A Guide to South Dakota’s Disability Discrimination Laws: Limits and Vantages

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SOUTH DAKOTA'S DISABILITY DISCRIMINATION LAWS: LIMITS AND VANTAGES

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South Dakota Codified Law provides protection against discrimination on the basis of disability in the context of employment, housing, and other environs. The plaintiff with a disability in South Dakota may select from either a federal or state law matrix (or both) in framing a complaint. In many respects, South Dakota’s disability discrimination laws were drafted with clear advantages for defendants in comparison to federal laws such as the Americans with Disabilities Act. Perhaps the most glaring intentional lapse in the South Dakota Human Relations Act is the restricted availability of remedies. The Act also suffers from disheveled draftsmanship and ambiguous directives. Nonetheless, in some situations, a state law based claim can boast a few strategic gains. It is the aim of this article to identify the major provisions and omissions of South Dakota disability discrimination law in the employment sphere, while suggesting analyses for South Dakota courts and practitioners which reference federal civil rights doctrines wherever the state statutory language permits.

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Pray tell, why was this working man
—an excellent worker—canned?¹

I. INTRODUCTION

The South Dakota Human Relations Act was amended in 1986 to reach discrimination on the basis of disability.² The Act’s provisions mimicked the federal Rehabilitation Act,³ and anticipated the Americans

¹. Strackbein v. Fall River Highway Dep’t, 416 N.W.2d 270, 275 (S.D. 1987) (Henderson, J., dissenting) (arguing that an employer lacked just cause to terminate an employee with epilepsy which was controlled by medication). Judge Henderson ended his dissent with a flourish: “A tip of my hat to Strackbein’s lawyers for taking this working man’s case to the Supreme Court. And I proudly walk with them and Strackbein today.” Id. (Henderson, J., dissenting). The facts of Strackbein arose prior to the effective date of South Dakota’s disability discrimination laws.

². 1986 S.D. Laws ch. 170. The amendment to the Human Relations Act was entitled “An Act to prohibit discrimination based on certain disabilities in employment, housing, public accommodations and public services.” Id. The amendments were codified as part of the Human Relations Act at S.D.C.L. ch. 20-13, the full title of which is the “South Dakota Human Relations Act of 1972” [hereinafter Human Relations Act]. S.D.C.L. § 20-13-56 (1995). The Act shares many similarities with its federal twin, Title VII. 42 U.S.C.A. §§ 2000e et seq. (1994). The Human Relations Act, however, also covers disability discrimination, housing discrimination, labor union discrimination, and other matters not to be found within Title VII.


The Rehabilitation Act provides a functionally identical definition, but previously had substituted the word “handicap” for “disability;” this has since been changed to reflect the more current terminology. See Florence v. Runyon, 590 F.Supp. 485, 487 n. 2 (N.D. Tex. 1987) (noting the 1997 amendments to the Rehabilitation Act which substituted “individual with a disability” for “individual with handicaps”).
with Disabilities Act by four years. Today, the Human Relations Act stands alongside its federal counterpart, the Americans with Disabilities Act (ADA), and practitioners representing individuals with disabilities often face the decision of whether to base a cause of action on state statute or federal law or both. This article attempts to sketch the outlines of the South Dakota Human Relations Act's prohibitions against discrimination because of disability, and identify several key areas in which the State Act differs from the ADA. Some of the considerations inherent in opting between the state or federal remedy will be highlighted. Although employment discrimination law will be emphasized, discrimination in other contexts such as housing and education will also be briefly touched upon.

Both the Human Relations Act and the ADA require exhaustion of administrative remedies. Surprisingly perhaps, few South Dakota Supreme Court cases have yet grappled with the substantive portions of the State Act, and no case has applied the substantive provisions relating to individuals with disabilities. Instead, the reported case law relative to the Human Relations Act is predominately concerned with the exhaustion prerequisite. Given that this is generally a relatively elementary

For this reason, this article occasionally relies on case law interpreting the Rehabilitation Act's provisions. In the interest of consistency, the term "disability" is employed rather than "handicap.")

The more acceptable use of the word "disability" within discourse also bears emphasis at this juncture. Rather than identifying individuals as "disabled," the better practice is to modify, rather than substitute, the signifier for person or individual. That is, "individual with a disability" is preferred to "disabled person." Noun-plus-prepositional-phrase constructions are preferred to adjective-followed-by-noun formulations in order to avoid emphasizing the characteristic of being disabled over the person who has a disability. Robert L. Burgdorf, Jr., "Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability, 42 VILL. L. REV. 409, 411 n.1 (1997). This article follows this phraseology except where language would be rendered unacceptably cumbersome. Also, rather than employ the wordy "he or she" convention, the article alternates, using "he" in one instance, "she" in the next, and so on.


requirement, this article skirts discussion of the administrative aspects of the Human Relations Act, except to note, and briefly emphasize, the Act's most perhaps important advantage for aggrieved plaintiffs: speedy, efficient, and inexpensive resolution of complaints through the administrative procedure. Should the plaintiff wish to proceed with a civil action in lieu of an administrative hearing or obtain judicial review of an unfavorable final administrative order, jurisdiction will lie in South Dakota state courts. The bulk of this article centers on South Dakota state law claims of disability discrimination in civil courts. The first question in any disability discrimination case is always whether the plaintiff has a "disability" as that term is defined by statute. This question is unique in civil rights jurisprudence, but the remaining elements of a prima facie case (discrimination and damages) differ little from charges involving sexual harassment, racial discrimination, and so on. For this reason, more space is devoted below to the threshold "disability" question than the remaining elements of a disability discrimination case brought under South Dakota statue of limitations is also one hundred and eighty days in most cases. 42 U.S.C. § 2000e-5(e)(1) (1995); Lewis v. Bd. of Trustees of Ala. State Univ., 874 F.Supp. 1299, 1303 (M.D. Ala. 1995) (discussing the "continuing violation" tolling doctrine).

9. See S.D.C.L. § 20-13-28 (1995) (vesting the South Dakota Division of Human Rights with the power to "receive, investigate, and pass upon charges alleging unfair or discriminatory practices"). Anyone who believes that he has been illegally discriminated against may file a factual written charge with the Division of Human Rights. S.D.C.L. § 20-13-29 (1995); S.D. ADMIN. R. 20:03:02:01(2001). If employees refuse to follow the Human Relations Act, their employer may also file a charge against them. S.D.C.L. § 20-13-30 (1995). Upon receipt of a charge, the Human Rights Division will "promptly investigate" and, if probable cause exists, "immediately endeavor to eliminate the discriminatory or unfair practice by conference or conciliation." S.D.C.L. § 20-13-32 (1995); see also S.D.C.L. § 20-13-1.1 (Supp. 1999) and Erdahl v. Groff, 1998 S.D. 28, ¶ 24, 576 N.W.2d 15, 19 (defining probable cause). If these efforts fail, the respondent may be required to provide a written answer or answer at a hearing. S.D.C.L. §§ 20-13-34, 20-13-35 (1995); see also S.D.C.L. §§ 20-13-36 et seq. (1995), S.D. ADMIN. R. 20:03:05 (2001) (describing the procedural aspects of administrative hearings). If a decision is made in favor of the complaining party, available remedies include injunctive relief, back pay, "compensation incidental to the violation, other than pain and suffering, punitive, or consequential damages," and "any other appropriate relief." S.D.C.L. § 20-13-42 (1995); see also infra notes 209-64 and accompanying text for a fuller discussion remedies. Approximately 130 charges are filed annually with the Division of Human Rights, most of which are sex discrimination charges, and about 90% of which are employment-related. South Dakota Division of Human Rights, Avoiding Discrimination, supra note 5. In 1999, disability discrimination charges made up 29% of the Division’s caseload. South Dakota Division of Human Rights, FY 1999 Caseload Statistics (last modified May 10, 2000) <http://www.state.sd.us/dcu/hr/stat99.htm> [hereinafter South Dakota Division on Human Rights, 1999 Caseload Statistics]. The effectiveness of the Division of Human Rights, however, has been questioned. See South Dakota Advisory Committee to the United States Commission on Civil Rights, Native Americans in South Dakota: An Erosion of Confidence in the Justice System, ch. 3, ¶ 5 (visited October 19, 2001) <http://www.usccr.gov/sdsac/ch3.htm> (observing that "[t]the South Dakota Human Rights Commission is limited in authority and resources") [hereinafter Native Americans in South Dakota].

10. See S.D.C.L. § 20-13-35.1 (1995) (providing the charging party or respondent the option of a civil action within twenty days after the South Dakota Human Rights Division has directed the respondent to answer); S.D.C.L. § 20-13-47 (1995) (allowing judicial review of final administrative orders). Jurisdiction will also lie in federal courts if the state claim is bundled with a federal question such as an ADA claim or if diversity jurisdiction is satisfied and pendent jurisdiction over the state law claim is invoked. See 28 U.S.C.A. § 1367(a) (1993). No reported Eighth Circuit decisions have involved claims involving the South Dakota Human Relations Act. But cf. Heintzelman v. Runyon, 120 F.3d 143 (8th Cir. 1997) (discussing disability claim under ADA and Missouri Human Rights Act); Snow v. Ridgeview Med. Ctr., 128 F.3d 1201 (8th Cir. 1997) (discussing claim brought under ADA and Minnesota Human Rights Act); Moritz v. Frontier Airlines, Inc., 147 F.3d 784 (8th Cir. 1998) (discussing ADA and North Dakota Human Rights Act claims).

11. Due to space considerations, the author has omitted any substantive discussion of defenses available under the state Act or the ADA.
II. DISABILITY

A. ACTUAL DISABILITY

We begin with the statutory definition of a disability. The Human Relations Act defines a disability as “a physical or mental impairment of a person resulting from disease, injury, congenital condition of birth or functional disorder which substantially limits one or more of the person’s major life functions.” Alternatively, a plaintiff may satisfy the definition of a disability if she is regarded or recorded as having such a disability. In addition, a disability, for purposes of certain statutory sections, must be unrelated to the individual’s ability to perform the duties, or utilize the services at issue.

The ADA, for purposes of comparison, contains a very similar definition. An ADA disability is “a physical or mental impairment that substantially limits one or more of the major life activities of such individual.” Three elements are visible within the definition of disabled: impairment; substantially limits; and major life activity. Because the ADA only prohibits discrimination against “a qualified individual with a disability,” an additional element of proof will also be required; the individual must be “qualified.” A “qualified” individual is one “who, with or without reasonable accommodation, can perform the essential functions of the employment position.”

A parsing of the state statutory language reveals that the Human Relations Act’s definition of “disability” contains four distinct elements. The statutory language provides that the plaintiff must demonstrate a “physical or mental impairment . . . which substantially limits one or more of the person’s major life functions.” These first three elements, which must always be satisfied in order for the complaining individual to qualify as a member of the pertinent protected class are: (1) an impairment; which (2) substantially limits; (3) a major life function. The fourth element of the definition, which is labeled “qualified” hereinafter for ease of identification, applies variously in different provisions of the Act as will be explained below. These four elements will be discussed in the order

16. Id.
19. Id.
listed, beginning with the existence of an impairment.

1. Impairment

The first element of the definition of a disability, the existence of an “impairment,” is often easier to frame in the negative, categorizing what an impairment is not rather than what an impairment is. Thus, we should begin with a statutory exclusion and compare the ADA’s provisions. By statutory fiat, drug addiction to illegal narcotics cannot be an impairment under the Human Relations Act. This is the only per se exclusion under the State Act.

The ADA, by contrast, excludes a host of addictions, sexual deviancies and other stigmatizing maladies and characteristics as per se non-impairments for purposes of the federal Act. Thus, homosexuality, bisexuality, “transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments or other sexual behavior disorders” can simply never qualify as ADA impairments. The ADA also excludes “compulsive gambling, kleptomania, or pyromania,” as well as “psychoactive substance use disorders resulting from current illegal use of drugs.”

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21. Id.; accord City of Sioux Falls v. Miller, 555 N.W.2d 368, 377 (S.D. 1996) (per curiam) (holding, in a case applying a city ordinance prohibiting disability discrimination, that the ordinance “should not draw within its protection employees who actively engage in the illegal use of drugs and alcohol”). The Human Relations Act provides that a disability “does not include current illegal use of or addiction to marijuana as defined in subdivision 22-42-1(7) or a controlled substance as defined in subsection 22-42-1(1).” S.D.C.L. § 22-42-1 (1995). Marijuana is defined as the cannabis plant; controlled substances are Schedule I-IV drugs, such as hallucinogens, stimulants, depressants and opium derivatives. S.D.C.L. § 22-42-1(1), (7) (1998); S.D.C.L. § 34-20B-11 to 34-20B-26 (1994 & Supp. 1999).

The ADA excludes from the definition of a disability individuals who are “currently engaging in the illegal use of drugs.” 42 U.S.C.A. § 12210(a) (1995). Yet the ADA also provides an exception for “the use of a drug taken under the supervision of a licensed health care professional.” 42 U.S.C.A. § 12111(6)(A) (1995). No such exception exists in the Human Relations Act. Thus, an individual with an addiction to drugs taken under a doctor’s supervision who otherwise meets the definition of an individual with a disability under the Human Relations Act would not qualify as disabled. Such an individual could qualify under the ADA.


Thus, under the Human Relations Act, though not under the ADA, a defendant could argue that it is not a violation of the law to discriminate against individuals who are disabled by virtue of an addiction to drugs, even though that person has been successfully rehabilitated. It is generally thought that even recovered addicts suffer from the problems of addiction, even though they may no longer use illegal drugs. See United States v. Southern Management Corp., 955 F.2d 914, 919 (4th Cir. 1992) (finding recovered addicts disabled under the Fair Housing Act). Ideally, individuals with drug addictions who have been successful in their efforts over their addictions ought to be protected from discrimination by the Human Relations Act, assuming they otherwise meet the definition of an individual with a disability. See Miller, 555 N.W.2d at 376 (per curiam) (citing 42 U.S.C.A. § 12114) (considering a terminated
The statutory exclusion from the ADA’s umbrella of protection of individuals afflicted with this grouping of especially alarming disorders, such as pyromania and pedophilia, has been the subject of criticism. These individuals, after all, are all the more likely to face unwarranted discrimination based on stereotypes and fear. The unambiguous language of the ADA, however, severs them from federal protections. Under South Dakota’s Human Relations Act, by contrast, there is no statutory basis for dismissing individuals with kleptomania or transsexualism solely on the basis of their particular diagnoses. While defense counsel faced with a plaintiff suffering from an ADA-excluded impairment in a Human Relations Act case can be expected to argue the ADA’s exclusionary provisions by analogy, the plain language of the Human Relations Act would appear to cover these individuals who can otherwise meet the remaining prongs of the definition of a disability. Aside from the exclusion for individuals with addiction problems, it is one of the state law’s more praiseworthy aspects that it does not carve out a class of individuals undeserving of legal protections simply because of the nature of their pariah-like impairments.

The Human Relations Act, like the ADA, limits the definition of an “impairment” to those impairments which are either physical or mental in character. Insofar as the ADA is concerned, nearly all mental or physical conditions which are not the subject of a statutory exclusion ought to qualify as impairments. The regulations interpreting the ADA, formulated by the Equal Employment Opportunity Commission (EEOC), refine the definition somewhat, distinguishing conditions which are purely the result of an individual’s culture or life experiences. Poverty, for example, is not an impairment according to the EEOC. The rationale is that poverty is not a mental or physical condition, but purely environmental. Furthermore, the EEOC reasons, conditions such as eye color cannot be impairments because they are normal physical employee’s attempts at rehabilitation for his chemical addiction in relation to a city ordinance prohibited disability discrimination, but rejecting his claim because of his history of unsuccessful treatment and drug-related misconduct). The Human Relations Act’s lack of protection for rehabilitated individuals who do not currently use illegal drugs but meet the definition of “disabled” by virtue of lingering substance abuse disorders is regrettable.

25. See Adrienne L. Hiegel, Sexual Exclusions: The Americans with Disabilities Act as a Moral Code, 94 COLUM. L. REV. 1451, 1453 (1994) (arguing that “[r]ather than changing the ethical significance of all disabilities, the Act carves out a new class of untouchables defined by sexuality and sex behaviors”).

26. Blackwell v. United States Dep’t of Treasury, 656 F.Supp. 713, 715 (D.C.C. 1986) (holding that under the then-existing language of the Rehabilitation Act, transvestites are clearly individuals with disabilities “because many experience strong social rejection in the work place as a result of their mental ailment ..”.


30. Id. Nor is a lack of education. Id.
Because the Human Relations Act lacks interpretative guidance, courts can be expected to rely on the federal regulations in some cases.32

Whereas both the Human Relations Act and the ADA cover physical or mental impairments, the Human Relations Act further tweaks the term “impairment.” The additional gloss upon the state statute provides that the impairment must result “from disease, injury, congenital condition of birth or functional disorder.”33 Because the state statute contains a phrase which the ADA does not, it could be argued that some impairments which would qualify as ADA impairments would not qualify as Human Relations Act impairments when they cannot be said to be “resulting from disease, injury, congenital condition of birth or functional disorder.”34 Nevertheless, most recognized ADA impairments would seem to qualify under the state statutory language as well.

The Human Relations Act’s phrase contains four alternative elements: disease/injury/congenital defect/or functional disorder.35 Three simple examples will illustrate the first three terms—disease, injury, and congenital condition. Example #1: Incontinence would qualify as an impairment under the Human Relations Act if it resulted from some ailment, illness, or “disease.”36 Example #2: A partially amputated foot ought to qualify as a Human Relations Act impairment when it results from an “injury.”37 Example #3: Hearing loss should meet the state statute’s definition of a physical impairment when it results from a “congenital condition of birth.”38 Exactly what constitutes a “functional disorder,” (the fourth alternative) however, is less straightforward.

The occasional plaintiff who is unable to trace his condition to a congenital defect, injury or disease might anticipate opposing arguments that the Human Relations Act’s definition of a disability has not been met. Consider an individual with asthma. Asthma is a recognized ADA impairment,39 but it is not always possible to establish that an individual’s

31. Id. “The definition of the term ‘impairments’ does not include physical characteristics such as eye color, hair color, left-handedness, or height, weight or muscle tone that are within ‘normal’ range and are not the result of a physiological disorder.” Id.
32. See City of Sioux Falls v. Miller, 555 N.W.2d 368, 373 n.6 (S.D. 1996) (per curiam) (stating, “It is helpful to consider federal standards” in construing a city ordinance provision relating to disability discrimination.).
34. Id.
36. Cf. Swain v. Hillsborough County Sch. Bd., 146 F.3d 855, 857-58 (11th Cir. 1998) (stating that incontinence resulting from a combination of ailments is implicitly recognized as an ADA impairment, but not as a disability when it is not substantially limiting in a major life activity).
asthma results from any specific injury, disease, or birth defect. The precise origins of learning disabilities are also a matter of some debate, and experts may disagree about whether a condition such as autism or cerebral palsy can be linked to an injury, disease, or congenital condition. But although impairments such as asthma or autism may have unknown etiologies, these types of physical and mental conditions ought to qualify under the State Act as impairments resulting from a "functional disorder." A dictionary defines "functional" as being "without a known organic cause. . . ." A "disorder," the same reference provides, is "a disturbance in physical or mental health or functions; [a] malady or dysfunction." Thus, a "functional disorder" can be defined as an abnormality or defect with an unknown etiology.

The additional wording in the state statute following the word "impairment" is, it is asserted here, more descriptive than operational. This proposed interpretation is consistent with case law from other jurisdictions analyzing similar word choice in various definitions of disability. Again, the statute provides that a mental or physical

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43. See RANDOM HOUSE UNABRIDGED DICTIONARY 775 (2nd ed. 1993) (defining functional as "without a known organic cause or structural change: a functional disorder") (italics in original). The OED defines functional as: "Of or pertaining to the functions or an organ. Of diseases: Affecting the functions only, not structural or organic. Also of a mental disorder: having no discernible organic cause." VI THE OXFORD ENGLISH DICTIONARY 264 (2nd ed. 1989). See also Meyerink v. Northwestern Pub. Serv. Co., 391 N.W.2d 180, 183-84 (S.D. 1986) (citing State v. Big Head, 363 N.W.2d 556, 559 (S.D. 1985)) (reciting, "[w]ords used by the legislature are presumed to convey their ordinary, popular meaning, unless the context or the legislature's apparent intention justifies departure").

44. RANDOM HOUSE UNABRIDGED DICTIONARY 567 (2nd ed. 1993); see also IV THE OXFORD ENGLISH DICTIONARY 799 (2nd ed. 1989) (defining disorder as "[a] disturbance of the bodily (or mental) functions; an ailment, disease. (Usually a weaker term than DISEASE, and not implying structural change")).

45. Cf. S.D.C.L. § 27A-15-1.1 (1999) (defining a person with a "severe emotional disturbance" for purposes of the treatment of minors as an individual who, inter alia, "[e]xhibits behavior resulting in a functional impairment which substantially interferes with, or limits the individual's role or functioning in the community, school, family, or peer group"), amended by H.R. 1036, 2000 Leg. (S.D. 2000) (defining a "severe mental illness" as a "substantial organic or psychiatric disorder of thought, mood, perception, orientation, or memory which significantly impairs judgment, behavior, or ability to cope with the basic demands of life").

46. S.D.C.L. § 20-13-1(4) (1995). The regulations and case law interpreting the ADA have described an ADA "impairment" as characteristics which are the result of a "disorder" as well. See Andrews v. State of Ohio, 104 F.3d 803, 808 (6th Cir. 1997) (quoting 29 C.F.R. § 1630.2(h) (1998)) ("The definition of the term 'impairment' does not include physical characteristics . . . that are within 'normal' range and not the result of a physiological disorder").

47. See, e.g., Subsequent Injury Trust Fund of Ga. v. Harbin Homes, Inc., 355 S.E.2d 702, 703 (Ga. App. 1987) (describing the conclusions of a trust fund in a workers' compensation proceeding: "Evidence established that there were no detectable organic grounds for Ms. Roberts' seizures; thus, they were characterized as a functional disorder"); Killebrew v. Abbott Laboratories, 352 So.2d 32 (La. App. 1977), aff'd, 359 So.2d 1275 (La. 1978) (analyzing whether, under the terms of an employer's long term disability plan, an employee's symptoms were due to "a functional nervous disorder").
“impairment” is one which is the result of “disease, injury, congenital condition of birth or functional disorder.” Like the regulations which interpret the ADA, this necessarily excludes culturally-situated behaviors such as one’s habit of dress and economic conditions such as poverty because neither can be said to be an impairment resulting from disease, injury, congenital condition, or functional disorder. When the specific origins of the impairment cannot be proven with certainty, the term “functional disorder” supplies a residual category.

The implicit requirements of this term are that the condition must, as a “disorder,” fall somewhat outside the norm and have at least some quantifiable negative effect on the individual as suggested by the adjective “functional.” If one accepts the analysis offered here, the state statute’s formulation of an “impairment” casts a wide net and few physical or mental conditions should be excluded as not meeting the definition. It is the second element of the definition, the “substantially limiting” element, where minor and trivial conditions and characteristics will be excluded.

2. Substantially Limits

Both the ADA and the Human Relations Act make use of identical language with regard to perhaps the most flexible aspect of the definition of a disabling impairment; that is, it must be one which has a “substantially limit[ing]” effect upon an individual’s major life functions or activities. An activity can be affected by an impairment without being substantially limited by it. The adverb “substantially” “suggests ‘considerable’ or

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48. See 29 C.F.R. app. § 1630.2(h) (1998) (advising that “[e]nvironmental, cultural, or economic disadvantages such as poverty, lack of education or a prison record are not impairments”).

49. Cf. Francis v. City of Meriden, 129 F.3d 281, 283 (2nd Cir. 1997) (quoting 29 C.F.R. app. § 1630.2(h) (1998)) (stating that an impairment under the ADA does not include physical conditions “that are within ‘normal’ range”) (emphasis added). Semantically speaking, a “functional disorder” also speaks to the functional limitation of the condition. The extent of the limiting effect of the condition at issue need not be considered separately in the context of asking whether an impairment is present, however, because this inquiry is provided for in the second element of the definition of a statutory “disability;” that is, its “substantially limiting” effect upon the individual. See infra notes 51-63 and accompanying text for a discussion of the “substantial limitation” modifier.


52. Kirkendall v. United Parcel Serv., Inc., 964 F.Supp. 106, 109 (W.D.N.Y. 1997) (citing Dutcher v. Ingalls Shipbuilding, 53 F.3d 723, 726 (5th Cir. 1995)). For example, an individual is not
‘specified to a large degree.’”\textsuperscript{53} Whether an impairment significantly restricts the performance of an activity is often ascertained by comparing the way the individual must perform an activity to the way most people in the general population perform that same task.\textsuperscript{54}

It should be noted that the United States Supreme Court, in \textit{Sutton v. United Air Lines},\textsuperscript{55} held that mitigating measures must be considered in any assessment of the substantially limiting character of an impairment.\textsuperscript{56} The individual must be evaluated in her “present state,” taking into account the effect of medicines or other devices.\textsuperscript{57} This means, for example, that the individual with epilepsy which is effectively controlled by medication, as well as the fully functional person missing a leg but wearing a prosthetic device may no longer meet the definition of individuals with disabilities under the ADA.\textsuperscript{58} The Supreme Court did not indicate whether an individual should be evaluated only with reference to mitigating measures actually used, or whether the evaluation should incorporate potential mitigating measures, whether adopted by the individual or not.\textsuperscript{59} \textit{Sutton} seems to suggest that the former is more consistent with the statutory language of the ADA.\textsuperscript{60}

\textsuperscript{54} 29 C.F.R. § 1630.2(j)(1)(i) (1998). “It should be noted that the term ‘average person’ is not intended to imply a precise mathematical ‘average.’” 29 C.F.R. app. § 1630.2(j) (1998). Of course, if the impairment makes performance of the task impossible, the task is substantially limited. \textit{Id.} “For example, an individual whose legs are paralyzed is substantially limited in the major life activity of walking because he or she is unable, due to the impairment, to perform that major life activity.” \textit{Id.}

\textsuperscript{55} Sutton, 527 U.S. at 490-91. This holding was echoed in two other cases decided the same term. Murphy v. United Parcel Serv., Inc., 527 U.S. 516, 520-21 (1999); Alberton’s v. Kirkingburg, 527 U.S. 555, 566-67 (1999). See Leading Cases, 113 HARV. L. REV. 337 (1999) (reviewing these decisions).

\textsuperscript{56} Sutton, 527 U.S. at 490-91. \textit{See also} McConnell v. Pioneer Hi-Bred Int'l, Inc., No. 98-2060, 2000 WL 234672, at ¶ 7 (D.S.D. 2000) (holding that plaintiff was not substantially limited in the major life activity of working where he took lithium to control a bipolar disorder and felt “fine while taking the lithium”) \textit{aff'd}, 260 F.3d 958, 2001 WL 913999 (8th Cir. 2001) (per curiam). \textit{But see} Gorman v. Easley, 257 F.3d 738, 750 (8th Cir. 2001) (rejecting defendant’s arguments that the plaintiff was not disabled because of the corrective device of a wheelchair: “[P]laintiff’s] wheelchair permits him some mobility, but hardly replaces his legs.”); Oting v. J.C. Penney Co., 223 F.3d 704, 709-11 (8th Cir. 2000) (holding that an individual who took medication to control her epilepsy was still disabled when, taking the medication’s effect into consideration, she still had sporadic seizures lasting between thirty seconds and two minutes).


\textsuperscript{58} Meadows & Bales, supra note 57, at 35. For post-\textit{Sutton} ADA cases applying the new mitigating measures rule, see Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 309 (3rd Cir. 1999) (holding that an individual taking lithium for a bipolar impairment may be substantially limited in a major life activity); Belk v. Southwestern Bell Tel. Co., 194 F.3d 946, 950 (8th Cir. 1999) (holding that an individual with an impairment of polio has a disability despite full-time use of leg braces); Taylor v. Blue Cross and Blue Shield of Texas, Inc., 55 F.Supp. 2d 604, 611 (N.D. Tex. 1999) (holding that plaintiff’s treated sleep apnea is not a disability); Todd v. Academy Corp., 57 F.Supp.2d 448, 454 (S.D. Tex. 1999) (holding that individual’s impairment of epilepsy, as treated by medication, did not substantially limit a major life activity); but see Rowles v. Automated Prod. Sys., Inc., 92 F.Supp.2d 424, 428 (M.D. Pa. 2000) (reaching the opposite result).

\textsuperscript{59} Meadows & Bales, supra note 57, at 54.

\textsuperscript{60} Finical v. Collections Unlimited, Inc., 65 F.Supp.2d 1032, 1037 (D. Ariz. 1999). \textit{See also} Sutton, 527 U.S. at 482-83 (directing that the “substantially limited” element of the definition of
In most instances, one would expect South Dakota law to generally follow federal interpretations of the ADA unless the statutory language directs otherwise. The federal law regarding consideration of impairments in their treated state, although now settled, was quite controversial before the Supreme Court pronouncement. Persuasive arguments, compelling case law, and legislative history supported the countervailing view. For this reason, one could expect some resistance to adopting the holding of **Sutton** to South Dakota law. Whether such

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**Disability** requires evaluation of the individual’s actual present limitations rather than hypothetical limitations. For example, under the Meadows and Bales analysis, an individual missing a limb who is limited by virtue of not having the latest and very expensive prosthetic device would be evaluated in their present state, without regard to the effects of hypothetical mitigating measures, but an individual who suffers severe seizures because she refuses to take her prescribed medication would be evaluated as if she were in fact following her doctor’s directions. Meadows & Bales, supra note 57, at 54.


A student writer has proposed an alternative approach. Maureen R. Walsh, Note, What Constitutes a “Disability” under the Americans with Disabilities Act: Should Courts Consider Mitigating Measures?, 55 Wash. & Lee L. Rev. 917 (1998). Walsh rejects both the view that mitigating measures should never be considered and the view that mitigating measures should always be incorporated into the substantially limited analysis. Id. at 950. Instead, she advocates a multi-factored sensitive inquiry into the mitigating measure on a case by case basis. Id. at 951. Her three-part inquiry examines (1) the mitigating measure’s effectiveness; (2) the mitigating measure’s reliability; and (3) the mitigating measure’s potential unreliability and ineffectiveness. Id. “These three factors should enable the courts to distinguish between mitigating measures that should be a part of the impairment analysis and those that should not.” Id. Walsh’s proposal deserves consideration by South Dakota courts interpreting this aspect of the Human Relations Act. Her approach successfully balances the concerns of both camps in the mitigating measures controversy. At any rate, not all mitigating measures were created equal, and it may be that the required adoption of the mitigating measure itself places substantial limitations on the individual’s major life activities and/or functions. See Todd v. Academy Corp., 57 F.Supp.2d 448, 454 (S.D. Tex. 1999) (suggesting that the side effects of anti-epileptic drugs may pose substantially limiting effects upon individuals’ major life activities); Meadows & Bales, supra note 57, at 52 (implying that stringent dietary restrictions which are necessary to ameliorate certain impairments such as hypertension may impose substantial limitations on the major life activity of eating).

resistance will ultimately succeed remains to be seen.

3. Major Life Functions

In the third element of the definition of a disability, the Human Relations Act uses the words “major life functions” while the ADA employs “major life activities.” That is, a disability is defined as an impairment which substantially limits a major life activity/function. Whether the South Dakota Supreme Court would afford a different analysis based on this subtle difference in word choice is a matter of conjecture. A “function” can be defined as “[a]ctivity; action in general, whether physical or mental,” while an “activity” means a “normal mental or bodily power, function, or process.” Arguably, the South Dakota law’s use of the word “functions” cuts a wider swath than the ADA’s “activities.”

Perhaps the more critical part of the “major life activities/functions” aspect of the definition of a disability resides not in the distinction between a function and an activity, but in the reading of the adjective “major.” Not all activities or functions are “major” ones. In this regard, South Dakota courts can be expected to reference federal decisions interpreting that word in the ADA. The Supreme Court has stated that the word major “denotes comparative significance” and has suggested “that the touchstone for determining an activity’s inclusion under the statutory rubric is its significance.” Major life activities under the ADA include walking, breathing, reproduction, and working. Rejected major life activities range from shopping to shoveling snow. Caring for oneself and performing manual tasks, on the other hand, are accepted major life activities. Thus, courts are reluctant to recognize major life activities

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65. VI THE OXFORD ENGLISH DICTIONARY 263 (2nd ed. 1989); see also RANDOM HOUSE UNABRIDGED DICTIONARY 775 (2nd ed. 1993) (defining a function as “the kind of action or activity proper to a person”).
66. RANDOM HOUSE UNABRIDGED DICTIONARY 20 (2nd ed. 1993). Another definition of an activity is a “specific deed, action, function, or sphere of action.” Id.
67. See Greenwood Trust Co. v. Commonwealth of Massachusetts, 971 F.2d 818, 827 (1st Cir. 1992) (stating that “if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it”) (quoting Felix Frankfurter, Some Reflections on the Reading of Statutes, 47 COLUM. L. REV. 527, 537 (1947)). “What is more, when such borrowing occurs, the borrowed phrases do not shed their skin like so many reinvigorated reptiles.” Id. While the Human Relations Act varied the term “activities” from “functions” in the Rehabilitation Act, the word “major” in both statutes is identical. 42 U.S.C.A. § 12102(2)(A) (1995); S.D.C.L. § 20-13-1(4) (1995).
69. 29 C.F.R. § 1630.2(i) (1998); Bragdon, 524 U.S. at 638 (holding reproduction to be a major life activity). The EEOC also lists caring for oneself, learning, seeing, hearing, speaking, and performing manual tasks as major life activities. 29 C.F.R. § 1630.2(i) (1998).
70. See Colwell v. Suffolk County Police Dep't, 158 F.3d 635, 643 (2nd Cir. 1998), cert. denied, 526 U.S. 1018 (1999) (also rejecting skiing, yard work, gardening, golfing, driving, painting, plastering, and moving furniture).
which address narrow and less important undertakings.\textsuperscript{72} The federal analysis implies that an activity must be "major" to the population generally, and that the importance (or unimportance) of an activity to the particular plaintiff is irrelevant.\textsuperscript{73}

4. Qualified

a. An Overview

A "disability" under the Human Relations Act means a mental or physical condition which meets the above discussed tripartite definition.\textsuperscript{74} A fourth element must also be satisfied. This element is unique in the manner in which it differs from the analogous requirement in the ADA in the sense that it varies according to the provision of the Human Relations Act invoked. In the interests of clarity, it is herein referred to as the "qualified" element, though it might be more accurate to call it the "unrelated to" requirement, since that phrase is key in each of its variations. It might be helpful, at this juncture, to view the statutory language. A Human Relations Act "disability," as discussed above, is established by showing an impairment which substantially limits a major life function, and that said impairment,\textsuperscript{75}

\textsuperscript{72} Reeves v. Johnson Controls World Serv., Inc., 140 F.3d 144, 152 (2nd Cir. 1998). That case explained:
The need to identify a major life activity that is affected by the plaintiff's impairment plays an important role in ensuring that only significant impairments will enjoy the protection of the ADA. An ADA plaintiff could considerably lessen the burden of making an individualized showing of a substantial limitation were he able to define the major life activity as narrowly as possible, with an eye toward conforming the definition to the particular facts of his own case. For example, while it might be hard to show that a very mild cough substantially limits the major life activity of "breathing," it would be far easier to make an individualized showing of a substantial limitation if the major life activity were instead defined more narrowly, say, the major life activity of "breathing atop Mount Everest." Depending upon how narrowly he may frame the scope of the "major life activity," the plaintiff's burden of making an individualized showing of substantial limitation will vary accordingly. In this regard, we underscore the basic principles, . . . that the ADA does not guard against discrimination based upon any physical or mental impairment, but only those impairments that are significant. Narrowing and diluting the definition of a major life activity, which in turn might lessen the plaintiff's burden of proving a substantial limitation, would undermine the role of the statute's "substantial lim[i]tation" inquiry in ensuring that only impairments of some significance are protected by the ADA.

\textit{Id.} Reeves rejected "everyday mobility," defined by the agoraphobic plaintiff as going through tunnels, shopping alone, and staying overnight in unfamiliar places, as a major life activity. \textit{Id.}

\textsuperscript{73} E.g., Bragdon v. Abbott, 524 U.S. 624, 638-39 (1998) (holding that reproduction is a major life activity without reference to the plaintiff's ranking of importance of that activity); Colwell, 158 F.3d at 643 (2nd Cir. 1998) (rejecting driving, gardening and shopping as major life activities without reference to whether the plaintiff held these to be major and important activities).

\textsuperscript{74} S.D.C.L. § 20-13-1(4) (1995). Those elements are: (1) an impairment; which (2) substantially limits; (3) a major life function. \textit{Id.}

\textsuperscript{75} The author has taken the liberty of re-phrasing the statutory language here a bit. The statute itself defines a disability as "a physical or mental impairment . . . which substantially limits one or more of the person's major life functions; a record of having such an impairment; or being regarded as having such an impairment which [is unrelated to the particular services at issue]." S.D.C.L. § 20-13-1(4) (1995). The manner in which the definition shifts from its three-element definition to the "qualified"
SOUTH DAKOTA'S DISABILITY DISCRIMINATION LAWS

(a) For purposes of §§ 20-13-10 to 20-13-17, inclusive [provisions relating to employment discrimination], is unrelated to an individual's ability to perform the major duties of a particular job or position, or is unrelated to an individual's qualifications for employment or promotion;

(b) For purposes of §§ 20-13-20 to 20-13-21.1, inclusive [provisions relating to housing discrimination], is unrelated to an individual's ability to acquire, rent or maintain property;

(c) For purposes of §§ 20-13-22 to 20-13-25, inclusive [provisions relating to public accommodations and public services], is unrelated to an individual's ability to utilize and benefit from educational opportunities, programs and facilities at an educational institution.

Disability is defined operationally by one of the statute's animating principles: individuals who are not qualified should not be allowed to recover against an employer when a particular job or service is simply beyond the individuals' abilities. It would be an absurd result if an individual without sight were allowed to successfully bring an action because he was not hired as a school bus driver. Indeed, it is a well-recognized duty of employers to discriminate on the basis of an employee's disability when that disability creates an unreasonable danger, given the functions the employee is expected to perform. South Dakota cases decided before the enactment of the disability provisions of the Human

element is awkwardly composed in that the "qualified" element forms an extended subordinate phrase to the "impairment" element in the "regarded as" alternative definition of a disability (which is discussed in supra notes 118-23 and accompanying text). The argument could therefore be advanced that on strict grammatical postulates, the "qualified" element only modifies the "regarded as" definition, and not to the "actual disability" or "record of" definitions. Such a reading would relieve the plaintiff of having to satisfy the "qualified" element in all except the relatively rare "regarded as" claim. Although some conservative schools of statutory construction might agree with this result based on a "plain reading" of the statute, see, e.g., William N. Eskridge, Jr., The New Textualism, 37 UCLA L. REV. 621, 660-63 (1990) (reviewing the statutory construction approach of Justice Scalia), given that the Rehabilitation Act preceded the enactment of South Dakota's definition of a disability, it can be expected that, notwithstanding the cumbersome statutory language, South Dakota courts will reject this interpretation and apply the "qualified" element to all three three-part definitions of "disability." See 29 U.S.C.A. § 794(a) (1999) (prohibiting discrimination against an "otherwise qualified individual with a disability" under federal grants and programs without selectively applying the "qualified" element); see also infra note 87 for examples of the South Dakota Supreme Court rejecting mechanical applications of statutes in favor of common sense meanings.


77. The Human Relations Act includes the qualified element within the definition of disability. S.D.C.L. § 20-13-1(4)(a) (1995). That is, technically speaking, an individual with quadriplegia does not have a "disability" under the state Act if the individual's impairment is not unrelated to her ability to perform the major duties of a particular position. See id. The ADA, by contrast, prohibits discrimination against qualified individuals with disabilities, providing a separate definition of "qualified" from "disability." See 42 U.S.C. § 12111(8) (1995) (defining qualified).


79. See, e.g., Giltner v. Stephens, 200 P.2d 290, 292-93 (Kan. 1948) (involving allegations of negligent hiring and retention of a carpenter with deafness and impaired speech to construct a dairy barn). In Giltner, the plaintiff was hoisting a girder, but when he told his disabled coemployee to "hold it" and stepped through, the rope ran through the pulleys and the girder dropped on the plaintiff, seriously injuring him. Id. at 293.
Relations Law have upheld the termination of employees with medical conditions which predispose them to injury with little inquiry into the reasonableness of the employers' decisions.\(^8\) Tort principles generally require employers to use reasonable care in selecting and retaining only employees whom are physically and mentally fit for the work assigned.\(^8\) The Human Relations Act acknowledges these common law duties by exempting non-qualified individuals from its anti-discrimination provisions.\(^8\) A "qualified" analysis applies to employer-employee relationships as well as landlord-tenant and school-student issues.\(^8\)

Herein lies one of those aspects of the Human Relations Act which impinges the most subtlety, for the Act does not frame its discrimination prohibitions against individuals with disabilities in near-absolutes, as it does with regard to discrimination on the basis of race, color, creed, sex, religion, national origin, or ancestry.\(^8\) Underlying these absolute anti-discrimination laws is the conception that race, for example, should never be a legitimate characteristic on which to base a decision to demote or terminate an employee. Similarly, treating individuals adversely on the basis of their religious beliefs or national origin can be condemned without equivocation. When it comes to individuals with disabilities that affect their ability to do a job, however, society not only permits, but, in certain circumstances, even encourages discrimination on the basis of disability when an individual's disability can be linked to an inability to do a job (in a way that ancestry or religious beliefs cannot). This explains the "qualified" element of the Human Relations Act's definition of a disability and its absence in other civil rights protections.

In the employment context, therefore, an employee alleging disability discrimination must show as an element of her prima facie case that her

\(^8\) See Strackbein v. Fall River County Highway Dep't, 416 N.W.2d 270, 272-73 (S.D. 1987) (upholding the termination of an employee with controlled migraines and vertigo based on the potential restrictions imposed thereby).
\(^8\) Estate of Arrington v. Fields, 578 S.W.2d 173, 178 (Tex. Civ. App. 1979); Fleming v. Bronfin, 80 A.2d 915, 917 (D.C. App. 1951). See also Strackbein, 416 N.W.2d at 273 (finding that an employee with migraines and mild, short-lived vertigo was terminated for just cause under his union's collective bargaining agreement); Hopes v. Black Hills Power and Light Co., 386 N.W.2d 490, 491 (S.D. 1986) (holding that an at-will employee's total disability is sufficient grounds for termination); Rollinger v. Dairyland Creamery Co., 287 N.W. 333, 336 (S.D. 1939) (holding that an employer may terminate an employee who becomes physically disabled and can no longer perform the job despite five year contract which merely provided for performance “within the limits of his ability”). Strackbein, Hopes, and Rollinger were decided before the enactment of the state disability discrimination protections currently in place. See also generally Adam A. Milani, Living in the World: A New Look at the Disabled in the Law of Torts, 48 CATH. U. L. REV. 323 (1999).
\(^8\) S.D.C.L. § 20-13-1(4)(b), (c) (1995).
\(^8\) S.D.C.L. § 20-13-1(16) (1995). Wage differentiation discrimination on the basis of sex is permitted to the extent that the disparity is “pursuant to established seniority systems, job descriptive systems, merit increase systems, or executive training programs, which do not discriminate on the basis of sex . . .” S.D.C.L. §§ 20-13-17, 60-12-16 (1995). Schools, academies and colleges may offer segregated athletic activities so long as both sexes are afforded a substantially equal opportunity to participate. S.D.C.L. § 20-13-22 (1995). Religious institutions may discriminate on the basis of religion when doing so relates to a bona fide religious purpose. S.D.C.L. § 20-13-18 (1995). Religious schools are allowed to discriminate on the basis of religion as well, so long as the standards imposed are related to a bona fide religious purpose. S.D.C.L. § 20-13-22 (1995).
impairment is “unrelated to [her] ability to perform the major duties” of the job, or that her impairment is unrelated to her “qualifications.”

Similarly, a plaintiff alleging housing discrimination on the basis of disability must establish that her impairment is unrelated to her “ability to acquire, rent or maintain property.” With regard to the Human Relations Act’s educational institution provisions, the plaintiff’s disability must be “unrelated to [her] ability to utilize and benefit from” the school’s programs and facilities, and, even more broadly, be unrelated to enjoying the school’s “educational opportunities.”

b. Major Duties

Turning to the “qualified” element in the employment context, the key concept is the “major duties” of the job at issue. That is, as the statute reads, an individual is qualified so long as his impairment is unrelated to his ability “to perform the major duties of a particular job.” The definition is also met if the impairment is unrelated to the

86. S.D.C.L. § 20-13-1(4)(b) (1995). Presumably an individual with a disability would not be “qualified” in the housing sense if, for example, a condition of a lease required the lessee to perform physical upkeep and maintenance of the property and the individual’s disability prevented him from performing those duties. The factual scenario contemplated by an individual whose disability relates to his ability to simply “acquire” property, however, is less clear. See id.
87. S.D.C.L. § 20-13-1(4)(c) (1995). The breadth with which the “qualified” element is drafted here practically assures that a student with a disability will never successfully advance a claim under the Human Relations Act’s educational institution provisions. The author is at a loss to imagine a hypothetical where a student could suffer from a physical or mental impairment which substantially limited at least one of the student’s major life functions and the impairment was “unrelated” to the student’s ability to “benefit from educational opportunities” at a school or college. See id. This in effect renders the detailed provisions regarding educational institutions’ duties towards individuals with disabilities an empty promise. See S.D.C.L. § 20-13-22 (1995). One possible exception to this conclusion is the individual who is not actually disabled, but simply “regarded as” having a disability. S.D.C.L. § 20-13-1(4) (1995). The individual who is only “regarded as” having a disability would not necessarily suffer an impairment which related to her ability to utilize educational programs since she may not be actually impaired. See id.

Perhaps South Dakota courts will infer a more limited legislative intent than this unjustifiably broad “qualified” language suggests, requiring only that the individual’s impairment be unrelated to the specific educational service of which the individual is complaining. An individual with impaired hearing, for example, would have an impairment which related to her ability to enjoy recorded music in the classroom. She would not be “qualified”—under this suggested analysis—for purposes of complaining of discrimination in the use of that service. See S.D.C.L. § 20-13-22(1) (1995) (prohibiting educational institutions from discriminating in the use of its services on the basis of disability). If that individual sought a remedy for being expelled from gym class, however, courts might conclude that in the context of that complaint, a hearing impairment is “unrelated” to the student’s ability to benefit from the school’s services. See S.D.C.L. § 20-13-22(2) (1995) (prohibiting educational institutions from expelling any individual because of disability). Although the plain language of the statute appears to require any student to make an impossible showing of a substantially limiting impairment which is unrelated one’s ability to benefit from educational opportunities, without softening this requirement into a more sensible approach, the anti-discrimination provisions for educational institutions is rendered surplusage, an absurd result which the cannons of statutory construction advise against. See Peters v. Spearfish ETJ Planning Comm’n, 1997 S.D. 105, ¶ 13, 567 N.W.2d 880, 885 (S.D. 1997) (stating that undefined terms are to be construed so as to avoid absurd results); cf. Accounts Management, Inc. v. Litchfield, 1998 S.D. 24, ¶ 9, 576 N.W.2d 233, 236 (S.D. 1998) (noting that to apply statutory rules of construction senselessly may yield absurd results).
89. Id.
"individual's qualifications." Just what constitutes the major duties of a given job can be expected to be hotly contested in some cases. The State Act does not define the term "major duties," though some guidance might be derived from the interpretation of the parallel ADA term which is "essential functions."

The ADA states that "consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job." A job's essential functions are those which are fundamental as opposed to the marginal functions of the position. Numerous factors can be considered in deciding whether a given function is essential, including whether the function is highly specialized and whether the function can be distributed among other employees. When an employer contests an employee's qualifications, the employer bears this burden of demonstrating which of the position's functions are essential. A similar analysis would seem appropriate for determining whether a given task is a "major duty" under the Human Relations Act.

c. The "Qualifications" Puzzle

As explained above, an individual is "qualified" under the Human Relations Act if her impairment is unrelated to her ability to perform the position's major functions. Alternatively, the Act states that the "qualified" element is fulfilled if the individual's disability is unrelated to her "qualifications for employment or promotion." The ADA lacks such an alternative definition.

The intent of the state statute's alternative definition is unclear. That is, how do an individual's "qualifications" (second definition) differ from

90. Id. This alternative definition is discussed infra at notes 96-98 and accompanying text.
91. 42 U.S.C. § 12111(8) (1995). Compare RANDOM HOUSE UNABRIDGED DICTIONARY 775 (2nd ed. 1993) (defining function as "the kind of action or activity proper to a person, thing, or institution; the purpose for which something is designed or exists; role") with id. at 609 (defining duty as "an action or task required by a person's position or occupation; function") and id. at 1161 (defining major as "great, as in rank or importance") with id. at 663 (defining essential as "absolutely necessary; indispensable"). Thus, the Human Relations Act looks to the important tasks required at a job ("major duties") while the ADA looks to the indispensable actions of the job ("essential functions").
93. 29 C.F.R. § 1630.2(n)(2)(ii), (iii) (1998). A function may be an essential function "because the reason the position exists is to perform that function." 29 C.F.R. § 1630.2(n)(2)(i) (1998). Consideration can also be given to "[t]he amount of time spent on the job performing the function" and "[t]he consequences of not requiring the incumbent to perform the function." 29 C.F.R. § 1630.2(n)(3)(iii), (iv) (1998).
94. Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1113 (8th Cir. 1995). The reasoning is that much of the evidence relative to which functions are essential lies with the employer. Id.
their "ability to perform the major duties of a particular job" (first definition)? The statute appears to contemplate a somewhat different analysis for fulfilling the "qualified" element when the individual is a rejected applicant for a position or a rejected candidate for promotion, than when the individual has simply been fired or treated adversely at work. Given the lack of guidance on what sort of variation was contemplated, however, it can be expected that courts will simply examine whether the individual's disability makes it significantly difficult or impossible for the individual to perform the fundamental duties of the job in question.

d. The "Unrelated To" Requirement

The State Act makes it more difficult for an individual with a disability to meet his burden of demonstrating the qualified element than does the ADA. The reason for this differential lies in the State Act's use of the adjective "unrelated." Under the Human Relations Act, the individual's disability must be unrelated to the person's ability to perform the job's major functions. The ADA, by contrast, merely requires a showing that the individual "can perform" the job's essential functions. The differences in word choice in the two statutes on this point could lend themselves to significantly different interpretations.

Take, for example, the case of an individual with a vision impairment who is fired from a data entry position. The individual can perform the important functions of the position, but his vision impairment does make the performance of some of his critical work duties more challenging. Arguably, the individual would be qualified under the ADA but not under the Human Relations Act. That is, the plaintiff may be able to demonstrate that he "can perform" the important aspects of the job (the ADA language), but not necessarily that his poor vision is "unrelated to" his ability to perform those tasks (the Human Relations Act wording).

97. The ADA's definition of the qualified element has two parts; first, that the individual possesses the objective prerequisites for the job, such as the required educational background, certifications, experience, and so on. 29 C.F.R. § 1630.2(m) (1998). Second, to be qualified, the individual must be able to perform the essential functions of the position with or without reasonable accommodations from the employer. Id. In cases brought under the Human Relations Act, plaintiffs' counsel might advance the argument that the state Act adopts only the second portion of the ADA's qualified element for job applicants and promotion candidates. Such an interpretation would require courts to simply examine whether the individual's impairment is unrelated to the individual's objective qualifications. This would substantially lessen the plaintiff's burden. The difficulty in such an approach is that it would in some cases allow a plaintiff to secure a job when the plaintiff possesses the basic qualifications but whose disability makes it impossible to perform the major functions of the job.

98. See S.D.C.L. § 20-13-1(4)(a) (1995) (providing that an individual's impairment must be "unrelated to an individual's ability to perform the major duties of a particular job or position, or is unrelated to an individual's qualifications for employment or promotion") (emphasis added).


The State Act raises the bar for plaintiffs, requiring them to show that their impairment does not relate to the job's functions. The ADA's focus is more precise and simply asks whether the person can do the job.

e. The "Accommodations" Dilemma

The ADA allows an individual to show that she can perform the job's essential functions "with or without reasonable accommodation." Thus, two means of demonstrating ADA qualification are provided: an individual is qualified if she can perform the job's essential functions unaided, and an individual is also qualified when an accommodation from the employer is necessary before the individual can perform those functions. Whether a given accommodation is a "reasonable accommodation" depends upon an independent analysis. After this has been determined, the ADA's definition of "qualified" is satisfied so long as the reasonable accommodation would permit the individual to perform the work satisfactorily. For example, if an individual can only perform a job's essential functions by being permitted to work part time, and a part time work schedule is a reasonable accommodation, the individual is qualified under the ADA.

Although the Human Relations Act fails to explicitly provide for a showing of "qualified" by means of reference to the provision of a reasonable accommodation, a fair reading of the Act as a whole suggests that such a definition is intended.

Later in the Act, a separate statute mandates employers to make good faith efforts to reasonably accommodate individuals with disabilities. Reading this provision in conjunction with the definition of a disability suggests that the qualified element must include consideration of the effects of such reasonable accommodations. That is, an individual who, with a reasonable accommodation from the employer is capable of performing the job's major duties, should be found to have met the qualified element. A contrary reading would render meaningless the mandate to provide reasonable accommodations.
f. A Final Dilemma

One additional conundrum appears in the Human Relations Act's provisions relating to the "qualified" element and "reasonable accommodations": the statute fails to incorporate the employment "qualified" element when a plaintiff is alleging discrimination by virtue of a denial of a reasonable accommodation. Instead, the statute appears to inadvertently incorporate the qualified element from the educational provisions to employment situations. That is, an employee alleging that his employer failed to reasonably accommodate his disability must show, according to the statute, that his impairment is unrelated to his ability to benefit from educational opportunities.

Mechanically applying the statute in the way in which it is drafted would lead to absurd results. Take the case of a used car salesperson with muscular dystrophy who claims that his employer violated the Human Relations Act by: (1) not building an access ramp into the sales building and (2) later terminating him because of his disability. For purposes of his wrongful termination claim, he would have to show that he was qualified for the job. But for purposes of his accommodations claim, he would have to show that in spite of his impairment, he could benefit from the programs offered at a local college or elementary school.

Instead, South Dakota courts will likely conclude that a "qualified" showing is required in any Human Relations Act disability discrimination suit. Moreover, courts should select an appropriate "qualified" showing from the statute for the facts at hand. In an employment context, the plaintiff should be required to show that, either with or without reasonable accommodations, her impairment is unrelated to performing the major duties of the particular job. Such an approach is consistent with South Dakota Supreme Court precedent which prefers to stretch the statutory grammar if it is at odds with the common sense legislative intent.

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113. For an ADA case with these facts, see Kells v. Sinclair Buick-GMC Truck, Inc., 210 F.3d 827 (8th Cir. 2000).
115. See Light v. Elliott, 295 N.W.2d 724, 725 (S.D. 1980) (Wollman, C.J., concurring) (rejecting a plaintiff's action against a marina which unfairly refused to rent him a slip space for his boat, apparently because of spite triggered by the plaintiff's legal representation of a former marina employee). Justice Wollman concluded that because the action was not based on the listed prohibited characteristics—then, race, color, creed, religion, sex, ancestry, disability or national origin—no cause of action had been pleaded. Id. (Wollman, C.J., concurring). The statute read:
   It shall be an unfair or discriminatory practice for any person engaged in the provision of public accommodations because of race, color, creed, religion, sex, ancestry or national origin to fail or refuse to provide to any person access to the use of and benefit from the services and facilities of such public accommodations; or to accord adverse, unlawful, or unequal treatment to any person with respect to the availability of such services and facilities, the price or other consideration thereof, the scope and equality therefor, or the terms and conditions under which the same are made available...

Id. (Wollman, C.J., concurring) (quoting S.D.C.L. § 20-13-23 (1995)). Justice Wollman's rationale
To sum up, the four elements of the definition of a Human Relations Act disability are: (1) an impairment; (2) which substantially limits; (3) the major life functions; (4) of a qualified individual. The State Act articulates a similar, but not identical, definition as the ADA and Rehabilitation Act. Federal precedent may therefore be invoked and applied to the State Act's definition, so long as counsel and courts remain sensitive to the state statute's variations which suggest different analyses.

B. REGARDED AS HAVING A DISABILITY

Both the ADA and the Human Relations Act offer an alternative definition of disability when the plaintiff is "regarded as" having a disability. According to the interpretive gloss provided by the federal regulations to the ADA, this definition may be met in essentially two ways. First, an individual may be perceived as having an impairment which substantially limits a major life activity, even if that perception is inaccurate. Second, an individual may have an impairment, the substantially limiting effect of which derives from societal prejudices. Someone with a shockingly disfiguring impairment, for example, might be substantially limited in the ability to find a job, even though medically speaking, the impairment does not limit the person's functions or activities. In either case, the plaintiff must demonstrate both an impairment and an accompanying substantial limitation, real or perceived. The focus in any "regarded as" disability claim is on the

stood in stark contrast to Justice Henderson's dissent, which carefully parsed the statute and determined that relief was not limited to classes of "individuals delineated in the first clause of the statute." Id. at 726 (Henderson, J., dissenting). Justice Henderson noted that there was no class requirement following the semicolon. Id. (Henderson, J., dissenting). Judge Wollman's view was the one later adopted by the full court over Justice Henderson's dissent. LaBore v. Muth, 473 N.W.2d 485, 487 (S.D. 1991). These cases demonstrate the court's willingness to overlook draftsmanship problems in order to apply statutes as they were clearly intended.

119. 29 C.F.R. § 1630.2(l)(1), (3) (1999). An individual is regarded as having a statutory disability if he or she has an impairment which is treated as substantially limiting or if the individual does not have an impairment and is treated as having an impairment which, if true, would be substantially limiting. Id.
120. 29 C.F.R. § 1630.2(l)(2) (1998). An individual is regarded as having a disability if he or she "[h]as a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment[.]") Id.
121. 29 C.F.R. app. § 1630.2(l) (1998). The example is of an individual with "a prominent facial scar or disfigurement" which does not inherently limit any major life activities, but which places hindrances in the individual's ability to work. Id.
122. 29 C.F.R. § 1630.2(l)(1998). Sutton explained that in either case, "it is necessary that a covered entity entertain misperceptions about the individual—it must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting
beliefs and attitudes of others.123

C. RECORD OF A DISABILITY

Finally, both the state and federal acts permit an individual to demonstrate a disability if he has a “record of” a disability.124 This definition is met, according to the federal regulations, when an individual “has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.”125 This provision protects individuals with a history of being disabled, such as those with a prior medical history of cancer.126 The prior history of the disability might also be found in employment or educational records.127 Because the definition relies on the definition of an actual disability, the record of the impairment must indicate a physical or mental impairment which substantially limits a major life activity.128 For example, in a pre-ADA case, the Supreme Court held that an individual who had been previously hospitalized with tuberculosis could show a record of a disability.129

III. DISCRIMINATION

In any disability discrimination case, there are essentially two components: the existence of a statutory disability, as discussed above, and unlawful discrimination. The Human Relations Act prohibits any person, because of an individual’s disability, “to fail or refuse to hire, to discharge an employee, or to accord adverse or unequal treatment to any person or employee with respect to application, hiring, training, apprenticeship, tenure, promotion, upgrading, compensation, layoff or any term or impairment when, in fact, the impairment is not so limiting.” Sutton v. United Airlines, Inc., 527 U.S. 471, 489 (1999). See also EEOC v. Woodbridge Corp., 263 F.3d 812, 816, 2001 WL 965164 (8th Cir. 2001) (holding that employees were not regarded as substantially limited in their major life activity of working where their employer merely regarded them “as unable to perform one particular specialized job at one particular plant”).

123. Chai R. Feldblum, The Americans with Disabilities Act Definition of Disability, 7 The LAB. L.J. 11, 16 (1991). The underlying principle “is that the law prohibits discrimination against an individual who is being treated as if he or she was disabled.” Id.

124. 42 U.S.C.A. § 12102(2)(B) (1995); S.D.C.L. § 20-13-1(4) (1995). See, e.g., Bizelli v. Amchem, 981 F.Supp. 1254, 1257 (E.D. Mo. 1997) (holding that a record of a disability is shown by plaintiff who had been on a leave of absence and receiving disability payments since being diagnosed with cancer and whose employer was aware of his chemotherapy and surgery); but see Colwell v. Suffolk County Police Dep’t, 158 F.3d 635, 646 (2nd Cir. 1998) (holding that a record of “a seven-month impairment of [plaintiff’s] ability to work, with the non-particularized and unspecific residual limitations described on his police work, is of too short a duration and too vague an extend to be ‘substantially limiting.’”) (citations omitted).

125. 29 C.F.R. § 1630.2(k) (2001).


129. Sch. Bd. of Nassau County, Fla. v. Arline, 480 U.S. 273, 285-86 (1987) (Rehabilitation Act case); but see Gutridge v. Clure, 153 F.3d 898, 901 (8th Cir. 1998), cert. denied, 526 U.S. 113 (1999) (holding that an individual who had five surgeries, medications, wraps, and splints, did not have a record of a disability).
condition of employment.\textsuperscript{130} Segregating or separating disabled employees also constitutes a violation.\textsuperscript{131} The Act is violated by either a completed or an attempted act.\textsuperscript{132} Separate provisions also address discriminatory practices by employment agencies,\textsuperscript{133} labor organizations,\textsuperscript{134} and employment advertising.\textsuperscript{135}

Before embarking on a discussion of the two cardinal types of employment discrimination against individuals with disabilities which are cognizable under the Human Relations Act, brief mention of one additional statutory provision for individuals with visual impairments is warranted. South Dakota Codified Laws section 20-13-10.1 prohibits employment discrimination against persons because of severe visual impairments "unless specific vision requirements constitute demonstrated and bona fide occupational qualifications necessary for effective work performance and [the employee’s] blindness or partial blindness is related to the person’s ability to perform the duties of a particular job or position."\textsuperscript{136} A maximum penalty of one thousand dollars may be imposed for violating this section.\textsuperscript{137}

\begin{itemize}
\item \textsuperscript{130} S.D.C.L. § 20-13-10 (1995).
\item \textsuperscript{131} S.D.C.L. § 20-13-1(16) (1995).
\item \textsuperscript{132} Id.
\item \textsuperscript{133} See S.D.C.L. 20-13-11 (1995). This section states:
  \begin{quote}
  It is an unfair or discriminatory practice for any employment agency, because of . . . disability . . . to accord adverse or unequal treatment to any person in connection with any application for employment, any referral, or any request for assistance in procurement of employees, or to accept any listing of employment on such a basis.
  \end{quote}
  Id. An “employment agency” is defined as: “any person regularly undertaking, with or without compensation, to procure employees for an employer or to procure for employees opportunities to work for an employer and includes any agent of such a person[,]” S.D.C.L. § 20-13-1(8) (1995).
\item \textsuperscript{134} See S.D.C.L. § 20-13-12 (1995). This section states:
  \begin{quote}
  It is an unfair or discriminatory practice for any labor organization, because of . . . disability . . . to deny full and equal membership rights to an applicant for membership or to a member; to expel, suspend, or otherwise discipline a member; or to accord adverse, unlawful or unequal treatment to any person with respect to that person’s hiring, apprenticeship, training, tenure, compensation, upgrading, layoff or any term or condition of employment.
  \end{quote}
  Id. A “labor organization” includes the following: “any person, employee representation committee, plan in which employees participate, or other organization which exists wholly or in part for the purpose of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours or other terms or conditions of employment[,]” S.D.C.L. § 20-13-1(10) (1995).
\item \textsuperscript{135} See S.D.C.L. § 20-13-13 (1995). This section states:
  \begin{quote}
  It is an unfair or discriminatory practice for any employer, employment agency, labor organization or the employees, agents, or members thereof directly or indirectly to advertise or in any other manner indicate or publicize that individuals of any particular . . . disability . . . are unwelcome, objectionable, not acceptable, or not solicited for employment or membership.
  \end{quote}
  Id. An “employer” means: “any person within the State of South Dakota who hires or employs any employee, and any person wherever situated who hires or employs any employee whose services are to be partially or wholly performed in the State of South Dakota[,]” S.D.C.L. § 20-13-1(7) (1995). The employment advertising section also applies against “labor organizations,” defined at supra note 134, and “employment agencies,” defined at supra note 133.
\item \textsuperscript{136} S.D.C.L. § 20-13-10.1 (1995). Blindness or partial blindness is defined as vision of “20/200 or less in the better eye with correction or where the field of vision subtends [sic] an angle of less than twenty degrees.” Id. The phrasing of this statute places the burden on the employer, not the employee, to demonstrate the necessity of treating persons with severe visual impairments differently from other employees. See id.
\item \textsuperscript{137} Id. This section also contains a provision dealing with “reasonable accommodations” against
Proving employment discrimination against individuals with disabilities differs very little from employment discrimination on account of race, gender, religion, or any other prohibited criteria. The plaintiff in any of these instances bears the burden of showing adverse or unequal treatment motivated by an illegal intent. That the subject under present discussion focuses on the criteria of disability does little or nothing to alter the analytical structure in which this burden is considered by the courts. For this reason, the discussion which follows relating to the “discrimination” element of a Human Relations disability discrimination claim has been substantially abbreviated. Readers are directed to the great body of scholarship in the civil rights area generally for more detailed information. Three major types of discrimination are discussed below: disparate treatment, disparate impact and “accommodation discrimination.”

A. DISPARATE TREATMENT

Disparate treatment is the garden variety sort of discrimination against individuals with disabilities. It occurs, for example, when an individual is fired—or not hired—because of the individual’s disability. South Dakota’s Human Relations Act casts a wide net with regard to the types of acts and omissions which will constitute disparate treatment, including adversely affecting “any term or condition of employment.” This phrase is a term of art in civil rights law which aims at the widest possible array of discriminatory treatment. There are two subtypes of disparate treatment claims: intentional discrimination and hostile work environment claims.

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140. S.D.C.L. § 20-13-10 (1995). See, e.g., McConnell v. Pioneer Hi-Bred Int’l, Inc., 10 AD Cases 518, ¶ 29, 2000 WL 234672, at ¶ 6 (D.S.D. 2000) (Schreier, J.), aff’d, 260 F.3d 958, 2001 WL 913999 (8th Cir. 2001) (per curiam) (“Dismissing an employee because of the job performance consequences of a disability, rather than the disability itself, is not actionable under the ADA.”) (citations omitted). In McConnell, the plaintiff was a district sales manager with bipolar disorder and depression. Id. ¶¶ 1, 2. He was often abrasive, overbearing and overzealous. Id. ¶ 1. See also Pickens v. Soo Line R.R. Co., 264 F.3d 773, 778, 2001 WL 987557, at ¶ 4 (8th Cir. 2001) (holding that a railroad conductor’s “express threat to disregard the safety of others in order to be employable is a legitimate, nondiscriminatory reason for discharging an employee”) (citations omitted).


142. See, e.g., Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 210 (1964) (holding that the phrase “terms or conditions of employment” in the National Labor Relations Act reached “a stipulation with respect to the contracting out of work performed by members of the bargaining unit”); State Div. of Human Rights, ex rel. Ewing v. Prudential Ins. Co. of Am., 273 N.W.2d 111, 115 (S.D. 1978) (examining the plaintiff’s employer’s group health insurance policy’s terms as potentially discriminatory in a term or condition of employment).
1. Intentional Discrimination

In any intentional discrimination claim, proof of a discriminatory motive is critical. This involves the plaintiff putting forth evidence relative to the defendant's state of mind concerning its actions toward the plaintiff. Occasionally, direct proof of the defendant's motive will be available. For example, the defendant might have told the plaintiff, "I am discontinuing your health care benefits because you are an individual with a disability." Direct evidence constitutes acknowledgement of the decisionmaker's discriminatory intent. When such evidence is available, it suffices to complete the plaintiff's prima facie case.

Much more frequently, of course, the plaintiff will have to rely on indirect proof of the defendant's motives. In cases of indirect proof, the McDonnell Douglas burden-shifting scheme is often employed. Under this framework, a plaintiff establishes a prima facie case by showing that she:

suffered an adverse employment action under circumstances giving rise to an inference of unlawful discrimination. Once the plaintiff has established her prima facie case, the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for its action. If the employer successfully makes this showing, the burden of production shifts back to the plaintiff to demonstrate that the employer's preferred reason is a pretext for unlawful discrimination.

Throughout this exercise, however, the ultimate burden of showing intentional discrimination because of disability remains with the plaintiff.

\[143. "Because employers who engage in illicit discrimination rarely leave records of their invidious acts, cases in which discrimination is proved through direct evidence are rare." Copley v. Bax Global, Inc., 80 F.Supp.2d 1342, 1350 (S.D. Fla. 2000).

144. E.g., Beshears v. Asbill, 930 F.2d 1348, 1354 (8th Cir. 1991) (holding employer's statement that older employees have problems adapting to new policies to be direct evidence of age discrimination); Burns v. Gadsden State Community College, 908 F.2d 1512, 1518 (11th Cir. 1990) (holding statement that "no woman would be named to a B scheduled job" to be direct evidence of sex discrimination); EEOC v. Alton Packaging Corp., 901 F.2d 920, 923 (11th Cir. 1990) (holding general manager's statement that if it was his company, he wouldn't hire any black people to be direct evidence of racial discrimination); EEOC v. Williams Elec. Games, Inc., 930 F.Supp. 1209, 1213 (N.D. Ill. 1996) (holding that statement that "he could not take responsibility for hiring [the applicant] with his disability, or for the possibility that [the applicant] might hurt his back, and that he would have hired [him] were it not a matter of 'endangering his back more'" to be direct evidence of disability discrimination) (internal citations to the record omitted).


146. Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989); Burns, 908 F.2d at 1519.


151. Id. (citation omitted).\]
2. Hostile Work Environment

Hostile work environment claims are cognizable under the ADA, as well as the Human Relations Act. The hostile work environment claim is the second subtype of disparate treatment claims. These claims also involve intentional discrimination against an individual because of her disability where the workplace culture itself is harassing. There are three elements to a hostile work environment claim:

To prevail, a plaintiff must show that:

1. she [has a disability],
2. she was subject to unwelcome [disability] harassment,
3. the harassment was based on [disability],
4. the harassment affected a ‘term, condition or privilege’ of employment, and
5. the employer knew or should have known of the harassment in question and failed to take proper remedial action.

B. DISPARATE IMPACT

Disparate impact is the second flavor of unlawful discrimination. Disparate impact means unintentional discrimination; it speaks of a facially neutral employment practice with a significantly adverse impact on individuals with disabilities. In contrast to disparate treatment claims, the employer’s motive is irrelevant in a disparate impact case. Instead, the court’s attention is directed to an unjustifiably disproportionate impact on individuals with disabilities. Rules which have such an impact are actionable under the ADA, as well as under South Dakota’s Human Relations Act.

The plaintiff’s burden in a disparate impact case is to show that a
facially neutral rule or policy disproportionately impacts members of the group of individuals with disabilities. The plaintiff’s proof necessarily involves statistical comparisons: at what rate does the rule exclude non-disabled employees; at what rate does the rule exclude disabled employees? The plaintiff has the burden of showing a ‘substantially disproportionate exclusionary impact’ on individuals with disabilities. The defendant is allowed to rebut this evidence by showing that the rule or policy is a business necessity, that is, that the rule is job-related. The plaintiff may prevail over a successful business necessity rebuttal by demonstrating that the employer’s goals could be served by an alternative, less exclusionary, policy.

C. ACCOMMODATION DISCRIMINATION

The third type of actionable discrimination is “accommodation discrimination.” What the author refers to herein as “accommodation discrimination” is unique in civil rights law in that it examines whether the defendant has failed to treat the plaintiff differently on account of his or her disability. This stands the typical inquiry on its head. In the field of disability discrimination, liability can incur both for treating the plaintiff adversely on account of a disability, and for not treating the plaintiff differently on account of a disability. The Human Relations Act and the ADA charge employers with the duty to provide reasonable accommodations to individuals with disabilities. An employer’s failure to provide a reasonable accommodation constitutes ‘accommodation discrimination.’

The rationale for a cause of action for accommodation discrimination is based on the realization that individuals with disabilities, while not necessarily incapable of performing jobs because of their impairments, may need to perform jobs in an unconventional manner. The plaintiff’s

160. See, e.g., Crowder, 81 F.3d at 1484 (analyzing the effect of Hawaii’s quarantine requirements on disabled individuals with service animals).
161. Waisome v. Port Auth. of N.Y. and N.J., 948 F.2d 1370, 1378-79 (2nd Cir. 1991); Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674, 681 (8th Cir. 1996). See also Gannon, 315 N.W.2d at 481 (rejecting plaintiff’s statistical evidence in a Human Relations Act case which was offered to show that women were not being promoted at the same rate as men within the South Dakota Department of Labor when it was “drawn from a very small total sample”).
162. Yartzoff v. Or. Employment Div. of Dep’t of Human Resources, 745 F.2d 557, 558 (9th Cir. 1984) (citations omitted). See, e.g., EEOC v. Greyhound Lines, Inc., 635 F.2d 188, 194-95 (3rd Cir. 1980) (holding that a no-beards rule excludes many blacks but that this is inadequate proof of disproportionate exclusion of racial minorities).
164. In re Employment Lit. Against State of Ala., 198 F.3d 1305, 1315 (11th Cir. 1999).
166. See 42 U.S.C.A. § 12112(b)(5)(A) (1995) (defining the term “discriminate” to include failing to make reasonable accommodations). The South Dakota Human Relations Act, by contrast, does not include a failure to accommodate within its definition of an “unfair or discriminatory practice.” S.D.C.L. § 20-13-1-16 (1995). Rather, a separate provision requires “[f]or purposes of employment, public accommodation, public service and education or housing, good faith efforts . . . to reasonably accommodate the disabled person . . . .” S.D.C.L. § 20-13-23.7 (1995).
burden in such a case brought under the ADA involves a showing that the accommodation described was appropriate, that it would have been reasonable for the employer to provide such an accommodation, and that the accommodation was requested and refused. The reasonableness of an accommodation depends on weighing its costs relative to its benefits. Accommodations can include, for example, providing wheelchair-accessible transportation to official off-site training events, or providing a special reserved parking space for individuals with mobility restrictions. Other potential accommodations include training materials, providing sign language interpreters, or reassigning an individual to a vacant position. Ordinarily, the litigation will wage upon the question of the reasonableness of the accommodation at issue.

The “good faith” of the defendant in providing reasonable accommodations is relevant under both the ADA and the Human Relations Act, but in distinctly different ways. In an ADA case, as stated above, a plaintiff makes out a prima facie case by showing that, as a qualified individual with a disability, he requested a reasonable accommodation and the request was denied. The Human Relations Act, by contrast, requires “good faith efforts” to reasonably accommodate individuals with disabilities. The duty imposed under state law, it seems,

168. See infra note 174 for cases which articulate the elements of a plaintiff’s prima facie case in an accommodation discrimination lawsuit.


171. Lyons v. Legal Aid Soc’y, 68 F.3d 1512, 1516 (2nd Cir. 1995).

172. 42 U.S.C.A. § 12111(9)(A), (B) (1995). The three types of reasonable accommodations are:
   (1) accommodations that are required to ensure equal opportunity in the application process; (2) accommodations that enable the employer’s employees with disabilities to perform the essential functions of the position held or desired; and (3) accommodations that enable the employer’s employees with disabilities to enjoy equal benefits and privileges of employment as are enjoyed by employees without disabilities.

29 C.F.R. app. § 1630.2(o) (1998). The initial burden of requesting a reasonable accommodation rests with the employee. See Burke v. Iowa Methodist Med. Ctr., 2002 WL 181241 (8th Cir. 2002) (stating, “the employer’s obligation [to reasonably accommodate] is not triggered until the plaintiff requests an accommodation or assistance with the disability”) (citing Cravens v. Blue Cross & Blue Shield of Kan. City, 215 F.3d 1011, 1021 (8th Cir. 2000)).


The McDonnell Douglas burden shifting framework is not employed in an accommodation discrimination case. Pond v. Michelin N. Am., Inc., 183 F.3d 592, 597 n.5 (7th Cir. 1999) (citing Deluca v. Winer Indus., 53 F.3d 793 (7th Cir. 1995)); Bulтемeyer v. Fort Wayne Community Sch., 100 F.3d 1281, 1283 (7th Cir. 1996); but see Smith, 180 F.3d at 1178 n.12 (stating that in the context of a motion for summary judgment “we use the burden-shifting mechanism, not to probe the subjective intent of the employer, but rather simply to provide a useful structure”) to examine the reasonableness of the accommodation at issue). This is because the defendant’s subjective intent is irrelevant in an accommodation discrimination case; instead, the focus is on the objective reasonableness of the proposed accommodation. Tyler v. City of Manhattan, 118 F.3d 1400, 1407-08 (10th Cir. 1997) (Jenkins, Senior District Judge, dissenting) (“Where, as here, Congress has mandated that public entities take affirmative steps to make reasonable accommodations for the disabled, an entity’s subjective motivation in failing to carry out its statutory obligations . . . should not be dispositive.”); accord, Williams v. Channel Master Satellite Sys., Inc., 101 F.3d 346, 350 (4th Cir. 1996).

is not to reasonably accommodate, but to make good faith efforts—and not necessarily successful ones—to provide reasonable accommodations. Of course, a failed effort to provide reasonable accommodations would be probative on whether the employer was actually acting in good faith.

Under federal law, the good faith of the defendant in providing reasonable accommodations determines whether the plaintiff is entitled to an award of money damages. This is a partial defense, with the burden of proof allocated to the defendant. This defense requires the defendant to demonstrate "good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity...." If the defendant satisfactorily demonstrates such efforts, the plaintiff is limited to injunctive relief.

In addition, in any accommodation discrimination case, the plaintiff is not entitled to any relief if the defendant can show that the proposed reasonable accommodation would constitute an "undue hardship." A defendant must show that a proposed accommodation would involve "significant difficulty or expense" in order to present an undue hardship defense. The defense is identical under state and federal law. The ADA lists factors to be considered including the financial resources of the defendant, the impact of the proposed accommodation on the defendant's operations, and the nature and cost of the accommodation.

176. Id. Notwithstanding the softened "good faith" duty under state law, South Dakota courts could also interpret the wording of the state statute concerning reasonable accommodations to require a greater degree of accommodation. Compare 42 U.S.C.A. § 12112(b)(5)(A) (1995) (prohibiting employers from "not making reasonable accommodations to the known physical or mental limitation of an otherwise qualified individual with a disability") with S.D.C.L. § 20-13-23.7 (1995) (requiring good faith efforts "to reasonably accommodate the disabled person"). The South Dakota statute is written in broader terms, encompassing accommodation of the individual rather than merely the individual’s limitations.

177. Cf., e.g., Prairie Lakes Health Care Sys., Inc. v. Wookey, 1998 S.D. 99, ¶ 26, 583 N.W.2d 405, 417 ("The amount of the present value given, the size of the antecedent debt secured, and the likelihood of success for the rehabilitative effort are relevant considerations in determining whether the transfer was made in good faith.") (quoting Uniform Fraudulent Transfers Act § 8, cmt. 6 (emphasis supplied)). See also Howell v. Michelin Tire Corp., 860 F.Supp. 1488, 1494 (M.D. Ala. 1994) (holding, in an ADA case, "The very evidence that suggests that the company did not reasonably accommodate [the plaintiff] is also probative of a lack of good faith").


179. See id. (providing that damages are unavailable "where the covered entity demonstrates good faith efforts... ").


D. SOME NON-EMPLOYMENT PROVISIONS

Before comparing the non-employment coverage provided by the ADA and the State Act, three other sections of the Human Relations Act should be noted. Those sections deal with disability discrimination in the context of housing, public entities and public accommodations. Housing discrimination receives relatively detailed statutory attention in the Human Relations Act.\(^{185}\) The Act prohibits discrimination on account of disability in the renting or selling of real estate and housing, or in the advertising thereof.\(^{186}\) Moreover, landlords must permit individuals with disabilities to make reasonable modifications to property wherever such modifications are necessary for the individual's full enjoyment of the property.\(^{187}\) New multifamily dwellings of five or more units must be constructed so as to accommodate individuals with disabilities.\(^{188}\) However, in other cases, there is no duty to modify or incur additional expenses for persons with disabilities in the provision of housing.\(^{189}\)

Disability discrimination by public services is prohibited as well.\(^{190}\) A public service is "any public facility, department, agency, board or commission, owned, operated or managed by or on behalf of the State of South Dakota," including agencies of any political subdivision within the State.\(^{191}\) The definition includes public corporations.\(^{192}\) The federal twin of South Dakota's public service discrimination law is found in Title II of the


\(^{186}\) S.D.C.L. § 20-13-20(1)-(3) (1995). The prohibition against advertising which indicates that individuals with disabilities are unwelcome in the sale or lease of property applies regardless of the type of property offered. S.D.C.L. § 20-13-20. The remaining prohibitions against discrimination in housing practices apply only to dwellings with living quarters for more than two families living independently of one another. Id. None of the provisions apply to dormitories or fraternities. Id.


\(^{188}\) S.D.C.L. § 20-13-21.2 (1995). This section provides:

It is an unfair or discriminatory practice to design or construct any multifamily dwellings with more than four units for sale, rent, lease, assignment, sublease or transfer that do not enable accessibility to ground-floor common areas and usability of ground-floor housing units by disabled persons or by wheelchairs. If the building has elevators, all housing units and common areas shall be usable by disabled persons and persons in wheelchairs. The accommodations may include widened doors, lowered electrical switches and outlets, lowered environmental controls, grab bars or reinforcements, kitchens and bathrooms usable by the disabled.

\(^{189}\) S.D.C.L. § 20-13-21.1 (1995). "Nothing in this chapter requires any person selling, renting or leasing property . . . to modify the property in any way, incur any additional expenses or exercise a higher degree of care for a person having a disability than for a person who does not have a disability."

\(^{190}\) S.D.C.L. § 20-13-24 (1995). The law prohibits public services from failing or refusing "to provide to any person access to the use and benefit [of], or to provide adverse or unequal treatment to any person in connection" with the provision of public services by reason of disability. Id.


\(^{192}\) Id.
ADA which deals with "public entities."\(^{193}\)

The provisions of the State Act attain an elevated importance in light of recent Eleventh Amendment Jurisprudence. In *Board of Trustees of the University of Alabama v. Garrett*, with the United States Supreme Court held that Title I employment discrimination lawsuits for monetary damages against a state in federal court were barred by the Eleventh Amendment.\(^{194}\) The Eighth Circuit has held that Title III of the ADA and the Rehabilitation Act are constitutionally deficient using a similar rationale insofar as against states.\(^{195}\) Although state entities can still be sued by virtue of the ADA in state court forums and in federal court for prospective injunctive relief, the Human Relations Act's public service provisions become more attractive options for plaintiffs in light of the latest Eleventh Amendment limitations.\(^{196}\)

Finally, public accommodation discrimination deals with the requirement that private commercial facilities be open and available to persons with disabilities.\(^{197}\) The ADA equivalent is found in Title III.\(^{198}\)

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196. Alsbrooks v. City of Maumelle, 184 F.3d 999, 1010 (8th Cir. 1999), cert. dismissed, 529 U.S. 1001 (2000) (holding that states are entitled to Eleventh Amendment immunity from Title II ADA claims in federal court); *accord*, Erikson v. Bd. of Governors of State Colleges and Univ. for Northeastern Ill. Univ., 207 F.3d 945, 952 (7th Cir. 2000); Bradley v. Ark. Dep't of Educ., 189 F.3d 745, 756 (8th Cir. 1999) (holding that the Eleventh Amendment bars lawsuits against states in federal court when the Rehabilitation Act is the basis for the plaintiff's cause of action for the reason that Congress exceeded its power to enforce the Fourteenth Amendment pursuant to section Five of that Amendment), reversed, Jim C. v. United States, 235 F.3d 1079 (8th Cir. 2000); *en banc* (reversing and holding that the Rehabilitation Act is a valid exercise of the congressional spending power), *cert. denied*, 533 U.S. 949 (2001); Randolph v. Rodgers, 253 F.3d 342 (8th Cir. 2001) (applying Alsbrook and *Jim C.*).
197. See *Gibson v. Ark. Dep't of Correction*, 265 F.3d 718 (8th Cir. 2001) (citing Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) (holding that individuals can sue state officials for prospective injunctive relief under the ADA under the *Ex parte Young* doctrine)); Mankins v. Paxton, 753 N.E.2d 918, 927 (Ohio App. 2001) (allowing a claim under the ADA brought in state court); Alsbrook, 184 F.3d at 1001 n.9 (citing Will v. Michigan Dep't of State Police, 491 U.S. 58, 63-64 (1989) (same; dicta)). The Eleventh Amendment is only operative when the state or a state agency is the named defendant; political subdivisions such as municipalities and counties do not enjoy Eleventh Amendment immunity. *Hadley v. N. Ark. Community Technical College*, 76 F.3d 1437, 1438 (8th Cir. 1996) (citing Lincoln County v. Luning, 133 U.S. 529 (1890)); *see also* Mount Health City Bd. of Educ. v. Doyle, 429 U.S. 274, 280-81 (1977) (holding that a local school board is not entitled to Eleventh Amendment immunity).
198. The Human Relations Act's public accommodations provisions are found in two sections. S.D.C.L. § 20-13-23 (1995) provides:

   It shall be an unfair or discriminatory practice for any person engaged in the provision of public accommodations because of . . . disability . . . to fail or refuse to provide to any person access to the use and benefit from the services and facilities of such public accommodations; or to accord adverse, unlawful, or unequal treatment to any person with respect to the availability of such services and facilities, the price or other
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The Human Relations Act defines public accommodations as “any place, establishment, or facility of whatever kind, nature, or class that caters or offers services, facilities, or goods to the general public for a fee, charge, or gratuitously.” The definition would include, for example, parks, day care centers, law offices, and hotels. Purely private clubs, however, are exempt. The South Dakota Supreme Court has held that an insurance company which sells insurance through individual agents to selected groups with selected risks does not constitute a public accommodation.

IV. COVERAGE

The ADA’s private employment provisions apply to “covered entities.” A “covered entity” is ‘an employer, employment agency, labor organization, or joint labor-management committee.’ The Human

consideration therefor, the scope and equality thereof, or the terms and conditions under which the same are made available, including terms and conditions relating to credit, payment, warranties, delivery, installation, and repair.

ld. For example, gasoline stations must permit individuals with disabilities with South Dakota handicapped license plates to buy attendant-dispensed gasoline at self-service prices. S.D.C.L. § 37-2-26 (1994). S.D.C.L. § 20-13-23.1, the second public accommodation provision, provides:

Any person with a disability is entitled to reasonably equal accommodations, advantages, facilities and privileges of all hotels, lodging places, places of public accommodation, amusement or resort, and other places to which the general public is invited, subject only to the conditions and limitations established by law and applicable alike to all persons. S.D.C.L. § 20-13-1(12) (1995).

ld. A new amendment to section 508 of the Rehabilitation Act requires new computer-use software accessibility requirements for individuals with disabilities. See 65 Fed. Reg. 17346 (2000); Jonathan Bick, Americans with Disabilities Act and the Internet, 10 ALB. L.J. SCI & TECH. 205, 222 (2000); David M. Nadler & Valere M. Furman, Access Board Issues Final Standards for Disabled Access Under Section 508 of the Rehabilitation Act, 3 E-COMMERCE L. REP. 9 (2001). The law, which went into effect in 2001, arguably, the application of these accessibility requirements can be extended to the Human Relation’s Act’s reasonable accommodation requirements.

199. 42 U.S.C.A. §§ 12181 et seq. (1995). The Supreme Court recently ruled in favor of professional golfer Casey Martin in an ADA Title III case. PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001). The Supreme Court held that allowing Casey Martin to use a golf cart, despite the PGA’s walking requirement, was not a modification that “would fundamentally alter the nature” of PGA events, and was therefore required. Id., 532 U.S. at 682 (citing 42 U.S.C. § 12182(b)(2)(A)(ii)). See also Cruz v. Pa. Interscholastic Athletic Ass’n, Inc., 157 F.Supp.2d 485, 2001 WL 722560 (E.D. Pa. 2001) (applying PGA Tour, Inc. in holding that a school district must waive its age requirement for a nineteen-year-old student with learning disabilities).


202. 42 U.C.S.A. § 12181(7); 29 C.F.R. § 1630.2(c)(2)(ii) (1998). As to a private club:

Public accommodation does not mean any bona fide private club or other place, establishment, or facility which is by its nature distinctly private, except when such distinctly private place, establishment, or facility caters or offers services, facilities, or goods to the general public for a fee or charge or gratuitously, it shall be deemed a public accommodation during such period of use.


Relations Act, by contrast, supplies broader coverage to “persons.” In addition, constitutional principles of federalism limit the application of the ADA, a fact which Congress acknowledged by defining “employer” to mean only those employers which employ at least fifteen employees. The term “employer” does not reach tax exempt private membership clubs and Indian tribes. In cases where a seasonal employer or small business is the potential defendant, plaintiffs are limited to the Human Relations Act as a means of recovery.

V. REMEDIES

The difference between the ADA and the South Dakota Human Relations Act stands in sharpest contrast when the available remedies under each are compared. Because this article’s emphasis is on the benefits and disadvantages of a state law disability discrimination suit in a judicial forum, the discussion which follows compares and contrasts the remedies of the Human Relations Act with those of the ADA in non-administrative proceedings. Before embarking on this comparative

206. The Human Relations Act applies not simply against employers, but against “persons,” which broadly includes the following:

one or more individuals, partnerships, associations, limited liability companies, corporations, joint stock companies, unincorporated organizations, mutual companies, joint stock companies, trusts, agents, legal representatives, trustees, trustees in bankruptcy, receivers, labor organizations, public bodies, public corporations, and the State of South Dakota and all political subdivisions and agencies thereof.

S.D.C.L. § 20-13-1(11) (1995). See also 79 S.D. Op. Att’y Gen. 37 (1979) (reasoning that “employer” also reaches a tribal organization’s off-reservation activities). The employment discrimination section does require the plaintiff to be an “employee,” however, “employee” is defined expansively as “any person who performs services for any employer for compensation, whether in the form of wages, salary, commission, or otherwise.” S.D.C.L. § 20-13-1(6). Any individual who performs in exchange for some form of compensation, therefore, is an employee for purposes of the employment discrimination provisions. Id. Significantly, this encompasses persons who, under the more typical legal definition of employment, would fall outside the Act’s protections. Independent contractors, and others who work in exchange for something of value, even temporarily, are “employees” under the Human Relations Act, notwithstanding the fact that they would not be “employees” under agency, unemployment or workers’ compensation doctrines. See S.D.C.L. § 62-1-3 (1993) (providing a more restrictive definition of “employee” for purposes of workers’ compensation); Scott R. Swier and Molly E. Slaughter, The Employee/Independent Contractor Dichotomy in South Dakota for Unemployment Compensation and Workers’ Compensation Purposes: An Examination and Suggested Analytical Framework, 43 S.D. L. Rev. 56, 63-65 (1998) (discussing employment which is subject to unemployment compensation provisions in South Dakota); Primeaux v. United States, 181 F.3d 876, 882 (8th Cir. 1999) (en banc) (applying South Dakota Law in finding that unarmed, out-of-uniform tribal officer who raped stranded motorist was acting outside the scope of his employment). Individuals who perform services gratuitously, however, would seem to fall outside the scope of the Human Relations Act’s definition. Cf. DENNIS H. HILL, ET AL., WORKERS’ COMPENSATION LAW IN SOUTH DAKOTA 23 (1997) (discussing same under the workers’ compensation definition).

The potential exists for an argument that the state Act expands the pool of potential plaintiffs to both employees and “persons” when the charge relates to “application, hiring, training, apprenticeship, tenure, promotion, upgrading, compensation, layoff or any term or condition of employment.” See S.D.C.L. § 20-13-10 (1995) (prohibiting persons from according “adverse or unequal treatment to any person or employee with respect to application, hiring, [etc.]”) (emphasis supplied). Applicants, of course, are not employees, yet are provided a cause of action. See id.

207. 42 U.S.C.A. § 12111(5)(A) (1995). In order to invoke the federal law, the entity must employ “15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person . . .” Id. See also U.S. CONST. art. I, § 8, cl. 3 (commerce clause).

analysis, however, mention should also be made of the remedial variations within the Human Relations Act itself, depending on the forum.

Different menus of relief present themselves when the parties find themselves in a civil versus an administrative forum under the State Act. According to the Human Relations Act, whenever a finding of illegal discrimination is entered by an administrative law judge, a cease and desist order will issue. The order will also require the respondent to take such affirmative action as is determined appropriate under the circumstances. The order may take many forms including reinstatement, an award of back pay, or requiring the respondent to make periodic compliance reports. Any award of damages is limited to “compensation incidental to the violation.” Pain and suffering, punitive, and consequential damages are not authorized. Costs (now renamed “disbursements”) may be awarded. Attorney fees, except in housing matters, may not.

The relief available to the plaintiff in a judicial forum is slightly more generous. Injunctive relief, including affirmative action, is authorized. Compensatory damages are also allowed, without any restriction on recovery for pain and suffering or consequential damages. Punitive damages may be awarded when the defendant has committed housing discrimination, financial institution discrimination, accommodation discrimination, retaliation, or has refused to rent to an individual because the individual is accompanied by a service animal. Costs are allowed, but again, attorney fees are not, except in housing matters.

210. Id.
211. Id. The statutory texts authorize such affirmative action as “hiring, reinstatement, or upgrading of employees, with or without back pay; the referring of applicants for employment by any respondent employment agency; the admittance or restoration to membership by any respondent labor organization; the admission to or continuation in enrollment in an apprenticeship program or on-the-job training program; the posting of notices; the making of reports as to the manner of compliance . . . [and] any other appropriate relief[].” Id.
212. Id.
213. Id.
217. Id.
218. Id. The standard for punitive damages is “oppression, fraud, or malice.” S.D.C.L. § 21-3-2 (1987).
A. COMPENSATORY AND INJUNCTIVE RELIEF

The remainder of this section will be devoted to a comparison between the remedies available under the ADA and those available under the Human Relations Act, assuming that the forum is non-administrative. In the interests of space and clarity, only remedies relative to employment discrimination will be covered. With regard to compensatory relief, the statutes employ similar though not identical language. The Human Relations Act authorizes, without restriction, the recovery of "compensatory damages." The ADA, which incorporates the remedies of the Civil Rights Act of 1964, permits a court to order "such affirmative action as may be appropriate," including, but not limited to, reinstatement or hiring "with or without back pay." The federal courts have interpreted this language to encompass the recovery of compensatory damages including intangibles such as humiliation and emotional anguish.

The ADA requires a threshold showing that the defendant "intentionally engaged in" unlawful discrimination before relief may be ordered. Courts have interpreted this phrase to mean only that "the defendant meant to do what he did." No showing of specific intent is required. Thus, this is not a particularly onerous standard, but it is one which the Human Relations Act does not impose. The state law only requires a finding that "an unfair or discriminatory practice has occurred" as a precondition to relief.

The ADA also restricts the availability of remedies in "mixed motive" disparate treatment cases where the adverse action against the employee was impermissibly motivated by the employee's disability, but the employer nonetheless establishes that it would have made the same decision even in the absence of the improper consideration. In other words, the employee may establish that her disability was a motivating

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224. 42 U.S.C.A. § 2000e-5(g)(1) (1994). Courts are authorized to enjoin or order relief if they find "that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint[.]" Id.


228. Id.

factor in the employer’s decision, thereby triggering liability. The employer then has the burden of establishing that although the impermissible motivating factor entered into the decision, the same decision would have been reached in any case. Although there is some controversy as to whether this partial defense is available to ADA defendants, it is clear that no such quasi-defense may be raised under the Human Relations Act, which simply requires plaintiffs to demonstrate unequal treatment “because of” disability.

B. ATTORNEY FEES

As stated above, except in housing discrimination cases, attorney fees may not be awarded pursuant to the Human Relations Act. This is a truly regrettable gap in the state law. Under the ADA, by contrast, the court may allow, in its discretion, reasonable attorney fees to the prevailing party, including costs. A plaintiff “prevails” if “actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant’s behavior in a way that directly benefits the plaintiff.” A defendant is not a prevailing party unless the defendant establishes “that the plaintiff’s suit was totally unfounded, frivolous or otherwise unreasonable” or that the plaintiff continued the litigation after it clearly became so. This standard adopts the applicable Title VII law and rests on the policy that while prevailing plaintiffs should be awarded

230. 42 U.S.C.A. § 2000e-2(m) (1994). That section prohibits an employment practice in which “race, color, religion, sex, or national origin was a motivating factor... even though other factors also motivated the practice.” Id.

231. 42 U.S.C.A. § 2000e-5(g) (1994). If the defendant sustains this burden, the plaintiff is limited to declaratory relief, attorney fees and costs directly attributable to the pursuit of the § 2000e-2(m) claim, and injunctive relief except for admission, reinstatement, hiring or promotion. 42 U.S.C.A. § 2000e-5(g)(i), (ii) (1994). Damages are not allowed. 42 U.S.C.A. § 2000e-5(g)(ii) (1994). Take, for example, the case of a Title VII plaintiff who was kept from obtaining work on a fishing boat because of her sex. Forrest v. Stinson Seafood Co., 990 F.Supp. 41, 42 (D. Me. 1998). If the jury determines that even in the absence of the defendant’s illegal discrimination, the plaintiff would not have been offered a job because she lacked the requisite skill and experience, the court’s award may be limited to a cease and desist order, and attorney fees and costs. Id. at 44-45.


234. S.D.C.L. § 20-13-35.1 (1995). In housing matters, attorney fees “may be awarded to the prevailing party.” Id. For an analysis of when a party is a prevailing party for the purpose of an attorney fee award, see generally Francis M. Dougherty, Annot., Who is “Prevailing Party” So As to be Entitled to Award of Attorneys’ Fees by Court Under Equal Access to Justice Act, 104 A.L.R. Fed. 110 (1991).


attorney fees in all but special circumstances in order to encourage the vindication of a policy of the highest priority against a violator of federal law, this equitable consideration is absent for prevailing defendants.\textsuperscript{238}

C. PUNITIVE DAMAGES

As noted above, punitive damages are available under the Human Relations Act, but only for certain specific violations of the Act.\textsuperscript{239} Because this section has been limited to the remedies available in employment cases, it may be said in this context that the only sort of cases in which punitive damages may be awarded under the Act are those in which the plaintiff succeeds in establishing either accommodation discrimination or retaliation.\textsuperscript{240} If, in retaliating or failing to make good faith efforts to reasonably accommodate an employee, the defendant has acted with "oppression, fraud, or malice, actual or presumed," punitive damages are appropriate.\textsuperscript{241}

As one court has noted, "South Dakota is among the states having the most stringent conduct requirement" for punitive damages.\textsuperscript{242} The element of malice, either actual or presumed, is essential.\textsuperscript{243} Presumed malice exists when one has acted willfully or wantonly.\textsuperscript{244} Willful and wanton conduct, the South Dakota Supreme Court has held, "is conduct which partakes to some appreciable extent, though not entirely, of the nature of a deliberate and intentional wrong."\textsuperscript{245} Such a state of mind is determined by an objective, rather than a subjective standard, and must demonstrate deliberate recklessness.\textsuperscript{246} This standard has been met when the defendant "must have known with substantial certainty, the danger which his conduct engendered."\textsuperscript{247}

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{238} Christianburg, 434 U.S. at 418-19 (quoting Newman v. Piggie Park Enter., 390 U.S. 400, 402 (1968)).
\item\textsuperscript{239} S.D.C.L. § 20-13-35.1 (1995).
\item\textsuperscript{240} S.D.C.L. § 20-13-35.1 (1995) (authorizing punitive damages pursuant to S.D.C.L. § 21-3-2 for certain violations of the Human Relations Act); S.D.C.L. § 21-3-2 (1987) (authorizing punitive damages, at the jury's discretion, "where the defendant has been guilty of oppression, fraud, or malice, actual or presumed... for the sake of example, and by way of punishing the defendant"); see also S.D.C.L. § 21-1-4 (1987) (stating that damages do not include exemplary or penal damages "unless expressly provided by statute").
\item\textsuperscript{244} \textit{Kjerstad}, 517 N.W.2d at 425 (citing Case v. Murdock, 488 N.W.2d 885, 891 (S.D. 1992)). "Presumed malice does not require hatred or ill will..." \textit{Id.} [A] claim for presumed malice can be sustained by demonstrating a disregard for the rights of others." \textit{Kjerstad}, 517 N.W.2d at 425 (citing Flockhart v. Wyant, 467 N.W.2d 473, 478 (S.D. 1991)).
\item\textsuperscript{245} Tranby v. Brodock, 348 N.W.2d 458, 461 (S.D. 1984).
\item\textsuperscript{246} \textit{Id.}
\item\textsuperscript{247} Berry v. Risdall, 1998 S.D. 18, ¶ 38, 576 N.W.2d 1, 10 (S.D. 1998) (quoting Flockhart v. Wyant, 467 N.W.2d at 478 (S.D. 1991)). In \textit{Berry}, the court held that the defendant acted with the
\end{enumerate}
\end{footnotesize}
It merits emphasis that both South Dakota and federal law require that the amount of an award of punitive damages “bear a reasonable relationship to the compensatory damage award.” On the other hand, according to state precedent, punitive damages “may considerably exceed compensatory damages.” The factors which bear on the amount of punitive damages to be awarded under state law are:

1. The amount allowed in compensatory damages;
2. The nature and enormity of the wrong;
3. The intent of the wrongdoer;
4. The wrongdoer's financial condition;
5. All the circumstances attendant to the wrongdoer's actions.

Furthermore, under South Dakota law, an award of compensatory damages is a prerequisite to an award of punitive damages; punitive damages may not be awarded unless some actual damages are established. No such requirement exists in ADA cases. Federal courts have reasoned that such extra-statutory prerequisites should not be invented by the judiciary.

Finally, an additional hurdle exists under South Dakota law with regard to punitive damages. Attention should also be directed to South Dakota’s rule that there must be a finding by clear and convincing evidence “that there has been willful, wanton or malicious conduct” before any discovery relating to punitive or exemplary damages will be permitted. The required showing is “‘clear and convincing’ but this
standard is softened by the succeeding phrase which indicates that the court need only be satisfied by ‘clear and convincing['] evidence, that there is a reasonable basis to believe that there has been willful, wanton or malicious conduct.’ 254 Essentially, this requires proof of “a ‘prima facie’ case for punitive damages.” 255 Under the Œrie doctrine, it has been held, this “discovery barricade” rule is procedural and therefore does not apply in federal courts. 257

Punitive damages under the ADA are available in both accommodation discrimination and intentional discrimination cases whenever the defendant has “engaged in unlawful intentional discrimination.” 258 Punitive damages are unavailable in disparate impact cases as a matter of statutory fiat. 259 By contrast, a Human Relations Act plaintiff alleging the disparate impact of a policy’s failure to provide reasonable accommodations could recover punitive damages. 260

The standard for awarding punitive damages under the federal law is which requires the same showing prior to submitting a claim of punitive damages to a jury. S.D.C.L. § 21-1-4.1 (1987).


257. Ammann v. Massey-Ferguson, Ltd., 933 F.Supp. 840, 843 (D.S.D. 1996) (Kornmann, J.); Herman, No. 97-CV-5009 at 12, but see Issendorf v. Capitol Indem. Corp., No. CIV 93-1011 at 12-13 (D.S.D. May 3, 1994) (declining to apply the discovery portion of S.D.C.L. § 21-1-4.1, but applying the pre-trial hearing portion). Senior District Judge Bogue held that “the ‘discovery’ portion of S.D.C.L. § 21-1-1.4 must yield to [Federal Rule of Civil Procedure] Rule 26 because a direct collision exists between the two provisions while the ‘submission to the jury’ portion of the same statute presents grave Seventh Amendment concerns.” Herman, No. 97-CV-5009 at 13. However, federal courts have the inherent authority to accomplish nearly the same aims without reference to the state statute. Id.; accord, Ammann, 933 F.Supp. at 843.


259. Id.


The disparate impact/reasonable accommodation framework is analytically problematic. See Tyler v. City of Manhattan, 118 F.3d 1400, 1407 (10th Cir. 1997) (Jenkins, Senior District Judge, dissenting) (citing Justice v. Pendleton Place Apartments, 40 F.3d 139, 144 n.6 (6th Cir. 1994)); Elliott v. City of Athens, 960 F.2d 975, 987 (11th Cir. 1992) (Kraffich, J., dissenting), abrogated on other grounds in City of Edmonds v. Oxford House, Inc., 514 U.S. 725 (1995). Traditionally, a disparate impact analysis applies when a person who is entitled to equal treatment claims uneven consequences. Id. (Jenkins, dissenting). Under the reasonable accommodation provisions of the ADA, however, covered entities have an affirmative duty to act. Id. (Jenkins, dissenting). It therefore becomes difficult to differentiate between an intentional violation of this duty and an unintentional adverse affect of a facially neutral policy. Id. at 1407-08 (Jenkins, dissenting); see also id. at 1403 n.6 (Jenkins, dissenting) (outlining the defendant’s arguments). Given the difficulty with which an accommodation discrimination theory can be grafted to a disparate impact analysis, plaintiffs should be especially careful in framing a complaint. It may be wise to draft allegations of disparate impact and animus-driven disparate treatment alternatively. See id. at 1403 (concluding that a pretrial order which describes disparate impact but not intentional discrimination necessarily excluded plaintiff’s claim for compensatory damages). For South Dakota Human Relations Act purposes, however, the remedy of punitive damages is available regardless of whether a failure to accommodate claim is construed as a disparate impact or a disparate treatment theory. S.D.C.L. § 20-13-35.1 (1995).
malice or reckless indifference to the plaintiff’s civil rights. Punitive damages are appropriate if an employer discriminates in “the face of a perceived risk that its actions will violate federal law.” A showing of egregious misconduct or outrageousness is not required. Where punitive damages are available, they are subject to a “cap” which varies depending upon the number of employees employed by the defendant. No such cap is imposed in Human Relations Act cases.

IV. CONCLUSION

The major drawbacks of the Human Relations Act are the absence of interpretive guidance and confusing arrangement. It has been the aim of this article to attempt to provide a partial fill of these interpretive gaps. The Human Relations Act is an imperfect but far from nugatory statute for individuals with disabilities in South Dakota. Its main benefits lie in its coverage, reaching state defendants and smaller employers than the ADA. Its cardinal flaws lie in its limited scope of remedies, weakened accommodation requirements, and in its unfairly drafted “qualified” element. Advancing a claim of punitive damages, in the few instances where they are statutorily available, requires special showings of malice. Attorney fees are simply unattainable. Nevertheless, it is hoped, counsel within the state will consider the disability provisions of the Human Relations Act in assisting clients who have been denied the full enjoyment of the law to which they are entitled.

263. Id. at 535. See, e.g., EEOC v. Wal-Mart Stores, Inc., 187 F.3d 1241, 1244, 1246 (10th Cir. 1999). The court described the facts from this case which justified a $75,000 award of punitive damages on top of an award of compensatory damages of $3,527.79:

The evidence shows that Wal-Mart knew Amaro was hearing impaired and employed him with the knowledge that in certain circumstances, including meetings and training sessions, he would need an interpreter. When Amaro refused to attend a training session which he could not understand without the aid of an interpreter, his supervisors not only failed to provide an interpreter, they transferred Amaro from his job as a Receiving Associate to a janitorial position. The next day, the supervisors again failed to provide Amaro an interpreter to discuss his transfer and, in fact, suspended him when he objected to a perceived demotion. When Wal-Mart did provide an interpreter one week later, it was to inform Amaro of his termination. The store manager, who ultimately approved Amaro’s suspension, testified that he was familiar with the accommodation requirements of the ADA and its prohibition against discrimination and retaliation in the workplace.

Id. The district court also awarded the plaintiff $41,063.72 in attorney fees. Id. at 1244.

264. 42 U.S.C.A. § 1981a(b)(3) (1994). This section imposes a cap on the total amount of damages awarded, including punitive damages. Id. The cap ranges from no more than $50,000 for a defendant employing 100 or fewer employees and no more than $300,000 for a defendant employing more than 500 employees. 42 U.S.C.A. § 1981a(b)(3)(A), (D) (1994).