

AMERICANS WITH DISABILITIES ACT ("ADA")

I. OVERVIEW

A. EMPLOYERS COVERED BY THE ADA

Employers who employ **15 or more** employees in 20 or more calendar weeks in the current or preceding calendar years are covered by the Americans with Disabilities Act ("ADA"), 42 USC 12101, et seq. When calculating this number, part-time employees should be counted. The ADA applies to governmental employers of all sizes, regardless of the number of employees.

The ADA generally requires employers to provide employment opportunities to employees and applicants with disabilities, provided that they can perform the essential job functions with or without a reasonable accommodation. 42 USC §12102(2).

It is important to remember that even if a business is not covered by the ADA, it is likely covered by the Michigan Handicappers Civil Rights Act ("MHCRA") MCLA 37.1101 et seq. which also prohibits discrimination against those with disabilities. The MHCRA covers employers who employ 1 or more employees and closely parallels the provisions of the ADA and its predecessor, the Rehabilitation Act of 1973. Accordingly, the concepts discussed in this outline may well apply to smaller businesses.

B. INDIVIDUALS PROTECTED BY THE ADA

The protections afforded by the ADA extend to three classes of individuals and extend to job applicants as well as employees.

1. Individuals with Disabilities

The ADA protects individuals with a "disability." The ADA defines a person with a disability as someone with a "physical or mental impairment that substantially limits a major life activity."

2. Individuals with a Record of Disability or Regarded as Disabled

The ADA also protects someone with a record of a physical or mental impairment that substantially limits a major life activity, or is regarded as having such an impairment. For example, an individual that had been a cancer patient eight years ago is likely protected under the ADA, even though the cancer has been in remission for six years because such a person has a record of an impairment.

An employee that is falsely rumored to have AIDS is protected under the ADA, even though the employee may be perfectly healthy. This worker is "regarded as" or perceived as having a covered disability.

3. Individuals with a Relationship with a Disabled Person

A person may be protected by the ADA because s/he is a person with a known association or relationship with a disabled person. A worker with a disabled spouse or other family member is protected by

the ADA. For example, it is unlawful to refuse to hire an individual whose spouse will require expensive medical treatment, decline to offer health care benefits to that individual, or try to make arrangements for employee-only health care coverage.

Employers should also be aware that "partners" in a homosexual relationship are likely in a relationship that qualifies for protection under the ADA. Employers should recognize that the ADA reaches farther than the Family and Medical Leave Act (FMLA) in this respect; The FMLA does not entitle an individual to FMLA leave for "partners" or "roommates."

An employer does not have an obligation to accommodate a person with a known association or relationship with a disabled person. However, the employer may not deny employment or employment benefits to such a person because of the association or relationship. An employer may also be obligated to provide this person with leave.

C. QUALIFIED INDIVIDUALS WITH DISABILITIES

Only "qualified" individuals with disabilities (or with a record of disability or regarded as disabled) are protected by the ADA. A "qualified individual with a disability" is a person who "satisfies the requisite skill, experience and educational requirements of the employment position such individual holds or desires, and who is able to perform the essential functions of their job with or without a reasonable accommodation."

1. Satisfying Qualification Prerequisites

Where a disabled individual does not possess the requisite skills, experience and/or educational requirements for the position, s/he is not a "qualified individual with a disability."

A "qualified individual with a disability" who is able to perform the essential functions of the job with or without accommodation, must be provided reasonable accommodation unless the accommodation would pose an undue hardship to the employer or employment would pose a direct threat to the health and safety of the employee, other employees or the public.

In addition, a qualified individual with a disability who is able to perform the essential functions of the job with or without reasonable accommodation may not be discharged or subject to discrimination in the terms or conditions of employment.

Finally, the ADA imposes restrictions upon an employer's ability to make medical inquiries, request medical examinations and make decisions based upon an individual's medical condition in the hiring process and throughout employment. The Act also specifies conditions under which medical records may be kept by employers.

a. Examples of situations where individual may be "unqualified":

(1) A person has lost some license or certification necessary for the job. (Eg: a driver whose operator's license has been revoked, or a CPA that fails to complete the necessary continuing education mandated by the SEC.)

Americans with Disabilities Act ("ADA") and The Family and Medical Leave Act ("FMLA")

! A paranoid deputy marshall was not qualified for the position because his condition precluded carrying a firearm, which was an essential function of the position. Lassiter v. Reno, 86 F3d 1151 5 AD Cases 1343 (4th Cir 1995) cert denied 117 S.Ct. 766 (1997).

(2) The individual may have been identified as so grossly lacking the basic skills or training for a position that s/he is not qualified.

! A registered clinical nurse with such severe hearing difficulties that he could not hear medical equipment alarms and could not respond appropriately to a patient's distress symptoms was not qualified for a hemodialysis position when he declined a hospital's offer of accommodation in the form of increased training. Schmidt v. Methodist Hosp. of Indiana, Inc., 89 F3d 342 (7th Cir 1996).

! An applicant that had lost the ability to power grasp a steering wheel (as required by D.O.T. regulations) due to a prior work related injury was not qualified for a driver's position. Campbell v. Federal Express Corp., 918 FSupp 912 (DC MD 1996).

However, employers must be careful in asserting a lack of qualifications for a present employee requesting accommodation (such as medical leave), because the prior period of employment will likely be a prima facie showing that the person was qualified for the job. Before an employer asserts that a present employee is not qualified for the position due to performance issues, the lack of skills should be well documented before any adverse employment action is taken.

(3) Some courts have been inclined to rule that employees that are unable to meet reasonable attendance requirements (allowing for some reasonable accommodation) are not qualified for the positions claimed.

! Depressed employee who was unable to attend work on a regular basis is not a "qualified individual with a disability" Corder v. Lucent Techs, Inc, 1998 U.S.App. LEXIS 31047 (7th Cir 1998).

! Employee who suffered from depression for several years, was not a qualified individual with a disability because she could not get to work on time. Kotlowski v. Eastman Kodak Co., 922 FSupp 790 (DC NY 1996).

! Where an employee's disability (depression) prevented her from reporting to work and remaining on duty for the entire shift, she was not "otherwise qualified" to perform her job. Matzo v. Post Master General, 685 FSupp 260 (DC DC 1987).

! A sales employee with chronic fatigue syndrome who was unable to work regular hours was not a "qualified individual with a disability." Kennedy v. Applause, Inc, 1994 US Dist LEXIS 192116, 3 AD Cases 1734 (DC Calif 1994), aff'd in part, dismissed in part 90 F3d 1477 (9th Cir 1996).

! An employee with Spina Bifida, unable to provide reasonable attendance and dependability was not qualified for a telephone operator position. Gore v. GTE South Inc., 917 FSupp 1564

Americans with Disabilities Act ("ADA") and The Family and Medical Leave Act ("FMLA")

(MD AL 1996). See also: Teahan v. Metro-North Commuter RR Co., 951 F2d 511 (2nd Cir 1991) cert denied 113 S.Ct. 54 (1992) (relapsed alcoholic and substance abuser with pattern of excessive absenteeism).

(4) Occasionally, employers can successfully argue that the nature of the disability renders the employee unqualified for the position. That even if the requested accommodations were implemented, the employee would not be able to perform the essential functions of the job.

- ! A rotary die cutter that was blind in one eye and suffered from multiple sclerosis was not qualified for the position where his physician concluded that his balance and vision problems, numbness and decreased sensation prevented him from working safely around machinery with or without accommodation. Riley v. Weyerhaeuser, 898 FSupp 324 (DC NC 1995) aff'd 8 AD Cases 1536 (4th Cir 1996);
- ! A secretarial employee with carpal tunnel symptoms that successfully petitioned for and obtained Social Security benefits and obtained a ruling from an Administrative Law Judge that she was "totally disabled," was no longer qualified for a position. Cline v. Western Horseman, Inc., 922 FSupp 442 (DC CO 1996). See also: Miller v. U.S. Bancorp, 926 FSupp 994 (DC OR 1996) Aff'd 139 F3d 906 (9th Cir 1998) (memory loss; claim for SSA benefits). Note: there are cases that hold that social security determinations of disabled and unable to work do not automatically preclude an ADA claim.)
- ! An employee that suffered "meltdown" every time a restaurant got crowded was not qualified for the position. Johnston v. Morrison, Inc., 849 FSupp 777, 3 AD Cases 259 (ND AL 1994).
- ! Individual that could only type 44 words per minute was not qualified for a job that required 45 words per minute. Lucero v. Hart, 915 F2d 1367, 1 AD Cases 1697 (9th Cir 1990).
- ! An employee who made death threats to his fellow employees was found not to be a qualified individual with disability under the ADA, even though the employee claimed the threats were the result of mental illness. Jones v. New York Housing Authority, 1993 US Dist LEXIS 18374, 5 AD Cases 1868 (DC SNY 1996).
- ! Previously injured employees that were unable to keep up with increased production standards were no longer qualified for their positions because the faster production schedule was implemented to improve the employer's competitiveness in the market. Milton v. Scrivner, Inc., 53 F3d 1118 (10th Cir 1995).

This issue becomes so intertwined with the question of accommodation, that employers should carefully consult with counsel whenever taking the position that an employee's disability renders them unqualified. It is important to remember that the employee's attorney will later seek to identify accommodation methods that would permit the employee to perform the essential functions. When communicating with an employee about employment decisions, the concept of the employee's lack of qualifications should be addressed in the context of available reasonable accommodations.

2. Essential Job Functions

The ADA only protects a disabled employee if that employee can perform the essential functions of the job with or without reasonable accommodation. The essential job functions are defined as the fundamental, basic, necessary or vital functions of the job. A key question that may be asked when engaging in an examination of the essential functions is: Does the job exist to perform that function.

An employer is not required to reassign (or hire an assistant to perform) any of the essential functions of the job to co-workers.

If a job duty is not an essential job function, it is a marginal job duty. Marginal duties must be reassigned to co-workers as a reasonable accommodation, if that would not constitute an undue hardship to the employer.

Evidence of essential functions include:

- a. Job descriptions (written before the employer advertises for the job), testimony by supervisors, and other evidence of the employer's judgment as to what is essential is given consideration.
 - (1) The EEOC has clarified that employers are not required to have job descriptions, but they are recommended because they can provide evidence of the essential functions. (But note: a bad job description will be used against an employer).
- b. The consequences of not requiring the employee to perform the job, e.g. if a fireman is unable to carry a victim out of a burning building, the consequences would be severe.
- c. The terms and conditions of a collective bargaining agreement.
- d. Past experience of employees holding the job.
- e. Experience of employees currently holding the job.
- f. The number of employees available to perform the function. (As indicated in the Technical Assistance Manual, it may be an essential function for a file clerk to answer a telephone if there are only a few employees in a busy office and each employee has to perform many different tasks.) A function may have become essential because other employees have been accommodated and only a limited number remain available to perform a task.
- g. The degree of expertise or skill required to perform the function.
- h. The amount of time spent performing a function.

While the employer's judgment as to what is an essential job function is relevant, the EEOC has declined to make the employer's judgment a "rebuttable presumption" (very strong evidence) despite many employers' requests and comments. 42 USC §12111(8). Yet, the interpretive comments indicate that the Act is not intended to second guess an employer's business judgment concerning qualitative and productive standards.

Americans with Disabilities Act ("ADA") and The Family and Medical Leave Act ("FMLA")

For example, if a auto center requires that mechanics achieve an hourly productivity level of \$1700 per hour, the government will not question the employer's choice of that production quota, assuming the employer can demonstrate the quota is actually imposed upon the employee. See Milton v. Scrivner, Inc., 53 F3d 1118 (10th Cir 1995) (injured employees unable to keep up with new, faster production schedule.)

However, other language in the interpretive guidelines, technical assistance manual and the statute itself suggest that the courts may question quality and productivity standards if they result in hiring, discharge or other adverse employment action toward a disabled individual. The Technical Assistance Manual specifically states that if a disabled person is found not qualified because s/he is unable to meet the standard, the employer must demonstrate that other employees are actually required to meet the standard and it was not established for discriminatory reasons. The Technical Assistance Manual also states that employers are not required to lower quality or quantity standards as an accommodation.

a. Regular, Predictable Attendance as an Essential Function

Attendance is one area where ADA concepts clash. Regular, predictable attendance is an essential job function. However, attendance policies must be relaxed and time off granted as an accommodation.

Regular attendance is an essential function of almost every job. However, the question is one of degree. Excessive, sporadic and unpredictable absenteeism is not subject to reasonable accommodation. Gore v. GTE South, Inc., 917 FSupp 1564 (MD AL 1996) (regular and reliable attendance on the job held to be an essential function of the employee's position as telephone operator: "common sense dictates that it is not possible to take a customer's incoming call if the operator is not physically present.") See also: Jackson v. Administrator of Veterans Affairs, 3 AD Cases 620 (ND AL 1993); aff'd, 22 F3d 277 (11th Cir 1994); Kennedy v. Applause, Inc., 1994 US Dist LEXIS 19216; 3 AD Cases 1734 (DC CA 1994) aff'd in part dismissed in part, 90 F3d 1477 (9th Cir 1996); Carr v. Reno, 23 F3d 525 (DC Cir 1994) (an employee's ability to appear for work and complete assigned tasks within a reasonable period is an essential function of any government job. See also Tyndall v. National Education Centers of California, 31 F3d 209 (4th Cir 1994).

b. Other Examples of Essential Functions

Case examples where courts have found a plaintiff to be unable to perform the essential functions of a job:

- ! A construction inspector that could not climb safely because of Parkinson's disease was unable to perform the essential functions of the job. Chiari v. League City, 920 F2d 311 (5th Cir 1991).
- ! An individual that was unable to perform if there was a hint of criticism was unable to perform the essential functions of the job. Pesterfield v. Tenn. Valley Authority, 941 F2d 437 (6th Cir 1991).
- ! An individual that could only type 44 words per minute was unable to perform the essential functions of a job that required 45 words per minute. Lucero v. Hart, 915 F2d 1367 (9th Cir 1990).

Americans with Disabilities Act ("ADA") and The Family and Medical Leave Act ("FMLA")

- ! Firefighters that were required to wear beards because of pseudofolliculitis barbae skin condition were not able to perform the essential function of obtaining an adequate seal on face respirators. Fitzpatrick v. City of Atlanta, 2 F3d 1112 (11th Cir 1993).
- ! A Police Chief that could not shoot a gun was unable to perform an essential function. Ethridge v. Alabama, 860 FSupp 808 (MD AL 1994).
- ! An attorney with depressive disorder and personality disturbance which impairs ability to perform independent legal analysis, research and writing is not qualified because no accommodation will permit him to perform the essential functions of the job. Bolstein v. Reich, 1995 US Dist LEXIS 731, 3 AD Cases 1761 (DC DC 1995); See also: Hill v. State of Florida, 2 AD Cases 177 (MD FL 1992)(depressive public assistant unable to keep up with interviewing full load of clients or processing paperwork)

D. COVERED DISABILITIES

Not all injuries, illnesses, medical conditions or ailments are covered disabilities under the ADA. The Act defines a covered disability as "any physical or mental impairment which substantially limits one or more major life activities."

Just because an employee has a "compensable injury" under the Workers' Compensation Act does not automatically mean s/he has a covered disability under the ADA. The employee must still meet the definitions of disability under the ADA.

Also, the mere fact that an employee's medical condition bears upon his or her ability to perform one particular job does not automatically mean that the person is disabled for purposes of the ADA.

To be a "disability" under the ADA, the condition must "substantially" limit a major life activity. This qualification, which has its origins in the Rehabilitation Act of 1973, was placed into the law to screen out minor ailments, injuries, and conditions.

1. Substantially Limits a Major Life Activity

The determination of whether an impairment is substantially limiting is made on a case by case basis and is concerned with "whether the particular impairment constitutes, for the particular person, a significant barrier to employment." Forrisi v. Bowen, 794 F2d 931 (4th Cir 1986).

Most cases hold that a condition that keeps an individual out of a particular career or a particular job with a particular employer, but which does not preclude employment in a general or a wide class of jobs does not substantially limit the person in the major life activity of "working." Bolton v. Scrivner, Inc., 36 F3d 939 (10th Cir 1994); Gupton v. Commonwealth of Virginia, 14 F3d 203 (4th Cir 1994) cert denied, 115 S Ct 59 (1994). See also: Weiler v. Household Finance Corp., 101 F3d 519 (7th Cir 1996) (inability to get along with boss is not a substantial impairment of an employee's ability to work). Accord: Lamboy-LaSalle v. P.R. Telephone Co., 8 AD Cases 392 (DC PR 1998).

Americans with Disabilities Act ("ADA") and The Family and Medical Leave Act ("FMLA")

The employee does not have to be totally unable to work in order to be substantially limited in the major life activity of working. If the ability to perform work in a wide range of jobs is significantly restricted, the ability to work is substantially limited.

Carpal Tunnel Syndrome has been found not to be a disability when it does not substantially limit the employees in their daily life and the employee could still perform other kinds of jobs. McKay v. Toyota, 878 FSupp 1012 (ED KY 1995). However, other courts have found that Carpal Tunnel Syndrome may be a covered disability. Feliberty v. Kemper Corp., 98 F3d 274, 4 AD Cases 1729 (7th Cir 1996).

Bad backs have been found not to be disabilities when the employees's ability to lift has not been substantially limited. The Fourth and Eighth Circuits have both ruled that a 25 pound lifting restriction was not substantial enough. Williams v. Channel Master Satellite Systems, Inc., 101 F3d 346 (4th Cir 1996) cert denied 520 US 1240 (1997); Aucutt v. Six Flags Over Mid-America, 85 F3d 1311 (8th Cir 1996).

The Technical Assistance Manual offers the following criteria to determine if the individual is "substantially" limited:

- ! The type of job from which the worker is disqualified;
- ! The geographical area in which the person may reasonably expect to find a job; and
- ! The number and types of jobs using similar knowledge, skill or abilities from which the individual is also disqualified because of the impairment.

2. Major Life Activity

Examples of major life activities include:

Seeing	Breathing	Performing manual tasks
Hearing	Learning	Working
Speaking	Sitting	Caring for one's self
Walking	Standing	Lifting
		Reading

There have been some rulings that certain activities are not major life activities. Krauel v. Iowa Methodist Medical Center, 95 F3d 674 (8th Cir 1996) (reproduction); Soleau v. Guilford of Maine, Inc., 105 F3d 12, 6 AD Cases 437 (1st Cir 1996)(getting along with others).

3. Specific Conditions Excluded as Disabilities

The EEOC Technical Assistance Manual and the EEOC Compliance Manual for EEOC investigators list a number of conditions that are **not** covered disabilities:

- ! Environmental, cultural or economic disadvantages;
- ! Homosexuality/bisexuality;

Americans with Disabilities Act ("ADA") and The Family and Medical Leave Act ("FMLA")

- ! Transvestitism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, and other sexual behavior disorders;
- ! Pregnancy (but complications of pregnancy may be disabilities);
- ! Physical characteristics, such as eye or hair color, left or right-handedness;
- ! Common personality traits such as a quick temper, poor judgment or irresponsible behavior;
- ! Normal deviations in height, weight or strength;
- ! Gamblers, pyromaniacs and kleptomaniacs;
- ! Infertility.

4. **Temporary Disabilities**

Temporary disabilities may or may not be covered under the ADA. The determination must be made on a case by case basis and will be based upon:

- ! The nature and severity of the impairment;
- ! The duration or expected duration of the impairment; and
- ! The permanent or long lasting impact of the disability.

The Technical Assistance Manual indicates that "broken limbs, sprains, concussions, appendicitis, common colds or influenza" generally are not disabilities. A broken leg that heals normally is specifically cited as the type of injury that does not qualify. However, if the leg did not heal properly and the individual's ability to walk was restricted, s/he may be considered to be disabled. Likewise, if the break resulted in the individual walking with a limp, s/he may be protected by the ADA if s/he is "regarded as" disabled.

The case law arising under the ADA has illuminated a number of conditions that have not sufficed as "disabilities" within the meaning of the Act. However, the reader is cautioned that many of these cases are fact-specific and cannot be read as excluding the condition as a disability carte-blanche. Nevertheless, the following conditions have, on occasion, been ruled to be not covered disabilities:

- ! A back injury that was not long-lasting, and not a substantial barrier to employment. Rakestraw v. Carpenter Co., 898 FSupp 386 (DC MS 1995). See Also: Graaf v. North Shore University Hospital, 8 AD Cases 436 (SD NY 1998).
- ! Shift-related sleep disorder. Williams v. City of Charlotte, 899 FSupp 1484 (WD NC 1995).
- ! Hernia as a temporary, non-chronic condition. Gonzalez v. Perfect Carton, 1996 US Dist LEXIS 2257, 6 AD Cases 151 (ND IL 1996).

- ! Carpal Tunnel Syndrome where the individual did not claim that she was excluded from a wide variety of jobs. (To be read with caution; other cases have held that carpal tunnel syndrome is a covered disability.) Lamury v. Boeing Co., 1995 US Dist LEXIS 16262, 5 AD Cases 39 (DC KS 1995).
- ! Repetitive strain injury resulting in 23% loss of motion where no evidence that the plaintiff was restricted from a broad class of jobs. Taylor v. Albertson's, 74 F3d 1250 (10th Cir 1996).
- ! Post Traumatic Stress which subsides within a short time is only a temporary condition and not covered by the ADA. Hamilton v. Southwestern Bell Telephone Co., 136 F3d 1047 (5th Cir 1998).

5. Drug or alcohol addiction or dependency as a disability

a. Drug use

Current drug users are not protected under the ADA. However, reformed or former drug users are protected. Employers may not discriminate with regard to employment decisions and have an obligation to accommodate, for example, by providing time off for treatment for former drug users. The Technical Assistance Manual states that an employee who violated a company substance abuse policy by testing positive for drugs could claim s/he was a former user. However, one court has indicated that remaining off drugs for seven weeks is not long enough to escape the status of a "current" drug user. Baustian v. State of Louisiana, 871 FSupp 1079 (DC LA 1995). See also: McDaniel v. Mississippi Medical Center, 877 FSupp 321 (DC MS 1995)(six weeks off drugs is insufficient). Furthermore, if the employee failed a drug test, s/he likely engaged in the current use of drugs.

It is not a violation of the ADA for an employer to refuse to hire an applicant who admitted past "casual" use of illegal drugs. Casual use is not a disability under the ADA because the ADA requires "some indicia of dependency sufficient to substantially limit a major life activity." Hartman v. Petaluma, 841 FSupp 946 (DC CA 1994).

b. Alcohol Addiction

The exclusion of current drug users is in contrast to the ADA's treatment of employees currently addicted to alcohol. Both current and former alcoholics are covered under the ADA. This presents challenging scenarios when attendance disabilities occur because the individual is too hung over to come to work. Employers must remember that the ADA imposes the obligation to treat alcohol addicted workers the same as employees with other disabilities with regard to attendance and discipline. See Eg: Schmidt v. Safeway, Inc., 864 FSupp 991 (DC OR 1994).

6. Special Problems with Mental Disabilities

The ADA protects individuals with physical or mental impairments. Individuals with mental disabilities may, however, as part of their illness, be prone to engage in disruptive, threatening and even violent behavior. Thus, a delicate balance must be maintained between accommodating employees with mental

Americans with Disabilities Act ("ADA") and The Family and Medical Leave Act ("FMLA")

disabilities and the rest of the workers, customers, and visitors. But it is also important to bear in mind that the ADA prohibits making generalizations about individuals with disabilities. Therefore, just because an individual has a mental impairment, the employer cannot assume the individual is disruptive, violent, or potentially violent.

- a. "Mental impairments" are defined as "[a]ny mental or psychological disorder, such as . . . emotional or mental distress." 29 CFR §1630.2(h)(2).
- b. Examples of "emotional or mental illness" include: Hunt-Golliday v. Metropolitan Water Reclamation, 104 F3d 1004 (7th Cir 1997)(depression, anxiety, panic attacks); Palmer v. Circuit City of Cook County, 117 F3d 351 (7th Cir 1997) cert denied 1998 US LEXIS 3384 (1998) (depression, paranoid disorder); Lassiter v. Reno, 86 F3d 1151 (4th Cir 1995) aff'g 885 FSupp 869 (paranoia); Gaul v. AT&T, Inc., 955 FSupp 346 (DC NJ 1997) Aff'd Sub Nom 134 F3d 576 (1998)(stress and depression); Schwartz v. COMEX, 1997 US Dist LEXIS 4658 (DC NY 1997)(paranoid disorder); Lewis v. Aetna Life Ins. Co., 1997 US Dist LEXIS 16851 (DC VA 1997)(depression); Kotlowski v. Eastman Kodak Co., 922 FSupp 790 (DC NY 1996)(depression); Johnston v. Morrison, 849 FSupp 777 (DC AL 1994)(employee who suffered "meltdown" every time restaurant got crowded); Matzo v. Post Master General, 685 FSupp 260 (DC DC 1987) Aff'd 861 F2d 1290 (DC Cir 1988) (depression); Brundage v. Los Angeles Office of the Assessor, 57 CA App 4th 228 (Cal Ct App 2nd Dist 1997)(manic depressive, bi-polar disorder).

Claims of mental disabilities are on the rise. Between July 26, 1992 and September 30, 1996 approximately 12.7% of ADA charges filed with the EEOC were based on emotional or psychiatric impairment. (EEOC Enforcement Guidance ADA and Disabilities)

7. Mitigating Measures

To qualify as a protected disability under the ADA, a physical or mental impairment must substantially limit one or more of the major life activities of the individual. Whether mitigating measures such as medicines should be part of the "substantial limitation" inquiry has become a debated issue. According to the EEOC, the "substantial limitation" question should be made without regard to mitigating measures such as medications, or assistive or prosthetic devices. EEOC Enforcement Guidance of the ADA and Psychiatric Disabilities, p. 6.

At present the courts are divided on the issue. The majority of courts have followed the EEOC's interpretation that mitigating measures should not be considered in the disability determination: Doane v. City of Omaha, 115 F3d 624 (8th Cir 1997) cert denied 118 S.Ct. 693 (1998); Holihan v. Lucky Stores, Inc., 87 F3d 362 (9th Cir 1996) cert denied, motion granted 520 US 1162 (1997); Harris v. H & W Contracting Co., 102 F3d 516 (11th Cir 1996); Roth v. Lutheran Gen. Hops., 57 F3d 1446 (7th Cir 1995); Fallacaro v. Richardson, 965 FSupp 87 (DC DC 1997); Hendler v. Intelcom USA, Inc., 963 FSupp 200 (DC NY 1997); Wilson v. Pennsylvania State Police Dep't., 964 FSupp 898 (DC PA 1997); Shiflett v. G.E.Fanue Automation Corp., 960 FSupp 1022 (DC VA 1997) Aff'd 151 F3d 1030 (4th Cir 1998); Sicard v. City of Sioux City, 950 FSupp 1420 (DC IA 1996); Thomas v. Davidson Academy, 846 FSupp 611 (DC TN 1994).

Americans with Disabilities Act ("ADA") and The Family and Medical Leave Act ("FMLA")

However, the following courts have rejected the EEOC interpretation and have found that mitigating measures should be considered in determining whether an employee is substantially limited: Ellison v. Software Spectrum, 85 F3d 187 (5th Cir 1996); Schluter v. Industrial Coils, Inc., 928 FSupp 1437 (DC WI 1996); Coghlan v. H.J. Heinz, Co., 851 FSupp 808 (DC TX 1994). Michigan has adopted this approach in cases filed under the Michigan Handicappers Civil Rights Act. Chmielewski v. Xermac Inc., 457 Mich 593 (1998).

The United States Supreme Court will review two cases this term and determine whether mitigating measures should be considered or not. The two cases are: Sutton v. United Air Lines, Inc., 130 F3d 893 (10th Cir 1997), cert. granted 1999 US LEXIS 2 (1/8/99); Murphy v. United Parcel Service, Inc., 141 F3d 1185 ____ (10th Cir 1998), cert. granted 1999 US LEXIS 3 (1/8/99).

E. REASONABLE ACCOMMODATION

An employer is required to provide a qualified individual with a disability, a reasonable accommodations that will permit the employee to perform the essential function of the job. An employer is not required to eliminate essential job duties as an accommodation. Bolstein v. Reich, 1995 US Dist LEXIS 731, 3 AD Cases 1761 (DC DC 1995).

An employer is only required to provide a reasonable accommodation. An employer is not obligated to provide the specific accommodation requested by the employee if another reasonable accommodation will permit the employee to perform the job. Wernick v. Federal Reserve Bank of New York, 91 F3d 379 (2nd Cir 1996).

For example, an employee that turns in a physician's slip indicating that the employee may only work 40 hours a week may prefer to have Saturday off, although the shop generally works Saturday. The employer would meet its duty of reasonable accommodation by giving the employee Wednesday off (or any other day) and requiring Saturday work.

The employer is also not required to provide the best possible accommodation, as long as the accommodation provided is effective for the purpose. If an employee rejects a reasonable accommodation offered by the employer, which would have accommodated the disability, the employee loses any claim under the ADA. Dyer v. Jefferson County School District, 905 FSupp 864 (DC CO 1995).

An employer may question the accommodation sought by an employee or the employee's physician if the employer can show that it had reason to believe that the physician's information is not valid, or that the employee could work without the accommodation requested. An employer may also seek additional information regarding the employee's ability to return to work without the requested accommodation. Stolmeier v. Yellow Freight System, 1994 US Dist LEXIS 2207, 3 AD Cases 65 (DC OR 1994).

1. Examples of Reasonable Accommodations:

- a. Making existing facilities available to employees, e.g., breaking curbs, lowering desks, rearranging display racks.
- b. Participating in an ongoing treatment regimen.

Americans with Disabilities Act ("ADA") and The Family and Medical Leave Act ("FMLA")

- c. Permitting a leave of absence.
- d. Altering pace of work.
- e. Isolating the individuals from others.
- f. Acquisition of special equipment and adaptive devices may be required for essential job function.

However, if adaptive devices will not permit the disabled employee to perform "marginal" job functions, those marginal tasks must be assigned to other employees as an accommodation. This accommodation is called job restructuring (e.g. electronic visual aids.) It is not necessary to provide personal devices such as hearing aids.

- g. Employers are not required to hire someone to do the disabled employee's job for her, e.g., a security guard whose job function is to check identification would not be able to argue that s/he needs an assistant to read the identification badges for her.
- h. Adjusting or modifying exams and training materials, e.g. a deaf interpreter may be required to assist with a computer proficiency test.
- i. Providing qualified readers, interpreters and personal assistants during employment may be required.
- j. Modifying work schedules and allowing flex time to attend rehabilitation clinics may be required. The morale of the other employees who may be adversely effected by having an employee unavailable at certain hours is completely irrelevant, e.g., requiring one or two managers to lock up five nights a week because the other manager needs flex time to attend a clinic.
- k. Part-time work may also be required if it will not create an undue hardship.
- l. Holding the employee's job open during a temporary disability.

(As indicated above, the ADA may or may not cover temporary disabilities and arguably does not require this type of accommodation. However, where a temporary condition is covered or a covered disability results in a temporary absence, the employer may have a duty to hold a position open, if there is no undue hardship.)

- m. Michigan has held that an employer is obligated to grant "reasonable healing time" under the state disability statute to permit a disabled employee to return to work. Rymar v. Michigan Bell, 190 Mich App 504 (1991), appeal denied 483 NW3d 402.

Americans with Disabilities Act ("ADA") and The Family and Medical Leave Act ("FMLA")

- n. An employer is not required to change an employee's supervisor as an accommodation. Wernick v. Federal Reserve Bank of New York, supra. However the EEOC's Guidance on Psychiatric Disabilities suggest that modifying supervisory styles may be a reasonable accommodation.
- o. Reassignment to a different position should be the "final" accommodation possibility.

2. Transfer To Vacant Position As An Accommodation

The ADA requires that a qualified individual with a disability be reassigned to a vacant position as an accommodation, if the employer has a regular practice or policy of reassigning employees without disabilities who have suffered occupational injuries, or other temporary medical conditions. But see: Rourk v. Oakwood Hospital Corporation, 458 Mich 25, 27 (1998)(Under Michigan Handicapper Civil Rights Act, an employer has no duty to transfer an employee to a different job or position).

Case law indicates an employer must search the entire geographic or metropolitan area for equivalent job vacancies. File v. United Airlines, Inc., ___ F2d ___ (7th Cir 1992).

Transferring a disabled employee into a vacant position may be offered as accommodation only after all other accommodation options have been considered and rejected for lawful reasons.

When extended leave from one position would be an undue hardship for the company, transferring the employee into another position that can more easily go vacant or be covered by other employees may be the answer. However, there is no obligation to bump an employee out of his/her job to give it to a disabled employee as an accommodation.

An employee who is transferred as an accommodation may suffer a reduction in compensation if warranted by the new position, and if consistent with the treatment accorded non-disabled employees in similar situations.

There is no requirement that employers create a new job for the employee as an accommodation. In other words, if the employee is unable to perform the essential functions of the position, the employer is under no obligation to design a job that s/he can perform. An employer also does not have to combine two existing part-time positions into a full time position as an accommodation. Fedro v. Reno, 21 F3d 1391 (CA 7 1994).

In the union setting, a big issue is whether collectively bargained provisions and seniority rules must be disregarded to accommodate a disabled employee. Case law is clear that there is no obligation to bump an employee out of his/her job to give it to a disabled employee as an accommodation. The Technical Assistance Manual suggests that if a collective bargaining agreement has specific seniority lists and work requirements, it "might" be an undue hardship to assign a disabled employee to a position if others had seniority for the job. See e.g. Eckles v. Consolidated Rail Corp., 94 F3d 1041, (7th Cir 1996) cert denied 520 US 1146 (1997). See also: Daigre v. Jefferson Parish School Board, 1997 US Dist LEXIS 494 (ED LA 1997), aff'd 119 F3d 2 (5th Cir 1997). Accord: Willis v. Pacific Maritime Asn., 1998 US App LEXIS 31060; (request for accommodation is per se unreasonable if it conflicts with a labor agreement between the employer and a union).

Americans with Disabilities Act ("ADA") and The Family and Medical Leave Act ("FMLA")

Under the ADA, employers can avoid liability if an employee refuses a favored work or light duty assignment (assuming s/he could not be accommodated in her former position).

3. Light-duty Positions

The term "light duty" means different things to different people in the employment setting, ranging from simply assigning an employee to a job that is more sedentary, to actually excusing an employee from demanding job functions.

Generally, "light duty" issues arise when trying to bring injured employees back from workers' compensation leave. When used below, the term "light duty" refers to positions with less demanding duties that are created specifically for the purpose of providing alternate work for employees that are unable to perform some or all of their normal duties. This definition, (which does not necessarily distinguish between essential or marginal duties) is the definition used by the EEOC's Enforcement Guidance: Workers' Compensation and the Americans with Disabilities Act, published in 1996.

The ADA does not require the creation of permanent light-duty positions. Miller v. Illinois Dept. of Corrections, 107 F3d 483 (7th Cir 1997). Likewise, an employer has no obligation to reassign essential job functions, and has no obligation to hire an assistant to perform duties that are essential job functions (see supra.) However, the required accommodation of reassigning marginal duties to other employees can make the remaining job resemble a light duty position.

Any policy of creating a light duty position must be applied in a non-discriminatory manner. If an employer "reserves" light duty positions, an employee with a non-occupational disability may be entitled to accommodation in the form of a transfer to a "vacant" light duty position if other accommodations do not permit her to perform the essential functions of her regular job.

There is no duty to create any position under the ADA, whether "light duty" or not. An employer may lawfully refuse to create a light duty position for an individual injured off duty where there is no light duty position available even where it creates light duty positions for occupationally injured employees provided however that a reasonable accommodation analysis is conducted. 1996 Enforcement Guidance Memorandum. However, if an employer has a vacant "light duty" or other position, it may be claimed by an employee seeking accommodation under the ADA. The EEOC Guidance Memorandum on the ADA and Workers Compensation issued September 3, 1996, draws a distinction between "creating" light duty positions for those employees with occupational injuries, and "reserving" light duty positions only for those with compensable injuries, which is forbidden.

Employers often create light duty positions for their employees who have suffered job-related injuries as part of their workers' compensation strategy. Employers have a financial incentive to create these "light duty" positions for those employees receiving workers compensation payments because it eliminates a future workers compensation claim. The issue arises whether an employee with a non-work related disability could insist upon a transfer to an open light duty position as an accommodation.

The answer is found in the EEOC Technical Assistance Manual released in 1992 and the EEOC Enforcement Guidance: Workers' Disability Compensation and the Americans with Disabilities Act released in September, 1996. The Technical Assistance Manual does not clearly state that a light duty position cannot

be claimed by an employee under the ADA as a reasonable accommodation, but it does suggest a strategy to avoid such claims. The Technical Assistance Manual indicates "If [the light duty position] was created as a temporary job, a reassignment to that position need only be for a temporary period." Thus, under the 1992 interpretation of the EEOC, at best an employee could only claim a temporary light duty position for its temporary duration. The obvious implication is that a light duty position could be claimed under the ADA on a long term basis.

Thus, an employer should only create a light duty position on an ad hoc basis to bring an employee back from workers' compensation leave. The light duty position should be documented as a temporary position. If the employee is not ready to return to regular duties at the contemplated end of the temporary light duty position, the employer has the opportunity to establish a second temporary term of the light duty position. If the employee is ready to assume regular duties earlier than anticipated, there is a risk that other employees with disabilities that did not arise at work may claim the now-vacant temporary job as an accommodation, but only for the temporary term of the job.

If a disabled employee is on workers' compensation leave, and can perform the duties of her original position with accommodation, the employer can require the employee to return to work without violating the ADA. However, if the leave qualifies as FMLA leave, the employee must be provided leave up to 12 weeks in duration, and cannot be compelled to take a light duty or a different job during the 12 week period. (Theoretically, under the FMLA, an employee is only entitled to medical leave if s/he is unable to perform the essential functions of the job, but the recertification and second/third opinion procedures of the FMLA make it unlikely that an employer will succeed in returning an employee in less than 12 weeks against the employee's will.)

4. Leaves of Absence as Accommodation

Although an employee may not mandate the type of accommodation to be provided, and an employer's only obligation is to provide a reasonable accommodation, in reality, leave is often the only accommodation that will permit recuperation. Granting unpaid leave and relaxing attendance and leave policies are two types of accommodation that are contemplated by the ADA.

In rare instances, an employee will request leave when it is not really a reasonable accommodation. For example, an employee that learns he is HIV positive may need several days off to deal with the emotional turmoil and to arrange medical care, but while he is asymptomatic, there may be no real need for leave consisting of several weeks. Whenever a decision is made to oppose a request for such leave, the employer should receive medical advice and must consider the individual circumstances of the employee. It is a mistake to proceed upon a layman's preconceptions about a particular physical or mental condition.

An employer may not decline to grant leave as an accommodation because the employee has used up all available leave time under a company policy, including a no-fault attendance policy. No-fault attendance policies are defended by companies on the basis that they do not discriminate against the disabled because they treat all persons the same. However, the ADA requires more than non-discriminatory treatment, it requires an affirmative duty of accommodation. The ADA specifically lists "adjusting or modifying policies" as one of the accommodations that may be required. Therefore, an employer may have to allow the disabled employee more leave time as a reasonable accommodation.

Americans with Disabilities Act ("ADA") and The Family and Medical Leave Act ("FMLA")

The ADA does not require an employer to provide a disabled employee paid leave as an accommodation. Companies may still set forth well-defined policies capping paid leave time. However, paid leave time available to other employees may not be denied to those with ADA covered disabilities.

An employer is not required to provide unlimited unpaid leave as an accommodation, nor does the ADA require an employer to hold a job open indefinitely until an employee's health problems are corrected. Monette v. Electronic Data Systems Corp., 90 F3d 1173 (6th Cir 1996); Hudson v. MCI Telecommunications, 87 F3d 1167 (10th Cir 1996); Myers v. Hose, 50 F3d 278 (4th Cir 1995). However, if the employment handbook provides for six months medical leave upon substantiation of a medical condition (for example maternity leave policies or recovery time for open heart surgery), the employer would likely face ADA liability for denying the same six months leave to a disabled employee as an accommodation. Likewise, an employer that grants personal leaves of absence to similarly situated employees for other nonmedical reasons (to finish a novel or obtain a PhD) would again likely face ADA liability for denying the same leave time to an employee with a covered disability.

Unpaid leave as an accommodation is not unlimited. At some point, the employee is no longer qualified to perform the position and extension of further leave becomes an undue hardship. Unfortunately, the ADA requires this decision to be made on a case by case basis. However, an employer cannot automatically terminate employment once the prescribed leave period runs out. An extension or relaxation of a company's leave policy would likely be required as a reasonable accommodation. Some state courts, including Michigan, have defined a "reasonable healing time" doctrine that requires employers to keep a position open if the employee's return to work is imminent. Federal courts may likely require the same as a reasonable accommodation. In addition, employers must consider whether they have extended the leave time granted to other non-disabled employees, because disabled employees may claim disparate treatment under the ADA.

5. An Employer Does not Have to Excuse Workplace Misconduct

A disabled employee is not immunized from consequences of his/her misconduct under the ADA. An employer may hold all employees (those with and without disabilities) to the same conduct standards. Nothing in the ADA prevents an employer from maintaining a workplace free of violence or threats of violence, or from disciplining an employee who violates a job-related conduct standard (such as stealing or destroying property). EEOC Enforcement Guidance on the Americans with Disabilities and Psychiatric Disabilities p. 26; Maddox v. University of Tennessee, 62 F3d 843 (6th Cir 1995).

An employer may hold a disabled employee, including an alcoholic, to the same standards as other employees. Courts have also held that the ADA does not require a retroactive "fresh start" accommodation. Office of the Senate Sergeant at Arms v. Office of Senate Fair Employment Practices, 95 F3d 1102 (Fed Cir 1996); Palmer v. Circuit Court of Cook County Social Services Dept., 117 F3d 351 (7th Cir 1997) cert denied 1998 US LEXIS 3384 (discharge of employee suffering from major depression and a paranoid delusional disorder for making a series of phone calls alleging harassment and threatening her supervisor). See also: Hamilton v. Southwestern Bell Telephone Co., 136 F3d 1047 (5th Cir 1998). EEOC v. Amego, Inc., 110 F3d 125 (1st Cir 1997); Williams v. Widnall, 79 F3d 1003 (10th Cir 1996); Crawford v. Runyan, 79 F3d 743 (8th Cir 1996); Martinson v. Kinney Shoe Corp., 104 F3d 683 (4th Cir 1997); Newland v. Dalton, 81 F3d 904 (9th Cir 1996); Little v. FBI, 1 F3d 255 (4th Cir 1993); Williams v. Anheuser Busch, 957 FSupp 1246, (DC FL 1997); McKey v. Occidental Chem. Corp., 956 FSupp 1313 (DC TX 1997); Brundage v. Los Angeles Office of Assessor, 57 Cal App 4th 228 (Cal Ct App 2nd Dist 1997).

Americans with Disabilities Act ("ADA") and The Family and Medical Leave Act ("FMLA")

Unfortunately, some courts hold that misconduct caused by a disability cannot be cited as grounds for termination without running afoul of the law. Teahan v. Metro-North Commuter Railroad Co, 951 F2d 511 (2d Cir 1991) cert den 506 US 815 (1992) (absences caused by substance abuse may not form the basis for discharge.)

F. EMPLOYER'S DEFENSES TO ACCOMMODATION

Even where an individual has a covered disability and is a "qualified individual with a disability," there are several circumstances which an employer can rely upon to defeat a claim that accommodation is required:

1. Unknown Disability

If the employer has not been notified of the disability and the symptoms of the disability are not obvious, there is no duty to accommodate. Miller v. National Casualty, 61 F3d 627 (8th Cir 1995); Bacon v. Great Plans Mfg., 958 FSupp 523 (DC KS 1997).

The employee has the initial duty to inform the employer of the disability and request accommodation. Taylor v. Principal Financial Group, Inc., 91 F3d 155 (5th Cir 1996)(employee with bipolar disorder seeking less stressful work environment failed to apprise management of any limitations relating to the impairment); Simpkins v. Specialty Envelope, Inc., 1996 US App LEXIS 22327 (6th Cir 1996)(the employee's duty to give notice required more than a telephone call from her spouse indicating that the employee was in the hospital and unable to work for a few days.) Accord: Willis v. Conopco, Inc., 6 AD Cases 806 (11th Cir 1997).

2. Employee Cooperation

Once sufficient notice has been provided by the employee, the employer and the employee must then engage in an interactive process to determine a reasonable accommodation. Beck v. University of Wisconsin, 75 F3d 1130 (7th Cir 1996); Bultemeyer v. Fort Wayne Community Schools, 100 F3d 1281, 6 AD Cases 67 (7th Cir 1996).

An employer is not responsible for providing an accommodation if the employee fails to specify the specific accommodation(s) needed to perform the job.

Recent case law has also held that if an employer offers alternative reasonable accommodations to a disabled employee, a refusal of the accommodations by the employee renders him/her unqualified under the law. Schmidt v. Methodist Hosp. of Indiana, 89 F3d 342 (7th Cir 1996). Where an employee fails to authorize the release of medical information to her employer, she has failed to cooperate and her ADA claim fails. See e.g. Templeton v. Neodata Services, Inc., 1998 US App LEXIS 31010 (10th Cir 1998).

3. Undue Hardship

Sometimes the accommodation requested by the employee presents an undue hardship for the employer. Employers are not required to make a reasonable accommodation if it would impose an "undue hardship" upon the business. EEOC ADA Technical Assistance Manual, §3.9. If one accommodation involves an undue hardship, others must be considered. Other times, all accommodations seem to present an undue hardship.

Americans with Disabilities Act ("ADA") and The Family and Medical Leave Act ("FMLA")

Taking the position that any accommodation presents an undue hardship must be done carefully, however, because it is likely that such position will be challenged by the EEOC or an attorney litigating on behalf of the employee.

The analysis of undue hardship involves an examination of the following factors:

- a. The size of the business;
- b. The type of operation. (For example, a lounge with low lighting would not be required to install bright lighting to accommodate a visually impaired worker);
- c. The nature and cost of accommodation;
- d. The financial resources of the local unit and the parent corporation; and
- e. The practical realities. (For example, a fire fighter must be able to carry victims out of a burning building.)

The Technical Assistance Manual makes it clear that the undue hardship is not limited to financial hardship. The concept includes any action that is "disruptive" or would fundamentally alter the nature or operation of the business." §3.9

Hardships may be created by the assignment of duties to other employees. Mears v. Gulfstream Aviation, 905 FSupp 1075 (DC GA 1995) aff'd 87 F3d 1331 (1996)(accommodation that adversely affects other employees' ability to do their job is an undue burden on the employer and thus unreasonable.); Jones v. Alabama Power Co., 1995 US Dist LEXIS 20971 (DC AL 1995) aff'd 77 F3d 498 (11th Cir 1996)(reassignment of over 40% of employee's tasks to other employees is undue hardship); Carr v. Barr, 1992 US Dist LEXIS 9022 (DC DC 1992)(unpredictable absences made scheduling of other employees impossible); Helgerson v. Gridon Cordage, Inc., 518 NW2d 869 (MN Ct App 1994) cert denied 1994 Minn LEXIS 661 (1994)(restructuring of rotation schedule for all employees so disabled employee only had to perform certain jobs was an undue burden where rotation developed for efficiency and safety reasons). Although creating a heavier workload for other employees may create an undue hardship, the possibility that assignment of marginal tasks to others could create a morale problem is irrelevant.

The EEOC guidelines interpreting the ADA indicate that an employer could demonstrate undue hardship by showing that the other employees cannot handle the reassignment of marginal tasks because of the limited number of available employees. For example, the employer may have certain work which can only be done by a mechanic and may only have one mechanic on duty at certain times. The fact that parts employees and tire installers are on duty is irrelevant if they cannot do the marginal functions that the disabled mechanic is incapable of doing.

The fact that an expensive accommodation is required for only one person or for a low-paying job is irrelevant. For example, a \$21.00 per hour reader may be required for a position that itself pays only \$16.00 per hour.

The employer must make a reasonable accommodation notwithstanding an undue hardship if a third

