ry to tenant's business could reasonably be anticipated in case of a landlord's breach.") (footnote omitted). Saul has not shown that the claimed damages are so speculative that entry of summary judgment is appropriate.

### 3. Saul's breach of contract claim

The district court also granted summary judgment on Saul's counterclaim for rents due and owing under the leases. The entry of summary judgment is based on an explicit provision of the leases, that "[t]he Minimum Rent shall be payable to Landlord or its designated agent in advance, in equal monthly installments, without notice or demand therefor, and without deduction, recoupment or setoff...." Appellants' App. at 106. However, the correctness of the ruling is dependent upon the outcome of plaintiffs' recission claim. *See Panama Timber Co.,* 633 P.2d at 1264 n. 15. Accordingly, the grant of summary judgment in favor of Saul on its counterclaim is reversed.

## III. CONCLUSION

Because the district court's decision must be reversed on the merits, and the district court's denial of the motion to remand is erroneous, the action is REVERSED and REMANDED with instructions to vacate the judgment and to remand the action to the district court for Tulsa County, Oklahoma. Plaintiffs' motion for attorneys' fees and costs is DENIED. The parties must bear their own costs and fees. All other pending motions are DENIED as moot.


**Laura K. SORENSEN, Plaintiff–Appellant,**

**v.**

**UNIVERSITY OF UTAH HOSPITAL, Defendant–Appellee.**

**No. 98–4068.**

United States Court of Appeals, Tenth Circuit.

Oct. 14, 1999.

Nurse who had been diagnosed with multiple sclerosis (MS) sued hospital, her former employer, under Americans with Disabilities Act (ADA). The United States District Court for the District of Utah, Kimball, J., 1 F.Supp.2d 1306, entered summary judgment for hospital. Nurse appealed. The Court of Appeals, Baldock, Circuit Judge, held that: (1) nurse failed to establish that she had record of impairment that substantially limited a major life activity, for purposes of establishing an ADA-qualifying disability, and (2) nurse failed to establish that she was "regarded as" being disabled within meaning of ADA.

Affirmed.

### 1. Civil Rights ⚿173.1

Nurse diagnosed with multiple sclerosis (MS) failed to establish that she had record of impairment that substantially limited a major life activity, for purposes of establishing an ADA-qualifying disability, despite nurse's contention that her MS substantially limited a major life activity during her five-day hospitalization and subsequent recovery time, where nurse maintained that she was ready to return to work eight days after she was released from hospital, and she did not currently have substantially limiting impairment. Americans with Disabilities Act of 1990, § 3(2)(B), 42 U.S.C.A. § 12102(2)(B); 29 C.F.R. § 1630.2(k).

**2. Civil Rights ⇨173.1**

Nurse diagnosed with multiple sclerosis (MS) failed to establish that she was "regarded as" being disabled within meaning of ADA, where plaintiff alleged only that employer-hospital regarded her MS as precluding her from holding the position of flight nurse, but hospital did provide her with numerous other opportunities to work as a nurse in other units following her MS diagnosis and hospitalization. Americans with Disabilities Act of 1990, § 2(C), 42 U.S.C.A. § 12101(C); 29 C.F.R. § 1630.2(j)(3).

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Nancy L. Kemp, Assistant Attorney General, (Jan Graham, Utah Attorney General, with her on the brief), Salt Lake City, Utah, for Defendant–Appellee.

Before TACHA, HOLLOWAY, and BALDOCK, Circuit Judges.

BALDOCK, Circuit Judge.

Plaintiff Laura K. Sorensen brought suit against her former employer, Defendant University of Utah Hospital, alleging discrimination in violation of the Americans with Disabilities Act (ADA). The district court concluded that as a matter of law Plaintiff was not disabled under the ADA and granted summary judgment in favor of Defendant. Plaintiff appeals. We exercise jurisdiction under 28 U.S.C. § 1291, and affirm.

I.

Defendant employed Plaintiff as a nurse from August 1990 through March 1994. Plaintiff initially worked as a Clinical II Nurse in the burn unit. In December 1991, Defendant hired Plaintiff as an AirMed Flight Nurse. This required special certification as a Certified Emergency Nurse and training in Advance Burn Life Support, as well as surgical procedures which are not generally required for nursing positions in the hospital units.

On October 30, 1993, Plaintiff's treating physician, Dr. John Barbuto, diagnosed her with Multiple Sclerosis (MS). During her subsequent five-day hospitalization, Plaintiff was unable to perform any life activities. Upon Plaintiff's release from the hospital, her doctor cleared her to return to work. Plaintiff contacted her immediate supervisor at the hospital, Janet Smith, and informed her that she intended to return to work on November 12, 1993. Smith told Plaintiff that she could not return to work until she obtained a letter from her doctor stating that she was physically able to return to her position as a flight nurse. Dr. Barbuto gave her a work release. Smith, however, remained concerned about Plaintiff's ability to perform the work. Smith, together with Plaintiff's other supervisor, Dr. Stephen Hartsell, Director of the AirMed Department, compiled a list of job qualifications to present to Dr. Barbuto. After reviewing the conditions of the job, Dr. Barbuto stated that he could not provide Plaintiff with a work release.

Neurologist Dr. John W. Rose also examined Plaintiff. During her evaluation period, Plaintiff returned to a schedule of work as a regular nurse in the burn unit, the surgical intensive care unit, and the emergency room. After evaluating Plaintiff, Dr. Rose informed Dr. Hartsell in December 1993 that she could return to work as a flight nurse. Nevertheless, Dr. Hartsell remained concerned about patient safety and the risks involved with allowing Plaintiff to return as a flight nurse. Dr. Hartsell then discussed the essential functions of the job with Dr. Rose and followed up with a letter setting forth the job requirements and his specific concerns. Dr. Rose believed Plaintiff could essentially perform the duties of a flight nurse, but he could not guarantee that she would never suffer from an episode or a problem associated with her MS while on duty. Dr. Hartsell believed this safety concern justi-

fied preventing Plaintiff from returning to her job.

At the end of February 1994, Defendant had neither returned Plaintiff to her job as flight nurse, nor made a final determination as to whether to return her to her job as flight nurse. On March 3, 1994, Plaintiff submitted a letter of resignation to Defendant which she alleges constituted a constructive discharge.

Plaintiff filed a complaint against Defendant alleging that she was a disabled person under the ADA, 42 U.S.C. § 12101; 29 C.F.R. § 1630.2(g), and that Defendant had discriminated against her because of her disability. Defendant filed a motion for summary judgment and Plaintiff filed a cross-motion for summary judgment. The district court found as a matter of law that Plaintiff did not establish a prima facie case of disability discrimination because she was not disabled under the ADA. First, the court found as a matter of law that Plaintiff did not suffer from an impairment that substantially limited a major life activity. Further, the court found as a matter of law that Defendant did not regard Plaintiff as substantially limited in performing a class of jobs. Because Plaintiff did not establish a prima facie case, the district court granted Defendant's motion for summary judgment. Plaintiff appeals claiming the district court erred in granting summary judgment for Defendant on the issue of whether Plaintiff was disabled under the ADA.

We review the grant of summary judgment de novo, applying the same legal standard as the district court. *Simms v. Oklahoma ex rel. Dep't of Mental Health & Substance Abuse Servs.*, 165 F.3d 1321, 1326 (10th Cir.), *cert. denied*, —— U.S. ——, 120 S.Ct. 53, —— L.Ed.2d —— (1999). A summary judgment is properly granted where no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). " '[W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue' that party must 'go beyond the pleadings' and 'designate specific facts' so as to 'make a showing sufficient to establish the existence of an element essential to that party's case' to survive summary judgment." *McKnight v. Kimberly Clark Corp.*, 149 F.3d 1125, 1128 (10th Cir.1998) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)).

## II.

The ADA prohibits employers from discriminating against individuals on the basis of disability. 42 U.S.C. § 12101. Numerous Tenth Circuit cases state the elements of a prima facie case under the ADA: "[A] plaintiff must demonstrate (1) that [s]he is 'disabled' within the meaning of the ADA, (2) that [s]he is qualified—with or without reasonable accommodation; and (3) that [s]he was discriminated against because of h[er] disability." *Butler v. City of Prairie Village*, 172 F.3d 736, 748 (10th Cir.1999) (quoting *Siemon v. AT&T Corp.*, 117 F.3d 1173, 1175 (10th Cir.1997)); *see also Hardy v. S.F. Phosphates Ltd. Co.*, 185 F.3d 1076, 1080 n. 2 (10th Cir.1999). The ADA defines disability as: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2). Plaintiff concedes that she does not have a present impairment that substantially limits a major life activity under subsection (A). Rather, Plaintiff argues that she has a record of such an impairment under subsection (B) and that Defendant regarded her as having such an impairment under subsection (C). The issue is whether the district court properly determined as a matter of law that Plaintiff was not disabled under (B) or (C).

### A. Record of Impairment

**[1]** Under the ADA, the definition of disability includes having a record of an impairment that substantially limits a major life activity of an individual. 42 U.S.C.

§ 12102(2)(B); *see Pack v. Kmart Corp.*, 166 F.3d 1300, 1304 (10th Cir.1999). To have a record of such an impairment, a plaintiff must have a history of, or been misclassified as having, an impairment that substantially limited a major life activity. 29 C.F.R. § 1630.2(k); *see also Hilburn v. Murata Electronics North America, Inc.*, 181 F.3d 1220, 1229 (11th Cir.1999). The EEOC regulations make clear that the impairment indicated in the record must be one that substantially limited a major life activity. *Id; see also* 29 C.F.R. § 1630, App. § 1630.2(k)(2); *Hilburn*, 181 F.3d at 1229 ("Regardless of whether Hilburn is proceeding under a classification or a misclassification theory, the record-of-impairment standard is satisfied only if she actually suffered a physical impairment that substantially limited one or more of her major life activities.").

Accordingly, Plaintiff must establish that her MS at some point substantially limited a major life activity. *See EEOC v. R.J. Gallagher Co.*, 181 F.3d 645, 655 (5th Cir.1999) (concluding a record of a cancer diagnosis was insufficient to establish disability under § 12101(2)(B); plaintiff must show record of an impairment that substantially limited any life activities). Plaintiff argues that she had such an impairment during the time she was hospitalized. Therefore, Plaintiff argues that her hospitalization, diagnosis, and communications to her supervisors constitute a record of such an impairment.

For an impairment to substantially limit a major life activity, the individual must be unable to perform, or be significantly limited in the ability to perform, an activity compared to an average person in the general population. 29 C.F.R. § 1630.2(j); *see also Sutton v. United Airlines, Inc.*, —— U.S. ——, ——, 119 S.Ct. 2139, 2145, 144 L.Ed.2d 450 (1999). The EEOC has established the following factors to be considered in determining whether an individual is substantially limited in a major life activity: "(i) The nature and severity of the impairment; (ii) The duration or expected duration of the impairment; and (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment." 29 C.F.R § 1630.2(j)(2); *see also Pack*, 166 F.3d at 1305–1306. For example, the EEOC Interpretive Guidance describes a broken leg that takes eight weeks to heal as an impairment of fairly brief duration. 29 C.F.R. § 1630, App. § 1630.2(j).

Plaintiff claims that her MS substantially limited a major life activity during her five day hospitalization beginning October 30, 1993 and subsequent recovery time. The nature and severity of Plaintiff's impairment during this time weigh in favor of finding that her impairment substantially limited a major life activity. Plaintiff could not perform any life activities during her hospitalization. The duration and long term impact of Plaintiff's impairment, however, weigh against finding that her impairment substantially limited a major life activity.

Plaintiff maintains that she was ready to return to work on November 12, eight days after she was released from the hospital. Further, Plaintiff states that she does not presently have an impairment which substantially limits a major life activity. Consequently, Plaintiff's impairment from October 30, 1993 through November 15, 1993 was of brief duration. Plaintiff's hospitalization and MS symptoms substantially limited her major life activities for only a limited period of time.

As for any permanent impact of her impairment, Plaintiff claims that she is currently physically qualified to perform the duties of flight nurse. As such, Plaintiff retains little, if any, long term impact resulting from her impairment. Because Plaintiff's hospitalization and MS symptoms affected her for only a brief period of time and do not presently impact her ability to perform the job, Plaintiff did not suffer an impairment that substantially limits a major life activity under the ADA.

Similarly, Plaintiff presented no evidence that she was misclassified as having an impairment that substantially limits a major life activity. Her record of impairment accurately described her five day hospitalization and subsequent recovery time. As discussed above, her impairment did not substantially limit a major life activity. Because Plaintiff never had the requisite impairment and was not misclassified as having such an impairment, she does not have a record of such an impairment under subsection (B).

B. Regarded as Disabled

**[2]** Under the ADA, "disability" also includes "being regarded as having" an impairment that substantially limits one or more of the major life activities. 42 U.S.C. § 12101(C). The Supreme Court has stated that a person is regarded as disabled within the meaning of the ADA if "(1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that the person's actual, nonlimiting impairment substantially limits one or more major life activities." *Sutton v. United Airlines, Inc.*, —— U.S. ——, ——–——, 119 S.Ct. 2139, 2149–50, 144 L.Ed.2d 450 (1999).

Plaintiff argues that under subsection (C), Defendant regarded her as having an impairment that substantially limited the major life activity of working because Defendant did not return her to her position as flight nurse. The EEOC and the Supreme Court have discussed the requirements to establish a disability under subsection (C) when the plaintiff claims the life activity regarded as impaired is the activity of working. *See Sutton*, —— U.S. at ——–——, 119 S.Ct. at 2149–52; 29 C.F.R. § 1630.2(j). The EEOC regulations provide,

> With respect to the major life activity of working—(i) The term *substantially limits* means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities. *The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.*

29 C.F.R. § 1630.2(j)(3) (emphasis added).

In *Sutton*, the Supreme Court considered the claim of plaintiffs who alleged that the defendant regarded their poor vision as precluding them from holding positions as "global airline pilot." The Supreme Court concluded that the position of global airline pilot is a single job and a number of other positions utilizing plaintiffs' skills were available, including regional pilot and pilot instructor. *Id.* The Court indicated that "[w]hen the major life activity under consideration is that of working, the statutory phrase 'substantially limits' requires, at a minimum, that plaintiffs allege they are unable to work in a broad class of jobs." *Sutton*, —— U.S. at ——, 119 S.Ct. at 2151.[1] Further, the Supreme Court stated, "If jobs utilizing an individual's skills (but perhaps not his or her unique talents) are available, one is not precluded from a substantial class of jobs. Similarly, if a host of different types of jobs are available, one is not precluded from a broad range of jobs." *Id.*

*Sutton* is consistent with the EEOC's guidelines. According to the EEOC's Interpretive Guidance, "[A]n individual who cannot be a commercial airline pilot because of a minor vision impairment, but who can be a commercial airline co-pilot or a pilot for a courier service, would not be substantially limited in the major life activ-

1. Because both parties accepted the EEOC regulations as valid, the Supreme Court did not decide what deference they were due, if any. *Id.* at ——, 119 S.Ct. at 2145. Consequently, the Court assumed without deciding that the EEOC regulations were valid. *Id.* at ——, 119 S.Ct. at 2151. The parties in this case do not challenge the EEOC regulations. Plaintiff does not challenge the EEOC Interpretative Guidance.

ity of working." *Id.* (quoting 29 C.F.R. § 1630, App. § 1630.2).

Based on the Supreme Court's analysis in *Sutton* and the EEOC's pilot example, Plaintiff fails to establish a disability under subsection (C) because she has not demonstrated that Defendant regards her as having a physical impairment that substantially limits the major life activity of working. Plaintiff alleges only that Defendant regards her MS as precluding her from holding the position of flight nurse. Because the position of flight nurse is a single job, this allegation does not support the claim that Defendant regards Plaintiff as having a substantially limiting impairment. *See Sutton*, —— U.S. at ——, 119 S.Ct. at 2151; 29 C.F.R. § 1630.2(j)(3)(i) ("The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working."). Rather, Defendant provided Plaintiff with numerous other opportunities to work as a nurse. In fact, Plaintiff worked for Defendant as a nurse in the burn unit, the surgical intensive care unit, and the emergency room following her MS diagnosis and hospitalization. Plaintiff has not distinguished the flight nurse position from the class of regular nurse jobs Defendant permitted her to perform. Accordingly, the district court properly concluded as a matter of law that Plaintiff did not establish that she is disabled under subsection (C) of the ADA.

AFFIRMED.


**BANCOKLAHOMA MORTGAGE CORP. Plaintiff–Appellant,**

**v.**

**CAPITAL TITLE COMPANY, INC.; Investors Title Company; Old Republic Title Company of St. Louis; U.S. Title Guaranty Company, Inc.; Peter M. Shaw; and U.S. Title Guaranty Company of St. Charles, Inc., Defendants–Appellees,**

**Joseph A. Iadevito; Theresa M. Janson; Lenders Mortgage Services, Inc.; Professional Builders Closing Service, Inc., Defendants.**

**No. 97–5186.**

United States Court of Appeals,
Tenth Circuit.

Oct. 18, 1999.

Buyer of residential mortgage loans brought action for fraud, breach of fiduciary duty, civil violations of Racketeer Influenced and Corrupt Organizations Act (RICO), and RICO conspiracy against company that originated loans, company that provided closing services to loan originator, and title companies that provided services on purchased loans. Title companies moved for summary judgment. The United States District Court for the Northern District of Oklahoma, Sven Erik Holmes, J., granted motion. Buyer appealed. The Court of Appeals, Marten, J., held that: (1) buyer's RICO claims against title companies were not barred by McCarran–Ferguson Act; (2) title companies were not liable under RICO; (3) loan originator did not act as agent for title companies so as to make companies liable for originator's misrepresentations; (4) fiduciary relationship did not exist between buyer and title companies; and (5) title companies were not liable on homeowner claims asserted by buyer as assignee.

Affirmed.

**1. Federal Courts ⚿776**

Court of Appeals reviews a district court's decision on summary judgment de novo.

**2. Federal Courts ⚿766**

In reviewing decision on motion for summary judgment, Court of Appeals de-