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# COMMFAX, ON COMMERCIAL LAW

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**COMMFAX**
is a newsletter devoted to commercial law issues and published by Garan Lucow Miller, P.C.

This newsletter examines real estate broker liability, and the law regarding an employer accommodating returning injured employees.

## REAL ESTATE BROKER LIABILITY

In Michigan, brokers may be held liable for fraud or misrepresentation based upon false material misrepresentations. *Price v Long Realty, Inc*, 199 Mich App 461, 470 (1993). Litigation over these issues usually arises when a purchaser discovers a defect in the real property which was not known by purchaser at closing. Often the seller's broker is named as a co-defendant in the lawsuit with the Seller.

A broker is not liable for fraud if the broker communicates only the seller's representations which the broker does not know or does not have reason to believe are false. A broker must be very conscientious about making any statements or representations regarding its principal's (the seller's) real estate. Any information about the real estate which is relayed to a potential purchaser should always be qualified with statements that the information is derived directly from the seller and that the broker does not have any independent or actual knowledge regarding the condition of the premises. However, lack of actual knowledge is not a complete shield. A broker may be held liable under the Michigan Consumer Protection Act and for fraudulent concealment or silent fraud if incomplete or misleading statements creating a false impression are made with fraudulent intent.

In a typical sale of residential property, a purchaser relies on representations made in a Seller's Disclosure Statement. Under Michigan statutory law, a seller of residential property is required to complete and deliver a written disclosure statement to a prospective buyer before a purchase agreement is deemed binding. MCLA 565.954 Ideally, delivery of the disclosure statement should be prior to the execution of the purchase agreement. If delivery is subsequent to the execution of the purchase agreement, the purchaser may terminate the purchase agreement within 72 hours after delivery of the disclosure statement to the purchaser if it was delivered in person or 120 hours if it was delivered by registered mail. Delivery by facsimile is also acceptable. MCLA 565.963 The seller and its broker may be held liable for any error, inaccuracy or omission in the disclosure statement which was within their personal knowledge. However, by statute, a seller's broker shall not be liable for any violation of Act 92 of 1993, known as the "Seller Disclosure Act," unless the broker knowingly acts in concert with the seller to violate

this Act. MCLA 565.965 The pivotal point here is the broker's knowledge. Generally, the broker does not have personal knowledge of the condition of the seller's residence and, under no circumstances, should a broker ever sign a Seller's Disclosure Statement.

Claims for innocent misre-presentation and negligence do not require a plaintiff to prove actual knowledge of the misrepresentation. However, a contractual relationship or duty is required for these claims. *M&D, Inc v W B McConkey*, 231 Mich App 22 (1998) Often neither exist between a purchaser and a seller's broker.

If you have any questions or comments regarding this article, please contact Steven Matta or Dawn Patterson in our commercial / residential real estate group at 248-641-7600.

**RETURNING TO WORK - The Law Regarding Accommodating Injured Employees**

In today's economy various statutes and court decisions affect the relationship between an employer and its employees. Maintaining a sense of security that as an employer you have complied with the legal requirements is almost impossible. Nowhere is this concern greater than with the problem of injured employees returning to work.

Even if employees are not covered by a union contract and can be legally dismissed at the employer's will, Federal and state statutes, including the Federal Americans with Disabilities Act (ADA) and The Michigan Persons With Disabilities Civil Rights Act, limit an employer regarding injured employees and their return to the job. However, as the state courts look to the Federal statutes and courts for guidance, this article will focus on the requirements for applicability of the ADA.

First the ADA applies to any employer who employs 20 or more employees, and it is designed to prevent discrim-ination of employees based upon an actual or perceived disability.

Therefore, the next inquiry is whether the employee may have a disability or handicap. The ADA defines a disability as "physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 USCA § 12102(2)(A). The regulations define "physical or mental impairment" as "[a]ny physiological disorder, or condition" affecting one or more specified body systems. 29 CFR §1630.2(h)(1). "Substantially limits" and "major life activities" are defined as well. 29 CFR § 1630.2(j)(1) and 29 CFR § 1630.2(i). Generally, whether an impair-ment substantially limits a major life activity requires a consider-action of: 1) nature and severity, 2) duration, and 3) the permanent or long-term impact . . . [of] the impairment." 29 CFR § 1630.2(j)(2)(I)-(iii). In certain situations the individual's ability to perform the major life activity of working may be considered. 29 CFR Pt 1630, App § 1630.2(j). *Bell v Elmhurst Chicago Stone*, 919 F Supp 308 (ND Ill, 1996). An employee who fails to demonstrate that his asthma substantially impairs his ability to breathe or work has failed to demonstrate that he is disabled under the ADA, *Ventura v City of Independence*, 108 F3d 1378 (6th Cir, 1997); or an impairment that prevents a person from doing only a narrow range of jobs is not considered substantially limiting. *Jasany v United States Postal Service*, 755 F2d 1244 (6th Cir, 1985). "Easily correctable" conditions where the symptoms can be eliminated such as vision and diabetes, do not constitute disabilities under the Act. Certain disorders and associated symptoms are specifically excluded from coverage under the ADA's own language for example drug abuse and alcoholism.

The ADA limits the options an employer has to discover a possible litigation risk by restricting post-hire inquiries and

examinations of employees. Generally an employer may require an employee to submit to a return to work physical examination to determine if any accommo-dation must be provided and/or if the employee's return to work may cause a risk to the health and safety of the work force. An employee can request that an employer provide "reasonable accommo-dations." To determine the appropriate reasonable accommodation it *may* be necessary for the employer to initiate an informal, interactive process with the qualified individual in need of the accommodation. 29 CFR 1630.2(o)(3).

It must be kept in mind that the employee bears the initial burden of proposing an accommodation and showing that accommodation is objectively reasonable. Yet an employee does not have to suggest a specific accommo-dation. Rather, "it is the employee's initial request for an accommodation which triggers the employer's obligation to participate in the *interactive process* of determining one." *Taylor v Principal Financial Group*, 93 F3d 155 (5th Cir, 1996) cert den, 117 SCt 586 (1996).

An employer may avoid the accommodation by showing undue hardship. *Monette v Electronic Data Sys Corp*, 90 F3d 1173, 1183 (6th Cir, 1996); *Smith v Ameritech*, 129 F3d 857, 866 (6th Cir, 1997). The ADA sets forth several factors for courts to consider in evaluating an undue hardship claim. 42 USC § 1211(10)(B). The employer has to show both that the hardship caused by the proposed accommo-dation would be undue in light of the statutory factors, and that the proposed accommodation is unreasonable and need not be made. The employer, however, does not need to prove that the employee was unqualified. Instead, the employee must bear the burden throughout the litigation of proving that she is qualified to do the job. *Cehrs v Northeast Ohio Alzheimers Center*, 155 F3d 781-782.

Only the ADA and its state counterparts require that an employer consider accommo-dations and then only if the employee raises the issue. While other issues should be considered when an injured employee asks to come back to work such as the Family Medical Leave Act, the ADA is the only one that imposes a non-monetary consideration, namely accommodating the employee.

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