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AWAKENING TO THE ADA: SLEEP DISORDERS FROM THE PERSPECTIVE OF TITLE I OF THE AMERICANS WITH DISABILITIES ACT

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ABSTRACT

The January 1993 Report to Congress by the National Commission on Sleep Disorders Research found sleep disorders to be a serious and growing health and economic crisis requiring major action. Individuals afflicted with sleep disorders have legal rights, including rights in the workplace under Title I of the Americans with Disabilities Act (ADA). As the health care and business communities address sleep disorders from public health and productivity perspectives, others must address the employment rights of individuals afflicted with sleep disorders. This article analyzes sleep disorders in individuals from the perspective of the ADA. Because the historical evolution of the legal and social rights of individuals having epilepsy provides interesting precedents for dealing with sleep and sleep disorders, this article also traces this process.

An estimated forty million Americans suffer from chronic sleep disorders and an additional twenty to thirty million Americans experience intermittent sleep-related problems [1, pp. vi and 17], but scientific knowledge concerning human sleep is quite limited [1, p. vi; 2; 3]. The National Commission on Sleep Disorders Research (hereinafter sometimes referred to as "the Commission"), established by Congress in 1988 [4], has reported that "America is seriously sleep deprived with disastrous consequences" [1, p. 22]. The Commission found sleep disorders impose on America a "[h]igh cost in dollars, lives and human suffering," estimating the direct costs of sleep disorders and sleep deprivation for 1990 to exceed $15 billion [1, pp. 24 and 45-46]. Insufficient data existed for meaningful estimation of indirect costs, though the economic impact of such costs is likely

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substantial [1, p. 46]. American society "fails to recognize and to attend effectively to sleep-related issues," although such issues are most pervasive [1, p. vi].

Though the Commission most certainly has been mindful of the legal implications of sleep disorders, its objective and intent has been to address sleep disorders from a public health and scientific vantage point. The overwhelming majority of members and staff of the National Commission on Sleep Disorders Research are individuals having strong and impressive medical and scientific backgrounds, including a disproportionate number of individuals connected with the National Institutes of Health [1, pp. xi-xiii]. The Commission's report addresses sleep disorders in the workplace from a productivity and safety perspective [1, pp. 45-47], and not necessarily a legal one. The Commission also concerned itself with the health care system's inefficiencies resulting from adequate sleep knowledge and policy [1, pp. 67-74].

There are perspectives to sleep disorders the Commission did not explore, including the legal rights of individuals afflicted with sleep disorders. This article analyzes sleep disorders in individuals from the perspective of the Americans with Disabilities Act (ADA) [5].

SLEEP DISORDERS

Though the functions of sleep are not all that well understood, sleep obviously plays a key role in the human body's physical and mental repair and maintenance processes [6]. Human sleep consists of two major phases, Rapid Eye Movement (REM) and Non-Rapid Eye Movement (NREM) [7-8]. Dreams occur during REM sleep [3, 7, 8]. Sleep in general, and the REM stage of sleep in particular, is vital to the function of the human brain [9-13]. There is indeed a scientific basis for the Shakespearian line "To sleep: Perchance to dream" [14].[1]

A broad range of clinical manifestations are classified as sleep and arousal disorders [3; 20-23]. Diagnostic classifications of such disorders can be grouped into four broad areas: Disorders of initiating and maintaining sleep (insomnias), disorders of excessive somnolence, disorders of the sleep-wake schedule and dysfunctions associated with sleep, sleep stages, or partial arousals (parasomnias) [3; 22, at 277]. Some of the disorder types are associated with other physical or medical conditions, and others are associated with the use of drugs or alcohol [3; 22, at 277]. The disorder types include narcolepsy, a largely undiagnosed condition with no known cure, which renders affected individuals unable to remain awake for varying periods of time [1, at 34-36; 24].

Paradoxically, our modern society and its technology have created an environment most conducive to the proliferation of sleep disorders [1, p. 47]. High-speed travel and artificial lighting have increased everyone's susceptibility to abnormal sleep, from the common shift worker [25-27] to the President of the United States [28]. As individuals age, they become more likely to be afflicted with sleep

abnormalities [1, pp. 43-45; 29]. As the American population ages, one can only expect America's sleep problem to worsen over time.

Sleep disorders go largely unrecognized by society and indeed by the health care community itself [1, at 24-26, 67-72; 3; 30-35]. To be sure, recent technological developments have enabled numerous sleep research advancements by physicians and other scientists and have facilitated a rapid growth of professional interest in sleep disorders [3, 36]. Nevertheless, the Commission found that "[i]nformation for the public about sleep disorders and disturbances is severely limited in both quality and quantity, despite the increasing scientific knowledge base developed over the past thirty years." [1, pp. 72-73].

THE AMERICANS WITH DISABILITIES ACT OF 1990

General Policies of the ADA

The ADA is a landmark piece of legislation [37-39][2] whose impact on the American workplace will surely be felt by virtually all employers [39]. The ADA is intended to be a ". . . clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities," [40] just as the Civil Rights Act of 1964 [41] was intended to mandate the end of ethnic-, racial-, and religious-based discrimination [42-43]. Though the Rehabilitation Act of 1973 [44] applied substantially the same provisions entailed in the ADA to executive branch agencies, the United States Postal Service, and any program receiving federal funds [45], the ADA's application sweeps beyond the federal funding parameters, and applies, inter alia, to most employers in the United States.[3]

Under Title I of the ADA, qualified individuals with disabilities may not be discriminated against by employers or prospective employers [47].[4] Employers must reasonably accommodate persons with disabilities [50-51]. The ADA definition of "disability" with respect to an individual is as follows:

> The term "disability" means, with respect to an individual—(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such impairment [52].

The ADA definition is specifically patterned after the definition of "individual with handicaps" set forth in the Rehabilitation Act of 1973 [53]. The ADA's use of the word "disability" where the Rehabilitation Act uses the word "handicap" was merely intended to eliminate many of the negative connotations inherent in the word "handicap," but makes no substantive changes in the definition [54].[5] Moreover, the standards applied by the ADA are intended to be at least as stringent as those under the Rehabilitation Act [56].[6]

Defining "Disability" under the ADA

The respective provisions of "individual with handicaps" set forth in the Rehabilitation Act [59] and of "disability" with respect to an individual as set forth in the ADA [60] each entail virtually identical provisions, which have been referred to as the "three-pronged test" [54 at 22-24; 61].[7] The three prongs of the ADA definition include 1) a mental or physical impairment that substantially limits one or more major life activities of the individual in question; 2) a record or history of such impairment; and 3) being regarded as having such impairment [60].

Under the so-called "first prong" [66], the meaning of "disability" is couched in terms of "physical or mental impairment," "major life activity," and "substantially limits" [60; 67]. Accordingly, one must understand meanings of these terms from the purview of the ADA [68].[8]

Fully aware that "new disorders may develop in the future," Congress recognized early on that producing a specific listing of impairments would be futile [54, at 22]. Accordingly, "physical or mental impairment" is broadly defined as:

> (1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or
>
> (2) Any mental or physiological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.[9]

Impairment is determined without regard to medications, prosthetic devices, or other such mitigating measures [70]. "Impairment" does not refer to mere physical, psychological, cultural, environment, or economic characteristics such as hair color, muscle tone, poverty, or a prison record [70].

The regulations under ADA define "major life activity" as ". . . functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working" [71].[10] The activities enumerated in the regulation are not intended to constitute an exhaustive listing [71], just as the activities similarly enumerated under the Rehabilitation Act are not intended to be an exhaustive listing of major life activities [72].

Once the existence of a physical or mental impairment has been established, it must then be determined whether the impairment "substantially limits" the particular individual's major life activities [68, at § 1630.2(j)]. Substantial limitation means 1) inability to perform a major life activity that the "average person in the general population can perform" or 2) a significant restriction as to the condition, manner, or duration under which the major life activity can be

performed as compared to the average person [73]. In determining whether there is a substantial limitation, relevant factors include the impairment's nature, and severity, duration, and long-term impact [74]. Nonchronic impairments with little or no long-term impact are not disabilities because they do not substantially limit the individual within the meaning of the ADA [68, at § 1630.2(j)]. A case-by-case determination must be made for each individual [68, at § 1630.2(j)].

Working is specifically enumerated as a "major life activity" [71]. The regulations apply specific factors in addition to the foregoing that are to be used in determining whether a particular individual is "substantially limited" with respect to the major life activity of working [75]. Such additional factors include the geographical area to which the individual has reasonable access and the types of jobs from which the individual is disqualified on account of the impairment [75].

The second prong of the definition [76] includes individuals with records of the types of impairments that would constitute disabilities under the first prong [77], including instances where such records are inaccurate or where the individual has recovered from such impairment [54, at 23; 77].

The third prong of the definition [78] entails individuals who are believed to have impairments that would constitute disabilities under the first prong [79], including such individuals whose major life activities are limited only because of attitudes of others [79; 80]. For example, although obesity is generally not a disabling impairment [68, at § 1630.2(j)], a person's obesity can satisfy the third prong of the ADA definition if employers treat such person's obesity as a disabling impairment [81].

Reasonable Accommodation under the ADA

Title I of the ADA [82] addresses employment. In general, the ADA prohibits employers or prospective employers from discriminating against otherwise qualified individuals with disabilities on account of such disabilities [47]. "Discrimination" is specifically construed, inter alia, as not making "reasonable accommodation" to the known physical or mental impairments of the employee (or prospective employee) involved [83]. The requirement and concept of reasonable accommodation is most fundamental to the ADA's mandate to end discrimination [84].

Under the ADA, "reasonable accommodation" is not actually defined, but it may include:

> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
>
> (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities [85].

The typical modes of reasonable accommodation enumerated by the ADA broadly entail both physical modifications to equipment and facilities, as well as adjustments to time and scheduling [85]. The regulations extend "reasonable accommodation" to cover accommodations with respect to the job application process, the work environment, and other employment opportunities and privileges [86]. Reasonable accommodation is intended to be tailored to the individual and the situation, and can entail types of accommodations not specifically enumerated in the statute or regulation [86].[11]

An employer is excused from accommodating an individual with a disability if the employer can demonstrate that doing so would cause an "undue hardship" to the employer's business [61, at 516-519; 87-88]. "Undue hardship" means a significant difficulty or expense to the employer in light of all relevant factors [68, at § 1630.2(p); 89]. "Undue hardship" is not limited to financial difficulty, but includes, inter alia, any accommodation that would fundamentally alter the nature or operation of the business [68, at § 1630.2(p)].

An employer may not use qualification standards to screen out individuals with disabilities unless the qualification standard is ". . . job-related for the position in question and is consistent with business necessity" [90]. Employers may impose a qualification standard that the employee or prospective employee not pose a "direct threat" to the health or safety of other individuals in the workplace [91]. The term "direct threat" means "a *significant* risk to the health and safety of others that cannot be eliminated by reasonable accommodation [emphasis added]" [68, at § 1630.2(p); 92]. The "direct threat" standard is a stringent one that is not met by mere speculation or conjecture, irrational fears, patronizing attitudes, or stereotypes [61, p. 513; 68 at § 1630.2(p)].

The "undue hardship" and "direct threat" exceptions to the reasonable accommodation requirements are intended to be just that, exceptions. There is a general obligation imposed by the ADA on employers to reasonably accommodate individuals with disabilities, and in light of the wide latitude of creativity allowed in making the reasonable accommodation, the employer bears the heavy burden of demonstrating that it is excused from the obligation.

SANCTIONS AGAINST EMPLOYEES FOR SLEEPING ON THE JOB

It has long been the case that an employee who sleeps on the job can be subject to severe sanctions, including dismissal.

Rationale for Imposing Sanctions

Sleeping on the job has been characterized as theft of an employer's time by the sleeping employee, who is receiving pay for work not performed [93-95].[12]

Sleeping on the job has been found to be sanctionable conduct when it contravenes explicit work rules prohibiting the same [94; 97-99]. Similarly, sanctions have been upheld where the employee had been given prior discipline or warning for sleeping on the job [97; 100-101]. Employers can reasonably sanction employees who sleep on the job where the presence of a nonalert employee would likely cause or materially contribute to unsafe conditions, including oil refinery operations [102-103], flammable chemical processes ". . . characterized by high temperatures and extremely high pressures" [104], mining and heavy equipment operations [94; 105], prison guard [106],[13] deck watch on a Mississippi River barge [108], and sleeping in "radiologically controlled area" of nuclear power plant [109]. Similarly, sleeping can be prohibited in jobs where alert employees are essential to the well-being of the employer's orderly operation or property, including mental hospital attendants [110], prison guards [106], or utility operations requiring constant human monitoring of controls [111-112]. Indeed, military law keenly recognizes the potential for grave harm to life and property posed by a sleeping lookout or sentry in a military setting [113-114].

Relevant Factors for Imposing Sanctions

Various factors are relevant in imposing sanctions on employees found sleeping on the job. A primary factor is the employer's policy and practice regarding sleeping on the job.[14] Written disciplinary policies are usually given great deference [94; 97-99]; however, actual enforcement of disciplinary policy, written or otherwise, has bearing on how the disciplinary action will be upheld. Arbitrators are more likely to overturn or modify the sanctions imposed by employers whose disciplinary practices vary [116] than the penalties imposed by employers having meticulously consistent, albeit draconian disciplinary practices [117].

Other factors include the degree of harm or potential harm that the sleeping caused to the employer [118], whether the employee was "hiding out" for the specific purpose of sleeping [99; 107], whether the employee deliberately left the work station in order to rest [98; 99; 107; 119; 120], whether falling asleep was inadvertent [99; 111; 121-125], the employee's past record [94; 99; 119; 126; 127], whether the sleeping occurred during duty hours [99], and whether the employee was intoxicated [128]. Other aggravating circumstances are also relevant.[15]

As in other cases involving employee grievances of disciplinary actions taken, whether the employer has clean hands can also be a factor in enforcing disciplinary sanctions. Penalties have been reduced or overturned where the employer had engaged in improper "union-busting" activity [130], given the employee false assurances to obtain an admission [131], failed to adhere to usual policies of progressive discipline [132], or contributed to the employee's condition that caused sleep [133].

The fact that the employee was taking prescribed medications has been found to be a mitigating factor in sleeping on the job cases [122; 130; 134; 135], particularly where the employer was or should have been aware of such medications [101].[16] It should be noted, however, that arbitrators have rejected mere conjectures in "medication defense" cases and have required credible evidence the medications in question actually caused the employee's sleepiness [136].

ADA ANALYSIS OF SLEEP DISORDERS IN INDIVIDUALS

Analyzing whether a sleep disorder constitutes a "disability" within the meaning of the ADA begins with defining whether an affected individual has a physical or mental impairment within the meaning of the ADA. In such regard, it is noted there are many varieties of sleep disorders and divergent viewpoints within the medical profession regarding how the various types of sleep disorders might be properly classified and distinguished [137; 138].[17] The ADA analysis, focusing on the individual, defines physical or mental impairment as ". . . any physiological *disorder or condition* . . . [emphasis added]" [54, at 22; 70]. Whether prevailing politics or ideologies within the medical profession view a given sleep abnormality as a "disorder" has little bearing on the ADA analysis of the patient's condition. It is difficult to argue that a sleep disorder does not constitute a physical or mental impairment within the meaning of ADA.

Sleeping is not specifically included among the major life activities enumerated in the regulation [71]. Nonetheless, the regulatory enumeration is not intended to be an exhaustive listing [68, at § 1630.2(i)], and in view of the human body's undeniable need to for sleep [6; 9-13], any arguments that sleep is not a major life activity would be feeble if not frivolous.

A chronic sleep disorder of substantial magnitude[18] that substantially limits the major life activity of sleeping would constitute a "disability" within the meaning of ADA.

Working is specifically denoted as a major life activity within the meaning of ADA [17]. To the extent that a sleep disorder significantly prevents an individual from engaging in a given job to the extent that the average person can do the job, there is a "disability" within the meaning of ADA.

Moreover, even if an individual's particular sleep disorder does not in fact limit his or her ability to perform a given job, the belief by others (including a supervisor) that such an individual is so limited would constitute a disability under the so-called "third prong" of the definition [68, at § 1630.2(i); 78]. Such would certainly include situations where the employer excludes an individual from an employment activity based on actual or feared negative reactions to the sleep disorder by the employer's customers [54, at 24; 68, at § 1630.2(i)]. It is clear that prejudice cannot be used as its own justification for discrimination against individuals with disabilities [140].

The individual who shows that he or she has a sleep disorder that substantially limits his or her major life activities of sleeping and/or working has made the threshold showing of disability within the meaning of the ADA, and employers would then be required to reasonably accommodate such an individual. Reasonable accommodation would, of course, be tailored to the particular situation [68, at § 1630.2(o)], and might entail a simple work schedule adjustment [31, p. 112; 68, at § 1630.2(o); 141; 142], allowing an employee limited periods of sleeping time [143], high-tech breathing appliances [1, pp. 43; 144], simple nonharassment [145], or any other appropriate measures.

To be excused from reasonably accommodating the individual with a sleep disorder, the employer would bear the burden of demonstrating that accommodating the individual would cause undue hardship [61, pp. 516-519; 87-88] or the individual does not meet bona fide qualifications standards by reason of the particular sleep disorder [90; 91; 142, at 1065]. Merely because an individual is not fully alert at meetings does not mean an undue hardship exists or the individual has failed to meet bona fide qualification standards [142, at 1065].

If the particular individual's sleep disorder would pose a genuine direct threat to the health or safety of others, and such direct threat could not be removed by reasonable accommodation, the employer would be excused from the ADA's reasonable accommodation requirement [68, at § 1630.2(p); 92]. Thus, an employer is more likely to be able to bar an individual with narcolepsy from working as an airline pilot[19] or a surgeon [146] than refuse to allow a "desk jockey" to take a job that primarily entails reviewing written documents.

Employees who find themselves in a situation where their performance is adversely affected by a sleep disorder should take all practicable measures to limit those adverse affects, particularly where the health and safety of other is at stake [133]. Employers cannot be liable for violating the requirement to provide reasonable accommodation to a particular employee if such accommodation is not requested [84, 147]. Therefore, an individual who is afflicted with a bona fide sleep disorder should promptly inform his or her employer of the fact [101; 143; 148]. Unless there are written procedures to the contrary, it would seem that the individual's immediate supervisor would be the appropriate person to be so informed.[20] Judges and arbitrators tend to give more credence to individuals who frankly disclose their conditions than to individuals who are not so candid [*cf* 35; 147; 151 *with* 101; 148; 152].

Merely because an individual is afflicted with sleep disorder does not mean that such individual is incapable of unacceptable performance. Infractions of rules and/or diminished performances that are unconnected with an individual's sleep disorder can, of course, be penalized as with any other employee [146; 148]. However, the employer cannot penalize the employee based on infractions or decreased performances that are directly attributable to the employer's own acts or omissions [133; 153].

THE EPILEPSY PARALLEL

The legal and social attitude toward sleep disorders have many parallels to the legal and social attitudes toward epilepsy. Less than a century ago, the epileptic was a social pariah with abridged legal rights. In one noteworthy case, *Gould v. Gould* [154], the highest state court in Connecticut judicially noticed epilepsy as "a disease of a peculiarly serious and revolting character . . ."[21] In the same opinion, the court went on to proudly boast that "[w]hile Connecticut was the pioneer in this country with respect to legislation [prohibiting epileptics from marrying], it no longer stands alone. Michigan, Minnesota, Kansas and Ohio have, since 1895, acted in the same direction" [154, at 245].

Laws prohibiting epileptics from contracting marriage were commonplace among states [154; 156]. Such laws continued to survive even into the 1960s,[22] reflecting the then-prevailing societal attitudes toward epileptics. Epileptics attempting to enter the workforce often faced the dilemma of concealing their conditions and possibly finding employment or being truthful and not getting a job [157-160].[23] Medical science has advanced in its knowledge and successful treatment of epilepsy [161], thus diminishing the eugenic basis for laws that restrict the rights of epileptics to marry [154].[24] More importantly, increased information about epilepsy has altered the attitudes held toward epileptics by those in power [164]. Following the significant advances in knowledge regarding epilepsy that occurred during the 1950s and 1960s, laws prohibiting or restricting the marriage rights of epileptics were repealed and have today been stricken from the books [163; 165].

Epilepsy is specifically recognized as a "disability" within the meaning of the Rehabilitation Act [159] and the ADA [54 at 22; 68 at § 1630.2(h)]. Though some negative societal and employer attitudes against epileptics are still known to persist even after the ADA's passage by Congress [54, at 24; 166],[25] the person with epilepsy living in the 1990s enjoys a far better situation than that imposed on epileptics during prior decades, no doubt a result of increased scientific knowledge, public education, and proactive assertion of rights within the legal system.

Those afflicted with sleep disorders during the early 1990s have much in common with those afflicted with epilepsy during the 1950s and 1960s. Medical knowledge of sleep disorders is a science in its infancy [1, p. vi; 2; 3], just as medical knowledge of epilepsy was until the 1960s. Those with sleep disorders often find it necessary to hide the fact of their affliction [1, pp. 35, 43; 34],[26] just as those with epilepsy did in prior years [157-169; 167]. The true nature and the relevance of sleep disorders are not adequately appreciated even by some of the more educated members of society [1, p. 73; 168].[27]

CONCLUSION

The January 1993 recommendations of the National Commission on Sleep Disorders Research ". . . seek to initiate a radical change in the way society deals

with sleep—changing it from top to bottom, from birth to death, from the bedroom to the factory, from the Persian Gulf to Prince William Sound" [1, p. ix]. Indeed, our societal attitudes toward sleep are most archaic and unenlightened. The commission found ". . . a profound absence of awareness about sleep disorders and sleep deprivation at every level of society" [1, p. 67].

Falling asleep at times other than bedtime is typically viewed as sloth and malingering, if not lunacy [144; 169; 170].[28] Falling asleep in a job setting is viewed with especially great negativity [34; 35], sometimes, apparently, as a management pretext for terminating employees [171]. Current societal attitudes toward sleep are so deeply ingrained that employers are often disinclined to recognize any valid reasons for employee sleeping [1, p. 35; 130, at 22]. Indeed, there is much to suggest that individuals who may be afflicted with a sleep disorder often deny their own conditions are such.[29] It seems merely closing one's eyes for reasons other than sleeping has such negative societal implications that a supervisor who sees a subordinate with his or her eyes closed can be most unreceptive to valid explanations [173].[30]

Society's negative attitudes pervade the judicial system as well. To ensure fair trials, statutes provide for removal of a juror who, for whatever reason, cannot properly function as such [174]. Under such provisions, a juror whose sickness during trial prevents him or her from hearing all the evidence can be dismissed without any negative personal aspersions or implications [175]. A juror's falling asleep during trial, however, has been negatively characterized by courts as "misconduct" [176].[31] The courts seem to apply a different standard to individuals whose sickness happens to be a sleep disorder.[32]

And neither do the nation's health care providers take seriously the sleep disorders of their own employees. Medical centers have failed to adequately recognize and treat their own employees [1, p. 35], and indeed, the National Institutes of Health (NIH) has been known to discriminate against its own employees afflicted with sleep disorders [142].[33]

The recommendations of the National Commission on Sleep Disorders Research entail ". . . the ambitious goal of changing the way society deals with sleep . . ." [1, p. 26]. Momentum toward that objective is obviously gaining in the scientific and political arenas [1, p. 74], and therefore, one can reasonably expect to see manifest changes in the way society deals with sleep and its disorders.

Many of the ADA's earthshaking changes that are now sweeping America apply directly to sleep and sleep disorders. In view of the ADA's requirements of reasonable accommodation, no longer may it be said that an employer ". . . has no obligation to give [an employee] such consideration [for a shift change]" [152]. Employers who are concerned with what their customers might think of an employee with a sleep disorder may no longer freely use their speculative fears as justification for discharging such an employee [177].[34]

American business's interest in sleep disorders will inherently be from a cost and productivity standpoint [*see* 1, pp. 45-47; 34; 35; 178]. The National

Commission on Sleep Disorders Research is interested in sleep disorders from a public health standpoint. Neither American business interests nor the Commission is specifically geared toward protecting the legal rights of individuals who have sleep disorders. Indeed, American businesses have already balked at the prospects of reasonably accommodating employees in accordance with the ADA [179; 180], just as American businesses resisted the so-called "scientific management" innovations nearly a century ago [181].[35] American business, as a whole, can be expected to resist its obligation to honor the rights of individuals with sleep disorders.

The combined factors of the Americans with Disabilities Act and the efforts of the National Commission on Sleep Disorders Research will lead to substantial changes in our societal attitudes toward sleeping on the job, and will present many opportunities for disability rights advocates to improve the lot of the growing numbers of Americans afflicted with sleep disorders. Indeed, the employment rights of those afflicted with sleep disorders must be proactively asserted during the imminently approaching upheaval.

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ENDNOTES

1. Though William Shakespeare's personal sleep patterns and cycles are no longer ascertainable, the Bard's writings most strongly suggest that he comprehended quite well the nature and workings of sleep and sleep disorders. *E.g.,* "We are such stuff as dreams are made on, and our little life is rounded with a sleep." [15]; "These should be hours for necessities, not for delights; time to repair our nature with comfortable repose, and not for us to waste these times." [16]; "O sleep! O gentle sleep! Nature's soft nurse, how have I frightened thee, that thou no more wilt weigh mine eyelids down and steep my senses in forgetfulness?" [17]; "O polish'd perturbation! Golden care! That keep'st the ports of slumber open wide to many a watchful night!" [17, act 4, sc. 5]; as well as the famous sleepwalking episode of Lady MacBeth [18].

   Certain writings of Charles Dickens, a known sufferer of episodic insomnia, similarly reveal their author's profound insight regarding sleep disorders [19].
2. A purpose of the ADA is "to *invoke the sweep of congressional authority* . . . in order to address the major areas of discrimination faced day-to-day by people with disabilities [emphasis added]" [37]. President Bush's Signing Statement on occasion of his approval of the ADA referred to the legislation as a "landmark bill" [38].

3. The ADA's application is eventually phased in to employers who employ fifteen or more employees [46].
4. The nondiscrimination provisions of the ADA also apply to state and local governments and other such public entitles [48], and to Congress itself [49].
5. In 1986, the Rehabilitation Act definitional reference to "handicapped individual" was changed to "individual with handicaps" in order to not perpetuate the stereotype that individuals with handicaps are less worthy than those without handicaps [55].
6. The regulations to implement the Title I equal employment provisions of ADA are codified at 29 C.F.R. Part 1630, which consists of the regulation sections themselves and an appendix that gives interpretive guidance. At the time this article was written, the regulations had not yet appeared in the official edition of the Code of Federal Regulations; however, the regulations were published in the Federal Register [57] and were also published in a joint publication by the Justice Department and the Equal Employment Opportunity Commission [58].
7. A need to satisfy *all* "prongs" is usually connoted when court decisions and law review articles speak of applying a multipronged test with respect to a statute [see 62-65]. Under the "three-pronged test" set forth by the ADA or the Rehabilitation Act, however, qualification under any one prong satisfies the definition of "handicapped" or "disabled" within the meaning of the respective statutes.
8. Various litigation has defined those terms with respect to the Rehabilitation Act of 1973 [69], thus effectively defining the terms for the purposes of ADA.
9. The regulatory definition uses verbatim the terminology from the Senate Report [54, p. 22].
10. The regulatory definition uses verbatim the terminology from the Senate Report [54, p. 22].
11. It is well to note that the President's Committee on Employment of People with Disabilities has a Job Accommodation Network, an information exchange for employment accommodation ideas. The network's toll-free telephone number is 800/526-7234 (800/526-4698 in West Virginia).
12. It has been recognized, however, that "sleeping on the job just does not equate with 'stealing,' 'theft,' 'lying' or 'dishonesty' as those terms are commonly interpreted" [96].
13. Sleeping on the job has been characterized as ". . . the ultimate infraction that a security guard can commit" [107].
14. Disciplinary policies with respect to sleeping on the job vary from employer to employer, and range from immediate dismissal to four-step progressive discipline [115].
15. "An employee who punctuates his objectives to a decision by threatening a Supervisor and spitting in his face has little to recommend leniency . . ." [129].
16. The use of prescribed medication has been characterized by one arbitrator as an "affirmative defense" for sleeping on job [134].
17. Indeed, the medical discipline that controls the respective hospitals' sleep laboratories varies from hospital to hospital, e.g., some sleep laboratories are administered by the department of psychiatry or the department of neurology. The Sleep Disorders Diagnostic & Treatment Center at Temple University Hospital, Philadelphia, Pennsylvania, is a multidisciplinary cooperative project [139].

18. A single isolated episode of insomnia would not constitute a "disability" within the meaning of ADA [68, at § 1630.2(j)].
19. The commission is most concerned about the costs in lives and dollars exacted by individuals with sleep disorders who work in the transportation industry [1, pp. 50-54].
20. Unless there are written procedures to the contrary, "common industrial sense" would dictate that the individual's supervisor would be the appropriate person to be so informed [149]. The arbitrators seem to infer that the immediate supervisor is the primary point of contact [101; 149; 150].
21. In characterizing epilepsy, the *Gould* opinion cited a prior case involving peach tree blight disease [155].
22. As of 1961, the following states had laws prohibiting or restricting epileptics from marring: Delaware, Michigan, Minnesota, Missouri, Nebraska, New Jersey, North Carolina, North Dakota, Ohio, Utah, Virginia, Washington, and West Virginia [156].
23. The Circuit Court decision in the *Reynolds* case [159] indicates that plaintiff concealed her epileptic condition from her employer, the federal government. The facts set forth in the district court decision following the remand indicate the plaintiff had in fact experienced prior employment terminations following her informing her employers of her condition.
24. The old Michigan statute [162], prior to its amendment in 1962 [163], had prohibited epileptics from marrying, with an exception available upon a physician's certification that the epileptic condition could not be transmitted to the issue of the marriage.
25. In one 1993 New York matrimonial case, the court-appointed expert's report found ". . . that the plaintiff does suffer neurological impairment with resultant intermittent unpredictable seizures which are to a large extent controlled by proper medication but not eliminated completely. Accordingly, as affects the plaintiff's employment, it is understandable that even though her talents as a registered nurse are in demand, the need for her to find an employer willing to tolerate her physical problems does hamper her employability to some extent" [166].
26. In one *New York Times* article on sleep disorders, the individuals interviewed by the reporter ". . . refused to be identified by name for fear of hurting their careers" [34].
27. In a relatively recent case, one arbitrator apparently did not view as significant the undisputed assertion by the grievant that he had not slept for two days prior to being found sleeping on the job [168].
28. An administrator of the Association of Sleep Disorders Centers was quoted thus: "It used to be you'd laugh at people who were tired in the daytime and thought that they had some kind of psychological problems. You didn't take it seriously" [144].
29. In one case, the facts suggest a plaintiff who specifically denied having a sleep disorder may indeed have been so afflicted, perhaps unbeknownst to himself [121]. In another case, a juror denied having been asleep during trial, despite observations by, inter alia, the assistant district attorney and the judge [172].
30. In one case, the arbitrator found grievant was not in fact asleep, but had closed his eyes to alleviate irritation caused by condition known as "dry eyes," ". . . a condition that the company could have inquired into by more thorough investigation" [173].
31. The facts set forth in the *DuPont* case [176] suggest, but by no means conclusively prove, that the juror in question may well have been afflicted with a sleep disorder.

32. With respect to the *Page* [175] and *DuPont* [176] cases, the operative New York statute [174] provides for discharge of a juror during trial based upon, inter alia, incapacity, being grossly unqualified to serve, or substantial misconduct.
33. NIH facilitated the commission's work, and would play a paramount role in implementing and administering the commission's recommendations [1].
34. The *Hodgdon* case [177], applying a Vermont statute modeled after the Rehabilitation Act, found that a ski resort wrongfully discharged a chambermaid because she lacked upper teeth.
35. Frederick Winslow Taylor (1856-1915), the "father of scientific management," wrote in 1911 that "[a]ll young women should be given two consecutive days of rest (with pay) each month, to be taken whenever they may choose" [181, p. 96]. Though Taylor's attitude was condescending (and, perhaps, sexist), it paradoxically was most conducive to the ADA concept of reasonable accommodation [68, at § 1630.2(o); 141].

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