded as claim. Ruiz Rivera does not maintain that she could perform her job as packaging operator in the bottling department with the restrictions imposed by her doctor, but that Pfizer mistakenly believed her unable to do so; rather, she maintains that she could perform her job if granted the accommodations to which the District Court found she was not entitled. This, coupled with Pfizer's refusal to

[10] The District Court determined that the impairment upon which Ruiz Rivera's workplace restrictions were based did not substantially limit her in any major life activity, including performance of manual tasks, working, and sitting and standing. *See Ruiz Rivera v. Pfizer Pharm. LLC,* 463 F. Supp. 2d 163, 172-75 (D.P.R. 2006).

accommodate Ruiz Rivera's request for a different job, is what forms the basis for her regarded as claim.

Specifically, Ruiz Rivera insists that Pfizer mistakenly regarded her as being substantially limited in the life activity of "working." For her support, she cites to two events: first, she cites Dr. Felix's response to the restrictions imposed by her personal physician, wherein Dr. Felix determined she could not return to and work at her position in the bottling department at the Pfizer plant; and second, she points to the comment allegedly made to her by Guzman to the effect that with the conditions imposed by her doctors, she could not perform any work at the Pfizer plant or anywhere else in the pharmaceutical industry. As correctly argued by Pfizer in its Motion for Reconsideration, Ruiz Rivera may not rely exclusively on her employer's recognition or implementation of the restrictions imposed by her own physician to establish a regarded as claim. *See Lusk v. Ryder Integrated Logistics,* 238 F.3d 1237, 1241 (10th Cir. 2001) ("Where the recognition of Plaintiff's limitations is not an erroneous perception, but is instead a recognition of fact, a finding that Plaintiff was regarded as disabled is inappropriate."); *Breitkreutz v. Cambrex Charles City, Inc.,* 450 F.3d 780, 783 (8th Cir. 2006) ("If a restriction is based upon the recommendations of physicians, then it is not based upon myths or stereotypes about the disabled and does not establish a perception of disability."); *see also Wooten v. Farmland Foods,* 58 F.3d 382, 386 (8th Cir. 1995) (employer who terminated

employee because of the restrictions associated with employee's impairment did not regard employee as disabled in the major life activity of working where its perception of employee's impairment was based not on speculation, stereotype, or myth, but on a doctor's written restrictions). Thus, Pfizer's recognition of Ruiz Rivera's impairment, and unwillingness to provide the accommodation that Ruiz Rivera sought, but to which she was not entitled, simply does not transform its actions into regarded as discrimination. Moreover, to allow this regarded as claim to stand would be tantamount to allowing her dismissed failure to accommodate claim in through the back door. *See Nuzum v. Ozark Auto. Distrib., Inc.,* 432 F.3d 839, 848-49 (8th Cir. 2005).

Although the District Court's reconsideration of its original decision to deny summary judgment on the regarded as claim lacked written justification, it is clear to us that dismissal on reconsideration was both appropriate and warranted. Any reliance on Dr. Felix's statements or opinion, based entirely on Ruiz Rivera's own doctor's recommendations, cannot support a regarded as claim. Furthermore, the allegation that Pfizer mistakenly regarded Ruiz Rivera to be substantially limited in the life activity of working makes little sense in the face of the undisputed record that Pfizer told Ruiz Rivera that it did not consider her impairment to constitute an ADA covered disability. Moreover, Pfizer did not terminate Ruiz Rivera's employment when it refused to accommodate the restrictions imposed by her doctor; rather,

it terminated her over nine months later, after numerous unsuccessful attempts to seek updates on her medical status. Finally, the isolated comment allegedly made by Guzman as to the impact of the restrictions on Ruiz Rivera's ability to find work in the pharmaceutical industry is of no help to Ruiz Rivera. At the time that Guzman allegedly made this comment, Pfizer had determined, in reliance upon Ruiz Rivera's own doctor's recommendations, that Ruiz Rivera could not perform the essential functions of her job; her impairment did not constitute a disability under the ADA; and it had no obligation to accommodate her. Thus, while Guzman may have considered the restrictions imposed by Ruiz Rivera's doctors as limiting her chances of finding work elsewhere in the pharmaceutical industry, there simply is no evidence that Ruiz Rivera was refused accommodation or terminated because of this generalization. In light of the record, Guzman's statement at worst amounts to little more than a stray remark, one which standing alone is insufficient to defeat summary judgment. *See Patten v. Wal-Mart Stores E., Inc.,* 300 F.3d 21, 25 (1st Cir. 2002) (direct evidence of discrimination excludes "mere background noise" and "stray remarks"); *Laurin v. Providence Hosp.,* 150 F.3d 52, 58 (1st Cir. 1998) (stray remarks, including "statements by decisionmakers unrelated to the decisional process itself normally are insufficient to establish discriminatory animus") (citations omitted).

IV. Law 44

On reconsideration, the District Court also dismissed Ruiz Rivera's parallel regarded as claim under Law 44 of July 2, 1995, P.R. Laws Ann. tit. 1, §§ 501 et seq., the Puerto Rico analogue to the ADA. Because Law 44 and the ADA are coterminous, we affirm the District Court's dismissal of both regarded as claims. *See Gonzalez v. El Dia, Inc.,* 304 F.3d 63, 74 n.8 (1st Cir. 2002).

V. Law 80

Ruiz Rivera asserts on appeal that the District Court erred when it failed to address and state whether it was going to exercise supplemental jurisdiction over Ruiz Rivera's purported Law 80 claim. While the issue of whether to retain supplemental jurisdiction over any remaining state law claim, and the viability of any such claim, is generally for the District Court in the first instance, we believe the Law 80 claim, on its face, is so inadequately plead that the District Court acted appropriately and committed no error by not addressing the issue.[11]

[11] We note that Ruiz Rivera's appellate brief marks her first substantive mention of the Law 80 claim. Pfizer did not move specifically for its dismissal, Ruiz Rivera did not assert its viability in her Opposition to Pfizer's Motion for Summary Judgment, and the District Court did not address the issue in either of its Orders.

"Puerto Rico Law 80 prohibits dismissal of employees without just cause." *Hoyos v. Telecorp Comm'ns, Inc.,* 488 F.3d 1, 6 (1st Cir. 2007). Nowhere in the Complaint does Ruiz Rivera allege termination for lack of just cause. Likewise, Ruiz Rivera does not raise Law 80 as one of her several causes of action. Instead, the sole reference to Law 80 in the Complaint is in the first paragraph, titled "Introduction," which lists Law 80 as one of many statutes under which the action was brought. There are no facts plead in support of this claim, and it is not raised in her Third Cause of Action, which alleges violation of various laws of Puerto Rico, specifically "Art. II section 7 of the Constitution of Puerto Rico; Act 100 of June 30, 1959, Act 3 of March 13, 1942, Act 69 of July 6, 1985 and Act 60 of May 30, 1976."

Thus, it appears on the face of the Complaint that the Law 80 claim fails to meet the most basic of pleading requirements, as it consists of nothing more than a solitary statutory reference, with nothing to support it. A plaintiff may not simply throw a statutory reference into a complaint hoping to later flesh out its claim with facts in support. "[A] simple request for relief without stating any grounds therefor is inadequate." *Pujol v. Shearson/Am. Express, Inc.,* 829 F.2d 1201, 1207 (1st Cir. 1987). Because the reference to Law 80 was so fleeting and inadequate, there was nothing for the District Court to review. There was no error in its non-review of this non-issue.

VI. Conclusion

For the reasons stated above, the District Court's January 8, 2007 Order is ***AFFIRMED***.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

DELIA RUIZ RIVERA, Plaintiff, v. PFIZER PHARMACEUTICAL LLC, Defendant.	)	CIVIL NO. 01-1757 (RLA)

ORDER IN THE MATTER OF PLAINTIFF'S DISABILITY CLAIMS

Plaintiff instituted these proceedings alleging discrimination based on her disability as well as her sex. Only the claims asserted under the Americans with Disabilities Act ("ADA")[1] and Law No. 44 of July 2, 1985, as amended, ("Law 44")[2] remain pending[3] which defendant has moved to dismiss by way of summary judgment. The court having reviewed the arguments presented by the parties as well as the documents in the court's record, FINDS as follows:

[1] 42 U.S.C. § 12101-12213.

[2] P.R. Laws Ann. tit. 1, §§ 501-511 (supp.2006).

[3] *See,* Partial Judgment Dismissing Sexual Harassment and Pregnancy Discrimination Claims (docket No. 44).

I. BACKGROUND

According to plaintiff, defendant refused to provide her with the necessary accommodation at work and subsequently terminated her from employment due to her disability. In the alternative, plaintiff argues that she was terminated "because of her perceived disability."[4] Defendant, on the other hand, contends that plaintiff is not disabled within the meaning of ADA nor was she perceived as disabled.

II. THE FACTS

The following uncontested relevant facts appear from the evidence submitted in this case:

1. Plaintiff commenced working with the defendant on a temporary basis as a packaging operator in defendant's Bottling Department at the end of 1997.

2. In November 1998, plaintiff became a regular employee continuing in the same position. On June 1, 1999, plaintiff submitted a medical certificate from her gynecologist, Dr. Gonzalez Camacho, indicating that plaintiff was 8 weeks pregnant and recommending that she avoid walking long distances.

3. No adjustments to her work demands were provided in response thereto.

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[4] Amended Complaint (docket No. 13) ¶ 45.

4. On August 14, 1999, plaintiff tendered another medical certificate from Dr. Gonzalez Camacho informing that plaintiff was now 18 weeks pregnant and was suffering from edema in her legs and feeling numbness in her extremities. He recommended that she should only work day shifts and in a seated position. On August 16, 1999, Dr. Gonzalez Camacho specified that this recommendation should extend until January 3, 2000.

5. The request for a seated accommodation was prompted by plaintiff's herniated disc.

6. No accommodation was provided at this time. Rather, Dr. Felix, Pfizer's in-house physician, authorized plaintiff a one-week leave of absence from August 16, 1999, until August 22, 1999.

7. On August 23, 1999, plaintiff was evaluated by Dr. Felix, who allowed her to return to her regular work without restrictions "pending coordination to work sitting down."

8. One week later, on August 30, 1999, plaintiff submitted a medical certificate signed by Dr. Oscar Ramos, a physiatrist. Dr. Ramos indicated that he had evaluated plaintiff on that day due to a left lumbo-sacral radiculopathy probably due to a herniated disc and that she would start medical treatment. The physician advised that plaintiff should be excused from work from August 30, 1999, to November 1, 1999.

9. Accordingly, plaintiff was authorized medical leave under the temporary non-occupational disability leave (SINOD) for these conditions from September 1, 1999, to November 1, 1999.

10. On November 2, 1999, plaintiff was again authorized a SINOD leave through January 1, 2000, for her back condition.

11. Plaintiff gave birth to her second child on December 31, 1999, and was authorized an eight-week maternity leave through February 24, 2000.

12. On February 25, 2000, the day plaintiff was due to return to work, she submitted a medical certificate signed by Dr. Ramos indicating that plaintiff was being treated for left Carpal Tunnel Syndrome and Lumbo Sacral Disc Herniation. The physician indicated that although plaintiff was fit to return to work there were some restrictions that should be implemented at her work. These restrictions were:

- Avoid repetitive motions of hands.
- Avoid hand-over-shoulders position.
- Limit lifting-pushing-holding-bending.
- Do not lift over 25 lbs.

13. On February 25, 2000, plaintiff also submitted a certificate from Dr. Norberto Pellot Moran who diagnosed her with a major depression caused by the herniated disc. Accordingly, on that day plaintiff was granted SINOD benefits through March 25, 2000.

14. Plaintiff returned to work on March 27, 2000, whereupon she was evaluated by Dr. Felix to ensure she was fit to return to work. At that time plaintiff insisted on defendant implementing the restrictions specified by her physiatrist. However, Dr. Felix indicated that there was no opportunity for her to remain working at the plant with these limitations. Dr. Felix telephoned Dr. Ramos to evaluate plaintiff and subsequently discuss her therapeutic options.

15. Dr. Felix prepared a consultation form for Dr. Ramos for evaluation and recommendations regarding plaintiff's treatment options and rehabilitation to perform her tasks at work.

16. Plaintiff was sent home until further notice and until receiving her physiatrist's opinion.

17. On March 30, 2000, plaintiff reported back to work. She was seen by Dr. Felix for her fit for duty evaluation at which time she provided him the consultation report from Dr. Ramos which, in pertinent part, reads:

> Diagnosis
>
> Left Carpal Tunnel Syndrome
> Both Wrists Tendinitis
> L5S1 Discs Herniation
>
> These are progressive diseases and may deteriorate her condition. She uses writs splinters at night and gets anti-inflammatory and muscle relaxants, and needs to protect the affected areas from damage.

> Actually she is not a surgical candidate for CTS or HNP.
>
> She should have some restrictions at her work area, so she can do her job with minimal deterioration of her condition. These restrictions should last at least six months, but may be longer.
>
> – Avoid repetitive motions of hands
>
> – Avoid hands-over-the shoulders position
>
> – Do not lift over 25 lbs.
>
> – Limit lifting-carrying-pushing-pulling-holding-bending.

18. Dr. Felix concluded that, "[i]n view of this [sic] recommendations and after conversation with [plaintiff's] work area supervisor where she can not perform the essential tasks of her job and needs her hands I do not recommend a RTW [return to work] to prevent further aggravation or lesion. Case discussed [with] HR [Human Resources] for plan of action."

19. Frances Guzman, Pfizer's Assistant Personnel Manager, advised plaintiff that with the conditions imposed by her physicians she had no chance of working either at Pfizer or at any other pharmaceutical company in the industry.

20. Plaintiff did not return to work.

21. On December 22, 2000 Pfizer sent plaintiff a letter requesting her to report to work on December 28, 2000. Plaintiff did not appear nor did she excuse her absence.

22. On January 16, 2001 plaintiff was given an ultimatum. Either she reported to work by January 22, 2001 or she would be terminated.

III. SUMMARY JUDGMENT STANDARD

Rule 56(c) Fed. R. Civ. P., which sets forth the standard for ruling on summary judgment motions, in pertinent part provides that they shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Sands v. Ridefilm Corp.,* 212 F.3d 657, 660-61 (1st Cir.2000); *Barreto-Rivera v. Medina-Vargas,* 168 F.3d 42, 45 (1st Cir.1999). The party seeking summary judgment must first demonstrate the absence of a genuine issue of material fact in the record. *DeNovellis v. Shalala,* 124 F.3d 298, 306 (1st Cir.1997). A genuine issue exists if there is sufficient evidence supporting the claimed factual disputes to require a trial. *Morris v. Gov't Dev. Bank of Puerto Rico,* 27 F.3d 746, 748 (1st Cir. 994); *LeBlanc v. Great Am. Ins. Co.,* 6 F.3d 836, 841 (1st Cir.1993), *cert. denied,* 511 U.S. 1018, 114 S.Ct. 1398, 128 L.Ed.2d 72 (1994). A fact is material if it might affect the outcome of a lawsuit under the governing law. *Morrissey v. Boston Five Cents Sav. Bank,* 54 F.3d 27, 31 (1st Cir. 1995).

"In ruling on a motion for summary judgment, the court must view 'the facts in the light most favorable to the non-moving party, drawing all reasonable

inferences in that party's favor.'" *Poulis-Minott v. Smith,* 388 F.3d 354, 361 (1st Cir. 2004) (citing *Barbour v. Dynamics Research Corp.,* 63 F.3d 32, 36 (1st Cir. 1995)).

Credibility issues fall outside the scope of summary judgment. "'Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.'" *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) (citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). *See also, Dominguez-Cruz v. Suttle Caribe, Inc.,* 202 F.3d 424, 432 (1st Cir. 2000) ("court should not engage in credibility assessments."); *Simas v. First Citizens' Fed. Credit Union,* 170 F.3d 37, 49 (1st Cir. 1999) ("credibility determinations are for the factfinder at trial, not for the court at summary judgment."); *Perez-Trujillo v. Volvo Car Corp.,* 137 F.3d 50, 54 (1st Cir. 1998) (credibility issues not proper on summary judgment); *Molina Quintero v. Caribe G.E. Power Breakers, Inc.,* 234 F.Supp.2d 108, 113 (D.P.R. 2002). "There is no room for credibility determinations, no room for the measured weighing of conflicting evidence such as the trial process entails, and no room for the judge to superimpose his own ideas of probability and likelihood. In fact, only if the record, viewed in this manner and without regard to credibility determinations, reveals no genuine issue as to any material fact may the court enter summary judgment." *Cruz-Baez v. Negron-Irizarry,*

360 F.Supp.2d 326, 332 (D.P.R. 2005) (internal citations, brackets and quotation marks omitted).

In cases where the non-movant party bears the ultimate burden of proof, he must present definite and competent evidence to rebut a motion for summary judgment, *Anderson v. Liberty Lobby, Inc.,* 477 U.S. at 256-257, 106 S.Ct. 2505, 91 L.Ed.2d 202; *Navarro v. Pfizer Corp.,* 261 F.3d 90, 94 (1st Cir. 2001); *Grant's Dairy v. Comm'r of Maine Dep't of Agric.,* 232 F.3d 8, 14 (1st Cir. 2000), and cannot rely upon "conclusory allegations, improbable inferences, and unsupported speculation". *Lopez-Carrasquillo v. Rubianes,* 230 F.3d 409, 412 (1st Cir. 2000); *Maldonado-Denis v. Castillo-Rodríguez,* 23 F.3d 576, 581 (1st Cir. 1994); *Medina-Muñoz v. R.J. Reynolds Tobacco Co.,* 896 F.2d 5, 8 (1st Cir. 1990).

IV. ADA

The ADA prescribes that no employer "shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to . . . discharge of employees . . . and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). The term "discriminate" includes the employer's failure to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability". 42 U.S.C. § 12112(b)(5)(A).

Although the evidentiary paradigm for establishing a prima facie discrimination claim in termination

actions is different from that applicable to a failure to accommodate claim, both causes of action require that the plaintiff be disabled within the meaning of the ADA.

In cases where a plaintiff alleges that an adverse employment action was taken due to a disability the "burden-shifting framework outlined by the Supreme Court in McDonnell-Douglas" is used. *Tobin v. Liberty Mut. Ins. Co.,* 433 F.3d 100, 104 (1st Cir. 2005).

Accordingly, in order to qualify for the ADA's protection in this case, plaintiff has the initial burden of establishing that: (1) she suffers from a "disability" within the meaning of the ADA; (2) she was able to perform the essential functions of her position with or without reasonable accommodation; and (3) the employer's adverse employment actions were based in whole or in part on her disability. *Orta-Castro v. Merck, Sharp & Dohme Quimica P.R., Inc.,* 447 F.3d 105, 111 (1st Cir. 2006); *Tobin,* 433 F.3d at 104; *Bailey v. Georgia-Pacific Corp.,* 306 F.3d 1162, 1166 (1st Cir. 2002); *Carroll v. Xerox Corp.,* 294 F.3d 231, 238 (1st Cir. 2002); *Gillen v. Fallon Ambulance Serv., Inc.,* 283 F.3d 11, 18 (1st Cir. 2002); *Quint v. A.E. Staley Mfg. Co.,* 172 F.3d 1, 9 n. 3 (1st Cir. 1999); *Tardie v. Rehab. Hosp. of Rhode Island,* 168 F.3d 538, 541 (1st Cir. 1999).

A failure-to-accommodate claim, on the other hand, has a different set of requirements, all of which must be met if plaintiff is to survive a motion for summary judgment. The First Circuit Court of Appeals has

listed these as: (a) plaintiff must furnish sufficient admissible evidence that she is a qualified individual with a disability within the meaning of the ADA; (b) that she worked for an employer covered by the ADA; (c) that the employer, despite its knowledge of the employee's physical limitations, did not accommodate those limitations; (d) that the employer's failure to accommodate the known physical limitations affected the terms, conditions, or privileges of the plaintiff's employment. *Orta-Castro,* 447 F.3d at 112; *Tobin,* 433 F.3d at 107; *Higgins v. New Balance Athletic Shoe,* 194 F.3d 252, 264 (1st Cir. 1999).

The term "disability" as defined in the statute is "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102(2)(A). Hence, plaintiff's initial step in establishing a disability claim under the ADA is to present evidence of a physical or mental impairment. *Toyota Motor Mfg., Kentucky, Inc. v. Williams,* 534 U.S. 184, 194, 122 S.Ct. 681, 691, 151 L.Ed.2d 615 (2002).

In making our determination under the ADA, the particular circumstances attendant to plaintiff's condition must be examined. "[T]he existence of a disability [must] be determined in . . . a case-by-case manner." *Toyota,* 534 U.S. at 198, 122 S.Ct. 681. "Whether a person has a disability under the ADA is an 'individualized inquiry.'" *Bailey,* 306 F.3d at 1167 (citing *Sutton v. United Air Lines, Inc.,* 527 U.S. 471, 483, 119 S.Ct. 2139, 144 L.Ed.2d 450 (1999)); *Carroll,* 294 F.3d at 238.[)]

However, having an impairment in and of itself is not sufficient to be entitled to ADA's protection. It is imperative that the impairment also have a substantial effect on a major life activity. *Toyota,* 534 U.S. at 195; *Sullivan v. Neiman Marcus Gp., Inc.,* 358 F.3d 110, 115 (1st Cir. 2004); *Whitlock v. Mac-Gray, Inc.,* 345 F.3d 44, 46 (1st Cir. 2003); *Bailey,* 306 F.3d at 1167; *Carroll,* 294 F.3d at 238.

Hence, evidence of an impairment supported only by a medical diagnosis is inadequate to prove a disability within the provisions of the ADA. "It is insufficient for individuals attempting to prove disability status under this test to merely submit evidence of a medical diagnosis of an impairment." *Toyota,* 534 U.S. at 198; *Whitlock,* 345 F.3d at 46; *Calef v. Gillette Co.,* 322 F.3d 75, 83 (1st Cir. 2003); *Bailey,* 306 F.3d at 1167.

In this regard, a physician's "conclusory assertion of total disability – an assertion lacking elaboration and support in the record – [is not] sufficient to make the individualized showing of [plaintiff's] particular limitations". *Whitlock,* 345 F.3d at 46. *See also, Gonzalez v. El Dia, Inc.,* 304 F.3d 63, 74 (1st Cir. 2002) ("testimony presented by the treating physician [was] highly conclusory.")

"Instead, the ADA requires [that claimants submit] . . . evidence that the extent of the limitation caused by their impairment in terms of their own experience is substantial." *Toyota,* 534 U.S. at 198 (citation and internal marks omitted.) That is, "[a]n

ADA plaintiff must offer evidence demonstrating that the limitation caused by the impairment is substantial in terms of his or her own experience." *Bailey,* 306 F.3d at 1167.

The ADA does not define the term "substantially limits." The Supreme Court has stated that "'substantially' in the phrase 'substantially limits' suggests 'considerable' or 'to a large degree'." *Toyota,* 534 U.S. at 196. "A substantial limitation cannot include any impairment which interferes in only a minor way with the performance of manual tasks, and the phrase 'major life activities' refers to only those activities which are of central importance to daily life." *Benoit,* 331 F.3d at 176 (citations and internal quotation marks omitted).

On the other hand, "'[m]ajor' in the phrase 'major life activities' means important . . . ' Major life activities' thus refers to those activities that are of central importance to daily life." *Toyota,* 534 U.S. at 198; *Bailey,* 306 F.3d at 1167. *See also, Benoit,* 331 F.3d at 176 (if no major life activity is affected the impairment is not considered a "disability" under ADA); *Guzman-Rosario v. United Parcel Service, Inc.,* 397 F.3d 6, 10 (1st Cir. 2005) (whether plaintiff's "condition impinged sufficiently on a 'major life activity' to be treated as disabling."[).]

Temporary conditions are not covered by ADA. "The impairment's impact must also be permanent or long term." *Toyota,* 534 U.S. at 198; *Guzman-Rosario,* 397 F.3d at 10; *Sullivan,* 358 F.3d at 116; *Benoit v.*

Technical Mfg. Corp., 331 F.3d 166, 176 (1st Cir. 2003); *Carroll,* 294 F.3d at 238.

A. DISABLED

We find no evidence in the record showing that plaintiff specifically identified the major life activities that were being purportedly limited by her conditions, either at the time she requested accommodation or when she was allegedly terminated from employment. Faced with this scenario, defendant's arguments address alternate theories of liability under the ADA, premised on either plaintiff's disability based on substantial limitations in performing manual tasks, or substantial limitation in the major life activity of working. The motion is centered on the evidence available to the employer at the relevant period of time which, as previously noted, only made reference to plaintiff's carpal tunnel syndrome, tendinitis, lumbo sacral disc herniation and restrictions regarding: repetitive hand motions; hand-over-shoulders position; lifting-pushing-holding-bending, and lifting over 25 pounds.[5]

(1) Manual Tasks

We agree with the defendant that the record does not support a finding of a substantial impairment to

[5] There is no evidence as to how a weight-lifting restriction of 25 pounds constitutes a significant impairment in plaintiff's particular case.

plaintiff's ability to carry out manual tasks. *See, i.e., Toyota,* 534 U.S. at 196 (plaintiff must "establish a substantial limitation in the specific major life activity of performing manual tasks.") "In order for performing manual tasks to fit into this category – a category that includes such basic abilities as walking, seeing, and hearing – the manual tasks in question must be central to daily life. If each of the tasks included in the major life activity of performing manual tasks does not independently qualify as major life activity, then together they must do so." *Id.* at 197.

"[T]o be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives." *Id.* at 198.

In making its analysis, the court must consider claimant's ability to tend to his own personal hygiene and to carry out personal and household chores. *See, Id.* at 201-202 ("household chores, bathing, and brushing one's teeth are among the types of manual tasks of central importance to people's daily lives, and should have been part of the assessment of whether [claimant] was substantially limited in performing manual tasks.")

The limitations imposed must be substantial. For instance, the Supreme Court has ruled that "changes in [claimant's] life [i.e., avoid sweeping, quit dancing, occasionally seek help dressing and reducing how

often played with children, tended her garden and drove long distances] did not amount to such severe restrictions in the activities that are of central importance to most people's daily lives that they establish a manual task disability as a matter of law." *Toyota,* 534 U.S. at 202.

Further, the inquiry must focus on the daily restrictions actually being imposed by the impairment, not the possible interference with work-related duties. "When addressing the major life activity of performing manual tasks, the central inquiry must be whether the claimant is unable to perform the variety of tasks central to most people's daily lives, not whether the claimant is unable to perform the tasks associated with her specific job." *Id.* at 200. Thus, it is inappropriate for the court to "consider [ ] [claimant's] inability to do such manual work in her specialized assembly line job as sufficient proof that she was substantially limited in performing manual tasks." *Id.* In other words, there is "no support . . . for . . . idea that the question of whether an impairment constitutes a disability is to be answered only by analyzing the effect of the impairment in the workplace." *Id.* at 201.

In her deposition, plaintiff indicated that she was able to spend time and take care of her children; attend church services; read; prepare food at home; change her baby's diapers; drive; sweep and clean her house; wash dishes; move merchandise in her current job; make and receive phone calls, and type.

As defendant points out, plaintiff did have physical limitations which were documented by her physicians, i.e., carpal tunnel syndrome, herniated disc and tendinitis. She failed, however, in demonstrating how these particular conditions substantially limited a major life activity, specifically, her ability to perform manual tasks. The limitations imposed by her condition are circumscribed to a confined type of activities which by no means prevent her from carrying out substantial life activities as mandated by the statute.

(2) Working

As we continue our analysis, we must note the Supreme Court's skepticism to rule that "working" is a major life activity. *Sutton,* 527 U.S. at 492. *See, Guzman-Rosario,* 397 F.3d at 11. ("Awaiting a definite ruling from the Supreme Court otherwise, we have assumed that 'working' is a major life activity and applied the EEOC's framework in [disposing] plaintiffs' ADA claims."[];] *Sullivan,* 358 F.3d at 115 ("We will, as we have done in the past, assume without deciding that work may constitute a major life activity."); *Whitlock,* 345 F.3d at 46 n.1 ("We assume, without deciding, that working may constitute a major life activity for purposes of the ADA.") *Bailey,* 306 F.3d at 1168 n.5 ("We note that there is some doubt a[s] to whether the Supreme Court will ultimately accept 'working' as a major life activity under the ADA.")[.] *See also, Carroll,* 294 F.3d at 239 n.7 (although Supreme Court not yet addressed the issue court has assumed so).

The EEOC regulations,[6] however, define the major life activity of "working" and provide that the term "'substantially limits' means significantly restricted in the ability to perform **either a class of jobs or a broad range of jobs in various classes** as compared to the average person having comparable training, skills and abilities." 29 C.F.R. § 1630.2(j)(3)(I) (emphasis ours).

The EEOC Interpretative Guidance to the regulations provide how an individual's substantial limitation for work under the ADA should be construed:

> An individual is substantially limited in working if the individual is significantly restricted in the ability to perform a class or jobs or a broad range of jobs in various classes, when compared with the ability of the average person with comparable qualifications to perform those same jobs. For example, an individual who has a back condition that prevents the individual from performing any heavy labor job would be substantially limited in the major life activity of working because the individual's impairment eliminates his or her ability to perform a class of jobs. This would be even so

[6] Although the EEOC regulations are commonly consulted by the courts in ADA cases, "no agency has been granted authority to issue binding regulations interpreting the term 'disability.'" *Guzman-Rosario,* 397 F.3d at 9 (*citing Toyota,* 534 U.S. at 194). *See also, Calef,* 322 F.3d at 85 ("Like the Supreme Court in *Toyota,* we do not pass on the validity of these regulations.")[.]

> if the individual were able to perform jobs in any other class, e.g., the class of semi-skilled jobs. Similarly, suppose an individual has an allergy to a substance found in most high rise office buildings, but seldom found elsewhere, that makes breathing extremely difficult. Since this individual would be substantially limited in the ability to perform the broad range of jobs in various classes that are conducted in high rise office buildings within the geographical area to which he or she has reasonable access, he or she would be substantially limited in working.

Hence, being unable to carry out a particular type of job does not qualify as a substantial limitation to the major life activity of working. *Sullivan,* 358 F.3d at 116. Plaintiffs must "show that they are precluded from more than the performance of a particular job." *Guzman-Rosario,* 397 F.3d at 11. "[T]he inability to perform a single, particular job does not constitute the required substantial limitation." *See, Toyota,* 534 U.S. at 201 ("claimant . . . required to show an inability to work in a broad range of jobs, rather than a specific job.") (citation and internal quotation marks omitted); *Whitlock,* 345 F.3d at 46. *See also, Benoit,* 331 F.3d at 176 (plaintiff only instructed to avoid "heavy lifting" and failed to show "that this precluded him from working in a substantial class or broad range of jobs.")

Based on the foregoing, even assuming that plaintiff had alleged that she was substantially

limited in the major life activity of working, her claim would still not survive. There is no evidence that plaintiff was not able to work in a substantial class of jobs or a broad range of jobs. Subsequent to her tenure at Pfizer, plaintiff was employed as an assistant at a physician's office manning the telephone and doing general secretarial/clerical work. She was also employed at a sandwich shop carrying out various duties such as cooking, cleaning and tending the cash register.

(3) Sitting and Standing

Rather than addressing defendant's arguments regarding her failure to establish substantial limitations to her major life activities of performing manual tasks and working, in her opposition to the summary judgment petition plaintiff argues instead that she "is substantially limited in her ability to sit and stand, both of which are major life activities."[7] The only evidence submitted by plaintiff in support of this position is a **May 21, 2002** medical report prepared by Dr. Oscar Arroyo Nieves, specialized in physical and rehabilitation medicine, who diagnosed plaintiff's condition as:

1. Chronic Low Back Pain
2. Lumbar Disc Disease L5 S1 (Herniation)
3. Lumbar Radiculopathy

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[7] Plaintiff's Opposition (docket No. 38) ¶¶ 10 and 28.

4. Fibriomiositis
5. Left CTS (Carpal Tunnel Syndrome)

In his assessment, Dr. Arroyo Nieves concluded that plaintiff had back pain as a result of a L5-S1 disc lesion. The physician further noted that plaintiff was receiving rehabilitation treatment. Dr. Arroyo Nieves recommended that plaintiff **should not remain seated or standing for long periods of time** and should alternate between these positions. Further, when lifting objects from the floor, plaintiff should bend her knees. Lastly, the physician indicated that plaintiff could continue carrying out her job duties.

As pointed out by defendant, the expert report submitted with plaintiff's opposition to the summary judgment request fails on various grounds.

No mention is made in the report of plaintiff's prior hand conditions specifically, carpal tunnel and tendinitis or her limitations as a result thereof as certified by Dr. Oscar Ramos, her physiatrist, in early 2000.

Further, the physician's recommendations do not meet the definition of substantial limitation set forth in the regulations which require that plaintiff either be "[u]nable to perform a major life activity that the average person in the general population can perform; or . . . [s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a major life activity as compared to the condition, manner or duration under which the average person in the general population can perform

that same major life activity." 29 C.F.R. § 1630.2(j)(1) (2006).

There is no reference in the report as to how long plaintiff could sit or stand nor how her limitations compare to the sitting and standing tolerance of the average population.

It is also important to note that plaintiff's counsel's argument in support of a disability based on her alleged substantial limitations in her ability to sit and stand are premised on the notion that plaintiff has "little tolerance to remain sitting or standing **even for shorts (sic) periods of time**".[8] However, this is **not** what the report says. Dr. Arroyo Nieves noted that plaintiff "should not remain seated or standing **for long periods of time**" which is a different assessment altogether.

Lastly, even assuming the report's conclusions are adequate, the report is dated **May 21, 2002** and there is no indication that these alleged limitations were present and to the same degree "at the time that [plaintiff] sought an accommodation from [defendant]." *Toyota,* 534 U.S. at 196.

(4) Conclusion

Based on the foregoing we conclude that plaintiff has failed to adduce sufficient evidence to establish

[8] Plaintiff's Opposition (docket No. 38) ¶ 30. *See also,* Plaintiff's Sur-reply (docket No. 40) ¶ 23 (emphasis ours).

that she had an ADA covered disability which in turn triggered the protection afforded by the statute.

B. REGARDED AS DISABLED

Plaintiff further contends that defendant violated the ADA in that she was "perceived as" disabled by her employer.

In its definition of the term "disability" the ADA includes not only those individuals with impairments that substantially limit their major life activities, but also those persons who "are regarded as having such an impairment." 42 U.S.C § 12102(2).

According to the Supreme Court "[t]here are two apparent ways in which individuals may fall within this statutory definition: (1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities. In both cases, it is necessary that a covered entity entertain misperceptions about the individual – it must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when in fact, the impairment is not so limiting." *Sutton,* 527 U.S. at 489. *See also, Bailey,* 306 F.3d at 1169; *Carroll,* 294 F.3d at 238 n.4; *Rodriguez-Garcia v. Junta de Directores,* 415 F.Supp.[2d] 42, 45 (D.P.R. 2006). *See also, Katz v. City*

Metal Co., Inc., 87 F.3d 26 (1st Cir. 1996) (accommodation due under perception of disability claim under ADA).

The purpose behind this provision is to avoid situations where an individual is "rejected from a job because of the 'myths, fears and stereotypes' associated with disabilities". 29 C.F.R. § 1630.2(*l*) EEOC Interpretative Guidance citing *Sch. Bd. of Nassau County v. Arline,* 480 U.S. 273, 287, 107 S.Ct. 1123, 94 L.Ed.2d 307 (1987). *See also, Sutton,* 527 U.S. at 489-90; *Calef,* 322 F.3d at 87 n.9.

"An employer runs afoul of the ADA when it makes an employment decision based on a physical or mental impairment, real or imagined, that is regarded as substantially limiting a major life activity." *Sutton,* 527 U.S. at 490.

"'A plaintiff claiming that he is 'regarded' as disabled cannot merely show that his employer perceived him as *somehow* disabled; rather, he must prove that the employer regarded him as disabled within the meaning of the ADA." *Benoit,* 331 F.3d at 176 (*citing Bailey,* 306 F.3d at 1169) (emphasis in original); *Sullivan,* 358 F.3d at 117.

In this particular case, plaintiff contends that her employer mistakenly believed that her physical conditions substantially limited her ability to work.

That is, her employer perceived her as substantially limited in the major life activity of working.[9]

Hence, we must ascertain whether plaintiff's termination was prompted by Pfizer's inaccurate perception that she was disabled within the meaning of the ADA. "Since [claimant] contends that [her employer] perceived [her] to be substantially limited in the major life activity of working, [she] must show that [she] was perceived as being unable to work in either a class of jobs or a broad range of jobs in various classes as compared with the average person having comparable training, skills, and abilities." *Bailey,* 306 F.3d at 1169-70. Being unable to carry out a particular type of job does not qualify as a substantial limitation to the major life activity of working. *See also, Toyota,* 534 U.S. at 186; *Guzman-Rosario,* 397 F.3d at 11[;] *Sullivan,* 358 F.3d at 116; *Whitlock,* 345 F.3d at 46; *Benoit,* 331 F.3d at 176.

We find that, based on the record, plaintiff has proffered sufficient evidence to establish a prima facie case that Pfizer regarded her as having an ADA-covered impairment which prevented her from going back to work and which led to her eventual termination. According to the evidence presented, Pfizer mistakenly believed that plaintiff's impairment substantially limited her ability to work in the entire pharmaceutical industry. Dr. Felix, the plant's in-house physician, noted that "with these limitations

[9] Plaintiff's Sur-reply (docket No. 40) ¶ 16.

[plaintiff] cannot stay in the plant."[10] Both in her deposition[11] as well as in her sworn statement,[12] plaintiff related that Frances Guzman, Pfizer's Assistant Personnel Manager, had informed plaintiff that with the restrictions recommended by her physician plaintiff had no chance of working either at Pfizer or at any other pharmaceutical company.

Because we are at a summary judgment stage we are not permitted to make credibility determinations. Hence, our ruling must be based on the evidence submitted by plaintiff regarding defendant's perception of her condition. Accordingly, we must deny the summary disposition of this particular claim at this time.

V. LAW 44

In addition, plaintiff seeks relief under Law 44, the local disability provisions. Defendant has sought to dismiss these state-based claims and plaintiff has failed to oppose the request. Inasmuch as Law 44 mirrors the ADA, because we have concluded that plaintiff is not disabled within the meaning of the ADA, except for the "regarded as" cause of action, her other Law 44 disability claims must also fail. *Garcia Diaz v. Darex,* 148 D.P.R. 364, 385 (1999); *Roman*

[10] Plaintiff's Opposition (docket No. 38) Exh. VII.

[11] Plaintiff's Opposition (docket No. 38) Exh. II Tr. pp. 166-67.

[12] Plaintiff's Opposition (docket No. 38) Exh. III.

Martinez v. Delta Maintenance Serv. Inc., 229 F.Supp.2d 79, 86 (D.P.R. 2002).

VI. CONCLUSION

Based on the foregoing, defendant's Motion for Summary Judgment (docket No. **37**)[13] is **GRANTED** in part.

We find that plaintiff was not disabled within the meaning of the ADA. Accordingly, the ADA discrimination claims for failure to accommodate and termination due to her disability are hereby **DISMISSED**.

Accordingly, the Law 44 discrimination claims for failure to accommodate and termination due to her disability are hereby **DISMISSED**.

Judgment shall be entered accordingly.

The request to dismiss the ADA claim and Law 44 claim for termination due to plaintiff's perceived disability is **DENIED**.

Defendant's Motion to Strike (docket No. **41**) is **DENIED**.[14]

IT IS SO ORDERED.

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[13] *See,* Plaintiff's Opposition (docket No. **38**); Pfizer's Reply (docket No. **39**) and Plaintiff's Sur-reply (docket No. **40**).

[14] *See,* Motion Objecting the Filing of Motion to Strike (docket No. **42**).

San Juan, Puerto Rico, this 30th day of November, 2006.

S/ Raymond L. Acosta
RAYMOND L. ACOSTA
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

DELIA RUIZ RIVERA, Plaintiff, v. PFIZER PHARMACEUTICAL LLC, Defendant.	)	CIVIL NO. 01-1757 (RLA)

ORDER GRANTING DEFENDANT'S MOTION FOR RECONSIDERATION AND DISMISSING PLAINTIFF'S PERCEIVED DISABILITY CLAIMS

Defendant's Motion for Reconsideration (docket No. **67**) is **GRANTED**.

Accordingly, the claims for termination due to plaintiff's perceived disability under the Americans with Disabilities Act and Puerto Rico Law No. 44 of July 2, 1985, as amended, are hereby **DISMISSED** based on the arguments presented by defendant in its request for reconsideration.

Judgment shall be entered accordingly.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 8th day of January, 2007.

S/ Raymond L. Acosta
RAYMOND L. ACOSTA
United States District Judge