Washington, D.C. 20410-0500

OFFICE OF GENERAL COUNSEL

APR 14 1992

MEMORANDUM FOR: All Regional Counsel

FROM: George L. Weidenfeller, Deputy General Counsel (Operations), GG

SUBJECT: Multiple Chemical Sensitivity Disorder and Environmental Illness as Handicaps

The General Counsel has accepted the attached memorandum as the Department's position on the issue of when Multiple Chemical Sensitivity Disorder ("MCS") and Environmental Illness ("EI") are "handicaps" within the meaning of subsection 802(h) of the Fair Housing Act (the "Act"), 42 U.S.C. § 3602(h), and the Department's implementing regulation, 24 C.F.R. § 100.201 (1991). In sum, MCS and EI can be associated with physical impairments which substantially impair one or more of a person's major life activities. Thus, individuals disabled by MCS and EI can be handicapped within the meaning of the Act. However, while MCS or EI can be handicaps under the Act, ordinary allergies generally would not be.

The attached memorandum explains the nature of these conditions, analyzes relevant case precedent, reviews relevant legislative history, summarizes interpretations of other Federal agencies, and discusses prior HUD interpretations. The guidance provided in this memorandum should be distributed to attorneys in your office to assist in analyzing fair housing complaints.

Attachment

cc: All Regional Directors of Fair Housing and Equal Opportunity

Gordon Mansfield, Assistant Secretary for Fair Housing and Equal Opportunity

AA-501583-C

Washington, D.C. 20410-0500

MAR 5 1992

OFFICE OF GENERAL COUNSEL

MEMORANDUM FOR: Frank Keating, General Counsel, G

FROM: Carole W. Wilson, Associate General Counsel for Equal Opportunity and Administrative Law, GM

SUBJECT: Multiple Chemical Sensitivity Disorder and Environmental Illness as Handicaps

This memorandum analyzes whether Multiple Chemical Sensitivity Disorder ("MCS") and Environmental Illness ("EI") are or can be "handicaps" within the meaning of subsection 802(h) of the Fair Housing Act (the "Act"), 42 U.S.C. § 3602(h), and the Department's implementing regulation, 24 C.F.R. § 100.201 (1991).

In sum, we conclude that MCS and EI can constitute handicaps under the Act.[1] Our conclusion is consistent with the weight of both federal and state judicial authority construing the Act and comparable legislation, the Act's legislative history, as well as the interpretation of other Federal agencies, such as the Social Security Administration and the Department of Education, construing legislation within their respective domains. The Civil Rights Division of the Department of Justice has also informed us that it believes MCS and EI can be handicaps under the Act. In addition, HUD has consistently articulated this position, and FHEO agrees with our conclusion.

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[1] As for any handicap, whether or not a particular complainant is truly handicapped is subject to a case-by-case determination. It is the responsibility of the Office of Fair Housing and Equal Opportunity ("FHEO") and the reviewing Office of General Counsel ("OGC") office to ensure that credible and objective evidence exists to substantiate the existence of any claimed handicap before recommending a charge.

Moreover, as a number of the decisions in this field highlight, the mere fact that a person may be disabled by MCS and EI and makes demands on other people, be they employers or housing providers, does not mean that those demands must be met. The Act requires only that reasonable accommodations in rules, policies, practices, or services be made when such may be necessary to afford a handicapped person equal opportunity to use and enjoy a dwelling unit, including public and common use areas. For example, over a year ago, my office determined that, while a complainant disabled by MCS was handicapped, the housing provider had reasonably met his duty to accommodate her and, accordingly, issued a Determination of No Reasonable Cause. Corcelli v. Gilbane Properties, Inc., (Case Nos. 01-90-0255-1-5, 01-90-0512-1) (Dec. 11, 1990) ("Corcelli") (Attachment A) discussed, infra, at 18. Whether a respondent in a case has met its duty to reasonably accommodate persons disabled by MCS and EI will turn on the facts and circumstances of that case.

I. Ordinary Allergies, Unlike MCS and EI, Generally Are Not Handicaps

Before turning to whether MCS and EI can fit within the definition of "handicap" under the Act, it is useful to define MCS and EI and distinguish these conditions from ordinary allergies. This memorandum uses the term MCS to refer to a condition that causes a person to have severe hypersensitive reactions to a number of different common substances. This memorandum uses the term EI to refer more generally to a condition that causes a person to have any type of severe allergic reaction to one or more substances.[2]

At least one court has accepted the following definition for MCS:

> [A]n acquired disorder characterized by recurrent symptoms, referable to multiple organ systems, occurring in response to demonstrable exposure to many chemically unrelated compounds at doses far below those established in the general population to cause harmful effects. No single widely accepted test of physiologic function can be shown to correlate with symptoms.

Ruether v. State, 455 N.W.2d 475, 476 n.1 (Minn. 1990) (quoting Cullen, The Worker with Multiple Chemical Sensitivities: An Overview, 2 Occupational Medicine: State of the Art Reviews 655, 657 (1987)).[3]

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[2] The use of the term "severe" in describing both conditions restricts them both to a situation that "substantially limits one or more [of a] person's major life activities." 42 U.S.C. § 3602(h)(1) (emphasis added). See also 24 C.F.R. § 100.201 (1991).

[3] There is, however, no definition of MCS that is accepted by all experts in the field. Hileman, Multiple Chemical Sensitivity, Chemical and Engineering News, July 22, 1991, at 26, 32. Indeed, some experts, including the American College of Physicians, take the position that the existence of MCS is not supported by any valid medical evidence. La-Z-Boy Chair Company v. Reed, 1991 U.S. App. LEXIS 14137 (6th Cir. 1991) (unpublished opinion) (affirming district court ruling that plaintiff alleging MCS as a result of on-the-job exposure to chemicals had not established an "injury" compensable under Tennessee's worker's compensation law). In addition, at least one court has indicated its view that "clinical ecology has no standing in the scientific community" and has sided with those in the medical community who attribute the purported symptoms of MCS to a psychological problem or to other physical causes, rather than to chemical sensitivities. Lawson v. Sullivan, 1990 U.S. Dist. LEXIS 18758 (N.D. Ill. 1990) (magistrate's recommendation), adopted, 1991 U.S. Dist. LEXIS 1560 (N.D. Ill. 1991), discussed, infra, at 12. We note, however, that, under the Act, a handicap may be either physical or mental. Accordingly, even if MCS was a psychological or mental impairment, rather than a physical one, a person with MCS would still be afforded full protection under the Act, so long as that condition substantially limited one or more of his or her major life activities, or the person had a record of

Ordinary allergies, as opposed to MCS and EI, generally would not constitute a "handicap" because, in most cases, ordinary allergies do not substantially limit a major life activity. Indeed, the National Academy of Sciences ("NAS") defines MCS to exclude reactions to more common types of allergens.[4] Thus, while we conclude that MCS or EI can be handicaps under the Act, ordinary allergies generally would not be such.[5]

The practical difference between a person with MCS and one with ordinary allergies is described in a decision which held that MCS is a "disability" under the Social Security Act:[6]

> Everyone knows someone with an allergy. If allergic to eggs, don't eat eggs and you will be fine. If you do eat an egg, have some Kleenex available. But [the plaintiff with MCS] represents the extreme. These extreme cases in the past were either ignored, sent to a psychiatrist, let die, or treated for other ailments. It has only been recently that the medical profession itself has recognized the degree of the problem and the numbers of persons involved....
>
> ... A severe exposure [of the plaintiff to the elements to which she reacts] causes us to reach not for a Kleenex box but for the telephone to summon an ambulance and this has happened in the past.

Slocum v. Califano, No. 77-0298, slip op. (D. Haw. Aug. 27, 1979).

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such an impairment, or was regarded as having such an impairment. 42 U.S.C. § 3602(h); 24 C.F.R. § 100.201.

[4] For research purposes, the NAS defines MCS as follows:

> Patients must have symptoms or signs related to chemical exposures at levels tolerated by the population at large. (Reactions to such well-recognized allergens as molds, dusts, and pollen are not included.) The symptoms must wax and wane with exposures and may be expressed in one or more organ systems. A chemical exposure associated with the onset of the condition doesn't have to be identified, and preexistent or concurrent conditions - such as asthma, arthritis, or depression - should not exclude patients.

Hileman, supra, at 32 (emphasis added).

[5] But see, infra, note 31 at 17.

[6] As discussed at more length, infra, at note 16, the Social Security Act's definition of disability is more limited than the Fair Housing Act's definition of handicap, i.e., the Fair Housing Act is broader and more inclusive.

Ordinary allergies are like a host of other common characteristics, which, although they may pose challenges to individuals with the characteristic, do not constitute handicaps because they either are not impairments or do not substantially impair major life activities. Judicial or other authority have found that the following characteristics do not constitute handicaps:

- left-handedness is not an impairment under Sections 501 and 504 of the Rehabilitation Act of 1973 ("Rehabilitation Act"), 29 U.S.C. §§ 791 and 794, because it is physical characteristic, not a impairment - Torres v. Bolger, 781 F.2d 1134, 1138 (5th Cir. 1986), aff'g, 610 F. Supp. 593 (N.D. Tex. 1985) (ruling that left-handedness is not an impairment and does not substantially impair major life activities);

- shortness is not a disability or impairment under Wisconsin employment discrimination law - American Motors Corp. v. Labor and Industry Review Commission, 8 F.E.P. Manual 421:661 (No. 82-389) [cited in Torres v. Bolger, 610 F. Supp. 593, 596 (N.D. Tex. 1985)];

- "For purposes of the definition of 'disability' in section 3(2), homosexuality and bisexuality are not impairments and as such are not disabilities under this Act." - Section 511 of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12211.

II. MCS and EI Generally Meet the Statutory and Regulatory Definition of Handicaps

Subsection 802(h) of the Act defines "handicap" as follows:[7]

(h) "Handicap" means, with respect to a person --

(1) a physical or mental impairment which substantially limits one or more of such person's major life activities,

(2) a record of having such an impairment, or

(3) being regarded as having such an impairment, but such term does not include current, illegal use of or addiction to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)).

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[7] Except for inconsequential differences in phrasing, the Act's definition is identical to the definition in HUD's regulation, 24 C.F.R. § 100.201 (1991).

As under the Rehabilitation Act's definition of handicap, 29 U.S.C. § 706(6), a definition substantially similar to that in the Act,* the determination of whether any particular condition constitutes a "handicap" necessarily involves a case by case determination of all facts and circumstances relevant to whether the condition meets the Act's definition. Forrisi v. Bowen, 794 F.2d 931, 933 (4th Cir. 1986) (case brought under the Rehabilitation Act); E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088, 1100 (D. Haw. 1980) (same). Those with MCS or EI generally attempt to meet the definition by virtue of paragraph (1) of the Act's definition, i.e., by maintaining that their condition constitutes a physical impairment which substantially limits one or more of their major life activities. As shown below, our understanding of the usual effects of MCS and EI is that persons with these conditions generally meet the Act's definition of persons with a "handicap."

A. Physical or Mental Impairment

The Act does not define its term, "physical or mental impairment," but the Department's regulations define that term as follows:

> "Physical or mental impairment" includes:
>
> (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 psychological disorder, such as ... emotional or mental illness .... The term "physical or mental impairment" includes, but is not limited to, diseases and conditions as ... visual, speech and hearing impairments, ... [and] emotional illness ....

24 C.F.R. § 100.201.

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* As discussed, infra, Part IV at 15, Congress based the Act's definition of handicap on that contained in the Rehabilitation Act and intended the sweep of the Act's definition to be as broad as the then contemporary interpretations of the definition in the Rehabilitation Act.

As discussed at more length, infra, at Parts III, V, and VI, courts and administrative agencies (including HUD) have found persons with MCS and EI to have a physiological disorder or condition, which, upon exposure to certain substances, causes the person to suffer substantial impairment of various body systems. Listed below are some of the systems that we understand can be affected, as well as some of the ways each can be affected:

1. neurological - blurred vision and black spots, ear ringing, incoherent speech, and seizures;

2. musculoskeletal - muscle aches, fatigue, muscle spasms;

3. special sense organs - blurred vision, ear ringing;

4. respiratory (including speech organs) - incoherent speech, shortness of breath;

5. hemic - unusually high T-cell count;

6. digestive - pancreas damage;

7. immunological - extreme sensitivity to various chemicals which can be life threatening.

B. Major Life Activities

The Act does not define the term "major life activities," but HUD regulations define it as follows:

> "Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.

24 C.F.R. § 100.201.

People with MCS and EI can have one or more major life activities affected by their condition. We understand these to include, but not be limited to:

1. working - such persons may be disabled under the Social Security Act, 42 U.S.C. § 416(i)(1);

2. speaking - incoherent speech when exposed to chemicals;

3. breathing - extreme shortness of breath when exposed to chemicals;

4. caring for themselves; performing manual tasks - may be substantially impaired by chronic fatigue and the need to avoid exposure, they are often bed-ridden;

5. walking - loss of muscle control;

6. seeing - blurred vision and black spots;

7. hearing - ear ringing.

8. learning - blurred vision, ear ringing, seizures, and chronic fatigue, all of which may substantially impair a person's ability to learn.

C. Substantially Limited

Neither the Act itself nor HUD's implementing regulations define what it means to be "substantially limited" in a major life activity. Case law, however, provides some guidance.

The Fourth Circuit in Forrisi v. Bowen, 794 F.2d 931 (4th Cir. 1986), ruled that, under the Rehabilitation Act, in order for an impairment to substantially limit a major life activity, "the impairment must be a significant one."[9] Id. at 933-34.

E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088 (D. Haw. 1980) ("Black"), ruled that a person who is disqualified from employment in his chosen field has a substantial handicap in employment and is substantially limited in his major life

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[9] The plaintiff in Forrisi was a utility systems repairer and operator with acrophobia (fear of heights). He did not allege that his acrophobia substantially limited his major life activities or that he had a history of such an impairment. Id. at 934. Rather, he alleged that he had a handicap because his employer regarded him as handicapped and had discriminated against him on that basis. The court found that the employer did not regard him as substantially limited in his major life activity of working and did not regard his condition to "foreclose generally the type of employment involved." Id. at 935. The court found that the employer "never doubted [the plaintiff's] ability to work in his chosen occupation of utility systems repair. The [employer] merely saw him as unable to exercise his acknowledged abilities above certain altitudes in this ... plant." Id. Thus, the court concluded that the plaintiff did not establish that his employer regarded him as handicapped and he did not have a handicap. As noted, supra, at 5, the definition of handicap under that act was the basis of and is substantially similar to that in the Fair Housing Act.

activity of working. Id. at 1099. In contrast, where a person is disqualified only from certain subfields of work, the determination of whether the impairment is substantial must be viewed in light of certain factors. Id. at 1101-02. These factors are:

1. the number of types of jobs from which the impaired individual is disqualified;

2. the geographical area to which the individual has reasonable access to find alternative employment; and

3. the individual's own job expectations and training.[10]

Id.

The Sixth Circuit in Jasany v. United States Postal Service, 755 F.2d 1244 (6th Cir. 1985), in discussing the "substantially limiting" requirement, stated that "[a]n impairment that affects only a narrow range of jobs can be regarded either as not reaching a major life activity or as not substantially limiting one."[11] Id. at 1249 note 3.

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[10] In Black, the court concluded that the plaintiff, an employee diagnosed with a congenital abnormality of the back which precluded heavy lifting, was handicapped under the Rehabilitation Act (which as noted, supra, at 5, contains a definition of handicap which Congress used as its basis for the definition in the Fair Housing Act), because he was unable to perform his job of carpenter's apprentice and was substantially impeded in achieving his career goal of becoming a journeyman.

[11] Jasany involved a plaintiff with strabismus ("crossed eyes") who was impaired in his visual acuity and could not perform his job as a mail sorting machine operator. The parties stipulated that the plaintiff's condition had never had any effect whatsoever on any of his activities, including his past work history and ability to carry out other duties at the post office apart from operation of the [mail sorting machine]." Id. at 1250. Based on this stipulation and the court's interpretation that an impairment which affects only a narrow range of jobs does not render a person substantially impaired in a major life activity, the court concluded that the plaintiff was not handicapped under the Rehabilitation Act. The court also stated in dictum that, even if the plaintiff were handicapped, he was not otherwise qualified for the job, because he was hired primarily to operate a mail sorting machine and the "post office was not required to accommodate [the plaintiff] by eliminating one of the essential functions of his job." Id. Once more, the definition of handicap in that act is the basis for and substantially similar to that in the Fair Housing Act.

For further cases, see also Wright v. Tisch, 45 F.E.P. 151 (E.D. Va. 1987) (BNA) (Postal service employee who was hypersensitive to dust was not handicapped under the Rehabilitation Act, because her condition only limited her from working in unusually dusty environments, not in ordinary working environments); Elstner v. Southwestern Bell Telephone Co., 659 F. Supp. 1328 (S.D. Tex. 1987) (telephone service technician with knee injury preventing him from climbing telephone poles using spikes, but not preventing him from climbing using a ladder, was not handicapped under the Rehabilitation Act,

Federal agencies[12] appear to have adopted a similar approach

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because his condition did not substantially limit any activity except climbing telephone poles and did not disqualify him from any other jobs with the company), Aff'd, 863 F.2d 881 (5th Cir. 1988); Pridemore v. Legal Aid Society of Dayton, 625 F. Supp. 1171 (S.D. Ohio 1985) (job applicant with a "mild" case of cerebral palsy was not handicapped under the Rehabilitation Act, because his condition did not impair his ability to walk and talk or engage in any other major life activities, it was discernible only with the use of sophisticated diagnostic equipment, there was no indication that he ever suffered from any substantially limiting condition, and there was no indication that his prospective employer regarded him as suffering from a substantially limiting condition); Pridemore v. Rural Legal Aid Society of West Central Ohio, 625 F. Supp. 1180 (S.D. Ohio 1985) (same).

[12] The Merit Systems Protection Board ("MSPB") ruled in Joyner v. Department of Navy, 47 Merit Systems Protection Reporter ("MSPR") 596 (1991), that a Navy machinist was substantially limited in the major life activity of working because he was "severely limited in his ability to lift, carry, climb, work on ladders or scaffolding, stoop, twist, bend, push, and pull, and that he [was] incapable even of walking from a reserved handicapped parking lot outside the industrial area to his work site or to the shuttle bus that would take him to the work site." Id. at 599-600. While the employee could do some administrative work, since this work was not "the same type of employment as machinist work," he was substantially limited in his ability to work. Id. at 599. Nevertheless, the MSPB concluded that the Navy had not discriminated against the employee in violation of the Rehabilitation Act because he could not articulate any reasonable accommodation that would enable him to perform his job as a machinist, and permanent assignment to light duty was not required. Id. at 600-01. Thus, the employee was not a "qualified handicapped person" because there was no reasonable accommodation the Navy could or should have provided him in order to enable him to perform his job. Id. at 600.

Under somewhat different reasoning, the MSPB in Cohen v. Department of the Navy, 46 MSPR 369 (1990) ("Cohen"), upheld the removal of a personnel classification specialist from her job for being absent without leave, rejecting her claim that she was handicapped by reason of having "post-traumatic stress disorder due to occupational stress factors," a contention she raised to defend against the termination. The MSPB concluded that she did not establish a prima facie case of handicap discrimination under the Rehabilitation Act because her condition did not foreclose her generally from doing federal personnel work, and thus, she was not substantially impaired in her ability to work. Id. at 374. Rather, her impairment only precluded her from meeting the demands of the particular job at the particular location to which she was assigned. Id. Thus, the MSPB upheld the Navy's removal of her from her job for being absent without leave, and the Navy's refusal to reassign her to another job.

The Equal Employment Opportunity Commission ("EEOC") in Gomez v. Aldridge, Secretary of the Air Force, Pet. No. 0389007 (Jan. 17, 1989), interpreted the "substantial limitation" language of the Rehabilitation Act similarly to Cohen. The EEOC concluded that an employee who was hypersensitive to paint fumes and other toxic chemicals was not "handicapped" under 29 C.F.R. § 1613.702(a), the EEOC's Rehabilitation Act regulations, because his hypersensitivity did not disqualify him from other jobs and "drastically reduce his employability;" and thus, he was not substantially impaired in the major life activity of working. Slip op. at 4-5.

The decision of the Office of Federal Contract Compliance Programs ("OFCCP") of the Department of Labor, In the Matter of Office of Federal

to the "substantially limited" requirement, as have state courts[13].

Persons with MCS and EI may be substantially limited in major life activities due to their handicap. For such persons, exposure to a variety of common substances may cause them significant limitations to their major life activities, such as those listed, supra, at Part IIB. Moreover, due to the frequency that ordinary living normally brings people into contact with the commonly found substances to which persons with MCS and EI typically react, persons with these disabilities may be severely constrained in their daily living and must make major adjustments to avoid exposure. Since it is critical that people with MCS and EI minimize their exposure to common substances found in or near most housing facilities, they generally face a significantly limited choice of housing.

III. Case Precedent Recognizes MCS and EI as Handicaps

The weight of judicial precedent supports the conclusion that MCS and EI can be handicaps.

A. Federal Case Law Recognizes MCS and EI as Handicaps

Vickers v. Veterans Administration, 549 F. Supp. 85, 86-87 (W.D. Wash. 1982), held that a Veterans Administration ("VA") employee who was hypersensitive to tobacco smoke was handicapped

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Contract Compliance Programs v. Shuford Mills, Inc., Case No. 80-OFCCP-30 (Recommended Decision and Order, May 26, 1981), also interpreted the "substantial limitation" language of the Rehabilitation Act. As summarized in Handicapped Requirements Handbook (Federal Programs Advisory Service) App. IV, para. 1005, that decision ruled:

> [A] person is not substantially limited or regarded as substantially limited when as here, that person is already gainfully employed" and is denied transfer to a lower paying and more strenuous job; that job would not be a more favorable progression or advancement; and the individual has not been confined to any particular trade or business and has not had any apparent restriction to his employment opportunities. Since the symptoms [the plaintiff] complained of were mild and temporary and did not appear to limit his ability to function, the judge determined that [the plaintiff] was not a handicapped person under the Act or regulations.

[13] E.g., Salt Lake City Corp. v. Confer, 674 P.2d 632 (Utah 1983) [under Utah Anti-Discrimination Act, the inability, because of spondylolysis (back disability), to do one particular job for one particular employer is not a substantial impairment of a major life activity]. The Utah Act defined "handicap" to mean "a physical or mental impairment which substantially limits one or more major life activity [sic.]." Utah Code Ann. § 34-35-2(14) (1979).

under the Rehabilitation Act.[14] The court ruled that the ability to work where one will be subject to an ordinary amount of smoke is a major life activity. Id. at 87. The court specifically found that the plaintiff had a physical impairment that substantially limited his ability to work in an environment that was not completely smoke free, and thus, he was handicapped.[14]

Rosiak v. Department of the Army, 679 F. Supp. 444 (M.D. Pa. 1987), aff'd, 845 F.2d 1014 (3d Cir. 1988), held that a carpentry worker who was hypersensitive to "hydrocarbon-type fumes or dust," including those from contact cement, was handicapped under the Rehabilitation Act due to his hypersensitivity.[15]

Kouril v. Bowen, 912 F.2d 971, 974 (8th Cir. 1990), held that a woman with MCS was disabled under the Social Security Act, 42 U.S.C. § 416(i)(1).[16] She suffered numbness in the legs,

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[14] The court concluded, however, that the VA had made "reasonable accommodations" to the plaintiff's handicap. These included: installing additional ceiling vents at agency expense, offering to install a floor-to-ceiling partition with a door, offering to assign him to a different job involving outdoor work, allowing him to move his desk to another part of the office closer to a window, allowing him to seek a voluntary agreement with those in his office and adjacent offices not to smoke in their offices (which he was able to obtain), and allowing him to use an air purifier in the office. Id. at 88. The court found that no further accommodation was required. Id.

[15] The plaintiff sued the Army for improperly terminating his employment. While finding the plaintiff to be handicapped, the court concluded that he was not otherwise qualified for the position, because, despite the employer's efforts to accommodate him, the plaintiff was still unable to perform his job. Id. at 451. The accommodations the employer made included working closely with the plaintiff, carefully considering him for alternative jobs, and offering him those alternative jobs for which he was qualified. Plaintiff rejected all other positions he was offered, could not suggest an alternative job he could do, and refused to try doing his job wearing the respirator his employer gave him. The court concluded that, while the plaintiff was handicapped, the agency made every reasonable effort to accommodate him, yet was unable to do so. Thus, the plaintiff was not an otherwise "qualified handicapped employee." Id.

[16] 42 U.S.C. § 416(i)(1) defines "disability" for purposes of disability benefits under the Social Security Act as follows:

> [T]he term "disability" means (A) inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months, or (B) blindness ....

If a person has a "disability" under the Social Security Act, he or she should have a "handicap" under the Fair Housing Act, because the former definition is a more limited definition than the latter. In contrast to the Social Security Act's definition of "disability," neither the Fair Housing Act

dizziness, light headedness, headaches, nausea, and various skin rashes and sores when exposed to common chemicals, such as ink, perfume, tobacco smoke, photocopier odors, engine exhaust fumes, new carpet, new clothes, and hydrocarbons. The court found her "complex allergy state" to require substantial restrictions in her daily activities and interfere with her ability to engage in substantial gainful activity. 912 F.2d at 976.[17]

Kornock v. Harris, 648 F.2d 525, 527 (9th Cir. 1980), involved a truck driver, diagnosed as having severe allergies to environmental pollutants and bronchial asthma, and, who, as a consequence, suffered disabling respiratory attacks. The court ruled that he was disabled from substantial gainful activity under the Social Security Act, and, thus, his widow was entitled to collect his Social Security disability benefits.

On the other hand, Lawson v. Sullivan, 1990 U.S. Dist. LEXIS 18758 (N.D. Ill. 1990) (magistrate's decision), adopted, 1991 U.S. Dist. LEXIS 1560 (N.D. Ill. 1991), affirmed a decision of the Secretary of Health and Human Services, which denied the claimant Social Security disability benefits based on a failure to produce adequate, objective, clinical evidence supporting her complaints of incapacitating migraine headaches, allegedly brought about by exposure to various common chemicals.[18]

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nor the Rehabilitation Act requires that an individual be unable to engage in any substantial gainful activity in order to be handicapped. Also, under the Fair Housing Act and the Rehabilitation Act, the handicap does not need to be one that can be expected to result in death. Nor does it need to be one which has lasted or can be expected to last for any particular duration. Some courts, however, have ruled that some conditions which temporarily disable a person are not handicaps within the meaning of these Acts, because the limitation to major life activities is temporary, and thus, not "substantial." See Handicapped Requirements Handbook (Federal Programs Advisory Service) at 220:3 (referencing Section 504 cases).

[17] The court remanded the case to the district court, with directions to remand it to the Secretary of Health and Human Services to determine whether the woman could perform other employment, or was disabled from working. Id.

[18] The court rejected the claimant's claim of being disabled by MCS, finding that there was a lack of evidence to establish (1) that she actually felt the pains she allegedly had, (2) what the origin of her alleged pains was, and (3) that the alleged pains disabled her from working. In making that ruling, the court rejected the claimant's testimony of her pains and the testimony of claimant's doctors. Instead, the court sided with medical professionals who testified espousing long-established, traditional allergy and immunology theories which the court interpreted as contradicting the claimant's claim of being disabled.

B. State Case Law Recognizes MCS and EI as Handicaps

Pennsylvania, California, and Ohio state courts have interpreted their state civil rights statutes prohibiting discrimination against the handicapped to apply to persons with MCS and EI. We have been unable to find any state court holding to the contrary.

Most noteworthy, because it involves housing discrimination, is a case interpreting the Pennsylvania Human Relations Act ("Pennsylvania Act").[19] Lincoln Realty Management Co. v. Pennsylvania Human Relations Commission, 598 A.2d 594 (Pa. Commw. 1991) ("Lincoln"). In that case, a Pennsylvania trial court affirmed, in part, the decision of the Pennsylvania Human Relations Commission. The court affirmed, without analysis of this issue, the finding that the plaintiff, a tenant unable to tolerate the presence of various chemical compounds (including certain pesticides and herbicides), was handicapped under the Pennsylvania Act.[20] Id. at 597, 601.

The California Court of Appeals held in County of Fresno v. Fair Employment and Housing Commission of the State of California, 226 Cal. App. 3d 1541, 1550, 277 Cal. Rptr. 557, 563 (Cal. App. 5th Dist. 1991), that the state human relations commission did not abuse its discretion in determining that hypersensitivity to tobacco smoke,[21] was a handicap under the California Fair Employment and Housing Act ("California Act").[22]

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[19] The Pennsylvania Act does not define handicap. However, 16 Pa. Code § 44.4 (1989), Pennsylvania's regulations governing discrimination on the basis of handicap or disability, contain a definition of handicap that is substantially similar to that in subsection 802(h) of the Fair Housing Act and HUD's implementing regulations, 24 C.F.R. § 100.201. The Pennsylvania hearing examiner applied the state's definition in his decision. Atkinson v. Lincoln Realty Management Company, Docket No. H-4358 at 30 (Aug. 28, 1990).

[20] The court affirmed in part and remanded in part the Commission's order regarding the accommodations the housing provider was required to provide. The court affirmed the order insofar as it required the defendant to give notice to the plaintiff of pesticide application and painting and to permit the plaintiff to modify her apartment at her own expense by installing a kitchen ceiling fan and a washer and dryer. Id. at 600-01. The court vacated the rest of the order's required accommodations, some of which the complainant had not requested.

[21] We believe that hypersensitivity to tobacco smoke, if it substantially impaired one or more of a person's major life activities, would be a handicap under the Act. See Vickers v. VA, discussed, supra, at 10-11.

[22] The California Act defines a "physical handicap" to include "impairment of sight, hearing, or speech, or impairment of physical ability because of ... loss of function or coordination, or any other health impairment which requires special education or related services." Cal. Government Code § 12926(h).

While this case involved employment discrimination, the California Act's definition of handicap applies equally to housing. Thus, the holding that hypersensitivity to tobacco smoke qualifies as a handicap would apply in housing discrimination cases also.

In Kallas Enterprises v. Ohio Civil Rights Commission, 1990 Ohio App. LEXIS 1683 (Ohio Ct. App. May 2, 1990), the Court of Appeals of Ohio, citing Vickers, discussed, supra, at 10-11, ruled that "occupational asthma" and "a hypersensitivity to [rustproofing] chemicals," are handicaps within the meaning of the Ohio Civil Rights Act ("Ohio Act"), Ohio Rev. Code § 4112 et seq.[23] The court affirmed the trial court's ruling that the plaintiff was illegally discharged because of his handicap and affirmed the trial court's reinstatement order.

In Kent State University v. Ohio Civil Rights Commission, 64 Ohio App. 3d 427, 581 N.E.2d 1135 (1989), a different district of the Court Appeals of Ohio held in favor of a person with laryngeal stridor with laryngospasm, diagnosed as a condition making her unable to breath when subjected to pesticides, cleaning solutions, natural gas, asphalt, auto exhaust, cigarette smoke, hair spray, cosmetics, rubber products, petrochemicals, and other common substances. 581 N.E.2d at 1137. The court found that her condition was a handicap under the Ohio Act.[24]

The court specifically rejected the defendant's contention that hypersensitivity to smoke is merely an "environmental limitation" but not a physical handicap. The court stated that, while to most people tobacco smoke may be merely irritating, distasteful, or discomforting, someone is physically handicapped if he or she suffers from a respiratory disorder and his or her ability to breathe is severely limited by tobacco smoke. 225 Cal. App. 3d at 1550. The court found that, although the defendants had provided numerous accommodations to the plaintiffs, the defendant did not go far enough, and thereby failed to reasonably accommodate them.

[23] The Ohio Act defines a handicap as:

> [A] medically diagnosable, abnormal condition which is expected to continue for a considerable length of time ... which can reasonably be expected to limit the persons' functional ability ... so that he cannot perform his everyday routine living and working without significantly increased hardship and vulnerability to what are considered the everyday obstacles and hazards encountered by the non-handicapped.

Ohio Rev. Code § 4112.01(A)(13).

[24] The court made this finding even though it was uncertain whether the cause of the complainant's condition was "an organic reaction to certain sensitivities or allergies" or "a psychological reaction to odors," see note 3 (last two sentences), supra, at 2-3, and even though she only faced hardship in her day-to-day life at work, but not at home where she was able to minimize her exposure to the substances to which she reacted adversely. Id. at 1139-

IV. Legislative History Supports the Conclusion that MCS and EI Can Be Handicaps

The Act's legislative history also demonstrates that Congress intended that the Act's definition of handicap be broad enough to include MCS and EI. Congress intended that the term "handicap," as used in the Act, be interpreted consistently with judicial interpretations of the term "handicap," as used in the Rehabilitation Act. In the preamble to the regulations implementing the Act, HUD noted "the clear legislative history indicating that Congress intended that the definition of 'handicap' be fully as broad as that provided by the Rehabilitation Act." 24 C.F.R. Subtitle B, Ch. 1, Subch. A, App. 1 at 704 (1991).[25] To support this conclusion, the preamble cited portions of the House Report and floor debate on the Act which reflected Congress's desire that the two definitions be interpreted consistently.[26] Before Congress passed the Fair Housing Amendments Act, lower federal courts had interpreted the Rehabilitation Act to cover MCS and EI as handicaps.[27]

Statutory construction principles lead us to conclude that, because Congress used substantially the same definition of handicap in the Act as it did in the Rehabilitation Act, Congress intended chemical hypersensitivity to be a handicap under the Act, as courts at that time had determined it to be under the Rehabilitation Act. It is a generally accepted principle of statutory construction that where the judiciary has given "contemporaneous and practical interpretation" to "an expression" contained in a statute, and the legislature adopts the expression in subsequent legislation, the judicial interpretation is "prima

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40. The court concluded that her employer failed to make reasonable accommodations to her handicap by refusing to move her office temporarily to another part of the building or to another building and by failing to provide adequate advance warning when it would use cleaning solutions or pesticides in the building. Id. at 1142.

[25] HUD rejected comments suggestions that it delete paragraphs (a), (b), (c), and (d) of the definition of "handicap" in HUD's proposed regulation, which were identical to those found in 24 C.F.R. § 100.201 (1991).

[26] 24 C.F.R. at 704, citing, H.R. Rep. No. 711, 100th Cong., 2d Sess., at 22 (1988); 134 Cong. Rec. S10492 (daily ed. Aug. 1, 1988) (statement of Sen. Chafee); Id. at H4689 (daily ed. June 23, 1988) (statement of Rep. Pelosi); Id. at H4612 (daily ed. June 22, 1988) (statement of Rep. Schroeder).

[27] See, e.g., Vickers v. Veterans Administration, 549 F. Supp. 85, 86-87 (W.D. Wash. 1982), discussed, supra, at 10-11, and Rosiak v. Department of the Army, 679 F. Supp. 444 (M.D. Pa. 1987), aff'd, 845 F.2d 1014 (3d Cir. 1988), discussed, supra, at 11.

facie evidence of legislative intent." This principle "is based on the theory that the legislature is familiar with the contemporaneous interpretation of a statute." Sutherland Stat. Const. § 49.09 (4th ed. 1984) at 400. The Supreme Court has applied this principle to interpreting civil rights statutes. Cannon v. University of Chicago, 441 U.S. 677 (1979) ("Cannon")[28] and Lorillard, A Division of Loew's Theatres, Inc. v. Pons, 434 U.S. 575 (1978) ("Lorillard").[29]

In addition, the Act's legislative history generally demonstrates that Congress intended that the Act's definition of handicap be interpreted broadly. During consideration of the Fair Housing Amendments Act, Congress considered proposals to limit the category of "handicaps" to more traditionally recognized ones, such as those affecting only sight, hearing, walking, or living unattended; Congress rejected those proposals. For example, Senator Hatch proposed a more restrictive definition of the term handicap in S. 867, 100th Cong., 1st Sess. See Fair Housing Amendments Act of 1987: Hearings on S. 558 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 100th Cong., 1st Sess. 520-22, 523 (1987) (statement of Bonnie Milstein, former Deputy Assistant General Counsel for Civil Rights in Departments of HEW and HHS). By adopting the definition it did, Congress rejected the more restrictive proposals. Interpreting the Act's definition to include persons with MCS and EI is consistent with that Congressional intent.

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[28] Cannon involved the interpretation of Title IX of the Education Amendments of 1972. Subsection 901(a) of those Amendments, 20 U.S.C. § 1681(a), prohibits sex discrimination in educational institutions. The Court concluded that Congress intended that Title IX provide a private right of action, in part, because Title IX was patterned after Title VI of the Civil Rights Act of 1964. Legislative history revealed that the drafters of Title IX explicitly indicated that it should be interpreted and enforced in the same manner as Title VI. Even though neither statute explicitly provided for a private cause of action, the Court relied on the fact that lower federal courts had already construed Title VI to create a private remedy when Title IX was enacted in concluding that Congress intended a private right of action under Title IX as well. Id. at 696-98.

[29] Lorillard involved the interpretation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq. The Court concluded that Congress intended a right to a jury trial in private actions under ADEA, in part, because subsection 7(b) of ADEA, 29 U.S.C. § 626(b), states that ADEA is to be enforced in accordance with the "powers, remedies, and procedures" of the Fair Labor Standards Act ("FLSA"). Even though neither statute explicitly provides for a right to a jury trial, the Court relied on the fact that lower federal courts had already construed FLSA to create a right to a jury trial when ADEA was enacted in concluding that Congress intended a right to a jury trial under ADEA as well. Id. at 580-81.

V. Other Federal Agencies Recognize MCS and EI as Handicaps

At least two other Federal agencies, the Social Security Administration ("SSA") and the Department of Education ("DOE"), recognize that MCS and EI can be handicaps. In addition, the Civil Rights Division of the Department of Justice has informed us that it believes MCS and EI can be handicaps under the Fair Housing Act.

As discussed, supra, at Part IIIA, two Circuit Courts of Appeals have ruled that MCS and EI are "disabilities" under the Social Security Disability Act.[30] An increasing number of SSA administrative law judges are "becoming aware" of these disabling conditions. Matthew Bender, Social Security Practice Guide, vol. 2, § 14.03[8] at 14-49 (1991). If a person is disabled under the Social Security Act, a fortiori, he or she is handicapped under the Fair Housing Act, because the former definition is a more limited definition than the latter.[31]

DOE has issued two agency letters of finding under the Rehabilitation Act concluding that MCS and EI can be handicaps. In San Diego (Cal.) Unified School District, 1 National Disability Law Reporter ("NDLR") para. 61, p. 311 (May 24, 1990), DOE concluded that a school district violated the Rehabilitation Act by refusing to reasonably accommodate a school bus driver who was chemically sensitive to petrochemical fumes. In that case, the school district refused to allow the driver to wear a respirator while driving. DOE concluded that the bus driver was handicapped and that the accommodation he requested was reasonable. In Montville (Conn.) Board of Education, 1 NDLR para. 123, p. 515 (July 6, 1990), DOE concluded that a guidance counselor with MCS was handicapped under the Rehabilitation Act. DOE concluded, however, that the school district had provided reasonable accommodations to the counselor.[32]

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[30] On the other hand, the Secretary of Health and Human Services appears reluctant to allow disability benefits to claimants alleging to be disabled by MCS. Contrary to the two Circuit Courts, one District Court has approved that position and accepted the views of the portion of the medical profession which does not accept the existence of MCS as a disability. Lawson v. Sullivan, 1990 U.S. Dist. LEXIS 18758 (N.D. Ill. 1990) (magistrate's decision), adopted, 1991 U.S. Dist. LEXIS 1560 (N.D. Ill. 1991).

[31] See, supra, note 16, for comparison of the Social Security Act's definition of "disability," with the definition of "handicap" under the Fair Housing Act and the Rehabilitation Act.

[32] In addition, in Windsor (Conn.) Public Schools, 17 Education for the Handicapped Law Report 692, Complaint No. 01-90-1131 (Jan. 18, 1991), DOE concluded in an agency letter of findings, without analysis, that asthma and allergies were handicaps under the Rehabilitation Act. DOE found, however, that the school district did not discriminate by failing to repair a school's air cooling system that affected only air temperature, not air quality.

In addition, the Merit Systems Protection Board ("MSPB") has suggested that, at least in some circumstances, severe chemical sensitivities could be a handicap under the Rehabilitation Act.[33]

VI. HUD's Prior Interpretations Have Recognized That MCS and EI Can Be Handicaps

On several occasions, HUD, including OGC and FHEO, has recognized that MCS and EI can be handicaps under Section 504 of the Rehabilitation Act and subsection 802(h) of the Fair Housing Act. OGC, Fair Housing Division, issued a determination, authorized by the General Counsel, in another fair housing case, Corcelli v. Gilbane Properties, Inc., (Case Nos. 01-90-0255-1-5, 01-90-0512-1) (Dec. 11, 1990) ("Corcelli") (Attachment A) stating that the complainant, a person suffering from environmental illnesses immune dysfunction syndrome and chronic fatigue, was handicapped under the Act. In Corcelli, medical evidence substantiated that the complainant was hypersensitive to common chemicals such as pesticides, petroleum products, perfumes, exhaust fumes, fresh paint, pine, soaps, chemical spraying of lawns, and most strong odors. When exposed to these substances, her reaction was severe or even life threatening. Based on this information, HUD found that the complainant's condition was a handicap and that the Act's provision on reasonable accommodations was fully applicable.[34] Corcelli at 3.

Even before OGC issued the Corcelli determination, HUD had stated that MCS was a handicap under Section 504 of the Rehabilitation Act, entitling those with the disability to reasonable accommodations. See Oct. 26, 1990 letter from Timothy L. Coyle, Assistant Secretary for Legislation and Congressional Relations to Senator Frank R. Lautenberg (Attachment B). Since

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[33] In Miller v. United States Postal Service, 43 MSPR 473 (1990), the MSPB ruled that a Postal Service employee who suffered from severe chemical sensitivity to dust, diagnosed as allergic rhinitis, was not substantially limited in a major life activity because, while she was unable to be a Distribution Clerk, the particular job to which she was assigned, she had "no history of significant impairment from her allergies either on or off the job" and her condition "did not significantly affect any prior employment." Id. at 478 and 479 n.7. Thus, the MSPB concluded that the individual was not handicapped under the Rehabilitation Act and the EEOC's regulations at 29 C.F.R. § 1613.702(a). The decision left open the possibility, however, that in cases where such chemical sensitivity does significantly impair an individual, he or she could be handicapped.

[34] HUD issued a determination of no reasonable cause, however, because the respondents had provided the complainant reasonable accommodations. Id. at 3.

Corcelli, HUD has continued to reaffirm its position that MCS and EI are or can be handicaps. For example, the FHEO provided all regional FHEO Directors a draft technical guidance memorandum dated June 6, 1991, stating that persons disabled by MCS and EI are handicapped within the meaning of the Fair Housing Act and Section 504. See Draft Technical Guidance Memorandum (Attachment C). In addition, HUD's recent report to Congress, written by the Assistant Secretary for FHEO and cleared by the Secretary, listed, as a handicap discrimination case, one involving the "refusal to delay fumigation to permit a temporary absence for an individual with chemical sensitivities." Report to the Congress Pursuant to Section 808(e)(2) of the Fair Housing Act (1990): The State of Fair Housing (Nov. 1991) at 5 (Attachment D).

As explained above, persons with MCS and EI generally will meet the statutory and regulatory definitions of persons with a "handicap." In addition, HUD's interpretation to date is fully consistent with case precedent, the interpretations of other Federal agencies, and the Act's legislative history.

VI. Conclusion

MCS and EI can be handicaps under the Act. This position is consistent with the statutory language, the weight of judicial authority, the interpretation of other Federal agencies, and the Act's legislative history. HUD also has been consistent in articulating this position on prior occasions. Thus, HUD's current interpretation seems correct, and there appears to be no compelling reason to change it now.

Attachments