ANALYZING WORK PLACE DISABILITY ISSUES

By: Ronald A. Sollish

I. THE AMERICANS WITH DISABILITY ACTS (ADA) OF 1990. 42 USC §12101 et seq. PROHIBITS DISCRIMINATION AGAINST "A QUALIFIED INDIVIDUAL WITH A DISABILITY".

A. The ADA's General Mandate - Discrimination Prohibited.

General Rule - No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, hiring, advancement, discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment. 42 USC §12112(a).

B. What is a "Covered Entity"?

"Covered entity" includes employment agencies, labor organizations, joint labor-management committees, and employers employing 15 or more employees during each of 20 or more calendar weeks in the current or preceding calendar year. 42 USC §12111.

C. Prima Facie Case Under the ADA.

1. Elements - An ADA plaintiff must show by a preponderance of the evidence that:

a. He or she is disabled;

b. He or she is otherwise qualified for the job, with or without "reasonable" accommodation;

c. He or she suffered an adverse employment decision;

d. The employer knew or had reason to know of his or her disability; and

e. After rejection or termination the position remained open, or the disabled individual was replaced.

D. Cap on Damages.

Damages awardable to employees for an employer's violation of the ADA are capped as follows:

1. For an employer with 15-100 employees - $50,000;

2. For an employer with 101-200 employees - $100,000;

3. For an employer with 201-500 employees - $200,000; and

4. For an employer with more than 500 employees - $300,000.

II. WHAT IS A "DISABILITY"?

A. If an individual does not have a "disability," he or she is generally not protected by the ADA. Therefore, courts often dispose of ADA lawsuits by simply finding that the Plaintiff did not have a "disability".

*

B. Under the ADA, a disability is a "physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 USC §12102(2)(a). "Disability" also includes having a "record of such an impairment or being "regarded as" having such an impairment. 42 USC §12102(2)(b),(c).

C. What is an "impairment"?

1. ADA regulations define impairments affecting any number of body systems broadly so as to include: a wide variety of disorders and conditions affecting any number of body systems including the neurological or musculoskeletal systems, special sense organs, respiratory, cardiovascular, reproductive, digestive, genitourinary hemic, lymphatic, or endocrine systems or the skin. In addition, impairments include mental or psychological disorders, including mental retardation, organic brain syndrome, emotional or mental illness, and certain learning disorders. (29 CFR §1630.2(h)).

2. The EEOC has stated that physical characteristics such as left-handedness, common personality traits such as being irresponsible for showing poor judgment, cultural, environmental, or economic disadvantages, homo-sexuality, bi-sexuality, pregnancy, and normal deviations in height, weight or strength are not impairments. Appendix to 29 CFR §1630.2(h). Similarly, traits like irritability and chronic lateness are not themselves impairments. EEOC Enforcement Guidance on the ADA and Psychiatric Disabilities, Number 915.002 (March 25, 1997) at page 4. *Johnson v. Billington*, 404 F.Supp.2d 157 (2005); *Duda v. Board of Education of Franklin Park Public School District No. 84*, 133 F.3d. 1054 (7th Cir. 1998) ("mere temperament and irritability" are not covered under the ADA). Courts have stated that conditions like general grief or stress are not covered under the ADA. *Poyner v*. *Good Shepherd Rehab at Muhlenberg*, 202 F.Supp.2d 378, 383 (ED PA 2002); *Johnson* v *Boardman Petroleum, Inc.,* 923 F.Supp. 1563 (S.D. GA 1996); *Mundo* v. *Sanus Health Plan of Greater New York,* 966 F.Supp. 171 (E.D. NY 1997) (Electronic Publication, only) ("an inability to tolerate stressful situations is not an impairment" under the ADA; the ADA "was not intended to categorize people with common personality traits as disabled"); *DeWitt* v *Carsten,* 941 F.Supp.1232

(N.D. GA 1996), affd. 122 F.3d 1079 (11th Cir. 1997) (Job related stress, caused by an unpleasant boss or having unpleasant duties (working around prisoners) is not an ADA disability); "while characteristic predisposition to illness or disease" because of environmental rather, economic, or social conditions is not an impairment, discrimination because of *genetic* predispositions is discrimination based on disability. EEOC Compliance Manual §902.2(C)(2). Some conditions which are *expressly excluded* from ADA'S protections are: transvestitism, transsexualism, pedophilia, exhibitionism, voyeurism, many gender identity disorders, other sexual behavioral disorders, compulsive gambling, kleptomania, pyromania, and psycho active substance use disorders resulting from current illegal drug use. 42 USC §12211.

While some courts have held that an "impairment" must actually affect the individual's ability to work, and not just any "major life activity" in order to be covered by the ADA, most courts have not adopted this approach.

3. The voluntariness of the impairment is irrelevant. For example, lung cancer is still an impairment even though the cancer was caused by one's smoking. Similarly, even though plaintiffs "morbid obesity" could have been lessened by behavioral changes, the morbid obesity was still an impairment. *E.E.O.C. v. Watkins Motor Lines, Inc.,* 463 F.3d. 436, 444 (6th Cir. 2006); *Cook v. Rhode Island Department of Mental Health,* 10 F.3d. 17 (1st Cir. 1993).

What is a "major life activity"?

The EEOC has said that major life activities include caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working. 29 CFR §1630.2(1). In the appendix to its

regulations, the EEOC added sitting, standing, lifting, and reaching to its list of major life activities. Appendix to 29 CFR §1630.2(1). In its compliance manual, the agency added "mental/emotional processes such as thinking, concentrating, and interacting with others to its list of major life activities. EEOC Compliance Manual §902.3(B) at page 15. In a1997 policy guidance, the EEOC added sleeping as a major life activity. EEOC Enforcement Guidance on the ADA and Psychiatric Disabilities, Number 915.002 (March 25, 1997) at page 4, and in an *Amicus Curae Brief,* the EEOC stated that the "ability to control basic bodily functions, specifically one's bowels" is a major life activity. EEOC's *Amicus Curae Brief,* in - *Pangalos v*. *Prudential Insurance Company of America,* 962022 (Brief filed in 3rd Cir., February 13, 1997).

At least one federal circuit court has held, however, that "interacting with others" is not a major life activity. *Calef v. Gillette Co*., 322 F.3d 75, 86 (1st Cir. 2003); *Soileau* v. *Guilford of Maine,* 105 F.3d 12, 15-16 (1st Cir. 1997) (although "the ability to get along with others" is "a skill to be prized, it is different in kind from breathing or walking," EEOC's manual is "hardly binding"). Another federal circuit court has held that "caring for others" is not a major life activity. *Krauel* v *Iowa Methodist Medical Center,* 95 F.3d 674, 677 (8th Cir. 1996). Another court has stated that "getting a sound night's sleep and reporting to work on time, clear minded" is not a major life activity. *Sarko v*. *Penn-Del Directory. Co.,* 968 F.Supp. 1026 (E.D. P.A. 1997). In *Bragdon v*. *Abbott,* (1998) the U. S. Supreme Court held that reproduction is a major life activity. The court noted that an activity does not have to have a "public, economic, or daily dimension" to be a major life activity and suggested, by stating that "sexual dynamics surrounding" reproduction are "central to the life process itself," that sex itself might be considered a major life activity. Courts have also found that eating, (*Fraser v. Goodale*, 342 F.3d 1032, 1040 (9th Cir. 2003); *Waldrip v. General Elec. Co*., 325 F3d. 652 (5th Cir. 2003); *Coughlal* v *H.J. Heinz*

Co., 851 F.Supp. 808 (N.D. Tex 1994)), and reading (*Head v. Glacier Northwest Inc*., 413 F.3d 1053 (9th Cir. 2005); *Bartlett* v *New York State Board of Law Examiners,* 156 F.3d 321 (2nd Cir. 1998)) are major life activities. However, courts have held that recreational swimming (*Popko v. Pa. State Univ*., 994 F.Supp. 293, 298 (M.D. Pa. 1998); *Martinez* v *City of Roy,* (unpublished) 1998 U.S. App LEXIS 5906 (10th Cir. 1998)), driving (*Winsley v. Cook County*, 563 F.3d 598 (7th Cir. 2009), working on cars, basic chores, shopping in a mall, skiing, golfing, yard work, mowing the lawn, painting, plastering, and shoveling snow (*Moore v. J.B. Hunt Transport, Inc.*, 221 F.3d 944 (7th Cir. 2000); *Soler v. Tyco Elec., Inc*., 268 F.Supp 97 (D.P.R. 2003); *Weber v. Strippot, Inc*., 186 F.3d 907 (8th Cir. 1999); *Colwell* v. *Suffolk County Police Department,* 158 F.3d 635 (2nd Cir. 1998)), climbing (*Otting v. J.C. Penny Co*., 223 F.3d 704 (8th Cir. 2000); *Robinson* v *Global Marine Drilling Co.,* 101 F.3d 35 (5th Cir. 1996)), driving at night, *(Wade* v. *General Motors Corp.,* 165 F.3d 29 (6th Cir 1998)) everyday mobility such as taking vacations or going to a shopping mall alone (*Reeves* v. *Johnson Controls Roll Services, Inc.,* 140 F. 3d 144 (2nd Cir. 1998)), and awareness (*Deas v. River West*, 152 F.3d 471 (5th Cir. 1998)) are not major life activities. The court's ruling in *Deas* that awareness is not a major life activity was part of a decision in which the court held that epilepsy is not a disability. In contrast to the court's decision in *Reeves* that everyday mobility is not a major life activity, the court in *Anderson* v *Gus Mayer Boston Store,* 924 F.Supp. 763 (ED Tex 1996) ruled that asymptotic HIV is a disability because an asymptotic HIV positive individual cannot travel freely without worrying about exposure to bacterial infection and fungi. Similarly, the court in *Kralik v. Durbin,* 130 F.3d 76 (3rd Cir. 1997) suggested that traveling is a major life activity.

Does the impairment "substantially limit" a major life activity?

1. The EEOC has stated that an impairment "substantially limits" a major life activity if the person is either (a) unable to perform a major life activity that the average person in the general population can perform; or (b) significantly restricted as to the condition, manner or duration under which he or she performs the activity as compared to the condition, manner or duration under which the average person in the general population performs the activity. 29 CFR §1630.2(J)(1). *Rawdin v. American Bd. Of Pediatrics*, 985 F.Supp2d 636, 649 (E.D. P.A. 2013); *Davidson* v *Midelfort Clinic, Ltd.,* 133 F.3d 499 (7th Cir. 1998). Therefore, the court in *Vonderheide* v *U. S. Post Office,* (unpublished) 1998 U.S. App. LEXIS 16885 (6th Cir. 1998) held that a plaintiff who was unable to work more than 40 hour work weeks because of an organic brain syndrome was not substantially limited since "most people work 40 hours per week." The ' EEOC has stated that if someone is "extremely nauseous" or "constantly fatigued" while performing a major life activity, that person could be considered substantially limited compared to the average person. EEOC *Amicus Curae Brief* in *Ellison* v *Software Spectrum, Inc.,* No. 95-10704 (Brief in Support of Petition for Rehearing filed in 5th Cir. June 28, 1996). The court in *Roush v*. *Weastc, Inc.* 96 F.3d. 840 (6th Cir. 1996) stated that if the plaintiff suffers pain while she works due to a bladder condition she might be considered substantially limited in working. In contrast, the court in *Hill* v. *Baltimore City Department of Social Services,* (unpublished) 1998 U.S. App. LEXIS 772 (4th Cir. 1998) stated that "severe chronic pain in the shoulder, upper and lower back, and sharp pains, and shooting pain in the arms and legs" would not rise to the level of a disability. When determining whether pain or nausea is considered a disability, courts consider the severity of the

pain and nausea. Typically, pain and nausea must be severe in order to constitute a disability.

Regulations issued by the EEOC require that courts look at a) the nature and severity of an impairment; b) the duration or expected duration of an impairment; and c) the permanent or long-term impact or the expected permanent or long-term impact resulting from an impairment when determining whether an individual has substantially limited "major life activity." 29 CFR §1630.2(J)(2). The court in *Penny v*. *United Parcel Service,* 128 F.2d 408 (6th Cir. 1997) ruled that the plaintiffs walking limitation did not rise to the level of a disability where plaintiff could not walk briskly and had some trouble climbing stairs. Similarly, the Court in *Kelly v. Drexel University,* 94 F.3d 102 (3d Cir. 1996), held that a plaintiff was not substantially limited in walking because he had "trouble climbing stairs, which requires him to move slowly and hold the handrail." Generally, the burden is on the plaintiff to establish that an impairment substantially limits a major life activity. As these cases imply, courts often look at the activities which a plaintiff is *able* to perform in order to assess whether the individual is substantially limited in a major life activity. If an impairment affects, but does not substantially limit, a major life activity, then courts typically dismiss the complaint. Similarly, if an impairment is only short-term and temporary, then courts typically do not consider it substantially limited.

Are mitigating/corrective measures (i.e., medication and/or prosthetic devices) to be taken into account when analyzing substantial limitation?

a. According to the EEOC and the Department of Justice, the effects of medication or prosthetic devices should not be

considered when determining whether an impairment substantially limits a major life activity. That is, an employer must consider whether the person's condition, in the absence of a prosthetic device or medication, would substantially limit a major life activity. EEOC Compliance Manual, §902 at pp 35-36; 28 CFR part 35, app. § 35.104.

b. The EEOC and Department of Justice position had been adopted by most courts prior to 1998. Specifically, the court, in *Washington v. HCA Health Serv. of Texas,* 152 F.3d 464 (5th Cir. 1998), held that when prosthetic devices, medications, or other corrective means are used on a continual basis, the medical condition should be assessed without taking into account the prosthetic device, medication or other corrective measure. On the other hand, if the condition is permanently corrected (such as a knee replacement), the medical condition should be assessed as corrected. One rationale supporting the assessment of medical conditions in the absence of medication is that to do otherwise would create a disincentive to self-help. That is, individuals might be reluctant to use medication or other corrective measures for fear of giving up their status as disabled. Similarly, courts have ruled that medical conditions are to be assessed without considering the behavioral adaptations of individuals. For example, the court, in *Doane v. City of Omaha,* 115 F.3d 624 (8th Cir. 1997), held that although the police officer compensated for the loss of peripheral vision and depth perception by shifting his head, the officer still had a disability because mitigating measures are not to be considered. Also, the court in *Bartlett v. New York State Bd of Law Examiners,* 156 F.3d 321 (2nd Cir.

1998), held that an individual who utilized phonics in order to read at an average level was substantially limited in pursuit of a major life activity because she was only able to read at an average level due to mitigating measures.

c. However, in 1999 the U.S. Supreme Court held that where employees took blood pressure medication *(Murphy v. United Parcel Service, Inc.*, 527 U.S. 471 (1999)) and wore glasses (*Sutton v. United Air Lines, Inc.,* 527 U.S. 471 (1999)), their medical conditions should be assessed only after taking into account the corrective measures for purposes of determining whether they are disabled under the ADA.

F. An impairment resulting from medication taken for another impairment may be substantially limiting. Specifically, the court in *Christian v. St Anthony Medical Ctr., Inc.,* 117 F.3d 1051 (7th Cir. 1997), held that a medical treatment itself can be a disability if the treatment itself is disabling even if the underlying condition does not constitute a disability. However, the court stated that in order to constitute a disability under the ADA the treatment must be "truly necessary, and not merely an attractive option."

G. Substantial limitation in major life activity of working.

Courts are very reluctant to rule that an ADA covered disability exists because of a substantial limitation in the major life activity of working. The court in *Pryor v. Trane Co.,* 138 F.3d 1024 (5th Cir. 1998), stated "If an individual is substantially limited in any other major life activity, no determination should be made as to whether the individual is substantially limited in working."

1. The EEOC and most courts examining the issue require that the individual must be excluded from a class of jobs or a broad range of jobs, not simply his or her particular job. 29 CFR § 1630.2Q and Appendix. Some courts go so far as to say that in order to be considered substantially limited in working, an individual must be excluded from employment in general. Courts have ruled that in order for an impairment to substantially limit the major life activity of working, the impairment must impair the employee's performance level on the job, not just result in pain, discomfort or unusual stress.

2. Relevant factors identified by the EEOC to determining whether a person is substantially limited in working include:

    a. The geographical area to which the individual has access;

    b. The jobs from which the individual has been disqualified because of an impairment and the number and types of jobs utilizing similar skills in training; and

    c. The jobs from which the individual has been disqualified and the number and types of jobs not using similar skills and training.

    29 CFR § 1630.2Q, Appendix. Such evidence must be presented as part of the plaintiff's *prima facie* case. *Skorup v. Modern Door Corp.,* 153 F.3d 512 (7th Cir. 1998).

"Record of Disability Cases.

1. Where an individual does not currently have an impairment that substantially limits a major life activity, the individual may still be protected by the ADA if he has a record of an impairment that substantially *limited* a major life activity. The U.S. Supreme Court,

in *School Bd. of Nassau Cty v. Arline,* 480 US 273, 281 (1987), held that a plaintiffs lengthy hospitalization for tuberculosis established a record of an impairment substantially limiting a major life activity. Lower courts, however, have subsequently held that hospitalization does not necessarily create a record of a disability. *See Horwitz v. L& J.G. Stickley, Inc*., 122 F.Supp.2d 350, 356 (N.D. NY 2000); *Gutridge v Clure,* 153 F.3d 898, 900-902 (8th Cir. 1998), and *Colwell v. Suffolk Cty Police Dept.,* 158 F.3d 635 (2nd Cir. 1998).

2. An individual is only protected under the ADA "record of doctrine if he or she had in impairment which itself substantially limited a major life activity. EEOC Compliance Manual, §902.7 at pp 40-41.

"Regarded as" Disabled Cases.

1. An individual is protected by the ADA where his or her employer perceives that the individual has a disability. An employer may "regard" an individual as being disabled in several ways: An individual might have an impairment, but one that does not substantially limit a major life activity, and the employer may treat him or her as having an impairment which substantially limits a major life activity; an individual may have an impairment that substantially limits major life activities only because of the attitudes of others; and an individual may not have an impairment, but the employer treats the individual as having a substantially limiting impairment. 29 CFR §1630.2(1), Appendix. Most "regarded as" cases involve an employer perceiving that an employee has an impairment that substantially limits the major life activity of working. Courts have held that an employer could not have "regarded" an employee as substantially limited in the major life activity of working when the employer encouraged the employee to work.

2. The EEOC considers discrimination based on genetic information to be "regarded as" discrimination, and at least one court has indicated that discrimination based on past workers' compensation claims is "regarded as" discrimination. Generally, an employer having made some changes to a job in order to help an individual with a medical condition does not generally mean that the employer has "regarded" the individual as disabled or that the employee has a "record of' a disability. Similarly, merely asking an individual to take a medical examination or offering an employee medical leave does not necessarily mean that the employer "regarded" an individual as " disabled. *Cody* v *Signa Health Care of St Louis,* 139 F.3d 595 (8th Cir. 1998).

III. REQUIREMENT THAT EMPLOYEE BE "QUALIFIED"

A. The ADA only protects individuals who have disabilities *and* who are "qualified." Under the ADA, an individual is qualified if and only if, he or she: (1) has the requisite skills, experience, education, licenses, etc., to perform his or her job; and (2) is able to perform the essential functions of the job, either with or without reasonable accommodation. 42 USC §12111(8); 29 CFR §1630.2(m). *Soto-Ocasio v. Federal Exp. Corp.,* 150 F.3d 14 (1st Cir. 1998). Furthermore, the employee bears the burden of proving that he or she is "qualified." *Mason v. Avaya Communications, Inc.,* 357 F3d. 1114, 1118 (10th Cir. 2004).

B. Reasonable Accommodation. The ADA prohibits an employer from failing to make "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 USC §12112(b)(5); *E.E.O.C. v. Picture People, Inc.*, 684 F.3d 981, 985 (10th Cir. 2012); *Humphrey v.*

Memorial Hospitals Ass'n, 239 F.3d 1128, 1133 (9th Cir. 2001); *Soto-Ocasio v. Federal Exp. Corp.,,* 150 F.3d 14 (1st Cir. 1998); *Rhoads v. Federal Deposit Insurance Corporation,* 956 F.Supp.1239 (1997).

Therefore, in order to establish discrimination based on denial of accommodation, a plaintiff must demonstrate that he or she is an otherwise qualified individual with a disability and that a reasonable accommodation was denied in a discriminatory fashion. *E.E.O.C. v. Picture People, Inc.*, 684 F.3d 981 (10th Cir. 2012); *Rhoads* v. *Federal Deposit Insurance Corporation,* 956 F.Supp 1239 (1997), *citing Bryant v. Better Bus. Bureau of Greater Maryland,* 923 F.Supp 720, 733 (D. Md. 1996), *citing Myers v. Hose, et. al,* 50 F.3d 278, 28182 (4th Cir. 1995). A request for an accommodation consisting of granting an employee additional sick days has been held to not be reasonable since "it is in substance a request not to perform (one's) job, and hence, facially unreasonable." *Rhoads v. Federal Deposit Insurance Corporation,* 956 F.Supp. 1239, 1248 (1997); *see*, also, *Francis v. Wyckoff Heights Medical Center*, 177 F.Supp.3d 754, 773 (E.D. NY 2016). The court in *Rhoads* did note, however, that the use of accrued sick leave and of part-time or modified work schedules is an appropriate accommodation in some circumstances. *Rhoads* at 1249. Similarly, the Court in *Soto-Ocasio, supra,* stated, "The term 'reasonable accommodation' may include 'job restructuring [and] part-time or modified work schedules.' 42 USC §12111 (9)(B). However, the ADA does not require an employer 'to reallocate job duties in order to change the essential function of a job.'" *Soto-Ocasio, supra,* at 18, *citing Milton v. Scrivner, Inc.,* 53 F.3d 1118, 1124 (10th Cir. 1995), *Cochrum v. Old Ben Coal Co.,* 102 F.3d 908, 913 (7th Cir. 1996), and *Fussell v. Georgia Ports Auth.,* 906 F.Supp 1561, 1571 (S.D. Ga. 1995).

IV. ADA CONTRASTED WITH THE MICHIGAN PERSONS WITH DISABILITIES CIVIL RIGHTS ACT

While the Michigan Persons with Disabilities Civil Rights Act (MPDCRA) is similar to the ADA in many respects, the MPDCRA differs from the ADA in important ways. The primary differences involve the MPDCRA definitions of *reasonable accommodation and undue hardship.* However, there are several other differences which should be considered when assessing one's potential liability under the MPDCRA as opposed to the ADA.

Litigation brought in federal court under the ADA may be more favorable to employers than litigation initiated in state court under the MPDCRA. This is because federal judges are more likely to enter a summary judgment than are state judges. Moreover, there are caps on damages awardable under the ADA, but not under the MPDCRA. On the other hand, the MPDCRA does not allow for punitive damages, while the ADA does. Initiating a disability discrimination case in federal court under the ADA is also beneficial to employers where the issue involves accommodating a disabled employee by placing him or her in a new job. This is because the MPDCRA, as interpreted by the Michigan Supreme Court, does not recognize this form of accommodation. However, where an employee failed to make a written request for accommodation as required by the MPDCRA, defending a suit in state court under the MPDCRA is generally preferable. Finally, if the cost of an accommodation exceeds the "formula" outlined in the MPDCRA, the practitioner may wish to file under the ADA.

A. Administrative Prerequisites

1. ADA General Rule.

Before filing an ADA lawsuit, a plaintiff must file a discrimination charge with the Equal Employment Opportunity Commission ("EEOC") and receive a right-to-sue letter from that agency. As a general rule, a plaintiff may sue only those claims that accrued not

more than 300 days before plaintiff's filing of the discrimination charge. Authority - 41 CFR § 60-741.61(b); *Stepney v. Naperville School Dist. 203*, 392 F.3d 236, 239 (7th Cir. 2004); *Dao* v. *Auchan Hypermarket,* 96 F.3d 787 (5th Cir. 1996).

Michigan is a "dual filing" state, which means that filing a charge of discrimination with the Michigan Department of Civil Rights ("MDCR") has the same legal effect as filing with the EEOC.

2. MPDCRA General Rule.

Under the MPDCRA, an individual has the choice of filing a claim with the MDCR or filing a lawsuit directly in court for injunctive relief, damages, or both. Thus, the MDCR and the circuit courts have concurrent jurisdiction over claims under the Michigan Act. Authority - MCL 37.1605-1607.

An individual has three years from the date of the adverse action to file a claim under the Michigan Act. Thus, the practitioner may wish to file under the Michigan Act if the purpose is to get into court quickly or if the 300-day period for filing a charge with the EEOC has expired. However, by bypassing the EEOC, the claimant is forfeiting the agency's role as a neutral investigator of the discrimination charge.

Burden of Proof.

1. ADA General Rule.

If a disabled individual challenged a particular job requirement as unessential, the employer will bear the burden of proving that the

challenged criterion is necessary. Authority – *Monette v. Electronic Data Sys. Corp.* 90 F.3d 1173 (6th Cir. 1996).

It is important for the practitioner to realize that *Monette* does not shift the overall burden of persuasion in an ADA case. Rather, the burden of persuasion remains with the ADA plaintiff at all times. *Hamlin v. Charter Township of Flint,* 165 F.3d 426 (6th Cir.1999). *Monette* only shifts the burden of persuasion to the employer on the "essential function" issue in a situation when an employer admits relying upon a disability when making an adverse decision or if there exists direct evidence that the employer relied on plaintiff's disability in making the adverse employment decision. *Monette*, 90 F.3d at 118.

2. MPDCRA General Rule.

Plaintiff retains the burden of proof on all qualification issues including the essential nature of a job function. Authority - *Crittenden v Chrysler Corp,* 178 Mich App 324; 443 NW2d 412 (1989); *Brown v. Sprint*, 891 F. Supp. 396 (E.D. Mich.1995).

Definition of "Reasonable Accommodation:

ADA General Rule.

While the ADA does not define the term "reasonable accommodation" the administrative regulations indicate that the term is quite broad. Examples include making existing facilities readily accessible to and useable by individuals with disabilities; job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modification of equipment or devices; appropriate adjustment or modification of examinations, training materials or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals

with disabilities. Authority - 29 CFR §1630.2(o)(2) (lists examples of possible types of reasonable accommodations); 42 USC §12112(b)(5)(A) (employer failing to provide reasonable accommodation to the known physical or mental limitations of a qualified individual with a disability commits unlawful discrimination unless it can demonstrate that the proposed accommodation would impose an undue hardship on its business).

If a proposed disability discrimination lawsuit is based solely on a failure to accommodate, and if no written demand for accommodation was made within 182 days (assuming the employer advised its employees of this requirement as required by the statute), an ADA lawsuit might be more appropriate. An ADA action would be suggested because the MPDCRA requires that employees make requests for accommodation in writing.

MPDCRA General Rule.

As a result of 1990 amendments, the MPDCRA recognizes three types of accommodation: (a) the purchasing of equipment and devices; (b) the hiring of readers or interpreters; and (c) the restructuring of jobs and the altering of schedules for minor or infrequent duties. Importantly, the duty to accommodate under the MPDCRA does not include placing the employee in a new job. In addition, under the MPDCRA, a person with a disability may allege a failure-to-accommodate claim only if that person notifies the employer in writing of the need for the accommodation within 182 days after the person with the disability knew or reasonably should have known that an accommodation was needed. The ADA does not contain such a requirement. However, the employer waives the right to notice if it fails to post notice or use other appropriate means to notify all employees and job applicants of the 182-day rule. Authority – MCL 37.1210 (2)-(5),(8)-(11),(18)-(19); *Hall v Hackley Hosp,* 210 Mich App 48; 532 NW2d 893 (1995); *Rourk* v. *Oakwood Hospital Corp,* 458 Mich 25;

580 NW2d 397 (1998) (duty to accommodate under MPDCRA does not include new job placement).

If the requested accommodation involves new job placement, do not file under the MPDCRA; form of accommodation is not recognized. The Michigan Supreme Court takes a strict view as to the types of accommodations available under the Act, namely, the three types of accommodations described in the statute.

Leave of Absence Requests: The Demise of "Reasonable Time to Heal" Doctrine.

ADA General Rule.

The ADA Interpretive Guidance suggests that a possible form of accommodation is permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment. ADA Interpretive Guidance §1630.2(o). A growing number of courts have held that while unpaid leave for medical care and treatment may be appropriate under certain circumstances, leave of an indefinite duration is not a reasonable accommodation. *Bennett v. Calabrian Chemicals Corp*., 324 F.Supp. 815, 837 (E.D. Tex 2004); *Cousins v. Howell Corp*., 113 F.Supp. 262, 271 (E.D. Conn 2000); *Mitchell v. Washingtonville. Central School Dist*., 190 F.3d. 1, 9 (2nd Cir. 1999); *Taylor v. Pepsi-Cola*, 196 F.3d 1106, 1110 (10th Cir. 1999). In these cases, the courts reason that the employee is not a qualified individual with a disability. *See e.g*., *L. Nowak v. St. Rita High School,* 142 F.3d 999, (7th Cir. 1998) (employee failed to meet burden that he was a QIWD when absent from position for 18 months and failed to inform employer during that period that he intended to return to his teaching duties); *Hudson v*. *MCI Telecoms Corp.,* 87 F.3d 1167 (10th Cir. 1996) (plaintiff failed to present any evidence of expected duration of impairment).

MPDCRA General Rule.

Under Michigan law, the general rule is that the disability status of an individual is determined as of the date of discharge. *Ashworth* v *Jefferson Screw Products, Inc,* 176 Mich App 737; 440 NW2d 101 (1989). In *Rymar v Michigan Bell Telephone Co,* 190 Mich App 504; 476 NW2d 451 (1991), the court held that an employee who, on the date of his discharge, is unable to perform the requirements of his job because of a disability may still have a claim under the MHCRA (now MPDCRA) if he would have required the capacity to work within a "reasonable time." The soundness of the "reasonable time to heal" requirement was called into question by another panel in *Lamoria v Health Care & Retirement Corp,* 230 Mich App 801; 584 NW2d 589 (1998). However, the *Lamoria* panel felt obligated to honor the holding in *Rymar,* due to its precedential effect. However, on January 21, 1999, the Court did convene a special panel which held that the MPDCRA no longer requires that an employer allow a disabled employee a reasonable time to heal. *Lamoria v Health Care & Retirement Corp,* 233 Mich App 560, 562; 593 NW2d 699 (1999); *see*, also, *Hawkins v. Genesys Health Systems*, 704 F.Supp2d 688, 700 (E.D. Mich. 2010) and *Kerns v Dura Mechanical Components, Inc*, 242 Mich App 1, 16; 618 NW2d 56 (2000).

With the demise of the reasonable time to heal doctrine in Michigan the practitioner should consider the ADA in situations where an employee requires additional time off work due to a disability. One form of the accommodation recognized by the ADA is the use of accrued leave or unpaid leave. In an important recent decision, the Sixth Circuit held that no presumption should exist that uninterrupted attendance is an essential job requirement and that a medical leave of absence can constitute a reasonable accommodation under appropriate circumstances. *Cehrs* v. *Northeast Ohio Alzheimer's Research Center,* 155 F.3d 775, 782 (6th Cir.

1998). Applying *Cehrs,* a factual determination will be whether the leave of absence would unduly burden the employer, much like any other reasonable accommodation analysis.

Differing Interpretations of "Undue Hardship".

ADA General Rule.

"Undue Hardship" is defined as "an action requiring significant difficulty or expense, when considered in light of [certain] factors." As the EEOC indicates in its March 1, 1999, enforcement guidance addressing the subject of reasonable accommodation and undue hardship, undue hardship addresses "quantitative, financial or other limitations" on an employer's ability to provide reasonable accommodation." Undue hardship is an affirmative defense to a failure to provide reasonable accommodation under the ADA. The burden of proving undue hardship is on the employer. In determining whether an accommodation would pose an undue hardship, the ADA indicates that several factors should be considered, as more specifically set forth in the statute itself. Authority- 42 USC §12111(10)(A)(B); 42 USC §12112(b)(5)(A); *Rodal v. Anesthesia Group of Onodaga, P.C*., 369 F.3d 113, 121-122 (2nd Cir. 2004); *Riel v*. *Electronic Data* Sys. *Corp,* 99 F.3d 678 (5th Cir. 1996); 42 USC §12111 (10)(B).

The employer's burden to prove undue hardship under the ADA is an onerous burden, and counsel should be aware that by raising a financial hardship argument. Opposing counsel likely will seek discovery of employer's confidential financial records. On the other hand, it is often very inexpensive to provide an accommodation. Counsel may wish to advise his or her client to work with the disabled employee to reach an accommodation solution. This may avoid the need to produce confidential information in defense of an "undue hardship" defense through discovery.

MPDCRA General Rule.

If a person with a disability establishes a prima facie case that an accommodation is possible, the employer bears the burden of producing evidence that an accommodation would pose an undue hardship on the company. If the employer produces evidence that an accommodation would pose an undue hardship, the person with a disability must demonstrate that the accommodation would not pose an undue hardship. This is contrary to the ADA, under which the burden of *proving* undue hardship falls squarely on the employer. In addition, the MPDCRA sets forth a "formula approach" to determining whether the purchase of any equipment or device or the hiring of readers or interpreters constitutes an undue hardship. The determination whether the proposed accommodations would cause an undue hardship depends on the number of employees employed by the person and is tied to state average weekly wage. The ADA does not adopt a formula approach to proving undue hardship. Authority - MCL 37.1210(1); *Hall* v *Hackley Hosp,* 210 Mich App 48; 532 NW2d 893 (1995); 42 USC §12112(b)(5)(A); MCL 37.1210 (2)-(6),(8)-(12).

Under the MPDCRA, the burden of proving undue hardship falls on the employee. A "formula approach" places definitive limits on the costs which employers must expend to accommodate an individual under the MPDCRA. In addition, a person who employs fewer than 15 employees is not required to restructure a job or alter the schedule of employees as an accommodation. MCL 37.1210(14).

Differences in Construing "Mitigating Measures."

1. ADA General Rule.

Consistent with the legislative history, the EEOC's interpretative guidance and the overall remedial purpose of the ADA, most courts held prior to 1999 that the ADA protects applicants and employees from discrimination based on the individual's medical condition without regard to whether the limitations of the individual are controlled through medications, treatment, or other devices. However, in 1999 the U.S. Supreme Court held that where employees took blood pressure medication (*Murphy v. United Parcel Service, Inc.,* 527 U.S. 471 (1999)) and wore glasses (*Sutton v. United Air Lines, Inc*, 527 U.S. 471 (1999)) their medical conditions should be assessed with regard to whether the limitations of the individual are controlled through medications, treatment, or other devices.

2. MPDCRA General Rule.

The Michigan Supreme Court has held that impairments must be considered in their mitigated state, rejecting the EEOC interpretative guidance. Authority - *Chmielewski v Xermac, Inc,* 457 Mich 593; 580 NW2d 817 (1998) (in a 5-2 decision, trial court did not err in refusing to issue jury instruction that mitigating measures, such as medication, should not be considered in determining whether plaintiffs alcoholism constituted a handicap under the MHCRA (now MPDCRA)).

G. Individual Liability.

1. ADA General Rule.

The ADA does not provide for supervisor liability, only employer liability. Authority- *Wathen v. General Electric,* 115 F3d. 400, 404-404 n.6 (6th Cir. 1997); *Mason v. Stallings,* 82 F.3d 1007 (11th Cir. 1996); *EEOC v. AIC Sec. Investigations,* 55 F.3d 1276 (7th Cir.

1995); *Gruener v. Ohip Cas. Co.,* 416 F.Supp.2d 592, 603 (S.D. Ohio 2005); *Fish v. Ristvedt,* 192 F. Supp.2d 1024, 1028 (2002)*; Montez v. Romer,* 32 F.Supp.2d 1235 (D. Colo, 1999); *Meara v. Bennett,* 27 F.Supp.2d 288 (D. Mass.1998).

2. MPDCRA General Rule.

Under MPDCRA, an owner of a business or a member of management, arguably are "persons" within the meaning of the act, which is defined to include both an individual and an agent of the company. Authority - MCLA 37.1103(h), MSA 3.550(103)[h],

Although authority for imposing individual liability under the Michigan Act, is somewhat questionable, it may be advantageous to sue under that statute rather than the ADA in those cases where judgment against an individual officer or agent is possible.

H. Monetary Relief.

1. ADA General Rule.

Under the ADA, a plaintiff may recover compensatory and punitive damages in addition to any relief authorized by §706(g) of the Civil Rights Act of 1964. 42 USC 2000e-5(g). This additional relief may include injunctive relief, reinstatement with or without back pay, or any other equitable relief the court deems appropriate (e.g., front pay). A prevailing party in an ADA action may be entitled to reasonable attorney fees (including expert fees) as part of costs. The EEOC and the United States are not entitled to attorney fees. Authority - 42 USC §2000e-5(g), 42 USC §2000e-5(k).

The maximum amount of compensatory and punitive damages available under the ADA is $300,000. 42 USC §1981a (b)(3). The limits are lower depending on the size of the employer. *Id*.

MPDCRA General Rule.

The MPDCRA allows a person to bring a civil action for injunctive relief, damages, or both. Damages also include reasonable attorney fees. Punitive damages cannot be recovered under the Michigan Act. However, there is no limit on the amount of compensatory damages that can be obtained under the statute. Authority – MCL 37.1606.

Plaintiff's counsel might consider filing under the ADA if the facts of the case are particularly egregious, thereby warranting the imposition of punitive damages for reckless conduct on the part of the employer. On the other hand, a lawsuit under the Michigan Act might be a good strategy if the facts support a claim for compensatory damages, since Michigan law does not limit the amount of damages that may be awarded for pain and suffering. However, many plaintiff attorneys believe that a particularly egregious case still may be filed under the MPDCRA, and that instead of obtaining punitive damages, a large value for non-economic damages (e.g., pain and suffering) can be sought from the jury.