If you are not a letter carrier with the Postal Service, pretend you are one. (Much later, I will ask you to pretend that you are a Postal Service window clerk; and, in this story, you will be the better off for it.)

One day, while loading trays of mail into your delivery truck, you feel a sharp, stabbing pain in your back. But the pain subsides and you deliver your route. By the next morning, however, your back has stiffened up, and the pain is so severe---it is now also radiating down your back to your right leg----that you cannot get out of bed. You call your supervisor to report the yesterday’s injury and to advise her that you won’t be in. You ask her to send you OWCP Form CA-1. You go to your family physician who prescribes muscle relaxants, and advises you to stay out of work for a week. In the meanwhile, you have received the CA-1, filled it out, sent it back to your supervisor, who sends it to the post office’s district “comp” office, which forwards it on to OWCP. Now you must pretend really hard because we are going to assume that the post office does not dispute the claim, and admits that you sustained a compensable injury for which you are entitled to Continuation of Pay.³

After a week in bed, you are still no better. Your family physician refers you to an orthopedist who orders an MRI. The MRI shows that you have ruptured your spinal disk between vertebrae L5 and S1.4 You go to physical therapy for several weeks to strengthen your back, but it does not help. Epidural injections of a cortisone-line drug do
not lessen nerve irritation. As a last resort, you undergo endoscopic discectomy, an outpatient surgical procedure, to remove herniated disk material. The surgeon declares your operation a success and refers you back to the orthopedist for follow-up. But you are still hurting. You cannot bend over to pick up anything from the floor; you cannot lift heavy objects and certainly not tray full of mail; you cannot stand or sit for any appreciable amount of time without feeling sharp pains; you can walk only short distances before the leg into which the back pain radiates burns you like a hot poker. To make matters worse, you frequently cannot sleep through the night.

Understandably, you want to stay out of work and, once COP runs out, you want to collect 75% of your pay tax free as an OWCP benefit. But the OWCP Examiner assigned to your case is unsympathetic, and, on the basis of the surgical record, she orders the post office to give you a limited-duty assignment. Your postmaster assigns you to answer the phone in the front office for four hours a day; you receive OWCP benefits for the other four hours.

You report to work, and answer the phone while sitting in a straight-back chair. As prescribed, you get up from the chair and walk around to loosen your back. But by the end of the day, your back is killing you, and it kills you the next day, and the next, etc. You go back to your orthopedist who asks you what you are sitting on. She tells you need an ergonomic chair with lumbar back support (to help hoist your upper and mid back off your lower back) and with seat-height adjustment (again to reduce the downward force on your lower back). You find such a chair in a catalogue for a store from which the post office purchases office furniture and your orthopedist writes you a prescription for the chair. You give the prescription to your postmaster who forwards it on to the “comp”
office, which says it won’t purchase the chair unless OWCP orders it to do so. Your prescription languishes with OWCP despite your calling your OWCP Examiner and leaving several messages for him.

What to do?

You could request sick leave (and you had better support the leave request with “administratively acceptable evidence of incapacitation”) and after that you could request LWOP under the FMLA. But what do you do after your LWOP runs out? Could the post office remove you even if you were incapacitated to go to work? Absolutely.

What to do?

Hire a shrewd lawyer, who was a former MSPB Administrative Judge and who has been adjudicating or litigating cases under the Rehabilitation Act of 1973 for more than 25 years, to request the agency to provide you with a reasonable accommodation. To wit: the ergonomic chair. (All foolishness aside, laypeople representing other laypeople before EEOC to vindicate their rights under the Rehab Act will get sued by the latter if they screw up.)

EEOC’s regulations mandate that the federal government, including the post office, shall become a model employer of individuals with disabilities and not deny employment opportunities or fail to provide reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless it can demonstrate that the accommodation would impose an undue hardship on the agency's operations. Inherent in this duty is an obligation to break down artificial barriers which preclude individuals with disabilities from participating on an equal footing in the work force - from having an "equal employment opportunity."
Accordingly, the Rehabilitation Act requires federal agencies to make various types of "reasonable accommodation" to federal employees and postal workers who have disabilities. This requirement helps ensure that such employees will be able to perform the essential functions of their positions, and attain the same level of performance as and enjoy all the benefits and privileges of employment enjoyed by non-disabled employees.\(^\text{13}\)

Compliance with this duty to reasonably accommodate is itself a form of non-discrimination.\(^\text{14}\) Consequently, EEOC’s regulations provide that: [i]t is unlawful for a covered entity [such as the postal service] not to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business .... [In addition] [i]t is unlawful for a covered entity [like the postal service] to deny employment opportunities to an otherwise qualified job applicant or employee with a disability based on the need of such covered entity to make reasonable accommodation to such individual's physical or mental impairments.\(^\text{15}\)

Thus, absent "undue hardship," an employer must provide reasonable accommodation for the physical or mental limitations of an employee (or applicant for employment) if the employee (or applicant) is an "individual with a disability" who is "otherwise qualified." For these purposes, an "individual with a disability" is one who (1) has a physical or mental impairment which substantially limits one or more of such person's major life activities; (2) has a record of such impairment; or (3) is regarded as having such an impairment.\(^\text{16}\) An individual with a disability will be "otherwise qualified," in turn, if "he
or she satisfies all the skill, experience, education and other job-related selection criteria"
- in other words, "if he or she is qualified for [the] job, except that, because of the
disability [at issue], he or she needs a reasonable accommodation to be able to perform
the job's essential functions."17

Got all of that? Don’t worry; I will break it down for you.

The first question is whether your back injury qualifies as a “physical impairment” which
29 C.F.R. § 1630.2(h)(1) defines as:

(1) Any physiological disorder, or condition, cosmetic
disfigurement, or anatomical loss affecting one
or more of the following body systems: neurological,
musculoskeletal, special sense organs, respiratory
(including speech organs), cardiovascular, reproductive,
digestive, genito-urinary, hemic and lymphatic, skin, and
endocrine

You had a herniated disk which surely qualifies as a neurological or musculoskeletal
disorder, but supposedly the surgeon removed the portion of the ruptured disk which had
been compressing the nerves enervating through your vertebrae. But she apparently did
not get it all because you are still hurting. At any rate, the shrewd lawyer who is
representing you sent you to an “independent medical examiner” who has also diagnosed
you with Spondylosis (any of various degenerative diseases of the spine), Spinal Stenosis
(Narrowing of the spinal column), and Lumbar Strain and Sprain—all of which the courts
or EEOC regard as physical impairments.18

But remember: before you are considered to be an “individual with a disability” and,
therefore, possibly qualify for a reasonable accommodation, you must show that your
physical impairment substantially limits one or more major life activities.19 Let’s first list
some activities that are regarded as major life activities and then let’s see if you are substantially limited in performing any of them.

As noted above, you claim that your injury impairs your ability to bend, lift, stand, sit, walk, and sleep. According to EEOC, major life activities include but are not limited to caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 20 In *Toyota, supra,* 21 the Supreme Court held that “household chores, bathing, and brushing one's teeth are among the types of manual tasks of central importance to people's daily lives, and should have been part of the assessment of whether respondent was substantially limited in performing manual tasks.” Sitting, standing, lifting, and reaching are also recognized as major life activities. 22 Sleeping is also a major life activity 23 and so are bending and walking. 24 Accordingly, all the physical activities affected by your injuries are regarded as major life activities.

On the “substantially limits” criterion, 25 I am going to make it easy for myself and I will assume that you have a ten-pound lifting restriction.). In *Selix v. United States Postal Service,* 26 the complainant had been diagnosed with the impairments of thoracic outlet syndrome and tendinitis of the right elbow, and in late 1991, with subsequent clarifications, was found by her osteopath to be permanently restricted from lifting over 10 pounds, reaching or working above the shoulder, engaging in repetitious fine manipulation, and bending, squatting, climbing, kneeling, twisting, and standing intermittently for more than four hours. EEOC found that, “The lifting restriction alone constituted a record of a disability.” See also *Coleman v. Potter,* 2002 WL 31107283, (Sep 13, 2002) (10 lbs lifting restriction substantially limiting). EEOC has found the
lifting restrictions as high as 20 lbs constitute a substantial limitation on that major life activity. *Palfy*, *supra*.

Because you have a physical impairment that substantially limits one major life activity — and you need only activity so limited—you are an “individual with a disability.” Congratulations. But only a “qualified individual with a disability” is entitled to a reasonable accommodation. In *Toyota*, *supra*, the Supreme Court noted that the ADA defines a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." Sadly, you are not “qualified” because even if the post office bought you the ergonomic chair, you still could not deliver the mail, which has to be the most “essential function” a carrier performs. To be sure, with the ergonomic chair, you could do your limited-duty assignment more safely and with less pain, but the Rehabilitation Act does not require the post office to assign you to limited duty assignments, much less accommodate you in those assignments. Indeed, the post office apparently gave Marie Greene, the appellant in an EEOC case, the Hobson’s Choice of accepting reassignment from the letter-carrier craft to the clerk-craft (with a resultant loss in seniority) or being fired. Like you, Ms. Greene sustained a herniated disk and, also, like you, she was given a limited-duty assignment. The post office apparently got fed up with this arrangement and allegedly forced Ms. Greene forced her “to sign a job offer [to the clerk craft], which lowered her seniority and changed her off days.” Ms. Greene filed a disability-discrimination complaint in which she alleged that the post office should have allowed her to continue
working in her limited-duty assignment. In a particularly nasty decision, EEOC disagreed and chided Ms. Greene for “misunderstand[ing] our regulations.” According to EEOC,

[A]gencies are not required to restructure positions in a manner which would require the reallocation of essential functions. Restructuring involves the redistribution of marginal, nonessential job functions. Accordingly, the Rehabilitation Act does not require the agency to keep complainant in the carrier craft when, in fact, she cannot perform the essential functions of carrier work with or without an accommodation. To the extent that complainant wanted to perform marginal functions of her original carrier position, we note that the Rehabilitation Act does not require the agency to consider accommodating complainant's restrictions by creating a "make work" limited duty assignment because such an assignment is not a vacant, funded position.

(Internal citations omitted).

Now what to do?

First, fire that shrewd attorney of yours, the former MSPB judge, who led you to this dead end, and demand a refund of the fee you paid him. (Good luck.) Then consider shelling out the couple hundred bucks to buy the chair yourself; maybe the postmaster will let you sit in it at work. Third, keep calling the OWCP Examiner; maybe he will agree to refund to you the cost of the chair.

In all seriousness, is this result fair? You get injured on the job; OWCP orders the post office to give you a limited-duty assignment; and then the post office won’t accommodate your disability by providing you with the ergonomic chair. Your best bet may be to speak with your NALC shop steward about filing a grievance under the collective-bargaining agreement.
Remember at the beginning, I told you I was going to ask you to pretend to be a window clerk? Pretend now that you are not a letter carrier, but that you are window clerk who sustained the exact same injuries and has the exact same physical restrictions as the letter carrier. Assume that you perform virtually all your clerk duties while sitting on a chair at the window, and the chair is a non-ergonomic straight-back chair.

Changes everything, doesn’t it? Now the post office must buy you the chair because with the accommodation you can perform the essential functions of the clerk’s position.

Congratulations: as a letter carrier you were merely an “individual with a disability” but as a clerk you are a “qualified individual with a disability.” The difference between the two is the difference between not getting the chair and getting the chair.

Maybe time to call that shrewd lawyer.

1 “OWCP” stands for the Department of Labor’s Office of Workers Compensation Program.

2 Federal Notice of Traumatic Injury and Claim for Continuation of Pay/Compensation.

3 20 CFR 10.200 provides: a) For most employees who sustain a traumatic injury, the FECA provides that the employer must continue the employee's regular pay during any periods of resulting disability, up to a maximum of 45 calendar days. This is called continuation of pay, or COP. The employer, not OWCP, pays COP. Unlike wage loss benefits, COP is subject to taxes and all other payroll deductions that are made from regular income.

4 The disk is part of the spinal column that is made up of cartilage and separates each vertebra of the spine. Disks are made up of a strong outer layer with a soft inner part that acts as a shock absorber to cushion the vertebrae when a person is moving. When the disk ruptures or herniates, the soft inner material will bulge out through a weak area in the hard outer layer. When this occurs the disk compresses or irritates a nerve root causing pain and, in some cases, even nerve damage.


5 20 CFR 10.401 provides b) Compensation for total disability is payable at the rate of 66\(\frac{2}{3}\) percent of the pay rate if the employee has no dependents, or 75 percent of the pay rate if the employee has at least one dependent.

6 Limited duty is for employees injured on-the-job; limited duty is primarily governed by ELM, Section 546.14.

7 5 C.F.R. §§ 630.401-409 regulate sick leave, detailing when it may be granted, as well as the proper procedures for applying for it. In disciplinary cases involving AWOL the FLRA has adopted the approach of the Merit Systems Protection Board (MSPB). U.S. Department of the Air Force, Robins Air Force Base, Warner Robins, Georgia and American Federation of Government Employees, Local 987, 41 FLRA 635, 639 (1991) (Warner Robins). Applying MSPB precedent, the Authority has held that an employee is entitled to sick leave when the employee submits administratively acceptable evidence of incapacity due to illness or injury.
8 The FMLA requires covered employers to provide 12 weeks of unpaid leave to qualified employees during a twelve-month period for any of the following reasons:

- the birth or adoption of a child or the placement of a foster child;
- The care of a parent, child or spouse with a serious health condition; or
- the employee's personal serious health condition

9 Bologna v. Department of Defense, 73 M.S.P.R. 110 (1997) (There was no foreseeable end to employee's absence and his absence was burden to agency, and thus agency did not act improperly in denying employee's request for leave without pay and in removing him on charge of absence without leave; physician's reports indicated that employee was totally and permanently disabled.)

10 Warning to union officials. Contact the general counsel of your union to make sure you and the local are immunized from a civil action even before accompanying an employee to the EEO Counselor to initiate an informal complaint of discrimination. The duty of fair representation may require you to file a grievance on behalf of an employee whose disability is not being accommodated. But the right to initiate a complaint of discrimination lies outside the collective bargaining agreement. For postal union officials see generally BIW Deceived v. Local S6, Indus. Union of Marine and Shipbuilding Workers of America, IAMAW Dist. Lodge 4, 132 F.3d 824, *829 -830 (C.A.1 (Me.),1997). For federal employee union officials see generally Montplaisir v. Leighton 875 F.2d 1, *5 (C.A.1 (N.H.),1989)

11 29 C.F.R. § 1614.203(b); 29 C.F.R. § 1630.9.

12 29 C.F.R. § 1630.2 provides: (o) Reasonable accommodation. (1) The term reasonable accommodation means:
   (i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or
   (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; or
   (iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.
(2) Reasonable accommodation may include but is not limited to:
   (i) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
   (ii) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.

13 See Appendix to Part 1630 - Interpretive Guidance on Title I of the Americans with Disabilities Act ("Appendix to Part 1630"), at Section 1630.2(o): Reasonable Accommodation.

14 See id. at Section 1630.9: Not Making Reasonable Accommodation

15 . 29 C.F.R. §§ 1630.9(a), (b); see also 42 U.S.C. §§ 12112(b)(5)(A), (B) (containing the statutory directive mandating reasonable accommodation for "otherwise qualified individual[s] with a disability").
16 See 29 C.F.R. § 1630.2(g).

17 Appendix to Part 1630, at Section 1630.9: Not Making Reasonable Accommodation.


19 9) Under the Rehabilitation Act

The term "disability" means--

(A) except as otherwise provided in subparagraph (B), a physical or mental impairment that constitutes or results in a substantial impediment to employment; or

(B) for purposes of sections 701, 711, and 712 of this title and subchapters II, IV, V, and VII of this chapter [29 U.S.C.A. §§ 760 et seq., 780 et seq., 790 et seq., and 796 et seq.], a physical or mental impairment that substantially limits one or more major life activities. (Emphasis supplied).

20 29 C.F.R. § 1630.2(i).


23 Palfy v. United States Postal Service, EEOC Appeal Nos. 07A10087 and 01993950 (June 17, 2002).

24 Hawkins v. United States Postal Service, EEOC Petition No. 03000006 (February 11, 1999) (back injury rendered an employee substantially limited in major life activities where medical restrictions prohibited him for kneeling, stooping, pushing, pulling, heavy lifting, and standing or walking for over four hours).

25 29 C.F.R. § 1630.2(j) defines substantially limits as follows:

(1) The term 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.

(2) The following factors should 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.

26 EEOC Appeal No. 01970153 (March 16, 2000)

27 The ADA requires covered entities, including private employers, to provide "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." 42 U.S.C. § 12112(b)(5)(A) (1994 ed.); see also § 12111(2) ("The term 'covered entity' means an employer, employment agency, labor organization, or joint labor-management committee"). Toyota, supra, at 193. The Rehabilitation Act and the ADA are co-extensive: In 1992, the substantive employment standards of the Americans with Disabilities Act, 42 U.S.C. Section 12111, et seq., were made applicable to the Federal Government through the Rehabilitation Act.

28 Toyota, supra.

29 Greene v. Potter, EEOC Appeal No. 01A13124 (September 19, 2002)

30 Id.

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