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SENSITIVITY TRAINING: MULTIPLE CHEMICAL SENSITIVITY AND THE ADA

Andrew K. Kelley*

In these pools the children played, and rolled about in the mud of the streets; here and there one noticed them digging in it, after trophies which they had stumbled on. One wondered about this, as also about the swarms of flies which hung about the scene, literally blackening the air, and the strange, fetid odor which assailed one's nostrils, a ghastly odor, of all the dead things of the universe. . . . Was it not unhealthful? the stranger would ask; and the residents would answer, "Perhaps; but there is no telling."¹

—Upton Sinclair, *The Jungle*

I. INTRODUCTION

For most employees in the United States today, work conditions have improved significantly from those of the Chicago stockyards at the beginning of the twentieth century. Yet to a certain segment of the population, the odors commonly encountered in the workplace can be as noxious as those Upton Sinclair so vividly described in *The Jungle*.² These people suffer from an affliction known as Multiple Chemical Sensitivity (MCS). For sufferers of MCS, the smell of perfumes, cleaning solvents, and other common chemicals can create an atmosphere that leads to nasal congestion, headaches, fatigue, lack of concentration, and memory loss.³ Indeed, some sufferers of MCS react

* Solicitations Editor, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW, 1997-1998.

¹ UPTON SINCLAIR, *THE JUNGLE*, 36 (1985).

² *Id.*

³ See E.E. Sikorski & K.E. Rodgers, *Overview in The Question of Multiple Chemical Sensitivity*, 24 FUNDAMENTAL & APPLIED TOXICOLOGY 22, 22 (1995).

so strongly to commonplace chemical odors that they simply cannot function when exposed to them.⁴

Some MCS sufferers have pursued legal action to compel their employers to accommodate their condition.⁵ In these efforts, some have chosen to use the recently promulgated Americans With Disabilities Act (ADA) as a source of legal recourse.⁶ As of this time, claims brought under the ADA by employees suffering from MCS have failed to get past defendants' summary judgment motions.⁷ These claims have failed for two reasons.⁸ Courts have found either that these individuals were not disabled as defined by the ADA, or that even if they were disabled, the accommodations which they requested were unreasonable as a matter of law.⁹

This Comment explores alternative ways in which workers who suffer from MCS can be viewed as disabled under the ADA, and the types of accommodations they can expect a court to find as reasonable. Section II of this Comment looks at MCS as a medical condition, briefly detailing the history, health effects, and debate which surrounds it. Section III walks through the various elements of the ADA which are central to bringing a successful claim, and touches upon the factors which someone suffering from MCS must be able to prove. Section IV discusses the cases which have been brought by workers suffering from MCS under the ADA, and shows how the courts have treated these claims. Section V discusses how courts have treated ADA claims based on ailments similar to MCS, focusing on what these courts have considered to be reasonable accommodations. Section VI then sets out how an individual with MCS should present his or her claim, and what types of accommodations he or she can expect a court to endorse as reasonable.

II. MULTIPLE CHEMICAL SENSITIVITY

The medical diagnosis of MCS traces its origin to an Illinois allergist named Theron Randolph.¹⁰ In 1962, Randolph developed a theory that

⁴ See Jacob Berkson, *Patient Statement: A Canary's Tale*, 10 TOXICOLOGY & INDUS. HEALTH 323, 323 (1994).

⁵ See *Patrick v. Southern Co. Serv.*, 910 F. Supp. 566, 567 (N.D. Ala. 1996), *aff'd*, 103 F.3d 149 (11th Cir. 1996); *Whillock v. Delta Air Lines, Inc.*, 926 F. Supp. 1555, 1556 (N.D. Ga. 1995), *aff'd*, 86 F.3d 1171 (11th Cir. 1996).

⁶ See *Patrick*, 910 F. Supp. at 567; *Whillock*, 926 F. Supp. at 1556.

⁷ See *Patrick*, 910 F. Supp. at 567; *Whillock*, 926 F. Supp. at 1556.

⁸ See *Patrick*, 910 F. Supp. at 567; *Whillock*, 926 F. Supp. at 1556.

⁹ See *Patrick*, 910 F. Supp. at 567; *Whillock*, 926 F. Supp. at 1556.

¹⁰ See Sikorski & Rodgers, *supra* note 2, at 22; Thomas L. Kurt, *Multiple Chemical Sensitivi-*

exposure to everyday chemicals can create a general allergic syndrome in some individuals.¹¹ It is this general allergic syndrome that we now know as MCS.¹² Randolph came to this conclusion after treating a patient who complained that she had become ill after passing through a highly industrialized area in which she was exposed to combustion products and other by-products of gas, oil, and coal.¹³ The patient had a panoply of medical ailments, including rhinitis, asthma, headache, fatigue, irritability, depression, weight swings, and intermittent loss of consciousness.¹⁴ Not knowing what specific agent caused these problems, all that Randolph could advise was that she avoid exposure to as many everyday chemicals and foods as possible and see if her condition improved.¹⁵

The inheritors of Randolph's mantle are a group of physicians known as "clinical ecologists."¹⁶ This group uses MCS as a diagnosis for patients with otherwise inexplicable illnesses characterized by multiple, subjective symptoms attributed to chemical exposure.¹⁷ Though a clear and precise definition of MCS has yet to emerge, it is commonly agreed among clinical ecologists that MCS is a "polysymptomatic, multiorgan syndrome that is elicited in response to levels of chemicals and common foods and drugs that do not affect most people."¹⁸ The symptoms that MCS sufferers commonly complain of are

ties - A Syndrome of Pseudotoxicity Manifest as Exposure Perceived Symptoms, 33 CLINICAL TOXICOLOGY 101, 101 (1995). Though the modern debate over the legitimacy of MCS has centered around Randolph's hypothesis, some believe that the condition has existed since the end of the nineteenth century. In 1886 a French scientist named Glenard wrote about a condition which was then known as "neurasthenia." The most famous sufferer of this condition was the French author Marcel Proust, who became so intolerant of the perfumes and other odors he was exposed to in ordinary life that he secluded himself in his Paris apartment and spent the latter years of his life in hermetic existence. James Bovard, *A Name Still in Search of a Disease*, THE SACRAMENTO BEE, Jan. 14, 1996.

¹¹ See Kurt, *supra* note 10, at 101; Claudia S. Miller, *White Paper: Chemical Sensitivity: History and Phenomenology*, 10 TOXICOLOGY & INDUS. HEALTH 253, 253 (1994) [hereinafter Miller, *White Paper*].

¹² There are a litany of terms which are used to describe the condition commonly referred to as MCS. Some of these terms are: Chemical Sensitivity; Environmental Illness; Cerebral Allergy; Twentieth Century Disease; Chemically-induced Immune Dysregulation; Total Allergy Syndrome; Ecologic Illness; Chemical Hypersensitivity Syndrome; Environmental Maladaptation Syndrome; Universal Allergy; and Chemical AIDS. Miller, *White Paper*, *supra* note 11, at 257.

¹³ See *id.* at 253.

¹⁴ See *id.*

¹⁵ See *id.*

¹⁶ See Sikorski & Rodgers, *supra* note 3, at 22.

¹⁷ See *id.*

¹⁸ See *id.*

nasal congestion, headaches, fatigue, lack of concentration, and memory loss.¹⁹

Before an individual becomes afflicted with MCS a two-step process must occur.²⁰ Initially the sufferer experiences a sensitizing stage, where he or she is exposed to a certain chemical.²¹ Either specific high-level exposure, or chronic low-level exposure may cause this sensitization.²² After the individual has been sensitized, he or she will then have adverse reactions to subsequent exposures to the same chemical, even at levels well below those tolerated by unaffected individuals.²³ Moreover, following sensitization to a particular chemical, a MCS sufferer can then begin to experience adverse reactions to low-level exposures to other, unrelated, chemicals.²⁴ Thus, from an initial exposure to a certain chemical an individual can become susceptible to many chemicals, creating a debilitating condition that makes functioning in an uncontrolled environment exceptionally difficult.²⁵

The medical community has not universally accepted MCS as a legitimate physiological ailment.²⁶ From its inception MCS has continually encountered considerable skepticism.²⁷ Many of those involved in the study and treatment of disease believe MCS is a psychological problem which has been misdiagnosed.²⁸ This skepticism is based on a number of factors. MCS has no generally accepted definition or diagnostic criteria.²⁹ There is no clinical or laboratory marker for MCS, nor is there an identified mechanism for the condition.³⁰ There are no objective physical signs of MCS or laboratory indications of pathology, and there is a lack of response reproducibility.³¹ Because patients suffering from MCS report a wide diversity of symptoms, some skeptics contend that the condition cannot appropriately be called a syndrome, as a syndrome is defined as a group of symptoms

¹⁹ See *id.*

²⁰ See Miller, *White Paper*, *supra* note 11, at 258.

²¹ See Sikorski & Rodgers, *supra* note 3, at 22; Miller, *White Paper*, *supra* note 11, at 258.

²² See Miller, *White Paper*, *supra* note 11, at 258.

²³ See Sikorski & Rodgers, *supra* note 3, at 22.

²⁴ See *id.*

²⁵ See *id.*

²⁶ See J.C. Selner, *The Many Faces of Multiple Chemical Sensitivity in The Question of Multiple Chemical Sensitivity*, 24 *FUNDAMENTAL & APPLIED TOXICOLOGY* 22, 25 (1995).

²⁷ See *id.*

²⁸ See *id.*

²⁹ See Sikorski & Rodgers, *supra* note 3, at 22.

³⁰ See Miller, *White Paper*, *supra* note 11, at 258.

³¹ See Selner, *supra* note 26, at 25.

or signs typical of a disease.³² The combination of these factors has led some in the medical profession to assert that "there is no such thing as multiple chemical sensitivity."³³

Putting aside the question of whether MCS is a psychological or physiological ailment, empirical data suggests that sensitivity to chemicals is of growing concern in today's society.³⁴ One study shows that roughly one-third of the United States population reports symptoms of chemical sensitivity, characterized as considering oneself to be especially sensitive to certain odors.³⁵ Although the number of people suffering from MCS is still relatively small, increasing numbers of people may turn to MCS to explain their physical ailments.³⁶ If MCS gains wider acceptance, conditions such as depression, migraine headaches, asthma, and chronic fatigue syndrome may be linked to chemical exposures as well.³⁷ Considering the widespread use of chemicals in the United States since World War II, and the fact that many Americans spend ninety percent or more of their days indoors with restricted ventilation, chemical sensitivity and the problems that attend it should be of ever increasing concern.³⁸

III. THE AMERICANS WITH DISABILITIES ACT

In 1990 Congress enacted the Americans With Disabilities Act (ADA).³⁹ The ADA has four main goals.⁴⁰ The first goal is to enunciate strong and comprehensive guidelines to eliminate discrimination against disabled individuals.⁴¹ The second goal is to provide some clear and effective standards that address the problems caused by discrimination against the disabled.⁴² The third goal is to make sure that the federal government takes a central role in enforcing the standards set forth in the ADA.⁴³ The last stated goal of the ADA is to use the full

³² See Claudia S. Miller, *Chemical Sensitivity: Symptom, Syndrome or Mechanism for Disease*, 111 TOXICOLOGY 69, 71 (1996) [hereinafter Miller, *Chemical Sensitivity*].

³³ See Selner, *supra* note 26, at 25.

³⁴ See Miller, *Chemical Sensitivity*, *supra* note 32, at 71.

³⁵ See *id.*

³⁶ See *id.*

³⁷ See *id.* at 84.

³⁸ See *id.* at 83-84.

³⁹ See 42 U.S.C. §§ 12101-12213 (1994).

⁴⁰ See 42 U.S.C. § 12101(b) (1994).

⁴¹ See *id.*

⁴² See *id.*

⁴³ See *id.*

powers of congressional authority to address the daily discrimination faced by those with disabilities.⁴⁴

As the title of the ADA and its stated purposes indicate, Congress established it to give legal protection to a class of individuals, the disabled, who have been subject to past discrimination.⁴⁵ In its attempt to reach this goal, the ADA was created with three separate titles.⁴⁶ These titles deal with the different substantive areas in which protection is to be provided: Title I deals with employment; Title II addresses discrimination in public services; and Title III targets public accommodations and services operated by private entities.⁴⁷

A. *Title I*

This Comment focuses on Title I of the ADA.⁴⁸ Title I prohibits discrimination in the workplace against an otherwise qualified person with a disability.⁴⁹ The basic principle that guides Title I is that, as long as an individual with a disability is able to perform the essential functions of a job, he or she should not be excluded from employment opportunities because of the disability.⁵⁰

The general rule of Title I lays out the foundations for bringing a claim.⁵¹ To bring a claim under Title I of the ADA, an individual must show that he or she: 1) is qualified; 2) has a disability; 3) has been discriminated against because of the disability; 4) works for an employer covered by the ADA.⁵² The ADA is designed to eradicate discrimination in the following areas of employment: job application procedures; hiring; advancement; discharge; employee compensation; job training; and other terms, conditions and privileges of employment.⁵³

⁴⁴ *See id.*

⁴⁵ *See* 42 U.S.C. § 12101(a) (1994).

⁴⁶ *See* 42 U.S.C. §§ 12101–12213 (1994).

⁴⁷ *See id.*

⁴⁸ *See* 42 U.S.C. § 12112(a) (1994).

⁴⁹ *See id.*

⁵⁰ *See id.* Title I is somewhat of an amalgam, borrowing much of its procedural framework from Title VII of the Civil Rights Act of 1964, and much of its substantive framework from the Rehabilitation Act of 1973. *See* H.R. REP. No. 101–485(III), at 31 (1990).

⁵¹ *See* 42 U.S.C. § 12112(a) (1994).

⁵² *See id.*

⁵³ *See id.*

Title I of the ADA explains what Congress intended to be considered discrimination by employers.⁵⁴ The statute provides that discrimination includes an employer's failure to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability.⁵⁵ However, the failure to make a reasonable accommodation will not be considered discrimination if the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its business.⁵⁶

B. *Definitions*

Navigating the labyrinth of Title I of the ADA requires defining a large number of specific terms. Congress designated the Equal Employment Opportunity Commission (EEOC) as the agency responsible for the employment discrimination section of the ADA, and accordingly the EEOC has issued regulations and definitions under Title I.⁵⁷ The terms that are central to an ADA claim under Title I are: covered entity; disability; otherwise qualified individual; reasonable accommodation; and undue hardship.⁵⁸

1. Covered Entity

A covered entity means an employer, employment agency, labor organization, or joint labor management committee.⁵⁹ An employer is any person or agent of a person engaged in commerce who has fifteen or more employees for each work day in each of twenty or more calendar weeks in the current or preceding year.⁶⁰ The term employer does not pertain to the United States, a corporation wholly owned by the government of the United States, an Indian tribe, or a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of the Internal Revenue Code of 1986.⁶¹

⁵⁴ See 42 U.S.C. § 12112(b) (1994).

⁵⁵ See 42 U.S.C. § 12112(b)(5)(A).

⁵⁶ See *id.*

⁵⁷ See 42 U.S.C. § 12111(1) (1994).

⁵⁸ See 42 U.S.C. § 12112(b)(5)(A).

⁵⁹ See 29 C.F.R. § 1630.2(b) (1996).

⁶⁰ See 29 C.F.R. § 1630.2(e)(1) (1996). The definition of employer changed for the period of time between July 26, 1992 and July 25, 1994, when it was necessary for an employer to have 25 or more employees for the same amount of calendar time. See *id.*

⁶¹ See 29 C.F.R. § 1630.2(e)(2). Though not included in the scope of the ADA, the federal

2. Disability

As the ADA is designed to protect the disabled, the term "disability" is the linchpin upon which most claims are based.⁶² Disability is defined as a physical or mental impairment that substantially limits one or more of the "major life activities" of the impaired individual.⁶³ Additionally, there either must be a record of such impairment, or the disabled person must show he or she is regarded as being impaired by his or her employer.⁶⁴

A physical impairment is defined as a physiological disorder, condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory (including speech organs); cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin and endocrine.⁶⁵ A mental impairment is defined as a mental disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.⁶⁶

When an individual suffers from a physical or mental impairment, that condition still must be substantially limiting for the condition to be covered by the ADA.⁶⁷ To be limited substantially, an individual must either be unable, or be significantly restricted in his or her ability to, perform a particular major life activity.⁶⁸ Examples of major life activities are: caring for oneself; performing manual tasks; walking; seeing; hearing; speaking; breathing; learning; and working.⁶⁹ This list, however, is not meant to be comprehensive.⁷⁰ Rather, the list provides examples of the basic types of activities that the average person in the general population can perform with little or no difficulty.⁷¹ Indeed, the barometer for determining a major life activity

government's employment practices are covered by the Rehabilitation Act, which provides the same basic framework for claims as the ADA. *See* 29 U.S.C. § 701 (1994).

⁶² *See* Patrick v. Southern Co. Serv., 910 F. Supp. 566, 567 (N.D. Ala. 1996), *aff'd*, 103 F.3d 149 (11th Cir. 1996).

⁶³ *See* 29 C.F.R. § 1630.2(g) (1996).

⁶⁴ *See id.*

⁶⁵ *See* 29 C.F.R. § 1630.2(h)(1) (1996).

⁶⁶ *See* 29 C.F.R. § 1630.2(h)(2).

⁶⁷ *See* 42 U.S.C. § 12102(2) (1994).

⁶⁸ *See* 29 C.F.R. § 1630.2(j)(1) (1996).

⁶⁹ *See* 29 C.F.R. § 1630.2(h)(2).

⁷⁰ *See* 29 C.F.R. § 1630.2(i) (1996).

⁷¹ *See id.*

is whether an average person can perform the activity with little or no difficulty.⁷²

The EEOC provides several factors that courts can use to determine whether an individual is substantially limited in a major life activity.⁷³ These factors include: the nature and severity of the impairment; the duration (or expected duration) of the impairment; and the permanent or long term impact resulting from the impairment.⁷⁴

The EEOC provides a more specific definition of what it means to be substantially limited in the major life activity of working.⁷⁵ To be substantially limited in the activity of working, an individual must be significantly restricted from performing either a class of jobs or a broad range of jobs in various classes.⁷⁶ The EEOC guidelines specifically state that being unable to perform a single, particular job in and of itself does not constitute a substantial limitation.⁷⁷ The EEOC also lists factors specific to the major life activity of working.⁷⁸ These specific factors are: the geographical area to which the person has reasonable access; the number of similar jobs (those utilizing similar training, skill, knowledge or abilities) within the geographical area which the individual is also disqualified from because of the impairment; and other dissimilar jobs in the geographical area which the individual is disqualified from due to the impairment.⁷⁹

3. Otherwise Qualified Individual

Under the ADA an individual must have the requisite skill, experience, education, and other job-related requirements of the employment position to be considered a "qualified individual."⁸⁰ In addition to these prerequisites, the individual also must be able to perform the "essential functions" of the position.⁸¹ For a disabled individual to be considered qualified, he or she must be able to perform the essential

⁷² See *id.*

⁷³ See 29 C.F.R. § 1630.2(j)(2).

⁷⁴ See *id.*

⁷⁵ See 29 C.F.R. § 1630.2(j)(3) (1996).

⁷⁶ See 29 C.F.R. § 1630.2(j)(3)(i).

⁷⁷ See *id.*

⁷⁸ See 29 C.F.R. § 1630.2(j)(3)(ii).

⁷⁹ See *id.*

⁸⁰ See 29 C.F.R. § 1630.2(m) (1996).

⁸¹ See *id.*

functions of the job once his or her handicap has been "reasonably accommodated."⁸²

The essential functions of a position are defined as the fundamental job duties of the employment position.⁸³ In determining if a particular job function is essential, the following factors should be considered: whether the position exists because of the function; whether a limited number of employees exist among whom the function can be distributed; or whether the function is so highly specialized that the person was hired for it because of expertise in performing the function.⁸⁴ Evidence as to whether the job function is essential includes: the employer's judgment; written job descriptions made prior to interviewing/hiring; the amount of time spent on the function; the consequences of not requiring the person to perform the function; terms in collective bargaining agreements; work experience of past employees in the position; and the work experience of current employees in analogous positions.⁸⁵

4. Reasonable Accommodation

Defining the term "reasonable accommodation" is essential not only because it factors into the determination of whether someone has been discriminated against, but also because it helps to determine if an individual is qualified for the position in the first place.⁸⁶ The term reasonable accommodation means modifications or adjustments made by an employer that enable an otherwise qualified individual with a disability to be considered for the position, perform the essential functions of the position, or enjoy the privileges and benefits that other similarly situated employees enjoy.⁸⁷ Reasonable accommodations may include, but are not limited to: making existing facilities accessible to and usable by individuals with disabilities; job restructuring; modification of work schedules; acquisition or modification of equipment; adjustment of examinations and training materials; and providing qualified readers or interpreters.⁸⁸ Determining the appropriate reasonable accommodation involves an interactive process be-

⁸² See *id.*

⁸³ See 29 C.F.R. § 1630.2(n)(1) (1996).

⁸⁴ See 29 C.F.R. § 1630.2(n)(2).

⁸⁵ See 29 C.F.R. § 1630.2(n)(3).

⁸⁶ See 42 U.S.C. § 12112(b)(5)(A) (1994); 29 C.F.R. § 1630.2(m) (1996).

⁸⁷ See 29 C.F.R. § 1630.2(o)(1) (1996).

⁸⁸ See 29 C.F.R. § 1630.2(o)(2).

tween the employer and employee.⁸⁹ Together the employer and employee must identify the precise limitations that the disability presents and suggest potential reasonable accommodations to overcome those limitations.⁹⁰

5. Undue Hardship

Even if there is an accommodation that can be made for the individual, the accommodation must not create an "undue hardship" for the employer.⁹¹ An undue hardship is defined as something which imposes significant difficulty or expense upon the employer when considered in light of five factors.⁹² The first factor includes the nature and net cost of the proposed accommodations.⁹³ The second factor encompasses the overall financial resources of the employer, the number of employees at the employer's facilities, and the effects of the accommodation on expenses and resources.⁹⁴ The third factor includes the overall size, financial resources, number, type and location of facilities of the covered entity.⁹⁵ The fourth factor is the type of operation which the covered entity runs.⁹⁶ The last factor is the impact which the accommodation will have both upon the operation of the facility and the ability of the other employees to do their jobs.⁹⁷

IV. CASES BROUGHT UNDER THE ADA BY EMPLOYEES WITH MCS

Few cases have been brought under the ADA by individuals suffering from MCS.⁹⁸ Those MCS sufferers who have brought claims have had very limited success.⁹⁹ Due to the myriad of requisite elements under the ADA, MCS claims have failed for a variety of rea-

⁸⁹ See 29 C.F.R. § 1630.2(o)(3).

⁹⁰ See *id.*

⁹¹ See 42 U.S.C. § 12112(b)(5)(A) (1994).

⁹² See 29 C.F.R. § 1630.2(p)(1) (1996).

⁹³ See 29 C.F.R. § 1630.2(p)(2).

⁹⁴ See *id.*

⁹⁵ See *id.*

⁹⁶ See *id.*

⁹⁷ See *id.*

⁹⁸ See *Frank v. New York*, 972 F. Supp. 130, 131 (N.D.N.Y. 1997); *Treadwell v. Dow-United Techs.*, 970 F. Supp. 974, 975 (M.D. Ala. 1997); *Patrick v. Southern Co. Serv.*, 910 F. Supp. 566, 567 (N.D. Ala. 1996), *aff'd*, 103 F.3d 149 (11th Cir. 1996); *Whillock v. Delta Air Lines, Inc.*, 926 F. Supp. 1555, 1556 (N.D. Ga. 1995), *aff'd*, 86 F.3d 1171 (11th Cir. 1996).

⁹⁹ See *Frank*, 972 F. Supp. at 131; *Treadwell*, 970 F. Supp. at 975; *Patrick*, 910 F. Supp. at 567; *Whillock*, 926 F. Supp. at 1556.

sons.¹⁰⁰ As a result, no ADA claim by an MCS sufferer to date has survived a defendant's summary judgment motion.¹⁰¹

Any person bringing a claim under the ADA initially must show that he or she suffers from a disability.¹⁰² On an evidentiary level, this requirement has been difficult for MCS sufferers to prove, in part because of the skepticism which some courts have expressed toward the condition and its proponents.¹⁰³ The United States District Courts of both the Northern District of New York and the Middle District of Alabama have granted defendants' motions in limine seeking to exclude plaintiffs' expert testimony relating to MCS.¹⁰⁴ These courts have held that "testimony regarding MCS, the treatment of MCS, and diagnoses and treatment modalities grounded in clinical ecology are lacking in scientific reliability and, therefore, must be ruled inadmissible."¹⁰⁵ These courts have refused to allow expert testimony regarding MCS because it lacks scientific reliability, thereby failing to meet the standards for expert opinion testimony established by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*¹⁰⁶ These courts have pointed to the lack of general acceptance of MCS within the medical community and the absence of objective data as factors leading to their determination that MCS is not scientifically reliable.¹⁰⁷ In these cases, the plaintiffs have been forced to eschew expert testimony regarding MCS, and instead have had to rely upon separate medical testimony that they are sensitive or allergic to particular agents, that these agents are present in the workplace, and that these agents are the cause of their adverse physical reactions.¹⁰⁸

In addition to evidentiary issues, plaintiffs with MCS have had further difficulty proving that their condition constitutes a disabil-

¹⁰⁰ See *Frank*, 972 F. Supp. at 131; *Treadwell*, 970 F. Supp. at 975; *Patrick*, 910 F. Supp. at 567; *Whillock*, 926 F. Supp. at 1556.

¹⁰¹ See *Frank*, 972 F. Supp. at 131; *Treadwell*, 970 F. Supp. at 975; *Patrick*, 910 F. Supp. at 567; *Whillock*, 926 F. Supp. at 1556.

¹⁰² See 42 U.S.C. § 12112(a) (1994).

¹⁰³ See *Frank*, 972 F. Supp. at 137; *Treadwell*, 970 F. Supp. at 983.

¹⁰⁴ See *Frank*, 972 F. Supp. at 137; *Treadwell*, 970 F. Supp. at 983.

¹⁰⁵ *Treadwell*, 970 F. Supp. at 984.

¹⁰⁶ See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592-95 (1993). The Supreme Court in *Daubert* set out the following factors in assessing whether to admit scientific evidence by expert testimony: (1) whether the scientific theory can be and has been tested; (2) the extent to which the theory has been subject to peer review and publication; (3) the known or potential rate of error of any scientific technique at issue; and (4) whether the theory is generally accepted within the relevant scientific community. *Id.*

¹⁰⁷ See *Frank*, 972 F. Supp. at 134; *Treadwell*, 970 F. Supp. at 982.

¹⁰⁸ See *Treadwell*, 970 F. Supp. at 984.

ity.¹⁰⁹ For example, in *Patrick v. Southern Co. Services*, the United States District Court for the District of Alabama found that the plaintiff, who suffered from MCS, failed to establish that she was disabled within the ADA's definition of the term.¹¹⁰ The plaintiff in *Patrick* claimed that because she suffered from MCS she was unable to work in the office building where defendant had stationed her, and requested that the defendant accommodate her by transferring her to another building.¹¹¹ In assessing her claim, the court did not discuss whether MCS is an accepted medical condition, but instead looked to the ADA for the definition of the term disability.¹¹² Under this analysis, the court concentrated its attention on whether the plaintiff's suffering from MCS substantially limited her in the major life activity of working.¹¹³

In determining whether the plaintiff was substantially limited in her ability to work, the *Patrick* court explicitly made clear that to be substantially limited the plaintiff must show more than an inability to perform her particular job.¹¹⁴ Rather, the plaintiff must show that her impairment disqualifies her from a class of jobs or a broad range of jobs in various classes.¹¹⁵ If the plaintiff can establish her disqualification from a class of jobs, the court noted, she shows that her impairment truly hampers her ability to participate in an activity that the rest of society is able to perform.¹¹⁶

Having established these guidelines for the determination of whether the plaintiff can be classified as disabled under the ADA, the court determined that the plaintiff failed to present substantial evidence to show that MCS had disqualified her from a class of jobs or broad range of jobs.¹¹⁷ The court relied in part on the plaintiff's claim that she could have been accommodated by working in a different building for the same employer.¹¹⁸ Because the plaintiff only alleged that MCS prevented her from working in a particular building, the

¹⁰⁹ See *Patrick v. Southern Co. Serv.*, 910 F. Supp. 566, 567 (N.D. Ala. 1996), *aff'd*, 103 F.3d 149 (11th Cir. 1996).

¹¹⁰ See *id.* at 571.

¹¹¹ See *id.* at 570.

¹¹² See *id.*

¹¹³ See *id.*

¹¹⁴ See *Patrick*, 910 F. Supp. at 569.

¹¹⁵ See *id.*

¹¹⁶ See *id.* at 570-71.

¹¹⁷ See *id.* at 571.

¹¹⁸ See *id.* at 570.

court concluded that she was not substantially limited in the major life activity of working.¹¹⁹

In contrast to the rigid definition of disabled used in *Patrick*, other courts have been more willing to find that people suffering from MCS are disabled.¹²⁰ However, these courts have placed another hurdle in front of plaintiffs suffering from MCS by focusing on the ADA definitions of qualified individual and reasonable accommodations.¹²¹ In *Whillock v. Delta Air Lines, Inc.*, the United States District Court for the District of Georgia found that the plaintiff suffering from MCS presented a triable issue as to whether she suffered from a disability as defined by the ADA.¹²² Despite this concession, the plaintiff's ADA claim failed because the only accommodation she would accept the court judged to be unreasonable as a matter of law.¹²³

In *Whillock*, the plaintiff had held a variety of positions with Delta Airlines over a twenty-five year period, the last being reservation sales agent.¹²⁴ While on the job as a sales agent the plaintiff experienced an acute exposure to a disinfectant used by a co-worker on her workspace.¹²⁵ This exposure led the plaintiff to develop what was subsequently diagnosed as MCS.¹²⁶ After experiencing numerous difficulties from her condition, both at work and in other daily activities, the plaintiff and her doctor concluded that the only accommodation that would allow her to continue to perform her job would be to work from her home.¹²⁷ In discussing the plaintiff's claim that she should be classified as disabled under the ADA, the court noted that her hypersensitivity to chemicals and chemical odors severely impaired her normal breathing.¹²⁸ The court found that this impairment could be considered a substantial limitation on a major life activity.¹²⁹ On the basis of this evaluation, the court found that there was sufficient evidence for a jury to find that the plaintiff had a disability.¹³⁰ Thus,

¹¹⁹ See *Patrick*, 910 F. Supp. at 571.

¹²⁰ See *Whillock v. Delta Air Lines, Inc.*, 926 F. Supp. 1555, 1563 (N.D. Ga. 1995), *aff'd*, 86 F.3d 1171 (11th Cir. 1996).

¹²¹ See *id.*

¹²² See *id.* at 1565.

¹²³ See *id.*

¹²⁴ See *id.* at 1557.

¹²⁵ See *Whillock*, 926 F. Supp. at 1557.

¹²⁶ See *id.* at 1558.

¹²⁷ See *id.* at 1561.

¹²⁸ See *id.* at 1562.

¹²⁹ See *id.*

¹³⁰ See *Whillock*, 926 F. Supp. at 1563.

the court demonstrated that MCS can in fact constitute a disability as it is defined in the ADA.¹³¹

After addressing the question of disability, the court proceeded to analyze whether the plaintiff met the other requirements necessary to bring an ADA claim.¹³² The court focused on the second requirement in Title I, that the plaintiff be otherwise qualified for the job.¹³³ To be considered qualified, the court noted that the plaintiff must show that she could perform the essential functions of her job with a reasonable accommodation.¹³⁴ The plaintiff in *Whillock* contended that she was unable to perform her job duties anywhere but in her home.¹³⁵ Because of this, the court's analysis focused on whether her requested accommodation of working at home was reasonable as defined by the ADA.¹³⁶

In its analysis, the court noted that in order for the plaintiff to be qualified she must be able to perform the essential functions of the job.¹³⁷ The court then stated that it is the employer who determines the essential functions of the job.¹³⁸ The court found that the plaintiff's position was one in which the employer required in-person interaction, both with customers and with other employees.¹³⁹ Because regular attendance was an essential function of the plaintiff's job, and she was unable to attend work regularly, the plaintiff was unable to perform the essential functions of the job.¹⁴⁰ Because the accommodation would eliminate an essential function of the job, the court reasoned that the plaintiff could not be defined as a "qualified" individual.¹⁴¹ Once the plaintiff was deemed unqualified, she was no longer under the protective umbrella of the ADA.¹⁴²

¹³¹ *See id.* at 1563. The court notes that the ADA mandates a case-by-case determination of whether a plaintiff's condition is so severe as to substantially limit a major life activity. *See id.* (citing *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723 (5th. Cir. 1995)). Because of this principle, there can be no per se definition of MCS, or presumably any other impairment, as being something which would constitute an ADA defined disability. *See id.*

¹³² *See id.*

¹³³ *See id.*

¹³⁴ *See id.*

¹³⁵ *See Whillock*, 926 F. Supp. at 1563.

¹³⁶ *See id.*

¹³⁷ *See id.*

¹³⁸ *See id.*

¹³⁹ *See id.* at 1564.

¹⁴⁰ *See Whillock*, 926 F. Supp. at 1565.

¹⁴¹ *See id.*

¹⁴² *See id.*

The court in *Whillock* went further, though, and addressed whether the proposed accommodation could be considered "reasonable."¹⁴³ Although the court recognized that there may be some forms of employment in which working at home was a reasonable accommodation, in this case, such an accommodation could be classified as unreasonable as a matter of law.¹⁴⁴ The court based this conclusion on the notion that the plaintiff's position required teamwork and supervision, two elements which could not exist if the employee was working at home.¹⁴⁵ Because of these considerations, the quality and productivity of the employee would necessarily drop if she worked at home, thereby making the accommodation unreasonable.¹⁴⁶

V. SIMILAR CLAIMS BROUGHT UNDER THE ADA AND REHABILITATION ACT

Courts considering what constitutes a disability under the ADA have provided helpful guidance for employees suffering from MCS who are bringing claims.¹⁴⁷ Instead of determining whether the plaintiff is impaired in the major life activity of working, some courts have focused on restricted breathing capabilities, finding that plaintiffs with such problems may be considered disabled under the ADA.¹⁴⁸ To date courts have been willing to accept that medical conditions which adversely affect breathing can be disabilities.¹⁴⁹ In *Homeyer v. Stanley Tulchin Associates, Inc.*, the United States Court of Appeals for the Seventh Circuit found that the plaintiff's breathing difficulties, which were aggravated by cigarette smoke, qualified her as disabled under the ADA.¹⁵⁰ In *Homeyer*, the plaintiff was a typist who had worked in the defendant's office for two years.¹⁵¹ The plaintiff suffered from chronic severe allergic rhinitis and sinusitis which impaired her ability to breathe, and this difficulty was heightened by co-workers'

¹⁴³ See *id.*

¹⁴⁴ See *id.* at 1566.

¹⁴⁵ See *Whillock*, 926 F. Supp. at 1566.

¹⁴⁶ See *id.*

¹⁴⁷ See *Homeyer v. Stanley Tulchin Assoc., Inc.*, 91 F.3d 959, 962 (7th Cir. 1996); *Whillock*, 926 F. Supp. at 1562.

¹⁴⁸ See *Homeyer*, 91 F.3d at 962; *Whillock*, 926 F. Supp. at 1567.

¹⁴⁹ See *Homeyer*, 91 F.3d at 962; *Whillock*, 926 F. Supp. at 1562; *Harmer v. Virginia Elec. & Power Co.*, 831 F. Supp. 1300, 1306 (E.D. Va. 1993); *Vickers v. Veterans Admin.*, 549 F. Supp. 85, 89 (W.D. Wa. 1982).

¹⁵⁰ See *Homeyer*, 91 F.3d at 962.

¹⁵¹ See *id.* at 960.

tobacco smoke which she encountered in the office.¹⁵² When she informed her employers of her disability and asked them to accommodate her she was told that no accommodation would be made, and that she should seek employment elsewhere.¹⁵³

The defendant in *Homeyer* argued that the plaintiff was not disabled as defined by the ADA because she could find similar employment in a smoke-free environment with another employer.¹⁵⁴ Because of the availability of other employment, the defendant reasoned, the plaintiff was not disqualified from a class or broad range of jobs, and therefore not substantially impaired in her ability to work.¹⁵⁵ Although the United States District Court for the Northern District of Illinois agreed with the defendant and granted its motion to dismiss, the United States Court of Appeals for the Seventh Circuit disagreed, reversing the decision and remanding the case.¹⁵⁶ The Court of Appeals agreed with the District Court that in an ADA claim where the disability is classified as an impairment to work the plaintiff must show that he or she is substantially limited in the general ability to work, and not that the individual cannot work at one particular job.¹⁵⁷ However, the Court of Appeals went on to say that granting the motion to dismiss was inappropriate because the plaintiff's breathing difficulties properly could be regarded as a disability under the ADA.¹⁵⁸ The Court of Appeals found that even if the plaintiff was able to find other comparable jobs in the area, a trier of fact could determine that the plaintiff's breathing difficulties qualified her as disabled within the meaning of the ADA.¹⁵⁹ Because the plaintiff's condition could be considered a disability, the case was then remanded to determine if the defendant had failed to provide a reasonable accommodation.¹⁶⁰

Courts have provided some clues to the types of accommodations they would consider reasonable for an employee with a breathing disability.¹⁶¹ Courts have made it clear that no accommodations are

¹⁵² *See id.*

¹⁵³ *See id.*

¹⁵⁴ *See id.* at 962.

¹⁵⁵ *See Homeyer*, 91 F.3d at 961.

¹⁵⁶ *See id.* at 963.

¹⁵⁷ *See id.* at 961.

¹⁵⁸ *See id.* at 962.

¹⁵⁹ *See id.*

¹⁶⁰ *See Homeyer*, 91 F.3d at 963.

¹⁶¹ *See Harmer v. Virginia Elec. & Power*, 831 F. Supp. 1300, 1306 (E.D. Va. 1993); *Vickers v. Veterans Admin.*, 549 F. Supp. 85, 89 (W.D. Wa. 1982).

per se reasonable, or per se unreasonable, insisting that the determination can only be made on a case by case basis.¹⁶² Yet some courts have deemed specific accommodations made by employers reasonable, thus indicating what future plaintiffs might have the right to expect under Title I of the ADA.¹⁶³

Of the specific accommodations that have been judged reasonable, those made by employers for employees with breathing disabilities are potentially the most applicable to MCS sufferers.¹⁶⁴ These examples can be found in cases brought under both the ADA and the Rehabilitation Act.¹⁶⁵

In *Vickers v. Veterans Administration*, the United States District Court for the Western District of Washington found that the accommodations which the defendant had made for the plaintiff were reasonable as defined by the Rehabilitation Act, and that they were not required by law to provide the specific accommodation the plaintiff sought.¹⁶⁶ In *Vickers* the plaintiff, who worked in the purchasing and contracts section at the Veterans Administration, was hypersensitive to cigarette smoke.¹⁶⁷ To accommodate the plaintiff's hypersensitivity the defendant provided a number of accommodations.¹⁶⁸ These accommodations included: physically separating the desks of smokers and non-smokers; convincing the other workers in the plaintiff's room to agree to not smoke; encouraging workers in rooms adjacent to the plaintiff's to agree not to smoke; installing vents in rooms where smoking did take place; installing an air purifier in the office of one smoker; offering to create a partition around the plaintiff's desk; giving plaintiff a chance to move his desk next to a window; and offering plaintiff an outside maintenance job.¹⁶⁹ Despite these accommodations, the plaintiff insisted that he was entitled to work in an environment wholly free of tobacco smoke.¹⁷⁰ The court disagreed

¹⁶² See *Buckingham v. U.S.*, 998 F.2d 735, 740 (9th Cir. 1993); *Vickers*, 549 F. Supp. at 89.

¹⁶³ See *Van Zande v. Wisconsin Dept. of Admin.*, 44 F.3d 538, 544 (7th Cir. 1995); *Harmer*, 831 F. Supp. at 1306; *Vickers*, 549 F. Supp. at 89.

¹⁶⁴ See *Harmer*, 831 F. Supp. at 1306; *Vickers*, 549 F. Supp. at 89.

¹⁶⁵ See *Harmer*, 831 F. Supp. at 1306; *Vickers*, 549 F. Supp. at 89. The courts view the ADA as extending the regulations placed upon the federal government to private employers. Thus, courts have often looked to cases decided under the Rehabilitation Act in determining whether requirements such as that of reasonable accommodation have been met under the ADA. See *Van Zande*, 44 F.3d at 542.

¹⁶⁶ See *Vickers*, 549 F. Supp. at 89.

¹⁶⁷ See *id.* at 87.

¹⁶⁸ See *id.* at 88.

¹⁶⁹ See *id.*

¹⁷⁰ See *id.* at 86.

with the plaintiff, finding that the defendant had reasonably accommodated the plaintiff's condition.¹⁷¹ The court noted that the defendant was in a position where it had to balance the rights both of those who smoked and those who were affected adversely by cigarette smoke.¹⁷² Because no statute or state regulation forbade smoking in government offices, the defendant had to pursue a policy which would not infringe upon the rights of smokers.¹⁷³ In light of this, the court found that the defendant's accommodations were reasonable, and that the measures taken served as an appropriate balance between the competing interests.¹⁷⁴

In *Harmer v. Virginia Electric and Power Co.*, the United States District Court for the Eastern District of Virginia found that the defendant's accommodations of the plaintiff's bronchial asthma were reasonable as required by the ADA.¹⁷⁵ The plaintiff had worked for the defendant for twelve years, the last six having served as a buyer in the defendant's purchasing department.¹⁷⁶ The plaintiff's bronchial asthma severely restricted his breathing ability, his ability to care for himself, and his ability to walk.¹⁷⁷ The plaintiff's doctor felt that the plaintiff's exposure to tobacco smoke at the workplace served as a major aggravant to his condition.¹⁷⁸ As a result of his doctor's advice, the plaintiff and several other co-workers requested a ban on smoking on the floor that they worked on.¹⁷⁹ The defendant refused to institute such a ban, and instead provided other accommodations to the plaintiff's condition.¹⁸⁰ These accommodations included: providing employees with fans; providing employees with smokeless ashtrays and air purifiers; rearranging the office to create more space between smokers and non-smokers; prohibiting smoking in rest rooms, conference rooms and hallways; and restricting smoking to the smoker's cubicle.¹⁸¹

The court in *Harmer* found that the accommodations provided by the defendant met the reasonableness standard of the ADA because

¹⁷¹ See *Vickers*, 549 F. Supp. at 89.

¹⁷² See *id.*

¹⁷³ See *id.*

¹⁷⁴ See *id.*

¹⁷⁵ See *Harmer v. Virginia Elec. & Power Co.*, 831 F. Supp. 1300, 1307 (E.D. Va. 1993).

¹⁷⁶ See *id.* at 1302.

¹⁷⁷ See *id.* at 1303.

¹⁷⁸ See *id.*

¹⁷⁹ See *id.*

¹⁸⁰ See *Harmer*, 831 F. Supp. at 1303-04.

¹⁸¹ See *id.*

they allowed the plaintiff to perform the essential functions of his job.¹⁸² The court found that the evidence, which included performance evaluation reports made by the defendant, showed that the plaintiff had been able to meet his job requirements.¹⁸³ The court reasoned that since the plaintiff was able to successfully perform his job requirements, the accommodations which the defendant made must have been reasonable.¹⁸⁴ Further, because the accommodations were reasonable the ADA did not require the defendant to provide the smoking ban the plaintiff had asked for.¹⁸⁵ The court viewed the plaintiff's request for a smoking ban as an "absolute accommodation," rather than as a reasonable one, and found that the ADA does not mandate such a standard.¹⁸⁶

VI. STRATEGIES FOR EMPLOYEES WITH MCS PURSUING ADA CLAIMS

As the case law indicates, employees who suffer from MCS face two basic hurdles in claims brought under Title I of the ADA: (1) showing that they are disabled; and (2) showing that the accommodation they requested is reasonable.¹⁸⁷ The disability prong may be satisfied based upon principles already espoused by the courts.¹⁸⁸ Similarly, the courts have provided a good sampling of accommodations which they have found to be both reasonable and unreasonable.¹⁸⁹ Drawing upon past decisions, it should become easier for employees suffering from MCS to prove they are disabled as defined by the ADA, making them eligible for a reasonable accommodation.¹⁹⁰ Further, past decisions should illuminate what a disabled employee with MCS can and cannot expect from an employer in terms of a judicially defined reasonable accommodation.¹⁹¹

¹⁸² See *id.* at 1306.

¹⁸³ See *id.*

¹⁸⁴ See *id.*

¹⁸⁵ See *Harmer*, 831 F. Supp. at 1306.

¹⁸⁶ See *id.*

¹⁸⁷ See *Patrick v. Southern Co. Serv.*, 910 F. Supp. 566, 570 (N.D. Ala. 1996), *aff'd*, 103 F.3d 149 (11th Cir. 1996); *Whillock v. Delta Air Lines, Inc.*, 926 F. Supp. 1555, 1565 (N.D. Ga. 1995), *aff'd*, 86 F.3d 1171 (11th Cir. 1996).

¹⁸⁸ See *Homeyer v. Stanley Tulchin Assoc., Inc.*, 91 F.3d 959, 962 (7th Cir. 1996); *Whillock*, 926 F. Supp. at 1562.

¹⁸⁹ See *Van Zande v. Wisconsin Dept. of Admin.*, 44 F.3d 538, 545 (7th Cir. 1995); *Harmer*, 831 F. Supp. at 1303; *Vickers v. Veterans Admin.*, 549 F. Supp. 85, 88 (W.D. Wa. 1982).

¹⁹⁰ See *Van Zande*, 44 F.3d at 545; *Harmer*, 831 F. Supp. at 1303; *Vickers*, 549 F. Supp. at 88.

¹⁹¹ See *Van Zande*, 44 F.3d at 545; *Harmer*, 831 F. Supp. at 1303; *Vickers*, 549 F. Supp. at 88.

Based upon the successes of employees disabled by the presence of cigarette smoke in the workplace, employees who suffer from MCS should present themselves as having a disability based upon their impaired ability to breathe, and not upon an impaired ability to work.¹⁹² When an individual claims a disability has impaired his or her ability to work, courts have made the plaintiff show that he or she is unable to perform a wide variety of jobs.¹⁹³ This has proven to be an exacting standard, and one which plaintiffs may have significant difficulty meeting.¹⁹⁴

Courts have recognized that breathing disorders, which MCS could qualify as being, can constitute a disability as defined under the ADA.¹⁹⁵ By focusing on an inability to breathe properly in the presence of odors found in the workplace, a plaintiff with MCS can claim that he or she is disabled in the same way that someone with a breathing disorder is when confronted with cigarette smoke.¹⁹⁶ By framing MCS properly as a condition which substantially limits the major life activity of breathing, a plaintiff with MCS can pass the critical initial barrier to an ADA claim.¹⁹⁷

Once an employee with MCS can be classified as disabled under the ADA, the question then becomes what types of accommodations the ADA will require the employer to provide.¹⁹⁸ Historically, courts have classified a requested accommodation of working at home as unreasonable.¹⁹⁹ Courts have reasoned that such an accommodation, in the vast majority of jobs, greatly reduces the employees' productivity, making the accommodation unreasonable as a matter of law.²⁰⁰ Accord-

¹⁹² See *Homeyer*, 91 F.3d at 961. If the plaintiff is unable to introduce testimony regarding MCS, he or she should instead focus on obtaining medical testimony regarding breathing difficulties and allergies to specific substances. See *id.* In this instance, the plaintiff would then have to show that these substances are present in the workplace, and exist at a level which would trigger his or her breathing difficulties. See *Frank v. New York*, 972 F. Supp. 130, 131 (N.D.N.Y. 1997); *Treadwell v. Dow-United Techs.*, 970 F. Supp. 974, 975 (M.D. Ala. 1997).

¹⁹³ See *Homeyer*, 91 F.3d at 961; *Patrick v. Southern Co. Serv.*, 910 F. Supp. 566, 570-71 (N.D. Ala. 1996), *aff'd*, 103 F.3d 149 (11th Cir. 1996).

¹⁹⁴ See *id.*

¹⁹⁵ See *Homeyer*, 91 F.3d at 961; *Whillock*, 926 F. Supp. at 1562.

¹⁹⁶ See *id.*

¹⁹⁷ See 29 C.F.R. § 1630.2(g) (1996). This step is critical because without it a plaintiff cannot place himself or herself in a position where an employer will be mandated by law to make a reasonable accommodation. See *Homeyer*, 91 F.3d at 961; *Whillock*, 926 F. Supp. at 1562.

¹⁹⁸ See 42 U.S.C. § 12112(b)(5)(A) (1994).

¹⁹⁹ See *Van Zande v. Wisconsin Dept. of Admin.*, 44 F.3d 538, 545 (7th Cir. 1995); *Whillock*, 926 F. Supp. at 1565.

²⁰⁰ See *Van Zande*, 44 F.3d at 545; *Whillock*, 926 F. Supp. at 1565.

ing to the majority view, "it would take a very extraordinary case for the employee to be able to create a triable issue of the employer's failure to allow the employee to work at home."²⁰¹ Considering this standard, most if not all employees with MCS would have great difficulty finding a court which would allow their request for an accommodation of working at home to get past summary judgment.²⁰²

There do seem to be some accommodations that courts deem as reasonable under the ADA which may help an employee suffering from MCS to function in the workplace.²⁰³ The accommodations that might be most helpful for those suffering from MCS are those made by employers for employees with impaired breathing abilities who had difficulty with cigarette smoke.²⁰⁴ These accommodations tend to focus on creating an environment where the offending odors are minimized or isolated from the disabled employee's workspace.²⁰⁵ These accommodations have included: restructuring the seating arrangements in an office; providing air purifiers; creating partitions; and getting co-employees to agree to minimize offending odors.²⁰⁶ In severe cases of MCS, such modifications might not provide enough of a sanctuary for an afflicted individual to remain on the job. However, these types of modifications to the work environment may in some cases allow sufferers of MCS to be able to continue to work.

VII. CONCLUSION

Those afflicted with MCS have a difficult time maintaining normal lives in today's society.²⁰⁷ For these people, the workplace can present a contaminated environment that precludes them from effectively performing their jobs.²⁰⁸ The ADA has the potential to serve as a source of legal recourse for those with MCS trying to find an environment in which they can work.²⁰⁹ By claiming that they are disabled because of the difficulty they have breathing, MCS sufferers can

²⁰¹ See *Van Zande*, 44 F.3d at 545.

²⁰² See *Whillock*, 926 F. Supp. at 1565.

²⁰³ See *Harmer v. Virginia Elec. & Power Co.*, 831 F. Supp. 1300, 1306 (E.D. Va. 1993); *Vickers v. Veterans Admin.*, 549 F. Supp. 85, 89 (W.D. Wa. 1982).

²⁰⁴ See *Harmer*, 831 F. Supp. at 1306; *Vickers*, 549 F. Supp. at 89.

²⁰⁵ See *Harmer*, 831 F. Supp. at 1306; *Vickers*, 549 F. Supp. at 89.

²⁰⁶ See *Harmer*, 831 F. Supp. at 1306; *Vickers*, 549 F. Supp. at 89.

²⁰⁷ See *Miller*, *White Paper*, *supra* note 11, at 253.

²⁰⁸ See *Miller*, *Chemical Sensitivity*, *supra* note 32, at 71.

²⁰⁹ See *Harmer*, 831 F. Supp. at 1306; *Vickers*, 549 F. Supp. at 89.

qualify for ADA protection.²¹⁰ Once an MCS sufferer is recognized as being disabled under the ADA, he or she is entitled to a reasonable accommodation of his or her disability.²¹¹ Though judicial determination of what constitutes a reasonable accommodation is highly fact-specific, courts in the past have found accommodations such as air purifiers, restructuring seating arrangements, and creation of partitions reasonable as a matter of law.²¹² These accommodations may help MCS sufferers, and may be within their legal right to receive.

²¹⁰ See *Homeyer v. Stanley Tulchin Assoc., Inc.*, 91 F.3d 959, 961 (7th Cir. 1996).

²¹¹ See 42 U.S.C. § 12112(b)(5)(A) (1994).

²¹² See *Harmer*, 831 F. Supp. at 1306; *Vickers*, 549 F. Supp. at 89.