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65.42 U.S.C. § 9607(b)(3) (1996).

66.Id.

67.42 U.S.C. § 9601(35)(A) (1996).

68.42 U.S.C. § 9601(35)(B) (1996).

69.A company cannot, however, abandon contaminated property that puts the public health or safety in danger. See Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection, 474 U.S. 494 (holding that a bankrupt company could not opt to abandon property which contained 470,000 pounds of highly volatile contaminated oil).

70.See, e.g., Philip H. Gitlen, Voluntary Clean Up Programs, 1 Albany Envtl. Outlook 28, 28 (1995); Richard D. Morse & John D. Chirlin, Environmental Enforcement and Compliance in New York State, 1 Albany Envtl. Outlook 50, 52 (1995); Terry J. Tondro, Reclaiming Brownfields to Save Greenfields: Shifting the Environmental Risks of Acquiring and Reusing Contaminated Land, 27 Conn. L. Rev. 789 (1995).

71.See generally Douglas A. McWilliams, Environmental Justice and Industrial Redevelopment: Economics and Equality in Urban Revitalization, 21 Ecology L.Q. 705 (1994).

72.But see Sara A. Goldberg, Lender Liability under CERCLA: Shaping a New Legal Rule, 4 N.Y.U. Envtl. L.J. 61, 74-77 (1995) (asserting that CERCLA should require lenders to monitor borrowers so that lenders have "gatekeeper liability").

73.Id. at 69-70.

74.Id.

75.Id.

76.See Thomas W. Church & Robert T. Nakamura, Beyond Superfund: Hazardous Waste Cleanup in Europe and the United States, 7 Georgetown Int'l Envtl. L. Rev. 15, 35 (1994) (noting Dutch statute has "fair Share" liability standard); Michael J. Gergen, Note, The Failed Promise of the "Polluter Pays" Principle: An Economic Analysis of Landowner Liability for Hazardous Waste, 69 N.Y.U. L. Rev. 624, 691 n.195 (1994) (citing Chemical Mfrs. Ass'n, A "Fair Share" Liability System for Superfund 1-2 (Aug. 17, 1993)).

EXAMINING THE PRIMA FACIE CASE IN MENTAL DISABILITY DISCRIMINATION CASES and RAISING QUESTIONS ON SHIFTING BURDENS

by

Rosemarie Feuerbach Twomey*

Introduction

The Americans with Disabilities Act of 1990, the Rehabilitation Act of 1973, and state disability discrimination laws, all of which prohibit discrimination against persons with handicaps or disabilities, require employers to think twice before taking action against applicants or employees who fall into this legally protected category. Though the common perception that the primary beneficiaries of these laws would be the wheelchair-bound, hearing or vision impaired persons, and others with various physical ailments, a study by the National Center for Health Statistics showed that as of December 1994, psychiatric impairments were the second largest category of complaints to the EEOC--at 11%. The largest category was persons with back-related problems [1]. The numerous forms that mental disabilities take present unique problems to parties concerned with implementation of, or compliance with, those laws. Learning disabilities alone (just one of the many mental disability categories) have had a major impact, not only on educational institutions and employers, but also on professional licensing bodies which administer proficiency tests--for example, in 1994, of the 1,250 applicants who requested accommodations for taking the LSAT test, 62% claimed to have a learning disability [2].

Recent cases alleging discrimination by persons claiming mental disabilities in an employment context are the focus of this paper. After extensive discussion of the prima facie case and what factors are considered by the courts when faced with mental disability discrimination cases, the focus shifts to an examination of the shifting burden of proof in these cases. The author concludes that there is a lack of consistency in court cases on the issue of burden of proof. This inconsistency makes it difficult to predict how any court will decide a particular disability case.

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Hypothetical Scenarios

(1) An emotionally vulnerable female employee was a clerk for an unreasonably demanding and crude supervisor. She eventually had a nervous breakdown and took two weeks sick leave. The employer discharged her. She filed suit for disability discrimination, claiming Avoidant Personality Disorder as diagnosed by her psychiatrist.

(2) John Doe took a pre-employment test which screened applicants for police work. Because the test results indicated personality traits unsuited to police work, he was rejected. He filed suit for disability discrimination, claiming Schizotypal Personality Disorder as diagnosed by his psychiatrist.

(3) A manual laborer took a position at a construction site. His work was satisfactory, but he was fired because he refused to climb ladders. He filed suit for disability discrimination, claiming Acrophobia as diagnosed by his psychiatrist.

(4) An attorney used monies entrusted to him by clients for his own personal needs and lied to his clients and to the Bar about his actions. The state bar association disbarred him. He filed suit for disability discrimination, claiming he suffers from bipolar disorder which precludes his ability to distinguish right from wrong.

Mental Disabilities

There are two points to be noted about the above scenarios: First, prior to the passage of the Americans with Disabilities Act in 1990, employers not subject to the federal Rehabilitation Act or a state disability protection statute had no reason for concern about liability in those situations. Unless the employers violated their own employment contracts with those persons or violated other statutes, they were within the law in taking the actions they took. Second, all the situations involve mental, not physical, disabilities.

The differences between mental disabilities and physical disabilities are of concern, not only in disability discrimination law, but also in other areas of law--workmen's compensation, family leave, and supplemental social security, in particular. There have been arguments and claims that persons with mental problems are not compensated as well or dealt with equitably under those laws--some even claim constitutional violations on equal protection grounds [3]. With regard to the enforcement and interpretation of disability discrimination laws, there are several reasons that mental disabilities pose particular problems to both the courts and to the employers (and other institutions) who must abide by their restrictions. Some of those reasons are the following:

1. Mental disabilities are not as visible as most physical disabilities.

An employer must be informed of a disability if an applicant or employee seeks protection under the disability laws. The "invisibility" of mental problems presents a dilemma for the disabled person who would often prefer that others not know of his or her mental condition. The "invisibility" factor also is problematic for employers who may face a Catch-22 situation. EEOC regulations stipulate that they cannot perform pre-employment medical testing on applicants, and the mental condition of an applicant may not be readily apparent. If they unwittingly hire someone who has a mental disability, and whose condition causes harm to others at work, the employer may face liability on two possible fronts: (1) from the employee who may argue the employer should have known of the illness (i.e., based on absences, behavior, statements, etc.) and should have "accommodated" it, and (2) from the person who was harmed, based on a "negligent tort" theory--that is, the victim would not have been injured if the employer had not been negligent in hiring (or retaining) someone with a mental problem.

As noted above, because mental disabilities are not easy to detect, an issue that arises in disability cases is whether an employer must accommodate a person about whom there is no factual dispute concerning the existence of a legally recognized mental disability when the employer had no knowledge of its existence at the time of discharge or other unfavorable employment decision involving the plaintiff. The courts are generally in agreement that lack of knowledge on the part of the employer results in a judgment in favor of the employer, and does not give rise to a duty to accommodate. In *Miller v. National Casualty*, 61 F.3d 627, 1995, the only knowledge the employer had of plaintiff's disability--a manic depressive condition--was a medical excuse from a nurse practitioner citing a diagnosis of "situational stress reaction" and a telephone message from the plaintiff's sister that "She's falling apart. She's really lost it. We're trying to get her into a hospital." The court did not believe this to be sufficient information to impose a duty of reasonable accommodation on the employer [4].

2. A stigma attaches to mental disabilities.

Regardless of its nature, there is often an inordinate fear or concern about associating with, or delegating responsibility to, someone who suffers from a mental problem. For this reason, employers are reluctant to hire, retain, or promote them. Furthermore, the victims of such disabilities avoid seeking help and often feel compelled to lie about their illness to prospective employers and others. It is this stigma that led legislators to include in the definition of persons with a disability those who have a "record of such impairment" or are "regarded as having" such an impairment--even if they in fact are not so disabled, e.g., they have successfully recovered from a mental illness.

3. Mental disabilities are not easily understood.

Causes and cures of many mental problems are unknown, and there is a belief on the part of many people that persons claiming a disability are simply not trying hard enough or are just not acting responsibly. A National Health Association poll found that 43% of

Americans view depression as a weakness [5]. The effect of this line of thinking can readily be seen in an employment situation.

4. It is difficult to distinguish a mental disability from ordinary personality traits.

Employers would argue that they have the prerogative to set workplace standards of behavior that all employees are expected to uphold. With respect to compliance with disability laws, the questions employers have are: To what extent can they hold an employee responsible for violation of workplace rules when the behavior is triggered by a mental disability? When is an employee's conduct the result of a mental disability as opposed to a mere personality fault, and how would the employer know?

If the conduct stems from mere personality faults, the employer can discipline with impunity, but if it stems from a mental disorder or disease, the employer may be obligated to "accommodate" the employee.

5. Mental disabilities are diagnosed primarily by the subjective statements of the patient.

Mental disabilities are diagnosed primarily by means of the subjective statements of the patient, while most physical disabilities can be diagnosed by objective data. This naturally transfers ambiguity into the legal arena, and permits a certain degree of abuse into the legal system by persons who choose to use the law inappropriately to their benefit.

6. The cost of care for mental disabilities is higher.

The cost of medical care is a barrier to persons suffering from mental illnesses and disorders. Employee benefits and insurance coverage for mental disabilities, in general, are lower than they are for physical disabilities. Again, this acts as a deterrent to disabled persons who will be reluctant to seek the help they need due to the cost involved.

Disability Discrimination Laws - Shields, not Swords

Disabilities laws for the employment arena were enacted to insure availability of opportunities for the disabled to obtain and retain gainful employment. If disabled persons are capable of working, but are denied a job or dismissed from work because of another's perception that they cannot do the work effectively and efficiently, the law requires that they be given the opportunity to work. These goals are laudable and provide a protective shield for disabled workers who are unfairly denied employment. Needless to say, there are persons who will use the law as a sword rather than a shield, and when the disability is mental in nature, the ground is fertile for such abuse. The EEOC and the courts are in the process of defining the parameters within which persons with mental disabilities will be protected while at the same time closing the gates to those who would manipulate the law to gain an unfair advantage. A review of the law and the cases handed down by the courts and the EEOC is presented here in an effort to better understand and predict the rights and responsibilities of employers and employees as they attempt to comply with, and seek protection under, these laws. The focus is on mental disabilities within the context of the prima facie case.

The Three-Pronged Test to Establish a Prima Facie Case

The cases involving alleged violations of the disabilities laws will be presented and discussed within the format that courts use to analyze the facts of these cases in making their decisions: the three-pronged test that is commonly viewed as the plaintiff's prima facie case [6]--i.e., those matters that the complaining party (the disabled person) must establish to have a cause of action. Unless otherwise stated, the cases cited have arisen under either the Americans with Disabilities Act of 1990 or the Rehabilitation Act of 1973. These two federal laws have many similarities and it is the intent of the lawmakers that they be construed harmoniously.

The three-pronged test consists of the following factors:

1. The plaintiff is "disabled" in accordance with the statutory language.
2. The plaintiff is a "qualified" person with regard to the position in question.
3. The action complained of (e.g., discharge) was "based on the disability" [7].

It should be noted that the "reasonable accommodation" requirement--that employers make special provisions for disabled workers when necessary--is not included here as part of the plaintiff's burden in establishing a cause of action. It is a matter of debate whether the plaintiff or defendant bears the burden of establishing the need for accommodation. In *Miller*, above, the court held that the burden to inform an employer of the need for accommodation was on the plaintiff when the need is "not obvious" [8]. Other cases have indicated that the burden of proof shifts to the defendant on the issue of reasonable accommodation after the plaintiff has shown that reasonable accommodation is possible [9]. Two cases which contain discussions of the shifting burden of proof for reasonable accommodation are: *Overton v. Reilly*, 977 F.2d 1190, 1992 which was brought under Secs. 501 and 504 of the Rehabilitation Act, and *Doe v. NYU*, 666 F.2d 776, which noted that allocation of the burden may depend on whether the employer's decision was based on the disability or on other factors. The Interpretative Guidance to the ADA provides that an employer may require that an employee present documentation regarding the need for accommodation [10]. The many concerns and questions involving the "reasonable accommodation" issue will not be a matter of intensive discussion in this paper.

The defense of "undue burden," which is clearly a matter for the employer to establish, is likewise not a matter of lengthy discussion in this paper. If the plaintiff has shown that he or she has a disability, that he or she is qualified, that the action of the employer was based on the disability, and the need for accommodation is apparent, the burden clearly shifts to the employer. If the employer shows that there is no reasonable accommodation

available, or if the accommodation sought would place an "undue burden" on the employer's operations, the employer prevails.

The First Prong: The Plaintiff Must Be "Disabled"

There are several factors which are considered in establishing whether or not the plaintiff is "disabled" under the law [11]:

A. Does the plaintiff have a mental impairment, a record of such an impairment, or is plaintiff regarded as having such an impairment?

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

C. Does the law specifically exclude the impairment from the definition of disability?

A. Does the Plaintiff have an "Impairment"?

The EEOC regulations state that a mental impairment is "any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities" [12]. The legislative history of the ADA refers to the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (known as DSM-IV) as the appropriate source for determination of what will be considered a mental impairment [13]. Also, courts generally require a diagnosis by a qualified mental health professional who bases his or her findings on the criteria and categories of the DSM-IV. In *Coaker v. Home Nursing Services*, 1996 U.S. Dist. LEXIS 1821, the court noted that the only documentation of plaintiff's mental disability was from her psychologist's report stating that direct patient care would be detrimental to the plaintiff's health. "From this ill-defined proposition, Coaker would have this Court leap to the conclusion that she is disabled." The court added that the psychologist did not even label the plaintiff's condition as post traumatic stress disorder, the disability from which plaintiff claims to suffer [14].

Reference to the DSM-IV does not guarantee a finding that the impairment constitutes a disability. For example, in addition to the specific personality disorders listed, there is a category known as "Personality Disorder Not Otherwise Specified." The EEOC's Interpretive Guidance states that personality *traits* do not amount to a personality disorder which is protected by law. The disorders listed in the DSM-IV are described as collections of personality traits that have become inflexible and maladaptive [15]. There is room, therefore, for challenging a professional's diagnosis of a personality disorder, especially if it is not one of the specific types listed in the DSM-IV.

There may be a finding of disability even when there is no diagnosis of an impairment recognized in the DSM-IV. That is when the plaintiff claims that he or she is "perceived" or "regarded" by the employer as having such a recognized impairment or when the plaintiff has a record of such an impairment and the unfavorable employment decision is based on that perception or record of a disability. In *Daley v. Koch*, 892 F.2d 212 (2d Cir. 1989), an applicant for police work, was disqualified for consideration based on testing which showed that he exhibited "poor judgement, irresponsible behavior and poor impulse control" which made him "unsuitable to be a police officer" [16]. Daley argued that the decision was based on a perception that he was mentally disabled. However, the defendant police department never indicated that it believed plaintiff had a mental disability. In fact, it argued that its decision was based on evidence which supported its finding that he was not qualified for the position due to negative personality traits--not to a perception of mental disability. The plaintiff himself specifically denied having a mental disability, and therefore, was left with no basis on which to claim disability discrimination.

B. Does the Impairment Substantially Limit a Major Life Activity?

There are several factors which enter into a determination of whether an impairment substantially limits a major life activity [17]. Two major factors are:

(i) the nature and severity of the impairment.
(ii) the duration or expected duration of the impairment.

(i) The Nature and Severity of the Impairment

The EEOC regulations state, "Major life activity is substantially limited if the person is unable to do that which the average person in the general population can do, or is significantly restricted as to condition, manner or duration under which the average person can perform the same life activity" [18]. Major life activities include walking, hearing, seeing, and other common abilities needed for functioning in everyday activities. In the March 1995 Interpretive Guidance issued by the Commission, several new major life activities were added, including mental and emotional processes, such as thinking, concentrating, and interacting with others [19].

One of the issues which has arisen in the case law is whether a person should be considered disabled when medication controls the impairment so that major life activities are not limited. The EEOC Compliance Manual and administrative regulations indicate that the taking of medication is a "mitigating condition" which should not be considered in deciding whether an impairment limits a major life activity [20].

A second issue that arises with regard to the substantial limitation of major life activities, deals with the ramifications of the EEOC's designation of "working" as a major life activity [21]. When the disability substantially limits a person's ability to "work," persons seeking the protection of the law must establish that their disability substantially limits their ability to work--which seems tantamount to stating that they cannot perform the essential functions of the job. Paradoxically, the law states that if disabled persons

cannot perform the essential functions of the job at issue, they are not disabled under the eyes of the law and cannot benefit from the protection of the law. The argument the disabled person would then make is that, with reasonable accommodations, he or she could perform the essential functions of the job. When the major life activity that is substantially limited by reason of the disability is "work," the courts consider whether the impairment creates a significant barrier to employment. In so doing, they consider the extent to which the substantial limitation precludes work of a particular and narrow type as compared to limiting the ability of that person to perform most types of work. For example, if a disability only prevents the employee from working for a particularly demanding supervisor because of the stress the relationship creates, but would not prevent the employee from working at any of a number of other positions in the marketplace of jobs in that geographic area for which the employee is qualified, then it is likely the court will conclude that plaintiff is not disabled. In *Forrisi v. Brown*, 794 F.2d 931 (4th Cir. 1986), the plaintiff was held not to be disabled because his disability--acrophobia--only prevented him from doing jobs which required such activities as climbing ladders [22]. His disability did not prevent him from performing many other different types of work. In light of the EEOC's new Interpretive Guidance, it is questionable whether the reasoning in *Forrisi* will predominate--the EEOC's new interpretations changed the scope of "working" as a major life activity. Among other things, it indicates that a person is protected under the law even if the disability precludes performance in only one class of jobs, such as those requiring heavy lifting, or the use of keyboards or computers [23]. Presently, this view is not consistently shared by the courts.

In deciding whether the major life activity of "working" is substantially limited by reason of a person's disability, courts consider several things: (1) the range of occupations that the person would not be precluded from doing, (2) the geographical area to which the person has access, and (3) the training, knowledge, skills, and abilities of the person [24].

A third issue in this category of substantially limiting major life activities is the extent to which ordinary personality traits--not recognized mental impairments--render one so limited; and, therefore, the person alleging disability discrimination is not disabled. In *Adams v. Alderson*, 723 F. Supp. 1531 (D.D.C. 1989) the court held that the plaintiff's inability to work effectively with his antagonistic supervisor, although designated as a "maladaptive reaction to a psychosocial stressor" did not amount to a substantial limitation of major life activities [25]. It was, instead, similar to problems which arise commonly in the workplace.

A fourth issue is the extent to which collateral court or administrative agency decisions regarding the disabilities of an individual affect a determination of disability under the disability discrimination laws. In particular, what bearing would such a decision have on the determination of whether the disability substantially limits a major life activity? One court was confronted with evidence that the plaintiff had applied for, and was eligible for SSA disability benefits. The question of the relevance of this evidence in a claim for protection under the Rehabilitation Act was discussed. That court, in *Overton v. Reilly*, 977 F.2d 1190 (7th Cir. 1992), held that the eligibility for disability benefits under SSA was not inconsistent with a finding that the plaintiff was qualified for the position from which he was fired, noting that "..even if a finding of disability could have preclusive effect in a private lawsuit, such a finding is consistent with a claim that the disabled person is "qualified" to do his job under the Rehabilitation Act... The SSA may determine that a claimant is unlikely to find a job, but that does not mean that there is no work the claimant can do... the determination of disability may be relevant evidence of the severity of Overton's handicap, but it can hardly be construed as a judgment that Overton could not do his job at the EPA" [26].

(ii) Duration or Expected Duration of the Impairment

While it seems clear that "disability" under the ADA or like statutes does not extend to such short term illnesses and conditions as broken bones and the common cold, the finding of a disability can turn on the issue of duration of the condition. The EEOC considers duration of an illness to determine whether it substantially limits major life activity [27]. A Third Circuit Court of Appeals decision in 1995, *McDonald v._Commonwealth of Pennsylvania*, held that a transitory physical condition is not a disability. That case involved a physical condition that required surgery and rehabilitation [28]. Mental disabilities, being more amorphous than physical disabilities, are not as easy to dispose of on this issue of duration. Many mental disabilities are of a long-term nature, but tend to come and go--perhaps in response to environmental factors or because they can be controlled as long as the person takes medication--enabling the person to work for extended periods without problems. In March of 1995 the EEOC issued policy guidance clarifications on the definition of disability which expanded the definition to include a greater number of chronic conditions, including episodic disorders [29].

The issue of duration of a mental disorder arose in *Jane Doe v. The Boeing Company*, a 1992 case alleging discrimination under a Washington state disability statute, in which the plaintiff successfully sued The Boeing Company. The disability was gender dysphoria (transsexualism) and the plaintiff was in the process of preparation for sex reassignment surgery when the company discharged her. The condition was, arguably, a temporary one which would end after the surgery. Nevertheless, the court held that the plaintiff was handicapped under the meaning of the state law and was entitled to accommodation [30]. The plaintiff would probably *not* have been successful in an ADA action for two reasons: (1) among the conditions excluded from coverage under the ADA are transsexualism and gender identity disorders not resulting from physical impairments, and/or (2) the fact that it was a transitory condition may have led to the conclusion that the disorder did not substantially limit a major life activity.

C. Is the Impairment Specifically Excluded from Coverage?

The ADA specifically excludes a number of mental conditions from its coverage: transvestism [24] transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments or other sexual behavioral disorders [32], compulsive gambling, kleptomania, and pyromania [33], and psychoactive substance use disorders resulting from current illegal use of drugs [34]. The Interpretive Guidance issued by the EEOC in March of 1995 gives examples of conditions which are not considered to be impairments. Among them are the following: illiteracy (unless due to a learning disability such as dyslexia), rude, arrogant, obnoxious behavior, or other antisocial conduct (unless it results from a bi-polar disorder or post-traumatic stress disorder) [35]. Cases holding that behavior did not rise to the level of an impairment under the law include *Daley*, above, Fields v. Lyng, a 1988 Maryland case involving shoplifting and an inability to travel [36], and *Adams*, above, involving stress related to difficulty in working with a supervisor [37]. Cases holding that plaintiffs were not impaired due to illegal use of drugs include *Collings v. Longview Fibre* [38] and *Overton*, above.

An example of a state law case finding that a sexual disorder did not satisfy the law's definition of impairment is *A.B.A. v. XYZ Corporation,* a 1995 case brought under the New Jersey Law Against Discrimination [39], in which the plaintiff claimed to suffer from a sexual disorder known as exhibitionism. Though he had an unblemished work record and had been promoted within the company, he had been arrested for indecent exposure in Texas while away on a business trip. As a result of that incident, the company fired him. While the opinion dealt with the plaintiff's request for anonymity, there is ample discussion of the question of whether the disorder should be classified as a disability under NJLAD. In a concurring opinion, Judge Petrella stated, "Merely because a disorder is listed in a medical reference tool such as the DSM does not automatically elevate it to the status of a handicap. Nor does the term disorder equate with the term disability....It strains credulity that the Legislature would prohibit lewdness on the one hand, but condone it on the other hand, by making it a protected handicap under the LAD." The court also acknowledged in a footnote that under the ADA, the particular disorder would be excluded.

Second Prong: The Plaintiff is a Qualified Person

The second prong of the prima facie case is a finding that the plaintiff is a qualified person who can perform the essential functions of the job.

With regard to being a "qualified" person, the courts have discussed several matters, among which are the following:

(A) Whether the person can perform the "essential functions" of the job. If the person cannot, he or she is not qualified.

(B) Whether the person's disability will pose a safety risk to self or others? If so, the person is not qualified.

(C) Whether a record of excessive absenteeism indicates that a person cannot perform the essential functions of the job, and therefore, the person is not qualified?

Many of the factors which enter into the determination of whether the plaintiff is able to perform the essential functions are interdependent with the factors which fall under the third prong. In particular, when there is misconduct involved, some courts hold that the plaintiff cannot prevail because the person is, by reason of the misconduct, not qualified, while other courts hold that the person cannot prevail because the employer's decision was not based on the disability, but on other considerations.

The author suggests that factors (B) and (C) should not be used under the second prong. In fact, these items should come within the defendant's burden and should not be part of the plaintiff's burden of proof.

(A) Can the person perform the "Essential Functions" of the Job?

In determining what constitute the essential functions of a particular job, EEOC regulations indicate that courts could consider written job descriptions prepared before advertising or interviewing applicants for the job, the amount of time spent performing the function, the consequences of not requiring the individual to perform the function under the terms of a collective bargaining agreement, and the work experience of past incumbents in the job and current incumbents in similar jobs [40]. The requirement that the disabled person be able to perform the "essential functions" of the job has caused many employers to rewrite job descriptions to protect themselves from claims alleging discrimination under disability laws. With regard to mental disabilities, employers have been advised to specify, as essential functions, such things as "ability to motivate and deal effectively with subordinates." In addition, they might state the importance of courteous and businesslike behavior in the workplace, and indicate that improper behavior could be the subject of disciplinary action. By doing so, the employers place themselves in a better defensive posture if allegations of disability discrimination are made.

In a related issue, a court considered whether, in trying to ascertain reasonable accommodation, it would be necessary for an employer to revise the essential functions of the position. One court held that accommodation does not require reallocation of essential functions-- *Carroza v. Howard County*, a 4th Circuit case, in 1995 [41].

One of the cases holding that inability to perform essential functions rendered the employee unqualified and, therefore, unprotected under the disability law is *Clement Florida Bar v.*, 662 So.2d 690 (Florida, 1995). The plaintiff, Clement, an attorney, alleged that his bipolar disorder interfered with his ability to distinguish right from wrong, and therefore his disbarment for misuse of client's funds and lying to cover up the wrongful actions constituted illegal discrimination under the ADA. The court stated that "..even if any of Clement's actions occurred when he could not distinguish right from wrong, the ADA would not necessarily bar this Court from imposing sanctions." It

concluded the issue with this statement, "Clement is not 'qualified' to be a member of the Bar because he committed serious misconduct, and no 'reasonable modifications' are possible. [42].

What activities or abilities might constitute "essential functions" of a particular job? The court in *McDaniel v. AlliedSignal Inc.*, a 1995 U.S. District Court case, provides one example. The court stated that being able to maintain security clearances in a government defense contracting position was an essential function of the job in question. The court believed that the plaintiff, who suffered from depression, would not necessarily be able to obtain the clearances, even with a requested accommodation, and, therefore, he was not qualified [43].

(B) Will the Person's Disability Pose a Safety Risk?

Clearly, there is a good argument on the part of employers that persons who pose a potential threat to themselves or to others can, and perhaps ought to be, refused employment or discharged from a job. In the area of mental disabilities, this line of reasoning is particularly apt. Courts generally support employers when the evidence indicates that the threat is real, rather than imaginary, and when there are no reasonable accommodations that would effectively nullify the threat. In *Doe v. Region 13 Mental Health-Mental Retardation Commission*, 704 F.2d 1402 (5th Cir. 1983), a Rehabilitation Act case, the plaintiff suffered from severe depression and worked with patients at a psychiatric facility. She threatened to commit suicide. The hospital feared she would communicate to the patients that suicide was a reasonable alternative. The court supported the hospital's position although there was no direct physical threat involved. That decision stands in contrast *to Collins v. Blue Cross Blue Shield of Michigan*, a lower court review of an arbitration decision [44], in which an employee told her psychiatrist that she hated her supervisor, that her supervisor "is living on borrowed time and she doesn't know it," and that "I have killed her a thousand times in my mind." Although the psychiatrist did not believe the patient would act on her statements, and concluded after counseling that she had recovered from her depression/adjustment disorder, the employer fired her. The court upheld the arbitrator's decision in favor of the employee.

Direct threat is defined in the EEOC regulations as a "significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation" [45]. Factors that are to be considered in assessing whether a direct threat exists include: the duration of the risk, the nature and severity of potential harm, the likelihood that the potential harm will occur, and the imminence of the potential harm [46].

An obvious and ominous problem faced by employers is the possibility that hiring or retaining persons with mental disabilities which include tendencies toward violence will lead, not only to harm, but also to legal liability on grounds of negligent hiring or negligent retention tort theories. In *Yunker v. Honeywell, Inc.*, a 1993 Minnesota case, the estate of a murder victim successfully sued Honeywell in a negligent retention action. Landin, an employee of Honeywell strangled to death a coemployee. After serving a five-year prison sentence, Landin was rehired by Honeywell as a custodian. Landin's criminal behavior continued--confrontations with others, sexual harassment, threats of violence--and the company transferred him to another facility. Eventually, after several more episodes of violent behavior, he committed murder a second time--again the victim was a coemployee. As was pointed out in an article in the *Massachusetts Employment Law Letter*, if Honeywell had not rehired him or had fired him after the recurrence of the abusive behavior, the worst-case scenario might have been losing in a disability discrimination lawsuit, which could have meant up to $300,000 in compensatory and punitive damages plus backpay. In contrast, a negligent retention tort case can cost a company a staggering sum of money for punitive, pain and suffering, and more [47].

(C) Does Excessive Absenteeism Equate with a Determination of "Not Qualified?"

Several cases have explored the issue of whether extended periods of sick leave amount to a justification for firing an employee in spite of a finding that the employee is disabled [48]. The absenteeism itself may be the basis for concluding that the employee cannot perform the essential functions of the job.

The court in *Leatherwood v. Houston Post Company*, 59 F.3d 533 [49], a case argued under the Texas disability law [TCHRA], held in favor of the defendant, primarily based on a finding that the plaintiff could not perform his work during his psychotic episodes of mania and depression. The plaintiff maintained that his disorder did not affect his ability to perform his job as a newspaper editor and that, prior to new management, the Post reasonably accommodated his illness. However, the court stated, "...Leatherwood's disability-based absence from his job as an editor for this daily newspaper, for 33 to 44 percent of his last nine months of employment strongly indicates that, for the purposes of the TCHRA, his disability rendered him unable to reasonably work in this position as a matter of law" [50].

Courts generally agree that an essential function of most jobs is regular attendance. However, depending on the nature of the position, absences do not, per se, prevent a person from performing job duties, and rulings must be made on a case-by-case basis. Closely tied to the issue is whether allowing periodic time off for sick leave due to a chronic mental disorder amounts to a reasonable accommodation under the circumstances. Perhaps work could be done from home or the nature of the work is such that the time off with or without pay will have little impact on whether performance of the essential functions of the job will be affected.

The Third Prong: Action Taken by the Employer was Based on the Disability

The third prong of the plaintiff's Prima Facie Case is the establishment of the fact that the employer made the employment decision based on the plaintiff's disability. Up to this point in the analysis of the case, the plaintiff has shown that he or she has a mental impairment that rises to the level of a disability and that he or she is a qualified person with regard to the position in question. The employer will prevail if the plaintiff cannot show that the discharge or refusal to hire was due to the disability, and not to matters unrelated to the disability.

This part of the prima facie test is somewhat analogous to the requirement in a Title VII discrimination case involving allegations of race, relation, sex, age, or national origin discrimination. Assuming the case has proceeded to trial and that the defendant has not raised an unequivocal defense resulting in a summary judgment in its favor, the plaintiff has at this point raised an inference of disability based discrimination. (This analysis has not appeared in the cases, but it is reasonable to assume that, in fact, this is a correct reading.)

The overlap between the second and third prongs is seen again in the manner in which courts present their analysis of cases involving misconduct. For example, if an employer argues that a discharge decision was based on behavior which was a violation of company rules and that the rules apply to all employees, regardless of the existence of a disability which caused the employee's behavior, is the employer using the second or third-pronged test? One court may conclude that the violation of the rule means the person is not qualified, and the other may conclude that the employer's decision to discharge was not based on the disability, but rather on misconduct. The difference is not an inconsequential one, for the burden of proof is arguably on the plaintiff under the second-pronged argument and on the defendant in the finding that there was misconduct which motivated the employer's decision.

Many cases involving findings of misconduct are drug or alcohol-related situations in which the courts decide in favor of the defendant employer, especially if the company has provided reasonable accommodations in helping the employee deal with the problem. In *Fuller v. Frank*, 916 F.2d 558 (9th Cir. 1990) an alcoholic employee was allowed leaves of absence, was provided with counseling and outpatient treatment periodically and was provided a "last chance" agreement which the employee violated. The court held in favor of the defendant.

Some courts have stated that employers can hold all employees to the same standard of conduct even when the misconduct is caused in part by a disability. Misconduct was an issue in *Oklahoma Bar Association v. Busch*. The plaintiff, an attorney, claimed that his Attention Deficit Disorder was the cause of the behavior which led to his suspension from the practice of law. His misconduct was as follows. He decided not to pursue execution on personal assets in a client's successful malpractice suit (a ten million dollar judgment) because he erroneously believed that the doctor did not have substantial personal assets. He went after the insurance carrier instead. He informed the doctor by letter. The insurance carrier refused to pay and only then was it discovered that the doctor had substantial amounts of money in several different bank accounts. Busch attempted to execute on the judgment but the state court held that the letter to the doctor precluded such action. He filed a notice of intent to appeal, at the request of his client, but failed to file a Petition of Error and did not tell his client. He next filed suit against the hospital, but lost on a summary judgment motion. Again, he agreed to appeal, but ended up appealing one day too late. His psychiatrist testified that ADD causes impulsive and stupid behavior without thought to the consequences. He specifically stated, however, that lying is not a symptom of ADD. The court stated, "While his neglectful behavior may have been influenced by his ADD, his physician testified that lying is not a direct result of the illness. Because we find that the Bar Association has proven by clear and convincing evidence all counts...we agree that discipline is necessary" [51]. It is interesting to note that in the Busch case, the court stated that prior to the enactment of the ADA, courts traditionally held that mental illness did not prevent attorney discipline, although the condition would be considered as a mitigating factor. We are left with the question of what impact the ADA has on these cases: If Busch's misconduct did not include lying, but only the other manifestations of his mental condition, would the court have held in his favor?

Conclusions and Questions on Shifting Burdens

Application of Three-Pronged Test to the Hypothetical Scenarios

If we apply the three-pronged analysis to the hypothetical questions posed at the beginning of this paper, we can make the following predictions as to their outcomes.

(1) The *emotionally vulnerable female* employee with Avoidant Personality Disorder who experienced a nervous breakdown after a noble effort to work under an unreasonably demanding and crude supervisor:

Under the First Prong, she probably loses. If we assume that the disorder is listed in the DSM-IV and her psychiatrist is considered a competent health professional, she has met the burden of showing she has an impairment. However, it is questionable whether courts will find that her impairment substantially limits a major life activity. Not getting along with one's boss is unfortunate, but it does not preclude her from working in general.

(2) The *applicant for police work* who argued that the police department's decision to reject him was illegally discriminatory because he suffers from Schizotypal Personality Disorder:

Under the First Prong, he probably loses. In the absence of a finding that the pre-employment screening was a medical test (which is prohibited by ADA), judgment would probably favor the defendant police department. The disorder will probably not rise to

the level of an impairment recognized by the law as a disability. The distinction between a recognized disorder and a genuine disability may turn on whether the evidence shows a serious psychiatric problem or a mere personality fault. If, however, it is found that the plaintiff has a disability, and it substantially limits a major life activity, the inquiry would proceed to the Second Prong.

Under the Second Prong, he probably loses. A court may find he is not qualified because he did not pass the screening test. The process indicated he was not suited for the work--he could not perform the essential functions of the job.

Likewise, under the Third Prong, he probably loses. He has not demonstrated that the rejection was based on the disability. The evidence shows that the rejection was based on the objective determination that he was unsuited for the job. There was no evidence that the employer knew of his disability or that it "regarded" him as having a disability.

(3) The *manual laborer with Acrophobia* who would not climb ladders:

Under the First Prong, he probably loses. Although the impairment would likely be considered a serious one, it is unlikely that the court would find it substantially limited a major life activity. It effectively prevented him from performing the essential functions of this job, but it would not prevent him from working in general.

(4) The *attorney with bipolar disorder* who stole funds from his client and lied about it:

Under the First Prong, he probably wins. He has a recognized disability. However...

Under the Second Prong, he probably loses. He cannot perform the essential functions of the job. If he argues that he could perform the essential functions of the job with accommodation, move to the Third Prong.

Under the Third Prong, he probably loses. The disbarment decision was based on misconduct, not on the disability.

Shifting Burdens - Questions Raised by Cases

There are several problems in attempting to sort out which factors in a disability discrimination case are matters for which the plaintiff bears the burden of proof and those for which the defendant bears the burden. In the First Prong, it is reasonable that the law require the plaintiff to show that he or she has an impairment which substantially limits a major life activity.

In the Second Prong, however, what do the courts require plaintiffs to show to demonstrate that they are qualified? There are court opinions which find that a disabled person is *not qualified* because the plaintiff's disability would pose a safety risk in the workplace. Is this part of the plaintiff's burden, or is it a defense to be raised by the defendant? If it is part of the defendant's burden, it should not be linked with the issues of whether or not the plaintiff is *qualified.* Other courts have found that a plaintiff was *not qualified* because there were no reasonable accommodations available which would enable the person to perform the essential functions of the job. If it is the defendant's burden to establish the reasonableness and availability of accommodations, it should not be linked to the issue of whether the plaintiff is or is not *qualified.* Others have found that the plaintiff was *not qualified* because he or she violated workplace rules, society's rules, or engaged in some other form of misconduct. If this is a defense, it should not be linked to the issue of whether the plaintiff is or is not *qualified.*

The point to be made here is that, in concluding that a disabled person is not qualified by reason of factors raised by the defendant, such as misconduct or safety risks, it "muddies the waters" with respect to the prima facie case and the burden of proof. One suggestion is to return to the wording of the Rehabilitation Act which required that the disabled person prove that he or she was "otherwise qualified." The plaintiff would bear the burden of proving that "but for" the disability, he or she has the qualifications for the job--the necessary skills, knowledge, credentials, etc. The factors regarding safety, misconduct, and other evidence which the defendants raise would not be commingled with the plaintiff's prima facie case and would not be determinative of the plaintiff's "qualification" for the job. They would, instead, be defenses and part of the defendant's burden of proof.

With regard to the Third Prong--the requirement that plaintiffs show that an employer's decision was based on the disability--other questions arise regarding the shifting burdens. To what extent does the plaintiff have to prove that the employer's decision was based on the disability? Once the plaintiff satisfies Prongs 1 and 2, could it be said that he or she has established a prima facie case?...that a rebuttable presumption has arisen that the employer's action was based on illegal disability discrimination?...that the burden of proof should now shift to the defendant? This is the manner in which Title VII employment discrimination cases are analyzed. The ultimate burden of proving that the employer's decision was based on illegal discrimination would remain with the plaintiff, as it does in the Title VII cases. Although there is very little, if anything, in the disability discrimination cases which indicates that courts use this approach in deciding disability discrimination cases, it would appear to be a workable one, and one that would eliminate some of the confusion that is evident to researchers studying this area of law.

As it stands, the cases involving mental disability discrimination in the employment arena seem to follow an ad hoc analysis with regard to what constitutes the plaintiff's prima facie case and which party bears the burden of proof for the issues that arise. In particular, there is confusion as to whether the plaintiff or the defendant bears the burden of proof in determining the need for and the nature of reasonable accommodation and what is meant by the terms "qualified" and "otherwise qualified."

An example of the confusion that exists is the court opinion in *Moran v. Chassin, Commissioner of the State of New York*, a March 1996 state lower court opinion in which a medical doctor, suffering from epilepsy, a seizure disorder and an emotional disorder, sought relief from a decision permanently restricting his license to practice medicine in the state. One of the doctor's arguments was that the Board's decision was contrary to the ADA and the Rehabilitation Act. The facts are that on the basis of patients' complaints, he was ordered to submit to a psychiatric examination. His refusal to do so resulted in a six-month suspension of his medical license. He was thereafter charged with professional misconduct. An administrative decision suspended his license for three years, but then stayed the suspension and placed him on probation with certain conditions and restrictions.

On appeal, the Administrative Review Board decided to *permanently* prohibit the doctor from engaging in direct patient contact. The case was then appealed to the state court which affirmed the Board's decision. In its opinion, the court stated, among other things, that the petitioner-doctor's contention that he is "otherwise qualified" is unavailing because as "..indicated by petitioner's own witnesses, petitioner cannot perform his functions without some type of modifications. Since the petitioner would need certain modifications at the job site in order to perform the functions of patient care, *he cannot perform in spite of his handicap and, therefore, he is not 'otherwise qualified.'"* [Emphasis added.] It went on to say that while reasonable modifications may sometimes be necessary to assist a handicapped individual in performing tasks, the modifications proposed in this case are unreasonable and would place substantial burdens on others involved [52].

In the *Moran* case, the issues pertaining to the three prongs discussed above are not easy to differentiate. It is not possible to determine which facts constitute the plaintiff's burden and which are the defendant's. Some of the confusion stems from the use (or misuse) of the terms, "otherwise qualified" and "in spite of." The Rehabilitation Act initiated the term, "otherwise qualified," but many disability discrimination cases--even those argued under the Rehabilitation Act--no longer use it. Although the terms "otherwise qualified" and "in spite of" were used in the U.S. Supreme Court's decision, *Southeastern Community College v. Davis* [53], involving a deaf woman's denial of admission to a nursing school, little light was shed on their meaning with respect to burden of proof. The words have not been consistently defined and are, therefore, subject to misinterpretation and confusion. If the finding of "qualified" or "otherwise qualified" were restricted to the plaintiff's burden of showing that he or she is qualified for the job in terms of skills, knowledge, credentials, etc., that would be helpful in distinguishing the plaintiff's burden from the defendant's burden. The misuse of the words and the convoluted reasoning which results is evident in the conclusions of the New York court in *Moran:* the doctor was found to be not "otherwise qualified" because he could not perform the functions of the job without accommodations...he could not perform *in spite of* his handicap and was therefore not otherwise qualified. The court's line of reasoning appears to require that disabled persons be able to prove that they can perform the essential functions of the job in spite of their handicap and without accommodation. Such reasoning would eviscerate the very substance and purpose of many of the Acts' provisions.

A suggestion would be to limit the use of the terms, "qualified" and "otherwise qualified," to those factors which are related to the ability of persons to perform the essential functions of the job in question. The inability to perform because of the disability, then, would be a matter for the defendant to prove--e.g. establish that no reasonable accommodation would enable the plaintiff to perform, show that the plaintiff's disability would pose a risk to the plaintiff or others, or produce evidence to show that the employer's decision was based on something other than the disability--such as misconduct or excessive absenteeism. Whether or not the person was "qualified" or "otherwise qualified" would be a fact clearly within the plaintiff's burden of proof. When the terms, "qualified" and "otherwise qualified" include consideration of other factors, such as plaintiff's misconduct or risks to safety caused by the plaintiff's disability, it is not clear who bears the burden on this matter.

A Suggested Prima Facie Case for Disability Discrimination Cases

To establish a prima facie disability discrimination case, the plaintiff must prove:

1. That he or she has an impairment (pursuant to the statutory language) or is perceived as having such an impairment, or has a record of such impairment.

2. That he or she is qualified for the position at issue (which would be interpreted to mean that plaintiff has the requisite skills, knowledge, experience, education, etc.).

3. That he or she has been the subject of a negative employment decision.

At this point, the plaintiff will have established a rebuttable presumption of illegal disability discrimination, and the burden will shift to the defendant employer to raise defenses. This could involve production of evidence that the impairment poses a safety risk, that the employer is unable to provide reasonable accommodation, or perhaps that the decision was based on factors other than the impairment, such as misconduct.

The burden would shift back to the plaintiff then to allow the plaintiff to prove that the employer's reasons are pretextual--and the real reason for the decision was illegal disability discrimination.

ENDNOTES

1. Kevin J. Conlon, *ADA Still Being Refined For Mental Health Cases,* CHICAGO

DAILY LAW BULLETIN, Nov. 3, 1995, at 6.

2. M.A. Stapleton, *Disabilities Act Brings About Sharp Increase in Student Requests For School, Exam Aide, CHICAGO DAILY LAW BULLETIN,* Dec. 22, 1995, at 3.

3. EEOC Interim Guidance on Application of ADA to Health Insurance, reprinted in Fair Empl. Prac. Manual (BNA) at 405:7115 (1993). See also Hershey Chocolate Co. v. Workmen's Compensation Appeal Bd.,162 Pa. Commw. 23, 638 A.2d 336 (1994), Pa. Commw. LEXIS 61, and Brown v. Campbell County Bd. of Education et al, 915 S.W.2d 407 (1995), Tenn. LEXIS 781. See also James Mc Donald, F.B. Kulick, and M.K. Creighton, *Mental Disabilities Under the ADA: A Management Rights Approach; Americans With Disabilities Act.* 20 EMPLOYEE RELATIONS LAW J., n. 4 at 541.

4. Miller v. National Casualty Co., 61 F.3d 627 (1995), U.S. App. LEXIS 20190, at *629.

5. Conlon, supra, at 6.

6. 42 U.S.C. Sec. 20132 (19). See also Pritchard v. Southern Company Services, 1995 U.S. Dist. LEXIS 6020 (N.D. Ala., March 31, 1995), WL 338662, 6 (N.D. Ala. 1995).

7. See McDaniel V. AlliedSignal Inc., 896 F.Supp. 1482 (1995), 1995 U.S. Dist. LEXIS 12504. See also Austin State Hospital et al v. Laura Kitchen, 903 S.W.2d 83 (1995), 1995 Tex. App.LEXIS 1377, for an analysis of a mental disability case with instructions to a jury.

8. Adams v. Alderson, 723 F. Supp. 1531 (D.D.C. 1989).

9. See Gardner v. Morris, 752 F.2d 1271 (8th Cir. 1985).

10. 29 C.F.R. app. 1630.9 (19).

11. 42 U.S.C. Sec. 12102(2) (19).

12. 29 C.F.R. 1630.2(h) (19).

13. James J. McDonald, F.B. Kulick, M.K. Creighton, *Mental Disabilities Under the ADA: A Management Rights Approach; Americans With Disabilities Act.* 20 EMPLOYEE RELATIONS LAW J., n. 4 at 541.

14. Coaker v. Home Nursing Services, Inc., 1996 U.S. Dist. LEXIS 1821 at *35.

15. DSM-IV, note 1, at 630. See also McDonald, supra, at 548.

16. Daley v. Koch, 892 F.2d 212 (2d Cir. 1989) at 213.

17. 29 C.F.R. 1630.2(j)(2). See also McDonald, supra, at 95.

18. 29 C.F.R. 1630.2(j). Also, "major life activities" are defined at 29 C.F.R. 1630.2(i).

19. Robert L. Duston, *Courts Will Scrutinize EEOCs Definition of Disability,* EMPLOYMENT TESTING--LAW & POLICY REPORTER, July, 1995, at 97.

20. 29 C.F.R. 1630.2(h) (19). See also Castorena v. Runyon, 65 E.E.P. Cases (BNA) 81 (D. Kan. 1994), a Rehabilitation Act case finding that plaintiff's paranoid schizophrenia did not substantially limit a major life activity even without medication. See also EEOC v. Union Carbide & Plastics Co., D.C. E.D. La., August 18, 1995, U.S.Dist. LEXIS 12444, Civ. Action No. 94-103 Section "L," stating that the issue of severity of impairment when medication controlled the disability is for trial.

21. 29 C.F.R. 1630.2(i) (10).

22. Forrisi v. Brown, 794 F.2d 931 (4th Cir. 1986). See also Coaker, supra, at *33.

23. See Robert L. Duston, supra.

24. See Coaker, supra, at *19, footnote #43, stating that the evidence and testimony used in making the determination of whether Coaker--claiming a post traumatic stress disorder--was in fact capable of undertaking work of a varied type available to her in her location.

25. Miller, supra, at *629 and Pritchard v. Southern Company Services, 1995 U.S. Dist. LEXIS 6020 (N.D. Ala., March 31, 1995), WL 338662, 6 (N.D. Ala. 1995).

26. Overton v. Reilly, 977 F.2d 1190 (7th Cir. 1992) at 1192.

27. 29 C.F.R. 1630.2(j)(2) (10). See also Allan H. Weitzman, K.M.McKenna, *Employment Law - Companies are Confounded by The ADA's Lack of Guidance on How To Cope With Employees Who Claim Mental Illness.* THE NATIONAL LAW J., Sept. 25, 1995, at B4.

28. McDonald, supra.

29. Duston, supra, at 97.

30. Jane Doe v. The Boeing, 64 Wash. App. 235, 823 P.2d 1159 (1992), 1992 Wash. App. LEXIS 49, 58 Fair Empl. Prac. Cas. (BNA) 107, 58 Empl. Prac. Dec. (CCH) P41,336.

31. 42 U.S.C. Sec. 12208. See also Weitzman, supra, and McDonald, supra.

32. 42 U.S.C. Sec. 12211(a).

33. 42 U.S.C. Sec. 12211(b)(1).

34. 42 U.S.C. Sec. 12114(a).

35. See EEOC Tech. Assistance Man., n. 10 & Fair Empl.Prac.Manual (BNA) at 405:6988.

36. Fields v. Lyng, 1 A.S. Cases 1381 (I) (Md. 1988).

37. Adams v. Alderson, 723 F. Supp. 1531 (D.D.C. 1989).

38. Collings v. Longview Fibre, 63 F.3d 828, (9th Cir. 1995).

39. A.B.C. v. XYZ Corporation, 282 N.J. Super. 494, 660 A.2d 1199, 1995 N.J. Super. LEXIS 209 at *494.

40. 29 C.F.R. 1630.2(n)(3i-vii) (19). See also Weitzman, supra.

41. Carroza v. Howard County, Md. 1995 WL 8033 (4th Cir. January 10, 1995). See also Jones, Walker, Waechter, Poitevent, Carrere & Denegre L.L.P., *Dealing With Mental Illness, Workplace Stress, and Job Performance Under the ADA.* 4 LA. EMPLOYMENT LAW LETTER *Louisiana Employment Law Letter*, Issue 1, April, 1995.

42. The Florida Bar v. Clement, 662 So. 2d 690, 1995 Fla. LEXIS 1749, 20 Fla. Law. S 553 at *699. Note: Although Clement was under psychiatric care for his bipolar disorder when the incidents in this case occurred, Clement also said he could fool his doctor into believing that he was in control during some of the period in question. This suggests that nothing could prevent repetition of the egregious misconduct that occurred in this case"

43. McDaniel v. AlliedSignal Inc., supra and Conlon, supra.

44. An arbitration award upheld by Judge Lawrence P. Zatkoff, Eastern Dist. Mich. See also McBrien, Marcia M., *"Homicidal" Thoughts Are Not Work Misconduct.* MICHIGAN LAWYERS WEEKLY, January 15, 1996, at 1.

45. 29 C.F.R. 1630(r).

46. Id.

47. Skoler, Abbott, & Presser, *Violence On The Job.* 5 MASS. EMPLOYMENT LAW LETTER, Issue 8, Nov., 1994.

48. See Steven H. Winterbauer, *Is Disability-related Absenteeism a Lawful Basis For Discharge Under The ADA?* 21 EMPLOYEE RELATIONS LAW J., No. 3, at 51, Dec. 22, 1995.

49. Leatherwood v. Houston Post Company, 59 F.3d 533, 1995 U.S. App. LEXIS 20421.

50. Id at 537.

51. State of Oklahoma ex rel. Oklahoma Bar Association v. Busch, SCBD 4068, Supreme Court of Oklahoma, 1996 Okla. LEXIS 39, March 12, 1996.

52. In the Matter of Thomas F. Moran v. Mark Chassin, as Commissioner of Health of the State of New York, et al., Supreme Court of N.Y., App. Div., Third Dept., 1996 N.Y. App. Div. LEXIS 2040 at *5.