IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDWIN TAYLOR,	:	
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Plaintiff,	:	CIVIL ACTION
	:	
v.	:	NO. 03-CV-2216
	:	
USF-RED STAR EXPRESS, INC.,	:	
	:	
	:	

Defendant.

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF HIS AMENDED MOTION FOR PARTIAL SUMMARY JUDGMENT

INTRODUCTION

Plaintiff Edwin Taylor initiated this lawsuit pursuant to Title I of the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq., (hereafter the "ADA"), and the Pennsylvania Human Relations Act, 43 P.S. § 955(a), (hereafter the "PHRA"), to redress the Defendant USF-Red Star's refusal to permit him to return to work after he suffered two nocturnal seizures on March 1, 2001. At the time his seizures occurred, Plaintiff had been employed by Red Star for approximately twelve years as a "combination" truck driver and dock worker. Pursuant to his seniority and the applicable collective bargaining agreement, and because Mr. Taylor possessed a Commercial Drivers Licence (CDL) issued by the United States Department of Transportation (DOT), Mr. Taylor generally had the choice to bid either on driving assignments or dock work. Rucker at 71. Subsequent to his seizures, Mr. Taylor exercised his seniority rights to bid on dock work, recognizing that he could not drive a truck until the genesis of his seizures and his prognosis could be investigated and ascertained.

On March 15, 2001, absent any medical documentation concerning Plaintiff's condition, without engaging in an interactive process to evaluate the nature of his impairment and whether, in spite of it, he could safely work in the company's facility, either with or without accommodation, Barry Saylor, the Terminal Manager, sent Mr. Taylor home. For the next twenty months, based on its erroneous perception that he had a "serious epileptic condition" and that he was subject to "sudden, unanticipated losses of consciousness," Red Star denied Mr. Taylor the right to return to work in any capacity in its Philadelphia facility.[1] Pursuant to a Red Star policy that denied accommodations to employees with non-work related disabilities, Defendant never considered whether and/or how the Mr. Taylor could be accommodated during that time period, or whether, in light of his seniority, he needed an accommodation at all. Indeed, the Defendant contended, in direct contradiction to the mounting medical evidence that Mr. Taylor's seizures had been an isolated occurrence caused by a vitamin supplement, that he was "seizure prone" and "could become unconscious at any moment." Accordingly, it refused to reinstate him in any capacity until he could produce a medical release without restrictions which would allow him to perform all the functions of *both* the dock *and* the truck driver positions, a demand which the company does not impose on any other dock worker.[2]

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1 *See* Appendix Volume II-A (hereafter II-A) at 96; 135; 139;151; 174; 199; 207-8; 212; II-B at 155; 178; 175; 162.

2 II-A at 171; 182; 186-8; III-B at 169.

Mr. Taylor brings this motion pursuant to Rule 56 of the Federal Rules of Civil Procedure, seeking summary judgment as to his claims that Red Star regarded him as a person with a disability as defined by the ADA and misclassification as such; that he was otherwise qualified to return to work, with or without accommodation, between March 16, 2001 and October 21, 2002; and that Defendant discriminated against him on the basis of its erroneous misclassification of his medical history and its perception of his disability. Additionally, he seeks judgment that USF Red Star's failure or refusal to even minimally engage in the interactive process, its failure to consider accommodating his disability (as they classified and perceived it) because it was not work-related, and its demand for full recovery release, all constitute *per se* violations of his rights under the ADA and the PHRA.[3]

THE UNCONTESTED FACTS

USF-Red Star is a nationwide motor freight company which operates a trucking hub

in Philadelphia. The company handles general commodity freight of all shapes, sizes, weights, and handling configurations.[4] It operates a truck fleet which delivers goods to

3 Mr. Taylor does not seek summary judgment on the retaliation claims set forth in Counts III and IV of Plaintiff's Amended Complaint, as they are inherently factual in nature and would require the Court to make credibility determinations and to draw inferences from the facts.

4 The company provided this explanation as to its operation in its submission to the EEOC

local customers and transfers freight between and among its own terminals throughout the geographical region in which the company does business.[5]

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on January 11, 2002. I- 84-2. *See also* II-C at 229; 231; 248.

5 The Deposition of Donald Rucker at page 16-17, is contained in Volume II of the Appendix, and will be noted herein as II-C.

Edwin Taylor was hired by Defendant in January, 1989.[6] He worked in the company's Philadelphia terminal, one of Red Star's largest, which is a round the clock operation which employs more than 200 people.[7] Mr. Taylor worked first as a "dock man," and then, after securing his CDL in 1990, as combination dock man and truck driver. II-A at 18. As a "dock man," Plaintiff's duties included loading and unloading trucks, with and without a forklift, and moving freight throughout the warehouse using a forklift and/or other material moving devices.[8] Dock men also check and sort freight,

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6 It is undisputed that Plaintiff is an employee as defined by the ADA, 42 U.S.C. §12111(4), and the PHRA, 43 P.S. § 954, and that the Defendant is a covered employer. 42 U.S.C. § 12111(5); 43 P.S. § 954 (b). III-A at 3.

7 Deposition of John B. Jones at 109 and William Hamilton at 21-22. The depositions of Mr. Jones and Mr. Hamilton are contained in Volume III of the Appendix, and will be referenced herein as II-A and II-B, respectively.

8 The company's Job Description for a Dock Worker states that the "general purpose of the

and perform a number of other tasks related to the tracking of vast quantities of incoming and outgoing freight. As a truck driver, Plaintiff delivered freight to a variety of the company's customers within a wide geographical area. It is undisputed that Red Star's dock workers are not required to drive trucks or to have licences of any kind, commercial or otherwise.[9]

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job" is to "load, unload, sort and handle freight from trailers by hand and/or by use of lift trucks, carts or other material handling equipment." Exhibit 6. See also II-C at 253: "Essential function of a dock worker is to move freight from one placer to another on the dock." Barry Saylor testified that a variety of freight moving equipment was available in the terminal, including a dozen wheeled carts and numerous pallet jacks, some of which were individually owned by the dock men and could be used at their discretion. II-B at 223-4. Dock workers have flexibility to load and unload trucks as they see fit, with or without forklifts or other mechanical devices. The company imposes no time requirements within which freight handling assignments must be completed. III-A at 199; Affidavit.

9 Numerous dock workers at Defendant's Philadelphia facility do not have a CDL or any other DOT certification or license, but operate forklifts. Some dock men do no even have licenses to drive cars. II-C at 136; 163; 170.

In February of 2001, Mr. Taylor gave up smoking and embarked on an exercise routine. As part of his new health regimen, he began taking a vitamin supplement called "creatine." I-237. Unbeknownst to Mr. Taylor at the time, creatine can cause a number of adverse reactions, including seizures.[10] II-A-161; I-265.

During the night on March 1, 2001, Mr. Taylor, for the first time in his life, experienced

a seizure. A second seizure followed a few hours later. The cause of the seizures was a mystery, and Mr. Taylor spent three days in the hospital undergoing a variety of neurological tests. II-A at 14. After a few days of recuperation at home, Mr. Taylor returned to work on March 12, 2001. He was taking Depakote, which his doctors had prescribed as a precaution, while he continued to seek neurological treatment and evaluation.[11] From March 12 through March 15, 2001 he used his seniority to bid on dock work. During those four days, he worked full-time loading and unloading trucks, using a fork lift and other equipment. He also "jockeyed" tractor-trailers in the

10 The deposition of Edwin Taylor is contained in Volume II of the Appendix, and will be referenced herein as II-A.

11 Mr. Taylor continued to take seizure control medication until June, 2001, when his medical providers concluded that he no longer needed it. I-232.

freightyard.[12] II-A at 68.

12 Jockeying tractor-trailers does not require a CDL. The CDL is only required when the truck leaves the company's property and enters onto public roadways.

There is a factual dispute as to how the company became aware of Mr. Taylor's seizures and whether he told the company he was being evaluated and/or treated for epilepsy.[13] However, it is undisputed that on March 15, 2001, the Terminal Manager, Barry Saylor, in consultation with Donald Rucker, the company's Director of Safety and Labor,[14] told Mr.Taylor that he would not be permitted to work because, they contended, of the seizures he experienced on March 1, 2001 precluded him from safely operating a forklift.[15] It is further undisputed that when Saylor sent Mr. Taylor home on March 15,

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13 The company contends that Plaintiff told Saylor on March 13, 2001 that he had been diagnosed with epilepsy. I-3 at 4; I- 84. Plaintiff denies that he ever told Saylor that he had been diagnosed with epilepsy, II-A at 96, although he clearly understood that epilepsy was one possibility his doctors were investigating. II-A at 14;98. He disputes that he could have said anything about any sort of diagnosis on March 13th because he first saw the neurologist after his hospitalization on March 14, 2001. *Accord,* III-E at 5. Saylor's handwritten chronology states that Taylor told him he had epilepsy on March 15, 2001, the same day Saylor sent him home. I-143; 149. 8; II-C at 41; 54;125; 133. ("he told us he had epilepsy and we believed him.") Neither Saylor nor Rucker ever told the company president, Brad Jones, nor the union president, William Hamilton, that Mr. Taylor had epilepsy. III-A at 80; III-B at 8.

Whether or not Mr. Taylor purportedly told the company he had epilepsy on March 13th or 15th, however, or whether he told them at all, is not a material dispute in this context, as it is undisputed that the company *did* send him home on March 15th, and that the *only reason* it did so was because Mr. Taylor had experienced seizures. II-B at 69; 82; 105. It is further undisputed that whether or not Mr. Taylor informed Saylor that he had epilepsy, or might have epilepsy, he never told him that he had any functional limitations, other than that he could not drive a truck, while the cause of his seizures was being investigated. He certainly never told Saylor or anyone else that he could not operate a forklift or load and unload trucks on the dock. II-C at 225; II-B at 44, 78.

14 *See* II-C at 38-41; 51. There is no dispute that Mr. Rucker was the pivotal decision maker for the company with regard to Mr. Taylor's case from its inception, and that he acted on the company's behalf with the knowledge and consent of the company's president and CEO, Brad Jones. III-A at 172-185; II-C at 10; II-B at 43; III-B at 10;38. Rucker reported directly to Jones, and the two of them conferred frequently throughout the relevant time period. *See eg.*, I-188; 169; 165; III-A at 157; 168.

15 According to Mr. Taylor, Mr. Saylor sent him home stating "it is not working out." Taylor at 71. Although Saylor's recollection of what transpired is somewhat different,

2001, he had no medical information regarding Mr. Taylor's condition and had not asked him for any; II-B at 41; 46; he knew Mr. Taylor had had seizures and thought he had epilepsy, and that but for the seizures, Mr. Taylor would not have been removed from the job. II-B at 67.[16]

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the exact nature of the conversation is not material to this motion, it is undisputed that at no time between March 16, 2001 and October 21, 2002 was Plaintiff allowed to return to work. As Mr. Taylor stated in his deposition, when you are not permitted to work, "you might as well consider yourself terminated." II-A at 71. According to company records, Mr. Taylor was carried by the company on "disability." I- 289.

16 Saylor testified that he did not know that a person could have seizures and not have epilepsy, or that people with epilepsy can often fully control their seizures with medication. II-B at 154.

During the week of March 19, 2001 Mr. Taylor took a pre-scheduled vacation. While he was away, Rucker, at Saylor's suggestion, had the DOT and OSHA regulations researched to determine whether they covered Mr. Taylor's situation. II-B at 62-63; II-C at 103; I-149; 152. His assistant, Steve Hacker, reported on March 20, 2001 that "there is no regulation on physical or mental requirements for the operation of powered industrial lift trucks (forklifts). II-C at 104. He further reported that the only potentially applicable OSHA regulation is the "General Duty Clause," which, although not directly applicable to forklifts, requires employers to provide a safe working environment free of known hazards. He cautioned, however, that Barry thinks that would "blow back in our faces." I-152.[17]

Rucker assumed that there was no applicable regulatory authority since "who would think that a guy diagnosed with seizures would want to drive a forklift and put his fellow employees at risk?" He further opined that "a doctor could be accepting a very large responsibility." I-152; II-C at 104.[18]

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17 Hacker told Rucker that he knew of a situation in which an employer had used the General Duty Clause as the basis for termination of an employee in another trucking facility. I-151.

18 It is undisputed that the DOT regulations govern the operation of commercial vehicles; the OSHA regulations govern workplace safety; a forklift is not a commercial vehicle subject to regulation by the DOT; and that OSHA has no regulations specifically pertaining to seizures and the operation of forklifts. II-B at 42; 44; 65-6; 76; II-C at 97; III-A at 56; I-214.

Meanwhile, that same day, Mr. Taylor called Saylor from Florida to discuss his return to work. Saylor told Mr. Taylor that he would need a note from a doctor describing his medical condition. Plaintiff called Dr. Karen Scardigli, the neurologist whom he had seen on March 14, 2001, and asked her to provide the requested information. Dr. Scardigli faxed a note to Mr. Saylor on the morning of March 20, 2001 which stated: "Edwin is under my care for seizures and is currently on Depakote." I-214-215. This was the first medical information the company had regarding Mr. Taylor's condition. II-B at 50-51.

When Mr. Taylor called Saylor later in the day to ask him if he had received the note, Saylor told him that he would need another note indicating that Mr. Taylor could operate a fork lift. II-A at 81; II-B at 49. Mr. Taylor secured a second note from Dr. Scardigli which stated:

> Edwin is under my care for seizures and is currently on Depakote. He is physically able to work the dock and run a forklift."

It is undisputed that the company had no medical information to contradict Dr. Scardigli's neurological opinion that Mr. Taylor could operate a forklift. II-C at 108. Neither Saylor nor Rucker sought any further clarification or detail from Dr. Scardigli, and they did not indicate to Mr. Taylor that he should do so. II-B at 51-2; II-C at 108. Saylor wrote Rucker, however, "this stuff ain't gonna do." Rucker directed Saylor to contact "our Doctor," and to "force a 3rd doctor if necessary." II-B at 51-2; II-C at 106-7; I-213. [19] This was a reference to the collective bargaining agreement between USF

19 At this point, five days after Saylor sent Mr. Taylor home because of his medical

Red Star and Teamsters Local 107, which provides for an impartial third doctor to resolve a dispute between the company's doctor and the employee's treating physician. II-B at 92.

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condition, he had never contacted the company's doctor for an opinion as to whether Mr. Taylor could safely work on the dock in spite of his seizures, or whether Mr. Taylor could be accommodated either in the dock job or in any other capacity. II-B at 50-51. The Deposition of Dr. Joel Mascaro is contained in Volume III of the Appendix and will be noted herein as "III-D". Dr. Mascaro testified that neither Saylor nor Rucker ever asked him whether Mr. Taylor could be provided with a "light duty" job. III-D at 73-4. This was contrary to their ordinary practice, which was to discuss light duty in every case. III-D at 44.

On March 26, 2001, Saylor contacted Dr. Joel Mascaro, medical director for NovaCare, which served as the company's medical facility. He then directed Mr. Taylor to report to Dr. Mascaro for an examination. II-B at 82; I-221. Saylor faxed Dr. Scardigli's notes to Bill Hamilton, the union president, complaining that "Ed's doctor's notes are not even legible; no diagnosis, treatment, or anything."[20]

> Although Mr. Taylor reported to NovaCare as directed, Dr. Mascaro never saw him.[21]

Dr. Mascaro faxed a note to Mr. Saylor, however, stating that Mr. Taylor was unable to "operate a vehicle (forklifts) under DOT regs."[22] Recognizing that DOT regulations do not apply to forklifts, as they are not commercial vehicles, Saylor asked Dr. Mascaro to revise his note. II-B at 85. On March 27, 2001, Dr. Mascaro faxed a second note to the company which stated that "due to a seizure disorder" Mr. Taylor "would place

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20 Mr. Saylor's note to Mr. Hamilton was inadvertently omitted from the Appendix. It is attached hereto as Exhibit A.

21 Dr. Mascaro stated in his deposition that he never told either Saylor or Rucker that he had seen Mr. Taylor. III-D at 72. Throughout the relevant time period Rucker and Saylor had numerous conversations and at least three meetings with Mascaro regarding Mr. Taylor. I-156; 195; 171; 179; 181; III-D at 11; 19; 73; II-C at 78-9;159.

22 Saylor sent Mascaro's note to Rucker that afternoon, noting "this is from our doc." I-218.

himself and others in potential danger by operating a forklift." I- ; II-A at 73.

Notwithstanding his earlier concern that Dr. Scardigli's notes provided "no diagnosis, no treatment, or anything," Saylor accepted Mascaro's unsubstantially opinion because it confirmed his own view that Mr. Taylor could not operate a forklift. II-B at 92.[23] As it contradicted Dr. Scardigli's opinion that Mr. Taylor could operate a forklift, Dr. Mascaro's note triggered the impartial evaluation clause in the union contract. II-C 112. Rucker drafted and Saylor hand-delivered a letter for Dr. Mascaro to send to Dr. Scardigli. II-B at 93-94; I-221. On March 29, 2001, Dr. Mascaro called Dr. Scardigli, purportedly because she was "not completely informed about the circumstances." III-D at 33.[24] Subsequent to this conversation, Dr. Scardigli, who had not seen Mr. Taylor since his initial appointment on March 14, 2001, faxed a third note

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23 Saylor never asked either Dr. Scardigli or Dr. Mascaro for a more thorough report on Mr. Taylor's diagnosis, treatment, or prognosis. II-B at 69; 93.

24 It is undisputed that Dr. Scardigli, unlike Dr. Mascaro, had examined Mr. Taylor and reviewed medical reports and other documentation regarding his condition. Moreover, she is a board-certified neurologist and Dr. Mascaro is not. III-E at 4; III-D at 5; 79; 81. Dr. Mascaro could not identify any information he had that Dr. Scardigli did not also have. III-D at 39. Although Rucker asserted that Dr. Mascaro was "very knowledgeable" about the applicable DOT regulations, II-C at 158. Mascaro clearly knew little or nothing about them. He testified in his deposition that: his knowledge about the DOT regulations was "very good" and conversely that he did not "really know the law for the CDL;" III-D at 15; 67; that CDL's are governed by state, but not federal law; III-D at 12; that people who experience non-epileptic seizures are only eligible for CDL re-certification after five, or perhaps even ten years; III-D at 14; 67; that the DOT regulations apply to forklifts, and indeed, "any motorized vehicle" that "runs with tires and a motor and carries an individual a certain distance by motorized movement." III-D at 25; 57. *Cf.* Federal Motor Carrier Safety Regulations, 49 C.F.R. § 391.41-391.49. Furthermore, he could not recognize the form required by the DOT for CDL licensure, which has been in use for many years in a similar format, even before the DOT existed and commercial drivers were governed by the Interstate Commerce Commission (ICC). III-D at 54; III-A at 97. Mr. Jones testified that he expected that anyone familiar with the DOT's regulations would recognize that form. III-A at 97.

to the company. This time, the note stated that Mr. Taylor is "unable to operate a forklift at this time." I-224. However, Dr. Scardigli intended this note to convey that a *temporary*, rather than a permanent restriction was appropriate due to his seizures. III-E at 19.

Saylor faxed Dr. Scardigli's third note to Mr. Rucker, noting on the fax sheet, "how's this?" I-223. Armed with this latest note from Dr. Scardigli, which purportedly agreed with Dr. Mascaro's assessment that Mr. Taylor should not operate a forklift, the company concluded that it no longer had a "third doctor situation." II-B at 108; I-225.[25] Saylor notified Mr. Taylor that he would not be permitted to return to work, stating, falsely, that U.S. DOT regulations preclude the operation of a forklift without a CDL, and, further, that there was no work available on the dock that did not involve using a forklift.[26] Mr. Taylor, who was aware that there are no federal or state licence requirements of any kind governing the operation of a forklift, told Saylor that his refusal to permit him to return to work constituted disability discrimination and was illegal under

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25 The union disagreed that Mr. Taylor was not entitled to an impartial third doctor evaluation pursuant to the contract. III-B at 52.

26 This was the position the company maintained throughout the twenty months that Mr. Taylor was kept out of work, notwithstanding the fact that the company employs dock workers without CDL's and that forklift operators are not governed by DOT regulations pertaining to CDL's. *See* I-27, ¶ 52. *See also* III-A at 56; 94; II-C at 173; II-B at 53; 136. According to Mr. Jones, even though the company's position was not based upon a legal requirement, it was so self-evident that a 6th grader can figure it out. According to Mr. Hamilton, the union president, "every time we gave a response to the company, their response was always the same. They just referred to the DOT language and said he [Mr. Taylor] was not capable to drive." III-B at 41. The union's position was that Mr. Taylor did not have to drive, as he was a high seniority employee who could bid dock work every day. III-B at 21; I- 254-55; *accord* II-C at 7; 182-3; II-B at 32-3. Moreover, the union maintained throughout the relevant time period that Mr. Taylor could work the dock even without a forklift due to the volume of freight at the terminal

the ADA.[27]

In response to the company's assertion that Mr. Taylor could not work the dock because

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that could be handled manually. III-B at 11; 16; 21.

27 *See* II-A 123-125; IV-2.

he could not use a forklift, Mr. Taylor, and at various times his Business Agent, Mike Nugent, and the union president, Bill Hamilton, attempted to discuss how Mr. Taylor could return to the dock without using a forklift. Both Nugent and Hamilton advised Saylor that there was dock work available on a regular basis that did not require the use of a forklift.[28] Saylor refused to discuss it, contending that he had to "kick[] it upstairs." Jones testified that Saylor was required to forward all such matters to Rucker. Rucker, in consultation with Jones, decided all requests for accommodations under the ADA. III-A at 40-41; 54; II-C at 24; III-B at 10; 38. The union processed a grievance on Mr. Taylor's behalf, asserting that Mr. Taylor's seniority rights were being violated, "as junior men were working the dock.... Barry Saylor is denying him work on the basis that he is

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28 III-B at 11; IV-2. Indeed, Saylor admits that the company employed dock men with less seniority than Mr. Taylor to load and unload freight on a daily basis. II-B at 105. It is undisputed that not only did Mr. Taylor have seniority over most of the dock workers the company employed at the time. II-B at 39; I-91. He had seniority and bumping rights over the casual workers. III-B at 17.

Although the company denies that there was sufficient freight to provide Mr. Taylor with non-forklift work, company witnesses did not know what came in and went out of the Terminal on a daily basis, including furniture, shower doors, tires, rugs, and other merchandise, or what percentage of the pelletized and non-pelletized freight which came through the Terminal could have been moved either manually or without a forklift. II-C at 236; 237-8; 251; III-A at 116; 120-1. Jones, Rucker, and Saylor all admitted that much of the freight that comes in and out of the terminal can be handled either manually or by forklift. III-A at 117; II-C at 230. Moreover, company representatives admit that they did not investigate whether or not Mr. Taylor could work on the dock loading and unloading manual freight because of its perception that his very presence on the dock, because he was "seizure prone" and "could become unconscious at any moment," would preclude him from performing any work in the facility. II-C at 201-2; 259; III-A at 178; *see also* I-162. *See also* I-210. (Rucker denies accommodation to a truck driver because the quantity of freight on the Pick Up and Delivery Line so seldom involved freight that did not have to be "manhandled" and for which mechanical tools would have been ineffective). II-C at 248.

disabled." I-111. [29]

Saylor, in consultation with Rucker, denied Mr. Taylor's grievance the same day he got

it, noting "dock work includes the necessity of running a forklift." I-100; II-C at 69. Upon his receipt of the grievance paperwork, Rucker asked Saylor whether it was "safe to assume ... [Taylor] will advise us when he is able to return to work in a full capacity?" I-155.

29 Saylor, Rucker, and the company president all testified that they had never heard of the interactive process under the ADA, III-A at 39; 81; 135; 191; II-B at 174-5. They all admitted that they never had a meeting with Mr. Taylor and his union to explore how Mr. Taylor might be able to return to the job, with or without accommodation. II-B at 174; II-C at 213; III-A at 81; 191-2. *See also* I-238. Indeed, they never discussed it among themselves, despite their understanding that Mr. Taylor and the union were requesting an accommodation, and that the union was willing to discuss how such accommodation could be accomplished with a view toward "everyone's safety." I-104; 174;165; 238; II-C at 263; II-B at 78; 104;119; III-E at 14; 25; III-A at 132.

The union's grievance was scheduled to be heard by the Joint Area Committee (JAC) on May 8, 2001. Prior to the grievance hearing, the union's Health and Welfare Committee wrote to Mr. Saylor asking whether the company could provide a light duty assignment for Mr. Taylor. I-225. [30] On May 3, 2001, Mr. Taylor forwarded additional medical information to Barry Saylor, including copies of 1) EEG and MRI reports dated April 12 and 17, 2001, respectively, indicating normal neurological functioning; and 2) an April 25, 2001 letter from Dr. David Roby, Board-Certified Neurologist, which stated that Mr. Taylor would likely remain seizure free, and that although he should not resume truck driving until he had been seizure free for one year, he could engage in physical labor, such as loading and unloading trucks. I-227. Dr. Roby did not specifically indicate whether loading and unloading trucks included using a forklift. Saylor and Rucker decided not to ask. I-141-142; II-B at 115; II-C at 91; 131; 136 ("...there's ample opportunity for Dr. Roby to put whatever he wanted to in that letter–.") See also III-A at 69-70. Likewise, they never asked Dr. Mascaro whether the medical information they received on May 3, 2002 would affect his opinion that Mr. Taylor could not operate a forklift. [31] II-B at 66; 128; II-C at 90 ("it's irrelevant"); 140. Rather, they proceeded to

30 Saylor stated in his deposition that he does not recall acting on the union's request. His receipt of the union's correspondence appears on his handwritten chronology, however, with the notation that "special accommodations" must have been "coached by Taylor because it fits ADA language." I-143; II-B at 219. It is undisputed that no light duty assignment was ever provided to Mr. Taylor. Rucker assumed he received the light duty request from Saylor, but did not remember whether he did or not. II-C at 264.

31 Indeed, there is no record that Saylor ever sent it to him. Rucker admits that it was important that the company doctor, upon whose opinion the company was relying, have all the available medical evidence. II-C at 141; *accord* III-A at 61-2. Rucker would have no idea whether the neurological reports Mr. Taylor provided to Saylor would have impacted upon Dr. Mascaro's opinion because "I am not a doctor." II-C at 94. Mascaro testified that as the

the JAC hearing with a written argument which stated "Taylor has a serious epileptic condition." I-101-2. [32] No doctor, not even the company doctor, had ever told the company that Mr. Taylor had an epileptic condition, serious or otherwise. II-B at 151-2. Indeed, Rucker admits that those were his words. II-C at 134. He further told the JAC "it is certain" that "Taylor is not qualified to drive a truck and not qualified to operate a forklift," and that "there is no medical evidence to refute the company's position." I-101-2. Rucker's notes to himself for the hearing indicate "lapses of consciousness; danger to himself and others." I-141. [33]

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company doctor, he would want all any medical information that was available to the company. III-D at 43.

32 Rucker was authorized to speak for the company at the JAC hearing. III-A at 74; 156.

33 The company presented no evidence to refute the union's position that junior men were working the dock, with or without a forklift. Hamilton told the JAC that Mr. Taylor had suffered from an "undetermined seizure that is still being investigated." I-112; 104. He also presented the neurological reports that Mr. Taylor provided to the company on May 3, 2002, and a letter from Dr. Jay Glickman, stating that Mr.Taylor will probably remain seizure free, and that he saw no problem with multiple jobs, including loading and unloading trucks. I-239.

Mr. Hamilton stated to the JAC that Mr. Taylor had rights under the ADA and that the company could permit him to used his seniority to bid on available dock work, or to otherwise accommodate him while his seizures were being investigated. He provided the Panel with literature regarding the ADA, the Job Accommodation Network, and information regarding seizures and work activities from the National Epilepsy Foundation. III-B at 52; I-105; 106. [34]

Because the contract does not authorize the JAC to adjudicate ADA issues, the Panel advised Mr. Hamilton that it could make no ruling as to whether or not the company had complied with its duties in that regard. It premised its ruling in the company's favor on Article 42,[35] which relates to seniority rights. II-C at 59; 84; III-A at 167; III-B at 61.[36]

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34 Rucker admits that the union asserted Mr. Taylor's rights under the ADA at least by the time of the grievance hearing, and that it became more of an issue "over time." II-C at 63; 64; 217-219. Although Mr. Jones denied that he ever knew that the ADA was an issue, he admitted that he knew the union's position at the grievance hearing was that Mr. Taylor should be permitted to perform dock work pursuant to his seniority, either with or without a forklift. III-A at 55; 132;149. Saylor testified that he never even thought about the ADA. II-B at 178-9. *But see infra* at n. 30.

35 The JAC report states: "Claim of union is denied; no violation of Article 42." I-111.

36 Mr. Rucker made Mr. Jones aware of the results of the JAC decision. III-A at 77-8.

After the JAC decision, Mr. Taylor and his union representatives continued their effort to engage Saylor in a dialogue regarding how Mr. Taylor might return to work, either using his seniority to bid dock work or in some other capacity. II-C at 213; III-B at 11; 14. On May 16, 2001, Mr. Taylor himself spoke with Saylor regarding his rights under the ADA, particularly in light of the company's assertion, which Mr. Taylor first heard at the JAC hearing, that he had "a serious epileptic condition." I-231; II-B at 144.[37] Saylor told Plaintiff that accommodations were reserved for workers who sustained injuries on the job, and refused to have any further discussions regarding Mr. Taylor's requests for reasonable accommodations.[38] Saylor told Mr. Taylor that before he would be permitted to return to work in any capacity, even on the dock, he would need a doctor's note indicating that he had been seizure free for one year, and thereby eligible for reinstatement of his CDL. This was in spite of the fact that dock workers are

37 Mr. Hamilton confirms that the first time he heard the company's assertion that Mr. Taylor had epilepsy at the JAC hearing. III-B at 39.

38 The company has a transitional work program for workers who are injured on the job, in which the company provides light duty assignments. It is undisputed that Red Star never considered whether Mr. Taylor could be provided with a similar assignment because 1) only people with work-related injuries are eligible for them; III-A at 140; 142-3; II-B at 144; 147-8; III-Bat 258; *and* 2) Mr. Taylor would have been a threat to the workplace in any capacity, because he was seizure prone and, in the company's view, subject to unpredictable "lapses of consciousness." III-B at 259; III-A at 178 . *See also* I-141;162. Accordingly, the company never considered whether Mr. Taylor could return to work with or without an accommodation. It did not investigate whether job modification or restructuring, or the acquisition or modification of equipment might be utilized to accommodate Mr. Taylor in the workplace while his seizures were being investigated. II-C at 255-56; II-B at 117; 147; 173-75; III-A at 127. *See also* Vocational Analysis of Daniel Rappucci; and I-1. Saylor and Rucker asserted that they did not know that reasonable accommodation under the ADA could require such modifications. II-B at 175. Brad Jones, however, with whom Rucker was consulting throughout the relevant time period, did know. III-A at 39.

not required to have a CDL.[39] Later that day, Mr. Taylor completed the paperwork for a charge of discrimination with the EEOC. I-118. [40] Mr. Taylor originally filed a charge of discrimination on March 30, 2001. I-113-117.

In July, 2001, through the efforts of his union, Mr. Taylor secured temporary employment at Bucks County Pictures, operating a forklift on a movie set. II-A at 170; III-B at 39-40; I-238.[41] He successfully performed that job until the movie ended in December, 2001. The company continued to deny Mr. Taylor employment unless he could produce a full release with no medical restrictions. [42]

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39 In addition to the fact that the company does not require CDL's for dock men, it also does not monitor its dock workers' medical histories to ascertain whether they have neurological impairments or any other condition that might evidence a predisposition to become unconscious at random intervals. Although dock workers undergo a medical examination when they are hired, the company does not require any subsequent medical screening for these workers. Mr. Saylor admitted that the company would have no way of knowing whether any of its dock men have had seizures, hypertension, diabetes, heart disease, or any other condition that might make them just as likely, if not more likely, to experience a loss of consciousness while operating a forklift or engaging in any other work activity on the dock. II-B at 160-61.

40 Saylor and Rucker have contended that Mr. Taylor's letter of May 17, 2001 is an admission that he had epilepsy. Mr. Taylor did not know at that time whether or not he had epilepsy. His letter was a simple and direct response to the company's position, which he heard for the first time at the JAC hearing, that he had a "serious epileptic condition." Even if the letter were an admission by Mr. Taylor that he believed he had epilepsy, rather than a simple reaction to the company's perception that he was a "serious epileptic," his lay-person's understanding as to the nature of his medical condition could not have caused the company to believe that he was an epileptic when it had medical information to the contrary. Furthermore, even if Mr. Taylor said he was epileptic or thought he might be, it is undisputed that he did not identify any functional limitations that would impact his ability to work the dock. II-C at 225; II-B at 44; 78; 151; 154. Moreover, it is undisputed that Mr. Taylor never said he had a serious epileptic condition. II-B at 29.

41 The company knew about this job at least by March of 2002. I-173.

42 There can be no dispute that the company was conditioning Mr. Taylor's return to work in any capacity, upon a full-duty, no restrictions medical release. *See* II-B at 129-30; 133-4; 187; 185; II-C at 171; 189; III-A at 156; 185-186; I-155; 241-2; 260-1;162; 179. According to Jones,

"it would be that simple. Has any doctor said he can come back to work without a problem, without qualification?" III-A at 156. Rucker testified that he and Jones agreed that Mr. Taylor could not return without a "clear unqualified release from Dr. Sperling." II-C at 186-88.

On January 11, 2002 Mr. Rucker submitted Red Star's response to Mr. Taylor's EEOC complaint. II-C at 300; I-126-129. He stated that Mr. Taylor has an "epileptic (convulsive, loss of consciousness) condition. This diagnosis, according to Rucker, was "conclusive" and confirmed by 4 different doctors".[43] Citing the DOT regulation regarding "established history or clinical diagnosis of epilepsy," Rucker stated that Mr. Taylor was not qualified to perform either his job as a truck driver or as a dock man because he was an individual who could lose consciousness at random intervals." I-126-29. [44] He reiterated the company's position that Mr. Taylor could return to work only when he was cleared under DOT regulations.[45] He did not

43 By January 11, 2002, the medical information in the company's possession included: 1) three notes from Dr. Scardigli and two from Dr. Mascaro, none of which stated that Mr. Taylor had epilepsy (I-213-20); 2) Dr. Rob's April 25, 2001 letter and Dr. Glickman's letter of May 7, 2001, neither of which stated that Mr. Taylor was epileptic, and both of which stated that they expected Mr. Taylor to remain seizure free (I-227); 3) the April 12, 2001 EEG report and April 17, 2001 MRI, both of which reported normal neurological functioning (I-228-30); and 4) Dr. Glickman's April 9, 2001 report to the union's Health and Welfare Fund, indicating that Mr. Taylor could work, (but not drive) if special accommodations for seizure precaution [could] be made (I-97). Contrary to the company's assertion to the EEOC, there were not four medical reports which stated that Mr. Taylor had an "epileptic (convulsive, loss of consciousness) condition." II-B at 154; 164-5.

44 The DOT regulations regarding seizures distinguish between three types of conditions: 1) "established medical history or clinical diagnosis of epilepsy;" 2) "nonepileptic seizures or episodes of loss of consciousness of unknown cause;" and 3) "nonepileptic seizures or episodes of loss of consciousness that resulted from a known medical condition." I-68. Rucker knew that the regulation to which he referred the EEOC regarding "established medical history or clinical diagnosis of epilepsy" did not apply to Mr. Taylor, as his seizures had never been attributed to epilepsy. I-176. Where a driver has a non-epileptic seizure with a known cause, the regulations require only that certification be deferred until the driver has fully recovered from that condition, has no existing residual complications, and is not taking anti-seizure medication. *See* Federal Motor Carrier Safety Regulations, 49 C.F.R. § 391.41-391.49. Mr. Jones was not aware that the regulations made such a distinction. III-A at 84-5.

45 According to Mr. Jones, Rucker was authorized to speak for the company at the EEOC, and maintain the "same position" the company had maintained from the beginning. III-A at 146.

inform the EEOC that those regulations applied only to Mr. Taylor's ability to drive a truck, not a forklift, and bore no relation to any other aspect of a dock man's responsibilities, or that the company was refusing to permit Mr. Taylor to return to work, even as a dock man, without medical clearances and licencing credentials not required of any other dock worker.[46]

On March 12, 2002, Mr. Taylor provided Saylor with a letter from Dr. Glickman dated February 6, 2002, which cleared him to return to work without restrictions. Specifically, Dr. Glickman's letter stated, in pertinent part:

> Ed has never experienced another episode similar to the one he had on 3/1/01, even after stopping the Depakote in 6/01. Ed was seen by Dr. Cooper from DigiTrace Care Services on ½4/02, who performed an ambulatory 24 hour EEG to see if Ed experienced ANY EEG activity that resembles a seizure disorder. This test was also negative.... I anticipate that he will remain seizure free, and he should be able to resume his customary job as a truck driver when he is "officially seizure free for 1 year", which is approaching very soon. As for his current situation, I see no problem with his engaging in any physical labor that may be required in any other job, including the loading and unloading of trucks.

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46 Rucker asserted to the EEOC that Mr. Taylor could not return to work in any capacity unless he could operate a forklift and that "all dock handling work requires a forklift." He further stated that Mr. Taylor was not "forklift qualified" even though there is no such thing as "forklift qualification" under any state or federal law or any employer policy or contractual provision. This position was re-iterated by Red Star's counsel in his correspondence to the EEOC. I-133-137.

I-239. (Emphasis in original).

At the same time, Mr. Taylor submitted a CDL certification from Dr. Lorraine Popowich which permitted him to operate a tractor-trailer under DOT regulations. I-240. Dr. Popowich's premised her clearance upon 1) the fact that Mr. Taylor's seizures were apparently attributable to Creatine which was known to cause seizures; 2) there had been no recurrence of seizures after March 1, 2001; and 3) the neurological studies and clinical tests, including the April 12, 2001 EEG, the April 17, 2001 MRIs, the Digitrace EEG report dated January 31, 2002, and Dr. Roby's neurological examination, had all been normal. Based upon her examination, Mr. Taylor's history, and the clinical reports which had been made available for her review, including Dr. Glickman's February 6, 2002 letter, Dr. Popowich concluded that Mr. Taylor should be able to drive under his CDL.[47] She also reviewed Dr. Roby's letter of the same date.[48]

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47 *See* I-240. According to the applicable DOT regulations, which Dr. Popowich had in her file, Mr. Taylor was eligible for re-certification after six months, as he had remained seizure free, was not taking anti-convulsant medication, and had not experienced an epileptic seizure, but a seizure with an identifiable cause, i.e., Creatine. 49 C.F.R. § 391.41-391.49. This regulation is contained in the Appendix at I-68.

48 On February 6, 2002 Dr. Roby faxed a letter to Mr. Taylor's counsel, Tom Earle, Esquire indicating that Mr. Taylor had been seizure free for more than eleven months, that he was not taking any seizure medication, and that he probably would remain seizure free. He stated that Plaintiff could operate a forklift. I-232-33.

Saylor admits that he received Dr. Popowich's medical clearance and that it appeared to be valid. II-B at 164. In consultation with Rucker, he rejected it, however, and denied Mr. Taylor's request to return to the dock because it had not come from the company doctor. II-B at 166; II-C at 150. Neither Rucker nor Saylor contacted Dr. Popowich for information regarding the basis of her opinion. Instead, on March 14, 2002, Rucker wrote to Dr. Glickman requesting information from *him* as to, *inter alia,* whether Drs. Roby and Scardigli had released Mr. Taylor to perform "all job duties without restriction" of the City Pick Up and Delivery Driver, *and* the Dockworker positions as set forth on USF Red Star's job descriptions. II-C at 181-2; II-B at 133-4, 181-2. According to Rucker, this was to ascertain whether Mr. Taylor could "remain fully conscious and alert during the performance of his normal job duties — operating vehicles registered at 80,000 pounds on the public highways." I-241-42. [49] In response, Dr. Glickman emphatically reiterated, in a note dated April 2, 2002, that Plaintiff was cleared for "all duties," including driving duties, and reminded Rucker that Mr. Taylor had been seizure free for more than one year. I- 244. Saylor understood from this note that Dr. Glickman had released Mr. Taylor to return to work without restrictions. II-B at 168.

Rucker and Saylor dismissed Dr. Glickman's opinion. II-B at 167; II-C at148. They

49 Rucker did not disclose to Dr. Glickman that Mr. Taylor could return to work on the dock and never operate a vehicles of any size on the public highways.

called a meeting with Dr. Mascaro for April 10, 2002. Prior to the meeting, Rucker contacted Ron Stryshak at DOT to discuss the situation. I-176. His notes from that conversation state: "although epilepsy is a black & white disqualifying issue, our documentation indicates Taylor was experiencing seizures, not epileptic attacks." Pursuant to their meeting with Dr. Mascaro, Saylor sent a letter to Mr. Taylor on April 11, 2002, directing him to call Dr. Mascaro for appointment. I-245; II-B at 184. Rucker's notes from the meeting reference Mascaro's "great attitude re: protecting the company's interests and understanding its liability." He indicates that "Mascaro will try to force Ed to get a full release from Dr. Roby." I-179-80; II-C at 276-7.[50]

50 Mascaro stated at his deposition that he did not suggest "forcing" Mr. Taylor to do anything. III-D at 50-51. Inasmuch as Mr. Taylor had presented the company with a legally valid CDL from Dr. Popowich, and a full duty work release from Dr. Glickman, it is unclear why the company sought to "force" Mr. Taylor to secure a full-duty release from Dr. Roby, particularly as they later reported to the EEOC that they never saw Dr. Roby's February 6, 2002 letter releasing Mr. Taylor to drive a forklift until the conciliation meeting on June 19, 2002. II-C at 210. Moreover, Rucker's notes indicate that Roby's letter "does not satisfy DOT– no evidence of contemporary evals." I-175.

When Mr. Taylor reported to NovaCare on May 2, 2002, Dr. Mascaro was on vacation. He saw Ronald Scott, a Physician's Assistant, who examined him. Dr. Scott provided Mr. Taylor with another CDL certification, which both Saylor and Rucker agree was legally valid. II-C at 150; II-Bat194. I-246. [51] The company now had two DOT certifications which legally permitted Mr. Taylor to drive a tractor-trailer, with nothing to contradict them other than Mascaro's two sentence note of March 26, 2001. They refused to permit Mr. Taylor to return to work in any capacity, however, because neither certification had come from Dr. Mascaro.[52] II-C at ; II-B at 191.[53] In a conference call, Saylor alleged, falsely, based on the office notes from NovaCare that the company was "not supposed to see," I-247; 181, that Mr. Taylor had lied to Mr. Scott about his seizures.[54] In fact, Scott's notes indicate, among other things, that Mr. Taylor told him

51 Mr. Taylor presented the May 2, 2002 CDL certification to Saylor in person. When Saylor told him that the company wanted him to see Dr. Mascaro, Mr. Taylor told him that Dr. Mascaro had intimidated his doctors, a concern that Saylor dismissed out of hand. II-B at 199; I-181.

52 Indeed, they had accepted CDL authorizations from Mr. Scott in the past without question. II-B at 190. Dr. Mascaro confirmed in his deposition that Mr. Scott was authorized by law and by NovaCare to perform CDL certification examinations pursuant to the DOT regulations. III-D at 75.

53 On his own and with the assistance of his union, Mr. Taylor was able to use his CDL to secure periodic work as a truck driver for other employers during this time. II-A at 169.

54 *See* I-191. He further claimed that Mr. Taylor had lied to Dr. Popowich. I-181. Saylor did not have access to Dr. Popowich's office notes or the medical records she reviewed; he also did not know what Mr. Taylor had told Mr. Scott, other than what was written in the office note that someone from NovaCare provided him in time for the conference call with Dr. Mascaro. II-B at 192, 197. *See also* I-195.

that he had been hospitalized for seizures.[55] Pursuant to the conference call, Dr. Mascaro sent Mr. Taylor a letter that day demanding that he provide a full-duty release from a Board certified neurologist. It is undisputed that no one from the company had ever suggested or required Mr. Taylor to produce such a release during the preceding fifteen months.[56] II-B at 204;. II-C at 187; 280; I-188.[57] Mascaro's letter also purported to revoke Mr. Scott's CDL certification, and claimed, erroneously, that the neurological test results which Mr. Taylor had provided to Mr. Scott, dated April 12, 2001, April 18, 2001, and January 31, 2002, respectively, were more than thirteen months old, and therefore outdated.[58] I-252.

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55 Scott's notes indicate that Mr. Taylor told him about his episode of "tonic clonic muscle tone ..." He also noted: "Pt. had EEG/MRI; ... no sequelae." Rucker confirmed in a conversation with the DOT on June 27, 2002, that "tonic-clonic muscle tone" refers to seizures. I-196; II-B at 139-141. Dr. Mascaro had Mr. Scott's information in his file, and presumably knew when he spoke with Rucker and Saylor, what "tonic-clonic muscle tone" meant. Saylor admits that he had no basis for his assertion that Mr. Taylor lied to Mr. Scott. II-B at 192. This did not stop him, however, from repeating the same allegation to Dr. Mascaro's successor, Dr. Gordon Manin. I-186. II-C at 291-2.

56 Throughout the relevant time period, the company remained willing to accept a release from Dr. Mascaro, who was not a neurologist, Board Certified or otherwise. III-D at 5; 79; 81; II-B at 92; 186; II-C at 78; 113; I-195. Mascaro testified that he did not have the knowledge to read or interpret the neurological test results that Mr. Taylor had provided to Mr. Saylor in May of 2001. III-D at 79.

57 Mr. Hamilton, on behalf of the union and Mr. Taylor, wrote to Dr. Mascaro on June 6, 2002, asserting that NovaCare had all the information they could possibly need to recertify Mr. Taylor under the DOT; but that in any case, there was no basis to continue to deny him the opportunity to return to work on the dock, which does not require a CDL certification. I-254. Dr. Mascaro never responded to Mr. Hamilton's letter.

58 Dr. Mascaro testified in his deposition that he could not interpret those test results anyway. III-D at 79. Mascaro did not immediately send a copy of his May 6, 2002 letter to the company, citing client confidentiality. Rucker directed Saylor to secure a copy, as "we're the one holding the bag here with the ultimate $$$ responsibility." I-158. On June 6, 2002 he sent another E-mail to Saylor, asking if Mascaro had received the "green card"

On June 3, 2002 the EEOC issued a "Determination," in which it found "probable cause"

back from Mr. Taylor. He noted: "Enough snakes lying in the grass." II-C at 296; I-159.

that Red Star had violated the ADA by failing to engage in an interactive process with Plaintiff; by terminating his employment; and by refusing to permit him to return to work in any capacity, notwithstanding a full medical release and re-certification of his CDL. I-130-132. The parties attended a conciliation conference at the EEOC on June 19, 2002, and discussed, among other things, Dr. Roby's February 6, 2002 letter, which Saylor and Rucker contended they had never seen before. I-232. [59] That letter specifically released Mr. Taylor to return to work on the dock and to drive a forklift. The company stated that Mr. Taylor would not be permitted to return to work until he complied with its demand, first made on May 6, 2002, that he secure a release from a board-certified neurologist which authorized him to return to work, with no restrictions, and fulfill all the job duties of a truck driver and a dock worker. I-252.[60] Immediately after the conciliation conference, Rucker and Saylor met again with Dr. Mascaro. They agreed that Dr. Mascaro would send a letter to Dr. Roby asking if Mr. Taylor had undergone complete neurological work up after the DOT waiting period and if the results were negative. I-197; 258; 197.[61] Rucker composed the letter and directed Dr. Mascaro to permit him to review it before it was sent out. I-256-58. Dr. Roby did not immediately respond to Mascaro's letter. He was no longer treating Mr. Taylor, and had

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59 *See* II-C at 157 (where Rucker stated that Red Star received Roby's February 6, 2002 letter in March.)

60 The EEOC made it clear that the company's demands were not appropriate. Rucker's notes indicate: "meeting was out of control; EEOC was hammering on us to settle; ..... nothing objective in EEOC's conduct." I-171.

61 The DOT does not provide for a specified waiting period when a driver experiences a seizure from a known medical cause, such as a "drug reaction," provided the driver has fully recovered, has no residual complications, and is not taking anti-seizure medication. I-68.

not seen him since May, 2002.[62]

62 Dr. Roby finally responded on August 26, 2002. I-264. *See infra*, at 26.

Meanwhile, based upon his understanding that Dr. Roby's February 6, 2002 letter "document[ed] that he was able to operate a forklift." II-B at 139-40, Saylor drafted a letter to Mr. Taylor, stating "at this point it is clear that Dr. Roby has released you for forklift work but has not released you to resume your normal job duties as a commercial driver...the Company is offering you forklift only work on the dock, effective Sunday, June 30th." II-B at 141-143; I-259. Saylor sent the letter to Rucker for approval. Rucker retracted the reference to Dr. Roby's forklift clearance, and refused to permit Saylor to extend an offer of dock work to Mr. Taylor.[63] The letter which Mr. Saylor ultimately sent to Mr. Taylor on June 28, 2002, as re-written by Rucker, stated that Dr. Roby had not "definitively" approved him to operate a forklift and that "given your past medical history, a clear unrestricted release from Dr. Roby is required for us to maintain the safety and security of the ... workplace." I-260; II-B at 138.

On the heels of the conciliation conference, Mr. Taylor went to see Dr. Hilliard Sharf, a Board Certified Neurologist.[64] Dr. Scharf wrote directly to the EEOC on July 29, 2002 indicating that Mr. Taylor's neurologic examination was "completely normal;" that Mr. Taylor "does not meet the definition of epilepsy;" that his seizures were "likely related to

63 On June 27, 2002 Rucker called the DOT and "explain[ed] situation with Taylor." The DOT representative with whom he consulted advised him that " ...discrimination could be an issue; tonic clonic muscle tone is a seizure; she did not think we were in conflict with ADA but referred me to EEOC website." I-196 II-B at 139-141. Rucker did not look at the EEOC website. II-C at 267; 270. *See also* Rucker's notes regarding the Roby letter. I-175.

64 Dr. Sharf's records indicate that he reviewed Mr. Taylor's records on June 25, 2002. I-265.

the use of creatine;" and that he is capable of operating a forklift and "meets the criteria for being DOT compliant." I-265. Saylor admits that there was nothing ambiguous about this release from Dr. Sharf. II-B at 212-213. It was a full release without restrictions.

Mr. Taylor faxed Dr. Sharf's letter to NovaCare on August 12, 2002. Again, Red Star refused to permit him to return to work even in a non-driving capacity.[65] Rucker complained about Dr. Sharf's letter to Dr. Manin, contending that the "neurologist is off-base." I-200. According to Rucker's notes, he reinforce[d] to Dr. Manin that "the liability could sink our company, and "explained how a prudent person would proceed vs. Taylor." He further explained that Dr. Manin and Nova Care would face liability "if he signs off on Taylor returning to work."[66] I-198-9. [67]

Meanwhile Rucker Manin were busy consulting with Dr. Roby, without Mr. Taylor's knowledge, in order to create a conflict with Dr. Sharf's medical release. I-203.[68] Pursuant to these discussions during which Dr. Manin explained the "potential liability for all parties– Roby,

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65 On August 2, 2003, the EEOC issued a Notice of Conciliation Failure. I-139.

66 Rucker's concern with the company's liability appears in a number of his handwritten notes during this time period. *See e.g.*, I-187 (Taylor's wife could sue the company for "dereliction of duty"); I-169 (referencing the company's potential worker's compensation liability if "an individual with a known seizure condition convulses on the dock."). *See also* II-C at 98; 105; 204; 285; II-B at 74; 204-6.

67 Rucker also told Manin how "Taylor/Atty/EEOC have been obstructive and belligerent the whole way, just trying to bull their point through," I-199, and that Taylor lied to the PA. I-186. *Cf.* I-196.

68 Rucker notes on September 2, 2002: "talked to Manin re: liability; continuing liability that could sink the company; explained Regs." He noted that the company's approach, pursuant to a conversation with Mr. Jones and the company's attorney, was for Manin to speak with Sharf; "Will try to persuade him to epilepsy center evaluation; would prefer a conflict between 2 of Taylor's own doctors; at best we have conflict between Sharf and Manin and ambiguity from

himself, Sharf" Dr. Roby, purportedly provided suggestions to the company "over and above regs." I-201. Manin asked Dr. Roby to write a letter denying Mr. Taylor a CDL clearance based upon criteria not contained in the DOT regulations. I-198; 200; 207. Dr. Roby, instead, sent a letter on August 26, 2002 suggesting that Mr. Taylor be evaluated by a comprehensive epilepsy center. I-198; 264. Dr. Roby never retracted his clearance for Mr. Taylor to drive a forklift.[69]

After ten days had passed since Dr. Sharf's report was sent to the company and to NovaCare without any word from the company, Mr. Hamilton wrote to Saylor on August 22, 2002, querying why, in spite of Dr. Sharf's full duty release, Mr. Taylor was still not back to work. I-254. Hamilton charged Red Star with discrimination, and predicted that the company would find a way not to accept Sharf's report, as they had done with previous reports. Hamilton sent copies of his correspondence to Rucker and to NovaCare. I-267.

Roby." There was still "a conflict unless Sharf flips." I-203; 206.

69 Rucker's notes indicate that Dr. Roby's letter was "not what we wanted; ambiguity, but enough." I-262. Manin told Rucker that he was reluctant to ask Dr. Roby to re-write the letter, as he had sensed "resistance." I-198-99; II-C at 286-7.

Rucker sent Hamilton's correspondence and Dr. Sharf's letter to Mr. Jones. On August 26, 2002, Jones, who perceived Mr. Hamilton's complaints as "bullshit"; III-A at 194, sent an E-mail to Rucker advising him to "refute all claims of discrimination." ... He defended the company's position, "regardless of what the current medical opinions show," contending that Mr. Taylor was "seizure prone" and "could become unconscious at any moment." I-162; III-A at 161. Mr. Jones had no information that Mr. Taylor had had a seizure since March 1, 2001; III-A at 155, and had not reviewed any medical documentation, other than Dr. Sharf's letter, but he told Rucker that "previous and undisputed facts" show that Mr. Taylor had had seizures and a "known medical condition." I-162. Rucker wrote to Hamilton on September 16, 2002 reiterating Jones' concerns, largely word for word, regarding Mr. Taylor being "seizure prone," that he could have a seizure at any moment, and that he was a danger in the workplace in any capacity. I-270.[70] Both Jones and Rucker admitted that these were sincere expressions of their perception of the situation at the time. III-A at 178-9; II-C at 211-212. [71]

Dr. Manin called Dr. Sharf on September 5, 2002 at Rucker's direction. Sharf reiterated to Manin that Mr. Taylor had had a full neurological work up and that he could return to work

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70 Although Jones was aware that Mr. Taylor's seizures had been caused by Creatine, he complained that Mr. Taylor was responsible for his condition, not the company. I-162. He felt that the company was being persecuted by Mr. Taylor and his representatives. III-A at 183. Jones testified at his deposition that his August 26, 2002 E-mail sets forth his sincere belief regarding Mr. Taylor's condition at the time. III-A at 178-79. Similarly, Rucker ratified Jones' statements, many of which he set forth verbatim in his response to Hamilton. I-270. Rucker denied that he would have said what he did unless he believed it. II-C at . *See also* I-170. (Rucker states this is "fundamentally a loss of consciousness situation"); I-198. ("We would not be at this point if we were uncertain").

71 Indeed, Mr. Jones testified that he could not change the memo now, even in light of his current knowledge. III-A at 186.

without restrictions. I-262. But, Rucker's notes indicate, he "understands what is going on." In the event that the company required another opinion to "settle the issue", Sharf recommended the neurology department at Thomas Jefferson University Hospital. I-265.

The company demanded that Mr. Taylor submit to yet another neurological examination. Mr. Taylor saw Dr. Sperling, a Board Certified neurologist, on October 2, 2002.[72] Based on this examination, and the neurological reports which Mascaro had claimed were "outdated" in his May 6, 2002 letter to Mr. Taylor, Dr. Sperling released Mr. Taylor to return to work without restrictions. I-276.

Rucker was still not satisfied. He disputed whether Dr. Sperling's release was "clear" and "unrestricted" with regard to CDL certification under the DOT regulations. II-C at 189; I-190; 207-8. He spoke with Dr. Manin, explaining to him "how a prudent person would act" under Mr. Taylor's circumstances, and re-iterating his concern that the "liability could sink the company." I-199. According to Rucker's notes, Dr. Manin understands his liability and that of NovaCare if he releases Taylor to return to work. I-198. Dr. Manin spoke with Sperling about Rucker's concerns. He advised Rucker that Dr. Sperling was standing by his release. I-207-08. On October 3, 2002, Dr. Sperling sent a letter clearing Mr. Taylor pursuant to DOT regulations. I-276. Mr. Taylor

72 Saylor retired on October 2, 2002, he E-mailed Rucker in December, as he "can't get away from the Taylor thoughts." II-B at 158. Saylor confirmed that he thought of Mr. Taylor when he saw an accident, as he feared that Mr. Taylor "could have a seizure at any time." *Id* at 158.

returned to work as a combination man on October 21, 2002. The company reinstated him as of that date, not May 2, 2002. I-278.

PLAINTIFF IS ENTITLED TO SUMMARY JUDGMENT THAT DEFENDANT DISCRIMINATED AGAINST HIM IN VIOLATION OF HIS RIGHTS UNDER THE ADA AND THE PHRA

Plaintiff seeks summary judgment that the Defendant discriminated against him in violation of his rights under the ADA and the PHRA. The record plainly establishes that the Defendant erroneously misclassified him as a person with a "serious epileptic condition,"[73] and on that basis, as well as its uninformed perception that he was "seizure prone" and subject to "sudden and unpredictable losses of consciousness,"[74] a condition which was so severe that he could "have a seizure at any moment," it deprived him of his employment for a period of twenty months.[75]

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73 I-162.

74 II-C-96.

75 The "relevant time period" at issue here extends from March 16, 2001, when Mr. Taylor was first sent home by Mr. Saylor, through October 20, 2002. Mr. Taylor returned to work at Red Star on October 21, 2002.

This is one of those rare cases in which the Plaintiff has access to eyewitness evidence regarding the Defendant's state of mind. This account is so detailed and voluminous that there can be no doubt about the perceptions which governed the Defendant's conduct toward Mr. Taylor, and illegality of those actions under the ADA and the PHRA. Plaintiff's motion is based upon direct evidence that the Defendant removed Mr. Taylor from his job and kept him from returning on the sole basis of his protected status. Indeed, the Defendant has denied that, but for its perception that Mr. Taylor had a "serious epileptic condition," there was any other reason for its actions.[76] The Defendant further admits that it specifically refused to permit Mr. Taylor to return to work until he could produce a full duty work release from a neurologist which indicated that he could perform all of the duties of both the dock worker and truck driver positions. It also refused to provide him with an accommodation because his medical condition was not work related. The Defendant's own records show that its assessment of Mr. Taylor's condition was unsupported by a single medical report, but based upon unsubstantiated fears and stereotypes concerning seizures and epilepsy, and, by admission, an overriding concern for its own financial liability.

76 Accordingly, this case does not involve mixed motives.

There are no genuine or material factual disputes as to whether Plaintiff is 1) an individual with a "disability" as defined by the ADA and the PHRA; (2) that at all times relevant to this action he was qualified to work at the defendant's facility with or without accommodation, and (3) he suffered an adverse employment action as a result of the disability. Plaintiff is entitled to judgment as a matter of law as to all three of these components of his burden of proof. *Taylor v. Pathmark Stores, Inc.*, 177 F.3d 180 (3rd Cir. 1990); *Taylor v. Phoenixville Hospital*, 184 F.3d 296 (3rd Cir. 1999); Deane *v. Pocono Medical Center*, 142 F.3d 138 (3rd Cir. 1999)(*en banc*).[77]

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77 The adverse actions which Mr. Taylor experienced at the hands of the Defendant in this case included his removal from employment during the relevant time period, and the various actions that the Defendant took to prolong that absence as long as possible, including, but not limited to, 1) failing to engage in the interactive process, 2) failing to accommodate Mr. Taylor's disability as the Defendant itself classified and perceived it, 3) failing, without excuse, to accept reliable medical evidence which fully supported Mr. Taylor's fitness for employment, and 4) imposing full-duty recovery rules which had the purpose and effect of keeping Mr. Taylor out of the workplace in violation of the specific dictates of the ADA and the PHRA. The Defendant's actions were based upon a misunderstanding of Mr. Taylor's diagnosis, one which flowed inevitably from its substitution of its own uninformed medical assessment for those of Mr. Taylor's treating physicians. Consequently, Defendant inaccurately perceived the vocational impact of Mr. Taylor's medical impairment as one which rendered him incapable of performing any job in its facility.

Mr. Taylor is entitled to summary judgment as to Counts I and II of his Amended Complaint.

I. MR. TAYLOR MEETS THE STATUTORY DEFINITION OF A PERSON WITH A DISABILITY UNDER THE ADA AND PHRA

Title I of the ADA was enacted to prohibit employment discrimination against persons with disabilities, when those impairments are so severe that they substantially limit a person's major life activities.[78] Just as importantly, however, it protects persons with a record of such

78 A person has a disability under the ADA under if he has an impairment that substantially limits one or more major life activities. The term impairment includes any physiological, mental or neurological disorder or condition which affects one or more body systems, 29 C.F.R. § 1630.2(h), including a neurological disorder such as seizures or epilepsy. Major life activities are not exhaustively defined by the statute or regulations to the ADA, but include activities such as caring for one's self, performing manual tasks, walking, seeing, hearing, breathing, speaking, learning, and working. 29 C.F.R. § 1630.2(i). Other major life activities have been recognized by the courts. *See Snow v. Ridgeview Medical Center*, 128 F.3d 1201 (8th Cir. 1997)(sitting, standing, lifting, and reaching are major life activities). *See also Perez v. Philadelphia Housing Authority,* 677 F. Supp. 357 (E.D. Pa. 1987), *aff'd.* 841 F.2d 1120 (3rd Cir. 1988). *Accord* EEOC Compliance Manual, Section 902 (re: definition of disability). Substantially limits means (i)
unable to perform a major life activity that the average person in the general population can perform; or (ii) significantly restricted as to the condition, manner or duration under which an individual can perform a particular 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). When working is the major life activity being considered, the statutory phrase "substantially limits" requires proof that the individual is unable to work in a broad class of jobs or a wide range of jobs in various classes, as compared to the average person with comparable training, skills, and abilities. 29 C.F.R. § 1630.2(j)(3)(i). *See also Sutton v. United Airlines, Inc.,* 119 S.Ct. 2139, 2151 (1999).

The PHRA uses an identical definition of disability. The PHRA makes it unlawful for "'any employer because of the ... non-job-related handicap or disability of any individual to refuse to hire or employ, or to bar or to discharge from employment such individual, or to otherwise discriminate against such individual with respect to compensation, hire, tenure, terms,

impairment, as well as those or who are inaccurately perceived and/or classified as having such an impairment.[79] 42 U.S.C § 12102(2); 29 C.F.R. § 1630.2(g) (k) and (l). As the Supreme Court

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conditions or privileges of employment ... 43 Pa. Stat. Ann. § 955. The PHRA bars discrimination against people with disabilities who, with or without reasonable accommodation, can perform essential job functions. 43 Pa. Stat. Ann. § 954(p); 16 Pa. Code § 44.4. *See also Cain v. Hyatt*, *supra*, 734 F. Supp. at 682; *Jenks v. Avco Corp.*, 490 A.2d 912 (Pa. Super. 1985). *Pennsylvania State Police v. Pennsylvania Human Relations Commission*, 457 A.2d 584 (Pa. Commw. 1983). The PHRA was patterned after Title VII and Section 504 of the Rehabilitation Act, (which was also the blueprint for the ADA). As a result, federal case law is commonly employed in the construction of the Act. Accordingly, the analysis of Mr. Taylor's ADA claim applies equally to his PHRA claim, and there will be no separate discussion of the PHRA claims in this motion. *Taylor v. Phoenixville School District*, 184 F.3d 296 (3rd Cir. 1999).

79 Thus, the definition of disability under the ADA contains both an objective and subjective element, either of which is sufficient to qualify an individual for statutory protection.

stated in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), by protecting "regarded as" employees under the Rehabilitation Act, Congress acknowledges that "society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment." 480 U.S. at 284.

The first statutory prong, which refers to actual impairment, is an objective one which depends upon evidence which can be measured and evaluated according to medical and vocational standards. The perception prong, on the other hand, shifts the focus away from the individual and onto the employer's mind set. In a "regarded as" case, the focus is on the employer's attitudes and perceptions, not on any verifiable dysfunction. Indeed, a person can qualify for the protection of the ADA under the perception prong without any impairment at all.

The record of impairment prong is a hybrid. Although it focuses upon the documentation of an actual impairment, or the misclassification of either an actual impairment or a perceived impairment, in most cases the basis upon which the employer acted adversely against the plaintiff is the perception of the medical history and what it means in a vocational sense. Thus, the analysis in a record of impairment case does not differ significantly from the applicable analysis in a perception case.

Mr. Taylor has alleged that Red Star inaccurately classified and perceived him as having a "serious epileptic condition," a condition so severe, that he could not be permitted to work in any job in the company's facility.[80] Mr. Taylor's record of impairment and the company's perception came into being as a result of the company's refusal to accept reliable medical information about his condition, and by its substitution of its own judgment not only as to the severity of his condition, but the diagnosis as well. On the basis of this misclassification, it deprived him of his livelihood in for a period of twenty months. Mr. Taylor is entitled to summary judgment that he is a person with a disability pursuant to both the second and third prongs of the tri-partite definition of disability under the Act, and that the Defendant took adverse action against him on that basis.

A. MR. TAYLOR HAS A QUALIFYING RECORD OF IMPAIRMENT

A person is covered as an individual with a disability under the ADA if he has a record of impairment which substantially affected at least one major life activity at the time the record was

80 Although Mr. Taylor did experience a critical medical event in March of 2001, one which prevented him from engaging in his usual occupation of driving a truck for an extended period of time, Mr. Taylor does not allege in this lawsuit that he has an actual impairment under the first prong of the ADA's definition. He predicates his claim upon the record and perception prongs of the statutory definition of disability, but he does not he seek a reasonable accommodation as a remedy in this case. Accordingly, the issue which the Third Circuit left open in *Deane, supra,* as to whether a plaintiff may seek a reasonable accommodation under the ADA when his disability is solely a function of the employer's perception, is not at issue here. That is not to say that accommodation is not a relevant issue in the analysis of his discrimination claim, however, as the definition of disability under the ADA requires an assessment as to whether the plaintiff, in spite of his disability, either actual or perceived, qualified for the job he held or desired with or without accommodation. Additionally, an employer who discriminates against a "regarded as" plaintiff by refusing to accommodate its erroneous perception is liable for employment discrimination under the Act. *Taylor v. Pathmark, supra.*

created.[81] It also protects those who are misclassified as having such impairments and are denied employment opportunities on that basis. 29 C.F.R. § 1630.2 (k); EEOC Compliance Manual, §902.7.[82]

81 Coverage exists based on a record of impairment even if, at the time the adverse job action takes place, the individual no longer satisfies the definition of one who, because of a present disability, has an impairment that substantially affects a major life activity. *Pritchard v. Southern Co. Services*, 92 F.3d 1130 (11th Cir. 1996), *cert. denied*, 520 U.S. 1274 (1997); *Wood v. County of Alameda*, US Dist. LEXIS 17514 (N.D. Cal. 1995); *Mark v. Burke Rehabilitation Hospital*, 1997 U.S. Dist. LEXIS 5159 (S.D.N.Y. 1997). *See also* 29 C.F.R. § 1630.2(k).

82 *See also School Board of Nassau County v. Arline*, 480 U.S. 1123, 1126 n. 55 (1987). The Plaintiff in *Arline* was discharged from her job based upon her record of tuberculosis, and the employer's misguided and uninformed perceptions about her medical history.

By its own admission, Red Star classified Mr. Taylor has having a "serious epileptic condition." Not one doctor ever told the company that Mr. Taylor had such a condition. Indeed, Rucker admits that those were his words. II-C-134. Although he had not one shred of medical support for his conclusion that Mr. Taylor was epileptic, much less a "serious epileptic," Rucker repeatedly asserted that he was. He first made this assertion to the JAC during Mr. Taylor's grievance hearing. He asserted it again to the EEOC, and further alleged that "four doctors had confirmed it." I- 124. He contended to others and in his private notes that Mr. Taylor's condition was "fundamentally a loss of consciousness situation," and he agreed with the company president that it was one which could cause Mr. Taylor to have a seizure "at any moment." *See eg.*, II-C- 99 (Taylor has "epilepsy-a diagnosed condition"). To the company president, this "history ... of a known medical condition," rendered Mr. Taylor incapable of being in the workplace in any capacity, "regardless of what the current medical opinions may show." This was so obvious, he concluded, that any sixth grader would understand it. I-162; III-A-94-5.[83]

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83 Of course, Mr. Taylor did have a medical record of seizures. There was no medical basis, however, for the Defendant's assertion that his seizure condition was uncontrolled, or that "he could have a seizure at any moment." Although there was cause for concern at the outset as to why Mr. Taylor had experienced seizures, his treating doctors informed the company by the time of the JAC hearing in May that they expected him to remain seizure free. Defendant refused to accept these medical opinions, although they had no contrary medical evidence, and proceeded to exaggerate the nature and extent of Mr. Taylor's seizures without any conceivable

medical foundation, and proceeded to prevent him from returning to work on this basis.

By misclassifying Mr. Taylor as a "known epileptic,"[84] one whose epileptic condition was not only "serious," but so unstable and unpredictable that he "could have a seizure at any moment," the Defendant has qualified him as a person with a disability under the Act.[85] Such a record of impairment reflects a substantial limitation upon most of Mr. Taylor's major life activities, including, *inter alia,* standing, walking, seeing, hearing, breathing, interacting with others, and working, all of which are dramatically impacted, if not eliminated altogether, when a seizure is in progress.[86] Indeed, the company's misclassification of Mr. Taylor as a person who was subject to sudden and unpredictable losses of consciousness, which rendered him not only unable to operate a forklift, but also unqualified to perform any other job in the Defendant's facility, establishes a substantial limitation in all the major life activities which would necessarily be implicated when such a condition actually exists. As Mr. Jones pointed out, "when you are having a seizure, you are unconscious." III-A-176. Losses of consciousness are characterized by the utter inability to carry on most major life activities that are of any

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84 II-C at 125 (Rucker).

85 Defendant brought Mr. Taylor under the umbrella of the ADA by misclassifying him as a person with a substantially limiting medical record. It then discriminated against him by depriving him of his employment and its emoluments on the basis of that misclassification, a fact which it does not deny. Indeed, the Defendant has admitted that but for the seizures and their implications, it would not have barred Mr. Taylor from the workplace.

86 This is best documented by Mr. Taylor's wife, Mary, who described in graphic detail the seizures which Mr. Taylor experienced in March of 2001. Not only was he not able to engage in any of the major life activities while the seizure was in progress, he was so impaired that Mrs. Taylor was directed by the rescue authorities to commence CPR to keep him alive. She could barely discern a pulse and he was hardly breathing. Mrs. Taylor's deposition is contained in the Appendix at Volume III-C.

importance to most people's daily lives. Although a person with epilepsy or a seizure disorder may not be in a perpetual seizure state, their major life activities are still circumscribed as if they were, especially if their condition is so unstable that they "could have a seizure any moment." A person who is subject to a loss of consciousness on such an unpredictable basis forfeits by necessity the independence that most adults take for granted, to protect against danger to themselves and others.[87] Such a person would be unable to go out of their home unattended, drive a car, care for children, cross a street, or perform almost any life activity without supervision because the consequences of having a seizure "at any moment" might place them in harm's way without the ability to protect themselves from serious danger or death.

This, indeed, was the company's perception of Mr. Taylor's condition, which, they feared, could strike at any time, without warning. Both Rucker and Jones cited the possibility that because Mr. Taylor might be subject to "sudden, ... unanticipated, unscheduled loss of

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87 Indeed, persons with "serious epileptic conditions" with this level of impairment equal or exceed the requirements of the Social Security Administration for Disability Insurance Benefits. *See* SSR-87-6: Titles II and XVI: The Role of Prescribed Treatment in the Evaluation of Epilepsy; 42 C.F.R. § 404.1525-30 Appendix 1, (2002):

11.02 *Epilepsy—convulsive epilepsy, (grand mal or psychomotor), documented by detailed description of a typical seizure pattern, including all associated phenomena; occurring more frequently than once a month in spite of at least 3 months of prescribed treatment.* With:

1. A. Daytime episodes (loss of consciousness and convulsive seizures) or

B. Nocturnal episodes manifesting residuals which interfere significantly with activity during the day.

11.03 *Epilepsy—nonconvulsive epilepsy (petit mal, psychomotor, or focal), documented by detailed description of a typical seizure pattern, including all associated phenomena; occurring more frequently than once weekly in spite of at least 3 months of prescribed treatment*. With alteration of awareness or loss of consciousness and transient postictal manifestations of unconventional behavior or significant interference with activity during the day.

consciousness," he might fall in front of a forklift, fall off the dock, or otherwise harm himself or cause danger to others, the results of which could be "horrific." [88] III-A-95; II-C-207; I-162. Accordingly, they were not willing to consider him for any position in the facility, because he could be a threat to himself or others "no matter what he was doing." II-C-259. Because, as Defendant admits, there was no medical support for its conclusion that Mr. Taylor was a "serious epileptic" or an epileptic at all, and was certainly not a "known epileptic," Plaintiff is entitled to summary judgment that the Defendant misclassified him as having a substantially limiting record of impairment.

B. DEFENDANT TOOK ADVERSE ACTION AGAINST MR. TAYLOR BASED ON HIS RECORD OF IMPAIRMENT

There can be no genuine or material factual dispute that the Defendant took action against Mr. Taylor based on the record of impairment which it created when it labeled him a "serious epileptic." The record is replete with examples of how he was denied the opportunity to return to work, not once, but repeatedly over the course of twenty months, because of the Defendant's reliance on this misclassification.

Perhaps the most damning example is Mr. Jones' August 26, 2002 E-mail to Don Rucker. Jones based his vehement opposition toward Mr. Taylor returning to work on Mr. Taylor's "past seizures." I-162. Jones was still relying on this history to keep Mr. Taylor out of the workplace eighteen months after his seizure episode, "regardless of what the current medical opinions may show."[89] This constitutes a clear and direct admission that the company was relying on Mr. Taylor's record of impairment to deny him reinstatement to his job.

Mr. Jones' admission, however, is just one of many that definitively demonstrate that the company used Mr. Taylor's record of impairment to keep him out of the workplace. Indeed, on the day the company first learned (allegedly) that Mr. Taylor had epilepsy, it sent him home. II-B-58; II-C-41;54. Although it had no medical documentation of the diagnosis, much less any information regarding any functional limitations Mr. Taylor might be subject to, it removed him from the workplace entirely because he was a "known epileptic." II-C-125. It relied on this misclassification to keep Mr. Taylor out of the workplace throughout the relevant time period. Indeed, it specifically based its submissions to both the JAC and the EEOC on Mr. Taylor's

89 Mr. Jones stated that he did not know whether Mr. Taylor was an epileptic. All he knew was that Mr. Taylor had a history of seizures and could not drive. His "past seizures," Jones stated, established that he could not come back to work without injuring himself or others. III-A-155. He stated that he did not care what caused the seizures, and that he had not reviewed any of the medical evidence amassed during the first eighteen months of his absence, other than Dr. Sharf's July 29, 2002 report. III-A-82 .

classification as an epileptic.[90]

As time went on, the company adhered to its own view of Mr. Taylor's classification and the severity of his impairment, notwithstanding the information which Mr. Taylor provided concerning his medical treatment. It refused to accept medical evidence if it contradicted its own assessment of his condition, even after he had been cleared not once, but twice, to drive a tractor-trailer under a CDL. Even after Dr. Sharf, a Board Certified Neurologist, told the company that Mr. Taylor did not have epilepsy, and provided the third opinion that Mr. Taylor should be re-certified for his CDL (although he had had a valid CDL since February, 2002); and stated definitively that Mr. Taylor showed no evidence of neurological impairment, Mr. Jones stated that "we disqualified him from his DOT physical from driving, and nothing has changed at this point." III-A at 176. Rucker said Dr. Sharf was off-base, and made frantic phone calls to Dr. Manin, the company physician, fretting that "the liability could sink our company." II-C-198-9. He tried to secure medical opinions that would contradict that of Dr. Sharf, and to confirm his own view that Mr. Taylor should not be permitted to return to work.

This uncontraverted evidence and the company's direct admissions establish that the Defendant relied upon its own unfounded classification of Mr. Taylor's condition to deny him employment throughout the relevant time period. Based on this misclassification, which had no medical foundation, it denied him the ability to return to work. Mr. Taylor is entitled to summary judgment that the Defendant discriminated against him on the basis of a record of

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90 *See also* Exhibit 23 (requiring a clear, unrestricted release "given your past medical history").

impairment.

C. DEFENDANT REGARDED PLAINTIFF AS A PERSON WITH A SUBSTANTIALLY LIMITING IMPAIRMENT

The "regarded as" prong of the ADA's definition of disability prohibits employment discrimination against individuals who do not have substantially limiting impairments but who are treated by their employers as if they do.[91] It also covers persons who have no impairments, and those who have impairments, but who are substantially limited by them as the result of the attitudes and exaggerated perceptions of others toward the impairment rather than by the impairment itself. [92] 42 U.S.C § 12102(2); 29 C.F.R. § 1630.2(g). *School Board of Nassau*

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91 The EEOC defines "regarded as" to include (1) has a physical or mental impairment that does not substantially limit major life activities; (2) has an impairment which substantially limits major life activities only as a result of attitudes of others; or (3) has neither of the impairments listed in (1) or (2) above but is treated as having a substantially limiting impairment. 29 C.F.R. § 1630.2(l). *See also* H.R.Rep. No. 101-485(II), at 53 (1990) ("House Labor Report"), *reprinted in* 1990 U.S.C.C.A.N. 303, 335; House Judiciary Report at 29, *reprinted in* 1990 U.S.C.C.A.N. at 452, cited in *Deane* at 143. As noted by then-Chief Judge Becker, "common to each definition [above] is the requirement that the individual not in fact have an impairment that, absent the misperceptions of others, would substantially limit a major life activity." *Id.*

92 The "regarded as" prong is directed toward common attitudinal barriers, as well as myths, fears, and stereotypes which denied people with disabilities, real and perceived, equal access to the workforce. Congress was particularly concerned about class-based discrimination against people with medical conditions such as diabetes and epilepsy, who have historically been singled out for discrimination on the basis of their diagnosis, without regard to how, if at all, the condition individually affects a person's capacity to be a productive member of the workforce. *See Taylor v. Pathmark, supra,* at 192-193, discussing common employer misconceptions regarding epilepsy, which are class based and not individualized. As the Court stated in *Van Zande v. State of Wisconsin,* 44 F.3d 538 (7th Cir. 1995), "...many impairments are not disabling but are believed to be so, and the people having them may be denied employment or shunned as a consequence." *See generally,* Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities, 40 U.C.L.A. L. Rev. 1341 (1993). Common attitudinal barriers to which the Act is directed, particularly in the employment context, include "concerns about productivity, safety, insurance, liability, attendance, cost of accommodation and accessability, and acceptance by co-workers or customers". EEOC

County v. Arline, 480 U.S. 273 (1987); *Taylor v. Pathmark*, 177 F.3d 180, 188 (3rd Cir. 1999); *Cook v. Rhode Island Dept. of Mental Health*, 10 F.3d 17 (1st Cir. 1993).

It is indisputable that USF Red Star perceived Mr. Taylor as "seizure prone" and as having a "serious epileptic condition." As a matter of law, the company perceived that this impairment substantially affected Mr. Taylor's major life activities, including, *inter alia*, walking, standing, seeing, speaking, hearing, interacting with others, breathing, working, and, indeed, remaining conscious on a predictable basis. This conclusion is required by the testimony of the Defendant's own high management officials and the percipient documentation of their efforts to keep Mr. Taylor from returning to work. This highly unusual and articulate record provides the Court with a bird's eye view of the company's perception of the nature and extent of Mr. Taylor's disability. Defendant perceived Mr. Taylor as a person with a substantially limiting impairment, and, he is, accordingly, entitled to the Act's protections.

D. THE DEFENDANT PERCEIVED MR. TAYLOR AS HAVING A DISABILITY IN THE MAJOR LIFE ACTIVITIES OF WALKING, STANDING, SEEING, SPEAKING, HEARING, BREATHING, AND INTERACTING WITH OTHERS

Compliance Manual at § 915.002.

Many of same factors which establish that Red Star misclassified Mr. Taylor as having a substantially limiting impairment with regard to the major life activities of standing, walking, seeing, hearing, speaking, interacting with others, and breathing, also preclude any factual dispute as to whether it perceived him in the same light.[93] This conclusion flows inevitably from the many statements by Barry Saylor, CEO Brad Jones, and Donald Rucker that because Mr. Taylor was "seizure prone" and, indeed, a person with a "serious epileptic condition" which could cause him to become unconscious at any moment," he was a danger to himself or others by his very presence in the company's facility. I-162.

93 *See infra* at 33, discussing the Defendant's misclassification of Mr. Taylor as a person with a record of a substantially limiting impairment. Because the analysis regarding the substantially limiting impact of the Defendant's misclassification of Mr. Taylor's record of seizures is very similar to the analysis of its perception of his condition, that discussion will not be repeated here, but is incorporated by reference.

As there is no medical evidence to establish that the employer's perception was accurate, there can be no material dispute that the company's perception was wrong.[94] Indeed, the only person to ever diagnose Mr. Taylor as an epileptic at all was Mr. Rucker, who admits, notwithstanding his representations to the JAC, the EEOC, numerous medical providers, outside agencies, the union, and Taylor himself, that he had no medical support for his conclusion.[95]

Unfortunately for Mr. Taylor, the company's perception subjected him to employment discrimination and the loss of his livelihood even though it was wrong. The company treated him as a person who could become unconscious at random and without warning, viewing him as a person who "at any moment" could be rendered unable to perform the most basic life activities while unconscious from a seizure. Red Star perceived Mr. Taylor's impairment as so substantial and so random, that if it were true, his major life activities would be extremely curtailed in order to protect himself from the potentially lethal consequences that could befall him in the ordinary course of every day life. *See infra* at . Therefore, Mr. Taylor has a "disability" as defined by the ADA by virtue of the Defendant's perception. There are no material facts in dispute and Mr. Taylor is entitled to summary judgment as a matter of law.

E. RED STAR REGARDED MR. TAYLOR AS SUBSTANTIALLY LIMITED IN THE MAJOR LIFE ACTIVITY OF WORKING

94 *See infra* at 33-5.

95 Although Dr. Scardigli's initial impression was that Mr. Taylor may be suffering from epilepsy, that diagnosis was preliminary, and it is undisputed that the Defendant did not know about Dr. Scardigli's initial assessment.

The company also regarded Mr. Taylor as having a disability, as defined by the Act, in the major life activity of working. *Taylor v. Pathmark, supra; Deane v. Pocono Medical Center*, 142 F.3d at 142. This conclusion flows inescapably from the many statements by Jones, Rucker, and Saylor, which establish that they perceived Mr. Taylor as having a "serious seizure condition," one which, because it was so unpredictable could cause him to have a seizure at any moment, and which would preclude him from working at the Philadelphia Terminal in any capacity because just being in the facility, *no matter what he was doing*, he could fall in front of a forklift and be injured or killed, or otherwise be a danger to himself or others. II-C-259.

Where the employer's perceives that a plaintiff is substantially limited in the major life activity of working, the question is whether the employer's perception of his disability, if true, would constitute a significant barrier to his vocational opportunities. *Cook v. Rhode Island State Hospital*, 10 F 3d 17 (1st Cir. 1993).[96] There can be no dispute that the company's perception of Mr. Taylor in this case satisfies the statutory threshold. The company's perception, had it been true, would have constituted a "significant [] restrict[ion] in [Mr. Taylor's] 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). [97]

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96 In order to have a disability in the major life activity of working, an individual must be precluded from more than one job or type of job. Additionally, factors such as the geographical area to which the individual has reasonable access and the number and types of jobs utilizing similar training, knowledge, skills, and abilities within the geographical area must be assessed. In other words, the query involves whether the disability poses a significant barrier to employment for the individual.

97 The focus here is not upon the number of jobs the Plaintiff can still perform, but on the

number of opportunities from which he is excluded (or would be excluded) as a result of the employer's perception. *Cook, supra. See also EEOC v. Chrysler Corp.*, 917 F. Supp. 1164 (E.D. Mich. 1996); *Muller v. Hotsy Corp.*, 917 F. Supp. 1389 (N.D. Iowa 1996); 29 C.F.R. Sec. 1630.2(j)(3)(ii). "Denying an employment applicant even a single job that requires no unique physical skills, due solely to the perception that the applicant suffers from a physical limitation that would keep her from qualifying for a broad spectrum of jobs, can constitute treating an applicant as if her condition substantially limited a major life activity, viz., working. *Cook, supra, at 23.*

The conclusion that the Defendant perceived Mr. Taylor as having a substantial limitation in the major life activity of working comes directly from the documentary and testimonial record, which is replete with statements by representatives of Defendant's management that they regarded Mr. Taylor's condition as so severe, that not only could he not drive a forklift or a truck, but that he could not load and unload trucks manually, or do any other job in the company's facility, because of the possibility that he might "convulse on the dock." It is bolstered by the report of Mr. Taylor's vocational expert, Daniel Rappucci, who states, based on his Vocational Analysis, that Red Star greatly exaggerated the vocational impact of Mr. Taylor's actual medical condition to such an extent that, had it been true, would have not only substantially limited his employment opportunities, but nearly eliminated them altogether. *Id.*

1. The Statements of Red Star Management

Saylor, Jones, and Rucker explicitly indicated that they perceived Mr. Taylor, due to his history of seizures and "serious epileptic condition" as incapable of being at the company's facility in any job. Thus, not only did they perceive that Mr. Taylor was not able to drive a truck or a forklift,[98] but that he could not be considered for even clerical or extremely light duty jobs because he might not be able to be aware at all times in the dangerous environment of the dock. ; I-162. Because they thought Mr. Taylor's condition was so unstable and so random, they did not even investigate whether he could perform clerical jobs or other non-forklift tasks as a

98 Even this perception would be enough to limit Mr. Taylor's employment opportunities to a sufficient extent that he would be protected by the ADA as a "regarded as" plaintiff. By virtue of not being able to drive a truck (well beyond when the medical evidence suggests that this was appropriate), and a forklift over the entire course of the relevant time period, Defendant's perception eliminated Mr. Taylor from the entire class of truck driving jobs and all jobs that required the use of moving equipment.

potential accommodation for Mr. Taylor because he was danger to himself or others "no matter what he was doing." II-C-259. Rucker admitted that a person with this level of impairment was not qualified for any job in the company's facility. II-C-202. This, by itself, is enough to establish that Red Star perceived Mr. Taylor as having a substantial limitation in the major life activity of working. *Taylor v. Pathmark, supra,* 177 F.3d at 188.

Red Star management also expressed concerns with productivity, safety, and liability which further evinces the perception that Mr. Taylor had a disabling impairment in the major life activity of working.[99] Rucker's notes indicate that he was extremely fearful that Mr. Taylor's presence in the workplace might lead to liability of such magnitude it could "sink our company." An employer's perception that an employee is a danger to himself or others, or that he poses a "direct threat" in the workplace, constitutes evidence that the employer perceives the employee as having a substantially limiting impairment, one which is so severe that it cannot be mitigated by reasonable accommodation. *See Doeble v. Sprint/United Management Co.,* 14 AD Cases 1281 (10th Cir. 2003). The record is littered with references by Rucker and others to Mr. Taylor being a danger to himself and others. *See infra at* . Those statements indicate, in combination with the company's other statements and assumptions about the impact of Mr. Taylor's seizure condition, establish that the company perceived him as a person with a

99 Common attitudinal barriers to employment to which the Act is directed include "concerns about productivity, safety, insurance, liability, attendance, cost of accommodation and accessibility, and acceptance by co-workers or customers." EEOC Compliance Manual at § 915.002.

disability in the major life activity of working.

2. The Vocational Report

Although the Defendant's own statements independently establish that it viewed Mr. Taylor as a person with a disability in the major life activity of working, this conclusion is further bolstered by the unrebutted Vocational Analysis performed by Mr. Rappucci. By extrapolating the Defendant's articulated perceptions to the labor market in Mr. Taylor's geographical region, in light of his age, education and work experience, Mr. Rappucci was able to identify the vocational extent of the Defendant's perception regarding Mr. Taylor's ability to work. Mr. Rappucci's extensive report illustrates how Red Star's perception of Mr. Taylor's impairment rendered him unable to perform almost any job. Indeed, had Mr. Taylor been impaired to the extent perceived by Red Star, he would have been precluded from consideration for employment, both within his chosen field of work and within a wide range of jobs across numerous classes within his geographic area.

Mr. Rappucci stated that if Mr. Taylor had been disabled to the extent perceived by Red Star, he would be precluded from performing most material handling occupations:

> In the Philadelphia metropolitan statistical area [("MSA"), comprising of Philadelphia, Atlantic City and Harrisburg, in the] first quarter [of] 2003, there were 87,409 individuals working in transportation and material moving occupations. These include not only driving occupations but also industrial truck operators (forklift operators), in which 7,262 individuals are currently working. In addition to these numbers (i.e., beyond the total of 87,409 workers within transportation and material moving occupations), there are 10,129 individuals working as freight, stock and material handlers (not otherwise classified). Hence, in view of the perception of Mr. Taylor's employer, he would be disqualified from a multitude of jobs, using similar training, knowledge, skill or abilities comparable to those possessed by Mr. Taylor, within the Philadelphia labor market.

Rappucci Report at 15.

Mr. Rappucci went on to analyze Mr. Taylor's skills, aptitudes and abilities (per his work history as defined by the Dictionary of Occupational Titles/United States Department of Labor) using the Occupational Assessment System ("Oasys")"to identify jobs in which Mr. Taylor could transfer the same or similar skills he developed in performance of past work and/or exercise demonstrated abilities/aptitudes consistent with satisfactory performance of his past work." *Id.* The analysis limited consideration of only those positions consistent with his skills, aptitudes and abilities "but likewise requiring the 'operation' and/or 'control' of equipment, and/or specifically – the use of a forklift." Mr. Rappucci's analysis produced a chart which confirmed that Mr. Taylor would be significantly restricted in the ability to perform a class of jobs that require equipment operations, inclusive of forklift operations. *Id.* at 16.

However, Mr. Rappucci went on to note that, based on his review of a significant body of evidence:

> Mr. Taylor's employer's perceptions go beyond significantly restricting him to the ability to perform a class of jobs, i.e., they extend to a broad range of jobs in various classes. This would include jobs that do not necessarily involve similar training, knowledge, skills or abilities, but from which Mr. Taylor would be disqualified because of the extent of his perceived impairment. Specifically, Mr. Taylor is deemed to have the potential to lose consciousness at random intervals. He is perceived to be seizure-prone. As such, this counselor would question the type of work and/or work environment that would be appropriate for Mr. Taylor i.e, an environment where he would not be at risk of harming himself should he "lose consciousness at random." [Such a view] is the expressed perception of his employer, and as such, there is no work classification, including mechanical, production, clerical, sales, service/accommodating, or humanitarian work in which Mr. Taylor would not have proximity to office or manufacturing equipment, or floor surfaces that would present a hazard to a

> falling unconscious individual. Hence, Mr. Taylor's employer's perceptions render Mr. Taylor totally vocationally disabled.

Id. at 16-17. Defendant's perception, therefore, as illustrated by the Vocational Analysis, was that Mr. Taylor's impairment preclude him from working in the same or similar employment in the geographic area *and*, in fact, in essentially *every other job.*

Defendant's perception, therefore, is far more limiting than what is needed to bring Mr. Taylor under the umbrella of the ADA. In order to establish a substantial impairment in the major life activity of working, the plaintiff need not establish that the employer perceives him as being unable to work at all. *MX Group, Inc. v. City of Covington,* 293 F.3d 326 (2002).[100] The Act is intended to ensure that people such as Mr. Taylor are not victimized by stereotypical assumptions and unfounded fears regarding a medical condition, whether or not that condition is by itself substantially limiting. *Id.* at 338; *Cook v. Rhode Island State Hospital,* 10 F 3d 17 (1st Cir. 1993). Mr. Taylor is entitled to judgment as a matter of law that the Defendant regarded him as unable to perform a numerous jobs in various classes as well as broad classes of jobs, that is, he was regarded having a substantially limiting impairment in the major life activity of working.

F. MR. TAYLOR IS OTHERWISE QUALIFIED

Mr. Taylor is entitled to summary judgment that he was a qualified person with a disability under the ADA. That is, in spite of the disability Defendant recorded and/or perceived, Mr. Taylor remained at all times capable, with or without accommodation, to perform the duties

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100 The same is true, of course, where the plaintiff seeks to establish that he is disabled in fact under the ADA. The very premise of the ADA is that people with disabilities can work, with or without accommodation.

of a dock worker at the Philadelphia Terminal.

A qualified person with a disability is one who:

> satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position.

42 U.S.C. Sec. 12111(8); 29 C.F.R. § 1630.2(m). *See also Arline, supra*, 107 S.Ct. at 1131 n. 17; *Buskirk v. Apollo Metals, Inc.*, 307 F.3d 160, (3rd Cir. 2002); *Deane v. Pocono Medical Center*, 142 F.3d 138, 145 (3rd Cir. 1998); *Accord, Jenks v. Avco Corp.*, 490 A.2d 912, 915-916 (Pa. Super. 1985) (PHRA).[101]

[101] *Accord Lowe v. Angelo's Italian Foods*, 87 F.3d 1170, 1174 (10th Cir. 1996); *White v. York International*, 45 F.3d 357, 361 (10th Cir. 1995); *Chandler v. City of Dallas*, 2 F.3d 1385 (5th Cir. 1993), *cert. denied*, 114 S.Ct. 1386(1994); *Matczak v. Frankford Candy & Chocolate Co*., 136 F.3d 933(3d Cir. 1997). *See also Jenks v. Avco Corp*., 490 A.2d 912, 915-16 (Pa. Super. 1985) (PHRA).

Although the Defendant contends that Mr. Taylor was not qualified to drive a forklift, and therefore not capable of performing the essential functions of a dock worker, the facts on the record establish that there is no material dispute, as a matter of law, as to Mr. Taylor's qualification. The record establishes that Mr. Taylor was, according to all reasonable criteria, capable of operating a forklift. Even if he was not, the qualification under the ADA incorporates the concept of reasonable accommodation. *Arline, supra*, n. 19, *Gilbert v. Frank, supra.*[102] Defendant admits that it never considered how Mr. Taylor might be accommodated in any job, as it insisted that he be capable of returning to work "full duties." Mr. Taylor is entitled to summary judgment that he is a qualified person with a disability.

1. Mr. Taylor Has The Requisite Skills, Education, Experience And Job-related Requirements of The Job of Dockworker

The Defendant does not dispute that Mr. Taylor has the skill, education, experience, and other job related requirements for the position of dock worker. Mr. Taylor was originally hired into this position in 1988, and worked in exclusively in that position until he became CDL certified and could work as a combination man. As a combination man, Mr. Taylor drove a truck and worked on the dock. Saylor admits that prior to March 1, 2001, he never questioned whether Mr. Taylor had the requisite qualifications and physical abilities to perform the job. II-B-28. Accordingly, Mr. Taylor is otherwise qualified as to all the skill and experience requirements of a dockworker.

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102 Accordingly, if Mr. Taylor could perform the essential functions of the job without an accommodation, he is qualified. If not, the question would become whether he could perform the essential functions of the job with an accommodation.

2. Mr. Taylor Was Qualified to Perform The Essential Functions of a Dockworker Throughout the Relevant Time Period, With or Without Accommodation

Throughout the relevant time period, Mr. Taylor was able to perform all the functions of the dock worker position, including operating a forklift. Even though Mr. Taylor was not able to drive a truck on the public highways, because of his seniority and the manner in which dock jobs were bid, he could almost always secure an assignment as a dockworker. The company does not dispute this. II-C- 71; II-B-32-33.

Additionally, on February 6, 2002, Mr. Taylor was re-certified to drive a tractor-trailer under CDL. I-240. From that time forward, he was qualified pursuant to all applicable federal regulations to drive a tractor trailer. The company concedes that DOT certification presumptively qualified Mr. Taylor to operate a forklift. Although the company ignored the fact that Mr. Taylor had been CDL re-certified, it concedes, as it must, that the certification was legally valid. Saylor at II-B-164; II-C-150. According to its own criteria, therefore, Mr. Taylor was qualified to operate a forklift *and* work on the dock from as of February 6, 2002. Mr. Taylor is accordingly entitled to summary judgment as to that time period.[103]

The only conceivable issue, then, with regard to Mr. Taylor's qualifications, whether,

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103 *See also* Vocational Analysis, I-54. There is absolutely no evidence to the contrary. Thus, in spite of the Defendant's assertion that Mr. Taylor was not qualified, an assertion it premises upon its own application of federal regulations to the operation of forklifts, (to which they do not apply), the company cannot dispute the legitimacy of Dr. Popowich's certification. Moreover, Mr. Taylor secured another certification from Ronald Scott, a physician's assistant from NovaCare, the company's medical provider, on May 2, 2002. I-246. Although the Defendant rejected that certification as well, Dr. Manin cleared Mr. Taylor on October 18, 2002 as of the date of Mr. Scott's examination. Dr. Manin's letter to Mr. Rucker was inadvertently omitted from the Appendix, but is attached hereto as Exhibit B.

between March 15, 2001, when the company sent him home, and October 21, 2002 when it finally took him back, Mr. Taylor was qualified to perform the essential functions of the dock worker position with or without accommodation. Mr. Taylor is entitled to summary judgment that he was.

3. Even If Operating a Forklift Is an Essential Function of the Dock Worker Position, Mr. Taylor Was Objectively Qualified

The best evidence that Mr. Taylor was capable of operating a forklift throughout the relevant time period is his actual experience doing so. He did in fact operate one without incident, from March 12 through March 15, 2001. Moreover, Mr. Taylor worked as a forklift operator on a movie set from July 2001 through December 2001. Thus, the company cannot dispute that Mr. Taylor was qualified to operate a forklift because it is uncontroverted that he in fact did so. II-A-170.

The fact that the company was making a demand for a particular type of release cannot be confused with Mr. Taylor's objective qualifications to operate a forklift. The Defendant cannot create a genuine or material factual dispute regarding Mr. Taylor's objective qualification to operate a forklift by arbitrarily imposing legal requirements that are inconsistent with the very laws they seek to invoke. There is no dispute that the DOT regulations, pursuant to which Defendant demanded that Mr. Taylor be re-certified in order to come back to work in any capacity, do not govern forklifts. Even if the company could establish a requirement for the dock worker position which uses a legal standard as a point of reference, it cannot employ such a criteria here to establish that Mr. Taylor was not qualified because there is no dispute that the

company does not require its dock workers to have such a certification. Dock workers do not drive trucks and are not required to be certified to do so by DOT or any other state or federal agency, and the Defendant admits that many of its dock workers who do not have such certifications. I-27.

The OSHA regulations are just as unavailing to the Defendant as the DOT regulations in this regard. It is undisputed that there are no OSHA regulations specifically pertaining to seizures and the operation of forklifts. I-54; II-B-44; 76; I-152; II-C-97. Moreover, its assertion that the General Duty Clause in the OSHA regulations created a responsibility to keep Mr. Taylor off a forklift because he was a "known epileptic" collapses upon itself by virtue of the fact that Mr. Taylor was not an epileptic and no one ever told the company that he was.[104] The medical evidence in the company's possession, in fact, was to the contrary.[105] Moreover, Saylor warned Rucker from the outset that this argument might "blow back in [their] faces. I-152. Rucker himself admitted as early as March 20, 2001 that there were no regulations that applied to Mr. Taylor's situation. *Id.*.

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104 In a desperate attempt to find something, *anything*, in some regulation which could be used to preclude Mr. Taylor from operating a forklift, Red Star sought out the advice of both DOT and the American Trucking Association ("ATA"). Rucker dep. at ; I-151-2; I-151. However, the research the company conducted turned up only the so-called "General Duty Clause, which imposes a general duty on an employer to maintain a working environment free of known hazards." I-151-2; Rucker dep. at . Beyond that, the company had "no luck" finding anything in OSHA regulations which linked seizures and operation of forklifts. *See also* I-69-70.

105 The only medical support the company ever had for its position was Dr. Mascaro's two sentence note dated March 27, 2002. The company never asked Mascaro to evaluate any medical information it subsequently received, and he never provided a more thorough report as to Mr. Taylor's condition or his vocational capabilities. Indeed, Dr. Mascaro testified at his deposition that he could not even interpret the neurological information which ultimately formed the foundation for Mr. Taylor's return to work.

Likewise, the company's demand that he secure to a full release from a Board certified neurologist under the DOT regulations after "the applicable waiting period,"a requirement first announced fourteen months after Mr. Taylor had his seizures, and after he had produced not one, but two CDL's, does not create a factual issue as to his qualifications.

Additionally, the regulations which the company used as the foundation for this new and improved requirement not only do not apply to forklifts, but also did not apply to Mr. Taylor's seizure situation, which resulted from a drug reaction and not an unknown cause. Accordingly, he was not required by the DOT regulations to be re-certified by a neurologist, board certified or otherwise even to drive a truck, and there was no regulatory waiting period. Thus, the company's demand for a DOT certification cannot establish a factual dispute regarding Mr. Taylor's qualifications to operate a forklift. It was entirely irrelevant.[106]

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106 This is particularly true in light of the company's concession that it would have accepted a release from the company doctor at any time, notwithstanding the fact that he was not a a neurologist. It is impossible for the company to contend that a release from a Board Certified neurologist is a predicate for qualification, when it would have accepted a release from a doctor who did not possess those credentials. Additionally, even when Mr. Taylor did produce a detailed report from a Board-Certified neurologist, the company refused to accept it, insisting that the "neuro was off-base." That the company was not willing to accept the precise type of certification material it said it needed undermines the notion that the certification was in fact a

4. Operating a Forklift is Not An Essential Function of the Dock Worker Position

benchmark for qualification. This is particularly so when one considers that the company does not require a CDL certification of any kind for a dock worker, and does not employ any measures to determine whether those workers have medical conditions that might impact upon their ability to "remain fully conscious" after their initial hire.

The Defendant cannot establish that operating a forklift is an essential function of the job. Although using a forklift is one way to load and unload freight and move it from one place to another, which the company admits, is the essential function of the dock worker position, it is not the reason that the job exists.[107] The record reflects that dock workers at Red Star have the discretion to use tools other than forklifts; they are permitted to get the job done in any way that they see fit; and they are not subject to time requirements for the completion of their tasks.[108]

As Mr. Rappucci notes in his expert report, the first consideration in determining whether a particular job function is essential is whether the employee in the position is actually required to perform it in order to do the job. Even if they are, the question becomes whether removing that function would fundamentally change the job, and even if it would, whether a reasonable

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107 II-C-109. The company's job description for the position of "dockworker" states that exists is to load, unload, sort and handle freight from trailers by hand and/or by use of lift trucks, carts or other material handling equipment. is described in Red Star's job description. The duties of the position are set forth as follows: strip (unload) trailers; load freight onto trailers; operate a forklift for freight movement; check freight; plan loading of freight; report pRobylems; properly position freight; properly lock freight; properly handle paperwork; and properly sequence freight bills. I-93.

108 *See also* Rappucci Vocational Analysis, I- 51. *Accord* Appendix to 29 C.F.R.Part 1630– Interpretive Guidance on Title I of the Americans with Disabilities Act at 364 ("Reasonable Accommodation Illustrated").

accommodation is feasible to permit the employee to do the job and still perform the essential function. I–51-2.

Here, the company cannot establish that operating a forklift is an essential job function in light of its admission that the purpose of the job is to move and sort freight, that it imposes no time requirements on this activity; and that it permits dock men to use a variety of equipment for that purpose.[109] Indeed, the company supplies a variety of tools and equipment for use on the dock, and even permits men to use their own pallet jacks. Moreover, the company has no specific information as to how much of the freight that it was handling during the relevant time period could have been handled manually, rather than by forklift only.[110] Pallet jacks can handle loads of up to 2000 pounds, and the testimony of Mr. Taylor and other dock men establishes that generally the freight that was being handled at the time did not weigh more than that. Rucker admits that pallet jacks perform the same function as forklifts. II-C-251; *see also infra* n. 25.

Moreover, although company witnesses testified that there was very little loose freight available during the relevant time period which would not have required a forklift, they could produce no specific testimony to rebut the specific information regarding men who worked the dock during the relevant time period without using a forklift, other than a general characterization of these workers as unconcerned with the company's productivity.[111]

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109 *See infra*, n.8.

110 In contrast to the company's lack of any specific knowledge, Mr. Taylor presented a petition to the EEOC signed by 101 dockworkers at Red Star's Philadelphia terminal stating that there was enough loose freight to be handled on the dock every day for an eight hour shift with no need for a forklift. *See also* IV-2 through 109. Additionally, Mr. Hamilton testified that the company was using casual workers on a daily basis during the relevant time period, and that they were handling non-forklift freight. Mr. Hamilton's testimony, which is supported by other witnesses including Mr. Taylor, is unrebutted.

111 II-C-226-40. Although Mr. Jones stated that he disputed that any one of the 101 persons who signed the petition could have worked productively at the Terminal without using a forklift, he did not actually have any facts as to what freight was coming into and out of the terminal

Although the company contends that there was very little loose freight and that due to concerns of productivity and efficiency, forklift use was absolutely essential to the dockworker job, the company admits that it did not investigate the feasibility of permitting Mr. Taylor to return to work on the dock, either in his usual full capacity or with an accommodation, because they deemed him unfit to work anywhere in the facility doing anything at all. II-C-202, 259. Thus, they did not consider how the job could be restructured to alleviate the necessity of operating a forklift, or how mechanical equipment might be utilized to accommodate the company's concern for safety. II-B-21.[112]

II. THE COMPANY TOOK ADVERSE ACTION AGAINST MR. TAYLOR BASED ON ITS

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during the relevant time period or how it was being handled. His testimony was based on a generalization regarding dock men and their lack of concern, in his mind, for productivity. II-A-100; 104.

112 *See eg.*, Declaration of Richard Horner, IV-1; 1A. Moreover, Rucker was confronted with a letter which he wrote regarding an injured Pick Up and Delivery truck driver in which he explained that the worker could return to work because there would be an insufficient amount of freight that could be handled by forklift or other mechanical means. According to Rucker, the majority of freight which would confront a Pick Up and Delivery Driver on a daily basis had to be "manhandled." I-210. Both Jones and Rucker admit that if a truck can be unloaded by hand, it can be loaded that way as well. III-A-112; II-C-226.

PERCEPTION THAT HE HAD A SUBSTANTIALLY LIMITING IMPAIRMENT

A. THE REQUIREMENT THAT MR. TAYLOR PROVIDE A FULL DUTY RELEASE CONSTITUTES A PER SE VIOLATION OF THE ADA AND THE PHRA

There is no material factual dispute that throughout the relevant time period, Defendant applied a "no restrictions" policy to preclude Mr. Taylor's return to work It is equally beyond dispute that such a policy or requirement is illegal under both the ADA and the PHRA. By design or effect, the company used the full duty release requirement to deprive Mr. Taylor of his livelihood. He is entitled to judgment as a matter of law that the defendant's demand that he produce a release with no restrictions, one which would enable him to perform not just the essential duties, but *all* the duties of *both* the dock worker *and* the truck driver positions, constitutes a *per se* violation of his rights under the ADA[113]

113 Mr. Taylor is entitled to summary judgment as to his claims of adverse action without proof of intent to discriminate. Although he believes that the Defendant used the no restrictions rule deliberately and in a retaliatory manner to preclude his re-entry to the workforce, and took other adverse action as discussed herein, the Court need not address those factual issues. Title I of the ADA specifically defines "discrimination" as the "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability", and prohibits any covered employer from "utilizing standards, criteria, or methods of

1. There Is No Factual Dispute That Red Star Conditioned Mr. Taylor's Return to Work On A No Restriction Requirement

administration (A) that have the effect of discrimination on the basis of disability; or (B) that perpetuate the discrimination of others who are subject to common administrative control. 42 U.S.C. § 12112 (b)(5)(A); 29 C.F.R.§ 1630.9. Proof of intent to discriminate is not required. The ultimate issue in an ADA case is whether the plaintiff suffered an adverse action motivated by the disability, whether or not the employer intended to discriminate on that basis. *Parker v. Columbia Pictures Indus.,* 204 F.3d 326, 337 (2d Cir. 2000).

The Defendant has admitted that it has a full duty release policy. Even if there could be some dispute about whether or not it maintains such a policy, there is no dispute that it applied such a requirement to Mr. Taylor. Although Mr. Taylor was requesting to return to work on the dock, the record is permeated with references to the company's demand that he provide a full duty clearance, one without medical restrictions of any kind, both as to his ability to drive a truck and to work on the dock. Without a full release to both positions, the company refused to permit Mr. Taylor to return to work at all.[114]

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114 The fact that Mr. Taylor was technically classified as a "combination man" and that a combination man ordinarily can drive a truck as well as work on the dock, is not a relevant consideration here for two reasons. First, it is undisputed that given Mr. Taylor's seniority, that even as a combination man, he could almost always secure a dock assignment. Saylor and Rucker both agree that Mr. Taylor would never have to drive a truck if he did not choose to do so, whatever his classification. Rucker at 71. Second, the focus here is not upon the job Mr. Taylor originally had, but the one he desired. Although Mr. Taylor might have technically held

the position of combination man, he desired the job of dock worker, which did not require truck driving. Even after his CDL was re-certified in February, 2002, he was always willing to come back in that capacity.

Viewed in this context, the release the company demanded from Mr. Taylor was significantly more than a full duty release, since even if he could fully perform all the functions of a dock worker, he could not return to work in that job unless he could also perform the functions of a different job altogether -- the truck driver position. Thus, Red Star was demanding that he be released to perform all the functions of the position Mr. Taylor desired, as well as one he did not desire. *See EEOC v. Yellow Freight*, 2002 U.S. Dist. LEXIS 16826 (2002). Such a requirement undermines the fundamental premise of the ADA that a company may only require that a person with a disability be able to perform the essential functions of the job he holds *or desires*, and to consider reassignment to a vacant position as an accommodation. In this situation, of course, Mr. Taylor did not technically need an accommodation because he was entitled to work on the dock by virtue of his seniority, whatever his classification.

That the company was applying a "no restrictions" rule to Mr. Taylor, is unequivocal and explicit. Mr. Jones testified that the company routinely applies full-duty release policies to its workers. He indicated that people returning from medical leaves must provide a "full release from a qualified doctor." III-A-185. With regard to Mr. Taylor, "it would be that simple," he said. "Has any doctor said he can come back to work without a problem, without qualification?" *Id., at* 156.

As early as March, 2002, Rucker was explicitly applying this rule to Mr. Taylor. Will he advise us, Rucker asked Saylor, when he can return to "full capacity?" I-155; 241; 260.[115] Rucker reiterated this requirement at the EEOC, as did the company's legal counsel. I-133-137; I-129. His correspondence to Mr. Taylor's family doctor, Dr. Glickman in March 2002 asks whether Mr.Taylor can return to fully perform the jobs of both the dock worker and the truck driver positions. II-C-181-2; II-B-133-4; 137; I-241. Throughout the relevant time period, Rucker repeated this demand to Mr. Taylor's union representatives, outside agencies, to the company doctor, and to Mr. Taylor's treating and examining physicians. *See eg.*, II-C-171 ("can

115 Of course, even after Mr. Taylor did secure CDL re-certification in February of 2002, and again in May, 2002, the company refused to accept it. Although Dr. Mascaro purportedly rescinded the certification which Mr. Taylor had secured from Mr. Scott at NovaCare, the company never suggested that Dr. Popowich's CDL certification did not remain in full force and effect. It simply chose to ignore it. Thereafter, on April 2, 2002, Mr. Taylor produced a full duty release from Dr. Glickman. The company refused to accept that as well. Moreover, when the company learned that Dr. Roby had released Mr. Taylor to drive a forklift, and hence, work on the dock "without restrictions," it refused to accept that, too. When he complied with its new requirement, first articulated fifteen months after his seizures, that he produce a full duty release from a Board Certified Neurologist (although it would have accepted at any time a release from Dr. Mascaro, who was not a neurologist at all), they rejected that. It was not until after the EEOC issued a finding of probably cause and he produced a second full-duty report from a Board Certified neurologist that the company finally relented and permitted Mr. Taylor to return to work.

he do his full job duties?); II-C-189 (need a clear unqualified release from Dr. Sperling); ("Mascaro will force a full release from Roby"). *See also* 145; 181. Rucker testified, in fact, that he and Mr. Jones agreed that this was the criteria Mr. Taylor had to satisfy in order to return to work. II-C-186-188; I-162. The company sent correspondence to Mr. Taylor which demanded a DOT clearance, a requirement that left no doubt that he could not return to work unless he was fully released to perform both the dock worker and truck driver positions. *See* I-252("Given your prior history of and treatment for seizures... DOT rules and regulations must be totally satisfied prior to your being returned to your full job duties").[116]

2. The Full Duty Requirement Violated the ADA and the PHRA

116 Mr. Taylor has always contended that he could return to work without an accommodation, because his seniority would have permitted him to transfer to a position, during the regular bidding process, that would have been within his restrictions.

Full duty recovery policies are flatly inconsistent with the the ADA's fundamental mission to protect qualified individuals with disabilities from employment discrimination when such persons, in spite of their disabilities, can perform the essential functions of the position they hold or desire, with or without reasonable accommodations.[117] *EEOC v. Yellow Freight, supra*. Full duty release policies impose illegal barriers to employment for persons with disabilities because they exclude them from job opportunities, whether or not they can perform the essential functions of a position with or without accommodation. Indeed, no person with a medical restriction imposed by a disability of any kind could satisfy the criteria of a "full duty" release.[118] As the statutory language of the ADA itself and its implementing regulations illustrate, this is the very type of discriminatory and stereotypical barrier that Congress intended to eradicate through the ADA, so that people with disabilities would have access to employment opportunities and economic self-sufficiency.[119]

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117 An employer cannot evade the mandatory duty to provide reasonable accommodation by adopting policies that make modifications unavailable. By definition, discrimination under the ADA includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity ..." 42 U.S.C. § 12112(b)(5)(A); 29 C.F.R. § 1630.9. Where a person with disabilities is, notwithstanding the disability, able to perform the essential functions of a job without accommodation; or could perform those essential functions with reasonable modifications, the employer's failure to provide accommodations violates the Act. *School District of Nassau County v. Arline*, 480 U.S. 273, 107 S.Ct 1123 (1987); *Cain v. Hyatt*, 734 F. Supp. 671 (E.D. Pa. 1990) (PHRA).

118 As the Court pointed out in *Yellow Freight*, such policies directly target persons with disabilities, as only they are adversely affected by them. *Id.*, at 67.

119 The concept of essential functions is critical to the functioning of the ADA, as it prevents an employer from summarily imposing or insisting upon requirements which he knows the individual cannot meet, and then denying the job on that basis. Likewise, it prevents marginal, non-fundamental aspects of a job from being interposed as a barrier to an opportunity for which

The regulations implementing Title I preclude an employer from imposing or employing eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program or activity, unless such criteria can be shown to be necessary for the provision of the service, program or activity being offered. 29 C.F.R. § 1630.7. Employer policies, which are inconsistent with these accommodations principles violate the Act on their face. The Equal Employment Opportunity Commission has issued specific guidance on this issue:

> An employer cannot refuse to let an individual with a disability return to work because the worker is not fully recovered from the injury, unless s/he (1) cannot perform the essential functions of the job s/he holds or desires with or without an accommodation or (2) would pose a significant risk of substantial harm that could not be reduced to an acceptable level with reasonable accommodation.

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the individual is otherwise qualified in spite of his disability, real or perceived.

EEOC Technical Assistance Manual at IX-4.[120] *See also EEOC Enforcement Guidance: Workers' Compensation and the ADA* at 10.[121]

The federal courts have overwhelmingly agreed that full duty release requirements violate the ADA on their face, as they purport to evade the ADA's mandatory requirement that employers conduct an individualized inquiry into the nature of an employee's restrictions and the feasibility of accommodations. Additionally, as no-restrictions rules demand that an employee with a disability be capable of performing all the functions of the job, including marginal functions, without accommodation, they violate the Act. *EEOC v. Yellow Freight, supra*

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120 The Technical Assistance Manual was issued by the EEOC to provide guidance to employers on the practical application of the legal requirements of the ADA. Although not binding, courts have found its interpretation of the ADA to be instructive. *Le v. Applied Biosystems*, 886 F. Supp. 717 (N.D. Cal. 1995).

121 The EEOC's Enforcement Guidance is available on its website, the same website that Mr. Rucker did not check, even after having been advised to do so by his contact at the DOT. II-C-

(collecting cases).[122]

Hutchinson v. United Parcel Serv., Inc., 883 F. Supp. 379, 397 (N.D. Iowa 1995), was one of the first courts to consider the issue. There, the court said,

> The court believes that a '100% healed' policy, if it exists, would be a *per se* violation of the ADA. Such a policy would on its face discriminate against a qualified individual with a disability because of the disability of such individual in regard to .. terms and conditions, and privileges of employment. 42 U.S.C. § 12112 (a).

267; 270.

122 The *Yellow Freight* case bears a striking similarity to this one. There, under the company's no-restriction policy, the plaintiff, a truck driver, was not permitted to return to work and bid on a job in the freight yard which he could physically perform unless he produced a note from a doctor releasing him, without restrictions, to perform his original job. The Court found that the company's no-restrictions rule violated the ADA, and also found that the employer's insistence upon a release for a job that the plaintiff held, but no longer desired, violated the ADA's accommodation requirement. 42 U.S.C. § 12111 (8); 29 C.F.R. 1630.2 (m). An employer may require only that the individual be able to perform essential job functions of the position the employee holds or desires, with or without accommodations.

Since then, the courts have been unanimous in rejecting full duty release requirements, as they "simply defy" the ADA. *Accord Henderson v. Ardco,* 247 F.3d 645, 653 (6th Cir. 2001*)*; *McGregor v. National R.R. Passenger Corp.,* 187 F,.3d 1113, 1116 (9th Cir. 1999) (collecting cases). *Hendricks-Robyinson v. Excel Corp.,* 154 F.3d 685, 699 (7th Cir. 1998); *Weigel v. Target Stores,* 122 F.3d 461, 466 (7th Cir. 1997) (stating that the determination whether one qualifies as a qualified individual with a disability "necessarily involves an individualized assessment of the individual and the relevant position"); *Warmsley v. MTA-NYCTA*, 2003 U.S. Dist. LEXIS 4235 (E.D.N.Y. 2004); *Norris v. Allied-Sysco Food Servs., Inc.*, 948 F. Supp. 1418, 1437 (N.D. Cal. 1996); *Heise v. Genuine Parts Co.*, 900 F. Supp. 1137, 1154 & n.10 (D. Minn. 1995) (holding that a "must be cured" or "100% healed" policy is a *per se* violation of the ADA because the policy does not allow a case-by-case assessment of an individual's ability to perform essential functions of the individual's job, with or without accommodation); *Sarsycki v. United Parcel Service,* 862 F., Supp. 336, 341 (W.D. Okla. 1994) (holding that under the ADA "individualized assessment is absolutely necessary if persons with disabilities are to be protected from unfair and inaccurate stereotypes and prejudices");*United States Department of Labor v. Cissell Manufacturing Co.*, 1994 WL 58348 (D.O.L.); *LaMott v. Apple Valley Health Center*, 55 FEP Cases 55, 58 (Minn. Ct. App. 1991)(such a policy "shows a clear intent to exclude disabled persons from the workplace").[123] The duty to consider whether an employee can perform a job

123 Blanket disqualifications have been repeatedly rejected under the ADA, the Rehabilitation Act, and the PHRA. Covered entities are precluded from adopting or employing rules or policies that automatically divest persons with disabilities of their statutorily protected right to reasonable accommodation and individualized consideration. *PGA v. Martin,* 532 U.S. 661 (2001); *School Board of Nassau County v. Arline*, 480 U.S. 273, 107 S.Ct. 1123 (1987); *Cain v. Hyatt, supra. See also Stillwell v. Kansas City Board of Police Commissioners,* 872 F. Supp. 682 (W.D. Mo. 1995) (blanket exclusion of all one-handed applicants for security guard

without accommodation in spite of his disability, and, if not, to consider, on an individualized basis whether he can perform the essential functions of the job with a reasonable accommodation, cannot be avoided by policies which say "we don't do that here", whether that policy impacts upon an entire workforce or a single individual. Were this not the case, employers could insulate themselves from the reach of the ADA through the simple expedient of

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positions rejected); *Sarsycki v. United States Postal Service*, 862 F. Supp. 336 (W.D. Okla. 1994) (rejecting blanket exclusion of all diabetics from driving positions); *Bombreys v. City of Toledo*, 849 F. Supp. 1210 (N.D.Ohio 1993) (blanket policy precluding the employment of insulin dependent diabetics violates ADA); *Galloway v Superior Court*, 816 F. Supp. 12 (D.C.C. 1993) (invalidating blanket exclusion of blind persons from juries); *Lane v. Pena*, 867 F. Supp. 1050 (D.D.C. 1994) (rejecting blanket exclusion of diabetics from Coast Guard program); *Anderson v. Little League Baseball*, 794 F. Supp. 342 (1992) (blanket exclusion of little league coaches in wheelchairs invalidated). The employer cannot discriminate through blanket requirements where it could not do so in individual employment decisions. *Bentivenga v. United States Department of Labor*, 694 F. 2d 619 (9th Cir. 1982).

re-writing job descriptions to make no-restrictions "essential."[124]

Accordingly, there can be no genuine factual dispute as to whether the company used a no-restrictions rule to keep Mr. Taylor from returning to work. Likewise, there can be no legal dispute that the application of this policy to Mr. Taylor violated his rights under the ADA. Mr. Taylor, accordingly, is entitled to summary judgment as to Counts I and II of his complaint

B. THE DEFENDANT FAILED TO ACCOMMODATE MR. TAYLOR'S DISABILITY AS RECORDED AND PERCEIVED

124 The Court in *Yellow Freight* noted that such policies constitute evidence that the employer regards persons who are not fully healed and able to secure a no-restrictions release as having a disability under the Act, since they preclude those people from performing any job in the company's facility. This perception was borne out in this case. Until Mr. Taylor could produce a no-restrictions release, the company continued to deny him reinstatement on the ground that he was a danger to himself and others, and therefore ineligible to work in any job in the Terminal.

The linchpin in the ADA's battle to overcome employment discrimination against persons with disabilities hereof is the requirement that a disability, real or perceived, be accommodated, if possible, if the individual, in spite of the disability, is able to perform the essential functions of the job. If an individual with a disability as defined by the Act is qualified for the job in question by virtue of his ability to perform the essential functions, even if only with accommodation, an employer will be held liable for employment discrimination if it refuses to provide an accommodation[125], unless to do so would constitute an undue burden. The burden is on the employer to establish that no accommodation is possible or that accommodating the plaintiff would impose an undue burden upon the employer.[126] 42 USC § 12112 (b)(5)(A); 29 C.F.R.§ 1630.9 (a); *Arline, supra,* 107 S.Ct. At 1130, n. 17. *See also Skerski v. Time Warner,* 257 F.3d 273, 285 (3rd Cir. 2001); *Martinson v. Kinney Shoe Corp.,* 104 F.3d 683, 687 (4th Cir. 1997); *Lowe v. Angelo's Italian Foods,* 87 F.3d 1170 (10th Cir. 1990); *Gilbert v. Frank,* 949 F.3d 637, 642 (2d Cir. 1991).[127]

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127 42 U.S.C. Sec. 12112(b)(5)(A); *Gilbert v. Frank* was a case decided under the Rehabilitation Act, which is substantively identical to the ADA. *McDonald v. Department of Public Welfare,* 62 F.3d 92 (3rd Cir. 1995). The principle that an employer bears the burden to

prove that no accommodation is possible is well established. *Martinson v. Kinney Shoe Corp.*, 104 F.3d 683 (4th Cir. 1997); *Mantolete v. Bolger*, 767 F.2d 1416 (1985); *Hall v. United States Postal Service*, 857 F.2d 1073 (6th Cir. 1988)(burden on employer to prove that accommodation of essential functions not possible); *Arneson v. Heckler*, 879 F.2d 393 (8th Cir. 1989)(same).

The term "reasonable accommodation" is defined as:

> (ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; ...

29 C.F.R. § 1630.2(o)(ii).[128]

128 The Act makes no distinction in the accommodation requirement between situations in which the employer fails to hire or fires an individual on the basis of an actual disability, or on the basis of a disability which the employer merely perceives. By treating perception plaintiffs the same as plaintiffs with actual disabilities, the Act prevents employers from acting upon their misperceptions unless they can objectively show that the disability upon which the employment decision is made cannot be accommodated.

Here, Defendant has not and cannot establish that accommodating Mr. Taylor's disability as it recorded and/or perceived it would have been impossible or that it would have created an undue burden.[129] Indeed, the Defendant admits that it did not consider accommodating Mr. Taylor because it perceived him as being incapable of performing any job in the company's facility. II-C-202; 259. Additionally, the Defendant failed to consider how the dock worker position could be restructured;[130] how mechanical tools or equipment might be

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129 Indeed, as set forth above, Mr. Taylor was capable of returning to work without an accommodation.

130 The fact that an accommodation would require a change in a supposedly neutral standard operating procedure does not render it unreasonable or unduly burdensome. "Indeed, that is the essence of reasonable accommodation". *McWright v. Alexander*, 982 F. 2d 222, 227 (7th Cir. 1992). Moreover, the fact that an accommodation might involve reassignment of some duties to other employees does not, standing alone, establish undue hardship. *Ackerman, supra*, 643 F. Supp. at 85.

utilized to mitigate the company's purported safety concerns. II-B-173; 175; IV-1.[131] Rucker admitted, in fact, that if there had been sufficient freight in the Terminal, there would have been no reason why Mr. Taylor could not have returned to the dock and worked without a forklift. He did not consider this alternative, however, because he did not deem Mr. Taylor capable to be on the dock in any capacity.[132]

Additionally, both Saylor and Rucker admitted that they did not consider assigning Mr. Taylor to an assignment consisting of work typically performed by injured workers in the Transitional Work Program for two reasons, neither of which would establish that accommodation was not feasible, nor that it would constitute an undue burden. First, the company contended that it reserves such accommodations for workers who are injured on the job. This is in spite of the fact that they are not aware of any provision in the ADA that would exempt them from providing accommodations to a person with a disability who was not injured

131 Additionally, the union consistently offered to assist the company to identify an accommodation that would take into consideration any legitimate safety concerns the company might have. The union made it clear that in its view, Mr. Taylor could have been accommodated. *See also* Vocational Analysis at I-53.

132 Transfer to a vacant position is specifically identified in the ADA as an accommodation. The company admits that it never considered whether it had a vacancy in its Transitional Work Program, or whether Mr. Taylor might be permitted to do tasks similar to those typically performed by workers assigned to that program, because he would be a danger to himself or others no matter what he was doing. II-C-202; 259; III-A-95.

at work. Thus, they never investigated whether there was a vacancy in the program, or whether Mr. Taylor could be provided with a similar assignment, even if not under the auspices of the Transitional Work Program. Rucker at 202; 259; II-B-117. Denying Mr. Taylor the opportunity for an accommodation on the ground that his disability was not work related violates the ADA. *See* EEOC's Enforcement Guidance, *supra,* at 17-18.

Second, the company admits that it did not consider such an accommodation because they believed that Mr. Taylor posed a threat to himself and others "no matter what he was doing." II-C-259. This perception was erroneous, a fact that Defendant either knew or should have known. It cannot support a finding that the company could not have accommodated Mr. Taylor when they never considered how they might have successfully done so.[133]

III. THE DEFENDANT IS NOT ENTITLED TO A LIMITED REASONABILITY DEFENSE

In *Taylor v. Pathmark, supra,* the Third Circuit set forth a limited defense available to employers who reasonably rely upon medical information and, on that basis, innocently misperceive the nature of an individual's impairment and take action on the basis of that mistaken perception. Under the Court's ruling, if the employer is factually mistaken about the extent of the employee's and the employee is responsible for the mistake, the employer will not be liable. However, if the employer bears the responsibility for the mistake, liability will be absolute. Thus, if an employer concludes that a person has a disability that precludes his performance of the essential functions of the job he holds or desires with or without accommodation, and takes an adverse action against the employee on that basis, the employer must be correct. The employer bears the responsibility for a mistaken perception that it could

133 Mr. Jones testified, in fact, that assignments in the Transitional Work Program can be as varied as the individual and the Terminal. II-A-135.

have avoided by educating itself about the nature of the employee's impairment and making an informed and individualized determination as to how that impairment would impact the employee in the work environment. *Taylor v. Pathmark Stores, Inc.*, 177 F.3d 180, 192 (3rd Cir. 1999). As part and parcel of the employer's duty to accurately ascertain the nature of the employee's impairment and its functional limitations, the employer is required to engage in good faith in the interactive process. This process is mandated by the Act in order to avoid mistaken perceptions and to prevent people with impairments, either real or perceived, from being denied job opportunities for which they are qualified.

Red Star is ineligible for the limited reasonability defense. Mr. Taylor is not responsible for the company's mistaken perception regarding the impact of his seizures and its baseless assertion that he was a person with a "serious epileptic condition" and "seizure prone." Furthermore, the company failed to engage in the interactive process at all. Accordingly, judgment should be entered in Mr. Taylor's favor as to both Counts I and II of his Amended Complaint.

A. MR. TAYLOR WAS NOT RESPONSIBLE FOR THE COMPANY'S MISCLASSIFICATION AND MISPERCEPTION OF HIS MEDICAL CONDITION

The limited reasonability defense does not come into play at all unless the employer relies upon misinformation provided by the employee. Here, there is no factual predicate for such a defense. Plaintiff provided the Defendant, time and again, with medical information regarding the nature of his seizures and the extent, if any, to which he had medical restrictions while the cause of the seizures was being investigated. The Defendant, time after time, rejected that information and refused to explore the implications of Mr. Taylor's doctors' repeated

assertions that they expected him to remain seizure free.

Accordingly, the Defendant cannot make even a colorable assertion that Mr. Taylor is responsible for its misperception and its decision to classify him, without a shred of medical evidence, as a person with a "serious epileptic condition." The company has attempted to deflect the responsibility for its own failure to educate itself about seizures, epilepsy, and Mr. Taylor's specific medical condition by pointing to an alleged admission by Mr. Taylor, on March 15, 2001, that the seizures had been caused by epilepsy. Plaintiff, of course, denies that he told Saylor that he had epilepsy, but for purposes of this motion, this is immaterial. Clearly, as Mr. Taylor admitted in his deposition, the possibility that he had epilepsy had not been ruled out, and he knew that his doctors were investigating whether or not he had epilepsy. II-A-117.[134] However, even if he did tell Saylor that he was or might be epileptic at that point, it would not have been unreasonable for him to have done so, given that this was one possibility being investigated, and it is undisputed that other than driving a truck, he never told the Defendant that he had any functional limitations as a result of his condition.[135] It is further undisputed that he

134 Karen M. Scardigli, D.O., Mr. Taylor's board-certified treating neurologist, testified that in mid-March, when Mr. Taylor purportedly made his remarks to Barry Saylor, no definitive diagnosis had been made regarding his condition since it was too soon after the seizure incidents to do so.

135 As the Court pointed out in *Taylor v. Pathmark,* A diagnosis, standing alone, could not have supplied the company with any information regarding Mr. Taylor's individual ability to perform the essential functions of the job on the dock, with or without accommodation.

never told the Defendant that he was "seizure prone," that he had a "serious epileptic condition" or that his condition was so fragile that he could have a "seizure at any moment," and that no doctor did so either.

This very situation was discussed at length in *Pathmark*. The Court used the example of an employer who assumes, based on a diagnosis of epilepsy, that a person has restrictions that he does not have, and denies the individual an employment opportunity on the basis of the perception that the person has a disability in the major life activity of working.[136] The Court admonished that in such a situation, the defense of limited reasonability would not be available. The Court further rejected the notion that the plaintiff could be held accountable for the employer's false notions regarding the impact of his impairment because it would not be unreasonable for the plaintiff to reveal that he had epilepsy. The burden is on the employer to

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136 The Court's illustration sounds haunting like the one here: "An employer who is informed that a particular individual has epilepsy might overestimate the limiting effects of that individual's epilepsy because of a general perception about the severity of epilepsy. If the employer mistakenly overestimates the degree of a person's impairment based on perceptions about the nature of the impairment, it is not basing its decision on an individualized evaluation. Moreover, the employer's defense would fail in such a case because the employee would have done nothing unreasonable in informing the employer of her condition. The employer should seek further specific information about the extent of the employee's impairment before it concludes that the employee is disabled. *Id.*, at 193 n. 8.

accurately evaluate the impairment as it affects the particular employee and make an informed judgment based on reliable medical evidence as to how, if at all, the impairment would impact the employee in the particular job. The Court admonished that "it is not reasonable for an employer to extrapolate from information provide by an employee based on stereotypes or fears...". *Id.*, at 193.[137]

137 The Court warned that if an employer believes that a person has a disability which inherently precludes the successful performance of the essential functions of the job, with or without accommodation, it must be correct. *Id.*, at 193.

There can be no genuine dispute that Defendant did just that. Rucker provided its own diagnosis of Mr. Taylor's condition, in his own words, without any medical basis, and then used that unsubstantiated label to deny Mr. Taylor the opportunity to work, all the while asserting to the JAC, the EEOC, and the union that his perception and classification were based on medical evidence.[138] This type of conduct, which is undisputed, is the very antithesis of what the Court had in mind when it established the limited reasonability defense in *Pathmark.* The responsibility for the Defendant's misclassification of Mr. Taylor's medical condition and its perception that he had a substantially limiting impairment rests squarely at the feet of the Defendant.

B. THE DEFENDANT WAS SOLELY RESPONSIBLE FOR ITS FALSE AND ERRONEOUS MISCLASSIFICATION AND MISPERCEPTION OF HIS MEDICAL CONDITION

As the Court explicitly stated in *Pathmark*, the employer has the obligation to accurately assess the impact of an employee's medical condition and its impact on the job. The employer may not abdicate this responsibility to a doctor or any other person. *Id,* at 190. Although an employer may certainly seek medical assistance in this evaluation effort, it may not unreasonably rely on unsubstantiated, uninformed, and unscientific medical advice, or advice that is not individualized or otherwise inconsistent with the employer's obligations under the ADA.

Here, the Defendant's perception that Mr. Taylor was a "serious epileptic," that he was "seizure prone" and likely to have a seizure "at any moment" was never supported even by Dr. Mascaro, its company doctor. The company claims to have relied, however, on Dr. Mascaro's

138 Rucker stated to the EEOC: "Taylor has an epileptic (convulsive, loss of consciousness) condition for which he is being treated. This conclusive diagnosis was confirmed by 4 different doctors ... There is no disputing this basic medical fact."). I-128.

two sentence opinion, written on March 26, 2001, that Mr. Taylor could be a danger to himself or others if he were permitted to operate a forklift.[139] Dr. Mascaro's opinion and Red Star's reliance upon it fails to comport with the Third Circuit's expectations as set forth in *Taylor v. Pathmark.*

First, the Defendant cannot evade its obligations under the ADA by contracting out functions to third party physicians and then alleging that its good-faith reliance upon that physician is sufficient to insulate it from liability. *Gillen v. Fallon Ambulance Services, Inc.*, 283 F.3d 11, 31 (1st Cir. 2002). Although a doctor's opinion can sometimes provide evidence of a nondiscriminatory intent, the mere possession of such an opinion does not automatically absolve the employer from liability under the ADA." *Id.; Cf. Bragdon v. Abbot*, 524 U.S. , 650 (1999)(emphasizing that "courts should assess the objective reasonableness of health care professionals without deferring to their individual judgments.") Employers "cannot slavishly defer to a physician's opinion without first pausing to assess the objective reasonableness of the physician's conclusions." *Gillen* at 31; *Holiday v. City of Chattanooga*, 206 F.3d 637, 645 (6th Cir. 2000) (explaining that "[c]ourts need not defer to an individual doctor's opinion that is neither based on the individualized inquiry mandated by the ADA nor supported by objective scientific and medical evidence.")

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139 The Court only needs to address this issue if it concludes that there is a reasonable possibility that Plaintiff was responsible for the Defendant's inaccurate misclassification of his impairment and its consequent erroneous perception.

Dr. Mascaro did not examine Mr. Taylor at all and conducted no individualized assessment, thus, his opinion is not supported by objective scientific and medical evidence. As he has never even seen Mr. Taylor, there is no basis for any deference to his opinion. *See Holiday, supra* at 647 (employer did not have an unconditional right to rely on an unqualified physician's "unsubstantiated and cursory medical opinion," based not on an individualized assessment of the alleged impairment, but a diagnosis alone).[140] *See also Taylor v. Phoenixville School Dist.,* 184 F.3d 296, 309 (3rd Cir. 1999) (employer does not reasonably rely upon a medical expert opinion based on a single office visit several years after the employment decision.)[141] Moreover, Dr. Mascaro made no attempt to obtain medical records from Dr. Scardigli which were readily available at the time he wrote his "unsubstantiated and cursory"

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140 Dr. Mascaro is not qualified to make assessments regarding a neurological disorder as he is an occupational medicine physician, not a neurologist, thus there is no reason to rely on his expertise. *Holiday v. City of Chattanooga,* 206 F. 3d at 643-44.

141 Cases under the PHRA follow a similar analysis. In *Action Industries v. Commonwealth, Human Relations Comm'n,*518 A.2d 610 (Pa. Commw. Ct. 1986), *app. denied,* 531 A.2d 433 (Pa. 1987)(Table) the court held that in a disparate treatment case, "an employer can have a good-faith defense which negates its intent to discriminate where it *reasonably* relies upon the opinion of a medical expert ..." *Id.* at 613 (emphasis in original). The court stressed, though, that "an employer cannot always insulate itself by having a physician 'sign off' on all [employment] decisions," and that the plaintiff may prevail if, *inter alia,* it can show that the employer's reliance was unreasonable under the circumstances. *Id.* More recently, in *Canteen Corp. v. Pennsylvania Human Relations Comm'n,* 814 A.2d 805 (Pa. Commw. Ct. 2003), the Commonwealth Court noted the limits of *Action Industries* and rejected the employer's reliance on a physician's assessment. In *Canteen,* the plaintiff was able to perform her regular duties as an accounting clerk but the employer sought to expand them to require lifting and bending which a previous physician's report indicated she was unable to do. While the employee requested an accommodation, the employer refused to enter into the interactive process arguing it would be useless because of the physical restrictions the employee had and that it was justified in relying on the medical opinion. The court, though, held that a medical opinion does not insulate an employer from liability for disability discrimination. *Id.* at 813. Further, the medical opinion stated that the employee could work with certain restrictions, which placed the burden on the employer to engage in the interactive process to identify accommodations. *Id.*

opinion. [142] The company's "slavish adherence" to Dr. Mascaro's opinion cannot be countenanced under *Pathmark* as it never paused to assess the objective reasonableness of his conclusions." *Accord Gillen v. Fallon Ambulance Services, Inc.*, 283 F.3d at 31. [143] Indeed, the "absence of any scientific support for the doctor's opinion" precludes any reasonable reliance on it." *Holiday v. City of Chattanooga*, 206 F.3d at 645.

Second, an employer is not permitted to simply rely on its own interpretation of a physician's opinion regarding the individual's ability to perform the job at issue.[144] In *Ollie v. Titan Tire Corp.*, 336 F.3d 680 (8th Cir. 2003), the court rejected the employer's contention that its reliance on medical opinion shielded it from liability. There the plaintiff was offered a job as a laborer contingent upon a physical examination. On the health questionnaire, he indicated "yes" to the question as to whether he ever had asthma. The physician reported to the employer that the plaintiff was able to perform the essential functions of the job but noted that he had asthma and *may* have difficulty with dust or fumes. The employer concluded that there was no available position at the plant that did not involve exposure to dust and fumes and declined to

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142 Dr. Scardigli testified that she received no request for records from anyone at Red Star or from Dr. Mascaro, thus, did not forward any of her medical records to them at any time, let alone before March 26, 2001.

143 Red Star took no steps to assure itself that Dr. Mascaro's opinion was reliable based on scientific evidence, or, indeed, whether he had ever seen Mr. Taylor. *See Taylor v. Pathmark Stores, Inc.*, 177 F.3d at 192. Whether the company failed to inquire accidentally or purposefully is irrelevant. It had a duty to know.

144 Chief Judge Becker wrote in *Taylor v. Pathmark Stores, Inc.*, "one of the points of a 'regarded as' protection is that employers cannot misinterpret information about an employee's limitations to conclude that the employee is incapable of performing a wide range of jobs." 177 F.3d at 190.

hire him. Subsequently, the plaintiff secured a job with a different company in the same plant and building as Titan Tire and worked there for three years. Rejecting the employer's contention that it was entitled to rely upon the physician's opinion, the court stressed that the physician did not state that the plaintiff could not work but, rather, that he was able to work though he "may have difficulty" in areas with dust or fumes. The employer was liable for "rel[ying] upon its own interpretation of the doctor's advice and its own opinion that Ollie could not perform the essential functions of any available job. *Id.* at 683-84; 686.

Furthermore, an employer may not rely upon a misunderstanding of a medical opinion as a result of its own failure to clarify ambiguity in the medical documentation. Red Star kept itself in the dark on numerous occasions as to meaning of the medical reports that Mr. Taylor was providing. For example, Dr. Roby said on April 25, 2001 that Mr. Taylor could load and unload trucks, but did not specifically state that he could do so with a forklift. Although Dr. Roby invited the company to call if it had any questions, it took no steps to determine whether loading and unloading trucks included forklift operation, assuming that it meant that he could not. II-A-69-70. Red Star's reliance on Dr. Roby's opinion as somehow supporting its own determination that Mr. Taylor could not operate a forklift is therefore without any basis and fatal to its claim that it reasonably relied on a physician's opinion in making its employment decision. *Taylor v. Pathmark Stores, Inc.*, 117 F.3d at 190. Moreover, Red Star never asked Dr. Mascaro to review Dr. Roby's opinion and or the EEG and MRI reports that accompanied it, even though they had no medical training and had no expertise they could use to interpret them. II-C-94.

Likewise, the after Dr. Mascaro procured a third note from Dr. Scardigli on March 29, 2001, stating Mr. Taylor was "unable to operate a forklift *at this time,"* the Defendant presumed

from then on that Mr. Taylor had a *permanent* restriction. Dr. Scardigli, however, meant to restrict Mr. Taylor for only six weeks. III-E- 18. As a consequence of Red Star's and/or Mascaro's failure to inquire what she meant by "at this time," the company misinterpreted true meaning of the note and denied Mr. Taylor the right to work on that basis.[145] The company's failure to inquire what Dr. Scardigli meant by "at this time" is fatal to any claim that relied on her opinion to preclude Mr. Taylor from working any job on the dock, whether or not it required a forklift. II-C-202 & 259. *Taylor v. Pathmark Stores, Inc.*, 117 F.3d 180, 190 (3rd Cir. 1999); *Ollie v. Titan Tire Corp.* 336 F.3d at 683-84; 686 (employer is liable because it "relied upon its own interpretation of the doctor's advice and its own opinion that [the employee] could not perform the essential functions of any available job."). There can be no reasonable dispute that Defendant never had any medical support, either for its own diagnosis that Mr. Taylor had a "serious epileptic" condition, or its conclusion that he could imperil himself or others "no matter what he was doing." II-C-259.

C. DEFENDANT FAILED TO ENGAGE IN THE INTERACTIVE PROCESS AS A MATTER OF LAW

Mr. Taylor is entitled to summary judgment on the question whether USF Red Star engaged in the interactive process. The record evidence on this point is overwhelming and uncontroverted. It is replete with uncontradicted testimony indicating that the company imposed barriers upon Mr. Taylor's attempts to return to work in the form of full duty release

145 The fact that Dr. Mascaro never in his life saw Mr. Taylor seriously undermines any opinion he offered concerning his ability to operate a forklift. *Cf. Taylor v. Phoenixville School Dist. 284 F.3d 309* (where a single office visit several years after the employment decision was deemed a woefully inadequate basis for reliance on the physician's opinion). Whether or not Saylor and Rucker actually knew that Mascaro had never seen Mr. Taylor, it was their responsibility to find out.

rules; employed regulatory criteria which were not legally applicable, and which they did not apply to any other dock worker; and by keeping Mr. Taylor out of the workplace based upon a diagnosis for which it did not have a shred of medical support.

Moreover, the managers and employees responsible for responding to Mr. Taylor's request to return to work, with or without accommodation, were so uninformed about the ADA, the interactive process, and so apathetic about investigating possibilities for accommodation, that the Defendant has failed to meet even the most minimal threshold for the interactive process. Finally, and most dispositively, to the extent that the company undertook an interactive process at all, that process was sabotaged by the company's use of illegal policies which artificially depleted the range of alternatives for accommodation which might otherwise have been available.[146]

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146 The interactive process requirement emanates from the central mission of the ADA to provide workplace opportunities to people who have disabilities, real or perceived, and who are denied the opportunity for economic self-sufficiency as a result. Historically, when disability struck, ejection from the workplace occurred as a matter of course. It was often assumed that most physical impairments would preclude an individual from being a productive working person. Congress recognized through the passage of the ADA (and earlier, when it amended the Rehabilitation Act in 1974), that disability need not necessarily deprive an individual of a livelihood. By changing the focus from debilitation to residual function, and by requiring disabilities to be accommodated where accommodations could be reasonably achieved, the Act anticipated that numerous work opportunities would be created to permit persons with disabilities, both real and perceived, to remain productive, and benefit society as a whole by moving disabled workers away from the public benefit system and retaining them in the workforce. This goal can only be accomplished through a good faith effort on both sides to explore the residual capacities of the individual with a disability to determine how work can be performed, even if in a non-traditional way, notwithstanding the disability. *Skerski v. Time Warner*, 257 F.3d 273 (3rd Cir. 2001); *Taylor v. Pathmark Stores, Inc*., *supra*; *Deane v. Pocono Medical Center*, 142 F.3d 138, 149(3rd Cir. 1998). This mandatory process is intended to bring to light information which each party holds but the other may not have or cannot easily obtain that might bear upon the feasibility of accommodation.

The uncontroverted evidence establishes, as a matter of law, that 1) the company knew or thought they knew that Mr. Taylor had a "serious epileptic condition;" 2) Mr. Taylor and his union requested accommodation so that he could return to work in spite of the seizures he experienced in March, 2001; 3) the company made no effort to assist Mr. Taylor in returning to work, with or without accommodation; and 4) but for the company's failure to constructively engage in the interactive process, Taylor could have been accommodated or could have returned to work without an accommodation. *Taylor v. Phoenixville School District*, 184. F.3d 296 (3rd Cir. 1999); *Sicoli v. Nabisco Biscuit Co.*, 2000 US Dist. LEXIS 12961 (E.D.Pa. 2000).[147]

1. <u>It is Undisputed that the Company Was On Notice of Mr. Taylor's Medical Condition And that He Was Requesting an Accommodation</u>

147 The EEOC regulations define the components of the interactive process as follows: This process should identify the precise limitations resulting from the disability and the potential reasonable accommodations that could overcome those limitations. 29 C.F.R. § 1630.2(o)(3). The hallmarks of the interactive process include communication and cooperation. *Taylor v. Pathmark, supra.* An employer which obstructs or delays the interactive process, or who fails to communicate by way of initiation or response, is not fulfilling its duty to engage in the interactive process in good faith. *Id.*

As the Third Circuit made clear in *Taylor v. Phoenixville,* 184 F.3d 296 (3rd Cir. 1999), all that is needed in order to trigger the interactive process is a clear indication from the employee, made directly or through a representative,[148] that the employee wants assistance for his or her disability. *Id.* The employer must be aware both of the disability and the request for accommodation.

Defendant admits that it knew about Mr. Taylor's medical condition. Indeed, since the Defendant itself diagnosed Mr. Taylor with a "serious epileptic condition" and the only reason that it removed Mr. Taylor from the workplace was his medical condition, it could hardly contend otherwise.

It is further undisputed that Mr. Taylor, on his own and through his union, requested assistance to return to work. Defendant admits that it knew Mr. Taylor was requesting to return to work, either with or without accommodation. II-C-212; II-B-104.

2. The Company Failed to Engage in the Interactive Process as a Matter of Law

148 *See Bultemeyer v. Fort Wayne Comm. Schools,* 100 F.3d 1281 (7th Cir.1996).

The Defendant's response to Mr. Taylor's request for accommodation is deficient as a matter of law. By even the most lenient application of the Third Circuit's teachings regarding the interactive process, Defendants failed to engage in it.[149]

149 Defendant does not even contend that it discussed the issue of accommodation with Mr. Taylor or his union in a constructive attempt to resolve the accommodation issue. Neither Saylor nor Rucker remember such a meeting. II-B-174; II-C-213. Moreover, Mr. Hamilton testified that notwithstanding the union's willingness to explore the possibility of accommodation, the company refused to participate, citing the DOT regulations and its insistence that Mr. Taylor could not return to work in any capacity unless he could drive. Moreover, neither Saylor, Rucker, nor CEO Jones knew what the interactive process was.

First and most importantly, the company applied an illegal full-duty policy in his response to Mr. Taylor's request for accommodation. Thus, Mr. Taylor could return to work in the position of dock worker, only if he could secure a full duty release to perform all the functions of that position and the position of truck driver. As indicated *infra* at 58-63, this policy is inconsistent with the ADA. Accordingly, the application of that policy to Mr. Taylor eviscerated the interactive process. Indeed, such a policy makes it impossible to comply with the EEOC's directive to "identify the precise limitations resulting from the disability and the potential reasonable accommodations that could overcome those limitations." 29 C.F.R. § 1630.2(o)(3). The interactive process cannot possibly be effective if the employer refuses to incorporate the concept of essential vs. non-essential functions and/or the potential for job modification into the analysis.[150] Because the company limited its focus to the full-duty release, it did not even consider, much less discuss, whether Mr. Taylor could return to work without an accommodation, or whether reasonable accommodations might have been available to bring him back to work.

In order to engage in the interactive process in good faith, it is imperative that the employer be governed in its assessment of potential accommodations by policies which are consistent with the Act. Otherwise the interactive process is a futile exercise, or, as in this case,

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150 The interactive process requires that the employer accurately assess both the disability and its limitations and the range of potential accommodations which could be utilized to accommodate the disability. 29 C.F.R. § 1630.2 (o)(3). *See also Skerski, supra.* An employer who applies illegal policies to deplete the range of possible accommodations, fails to inform himself about the range of possible accommodations, and fails to promptly and diligently respond to requests for information and assistance has not, by definition, engaged in the interactive process in good faith.

an exercise that never takes place at all. The superimposition of an illegal policy on the interactive process causes the employer to reject out of hand accommodations which might otherwise be possible through the use of equipment, job modifications, job restructuring, or other modifications to the job. 29 C.F.R. § 1630.2 (j). The interactive process requires employers to consider these alternatives in determining whether accommodation of the individual's precise limitations might be feasible.[151]

Mr. Taylor is entitled to judgment as a matter of law that Defendant failed to engage in the interactive process. Accordingly, it is not entitled to assert the defense of limited reasonability. *See* Vocational Analysis at I-53 & 56. Judgment should be entered in his favor as to Counts I and II of his Amended Complaint.

CONCLUSION

For all the reasons stated herein, plaintiff Edwin Taylor respectfully requests that his Motion for Partial Summary Judgment be granted.

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151 The company's response to Mr. Taylor's request for assistance were also hampered by his ignorance of the requirements of the ADA and the interactive process. Neither Saylor, Rucker, nor CEO Jones knew what the interactive process was. The company is accountable for its failure to engage in the interactive process in good faith when it fails to train its employees or to ensure that its managers apply policies consistent with the ADA in responding to requests for accommodation, and to monitor the diligence with which those requests are addressed.

Respectfully submitted,

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