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# The Latex Allergy Crisis: Proposing a Healthy Solution to the Dilemma Facing the Medical Community

Lynn Cherne-Breckner

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THE LATEX ALLERGY CRISIS: PROPOSING A HEALTHY  
SOLUTION TO THE DILEMMA FACING THE MEDICAL  
COMMUNITY

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I. INTRODUCTION

Tina Petriella was a 24-year old student at the Cleveland Institute of Dental and Medical Assistants when she had her first encounter with the symptoms of a latex

allergy. A mild rash had broken out on her hands several times during her clinical training. She thought little of it as the redness always disappeared eventually. It was not until approximately one year later, during her employment as a Dental Assistant at Family Dental Care in Mentor, Ohio, that her suffering truly began.

Tina wore the latex gloves provided by her employer as a standard procedure to protect herself and her patients from the HIV virus. She went through dozens of pairs of gloves per day, and once again, the rash returned. It was mild at first, but in a short time, her hands were bleeding from the open sores she had developed. Seeking help from her doctor, Tina was prescribed a treatment of hydrocortisone cream and cotton liners for her latex gloves. Her physician simply told her that she was allergic to the latex gloves she was wearing, and that this treatment should be sufficient to prevent the symptoms she was experiencing.

Unfortunately, the rash was only the beginning of Tina's problems. Subsequently, she developed latex-related asthma requiring the regular use of an inhaler. The slightest exposure to the latex proteins brings on an attack that includes hives and new allergic cross-reactions to other products occurring on a regular basis. She has been forced to leave her apartment after breaking out in hives from painting with latex-based paint and had her wrist swell up after having a hospital name band placed on her at the Cleveland Clinic. She can only use certain brands of toilet paper and lotions, and must carefully watch workers at the supermarket deli to make sure that they are not wearing latex gloves.

Extreme precautions also must be taken before Tina can have routine surgery. Any time she needs a procedure, the hospital staff must scrub down the entire operating room to remove all traces of latex. They must make sure every piece of tubing, including the ports on her I.V.'s are non-latex based products. On one occasion before a fairly routine procedure to remove an ovarian cyst, the hospital staff realized that they forgot to specially prepare the operating room. As a result, Tina narrowly escaped what could have been a fatal allergic reaction. Fortunately, the error was caught, but she had to wait for three more hours for the operating room to be sterilized before her surgery could proceed.

One of Tina's biggest frustrations is the erratic nature of the allergy. Her colleague, a nurse for over fifteen years, went into latex-induced shock as she was driving home from work. The colleague had no warning of the reaction. Consequently, Tina lives with the constant worry that at any moment she could be subject to anaphalactic shock symptoms requiring emergency measures. Presently, at age 35, she is no longer working in the health care field. She had to abandon her chosen career after several unsuccessful attempts to find alternative medical employment, and she is currently working in customer service for a trucking company. She laments that her present employment is in no way financially comparable to the earning potential she had as a skilled dental assistant and is nowhere near as fulfilling.<sup>1</sup>

Women like Tina and her colleague represent a growing class of health care workers experiencing an alarming process known as latex sensitization.<sup>2</sup> Each additional exposure, no matter how minute, increases sensitivity to the latex and to

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<sup>1</sup>Telephone Interview with Tina Petriella (Nov. 23, 2003).

<sup>2</sup>Pacific Northwest Foundation, *Latex Allergies and Sensitivities*, at [http://www.pnf.org/latex\\_allergy.html](http://www.pnf.org/latex_allergy.html) (last visited Oct. 24, 2003).

other chemical products, thus turning every day activities into potential life-threatening hazards.<sup>3</sup>

The explosion in the number and severity of latex allergies began with the emergence of the AIDS epidemic as the Centers for Disease Control issued universal precautions advising health care workers to use protective barriers to prevent the spread of the infection.<sup>4</sup> This resulted in constant use of the gloves by medical workers and a great increase in demand for cost effective gloves. Essentially, the quality of the glove making processes decreased, increasing the amount of allergy inducing proteins excreted to wearers.<sup>5</sup> Afflicted workers include physicians, nurses, dentists, dental hygienists, operating room personnel, laboratory technicians and ambulance attendants among others.<sup>6</sup> Many of the most extensively trained medical professionals in our society are being turned away from jobs or forced to quit due to the potential health consequences. This situation has resulted in mass product liability litigation against the manufacturers of the latex gloves, employment discrimination suits against employers, and voluminous worker's compensation lawsuits.<sup>7</sup> Pursuit of these remedies has yielded mixed results, with some plaintiffs receiving multi-million dollar awards and others receiving nothing. As with most litigation, the outcome is rarely satisfactory to any party involved.

This note first explores the nature of the latex allergy, followed by an explanation of the various types of litigation that have been brought by health care workers to obtain relief. In Part IV, this paper explores the issue of the latex allergy as a "disability" under the Americans with Disabilities Act. Finally, it will propose that education regarding prevention and accommodation measures combined with proper government agency regulations will ensure the health of individuals who chose to pursue a career in the medical field, will protect consumers, and will preserve the strength of the health care industry as a whole. Most importantly, the value obtained in accommodating these highly skilled workers outweighs the costs incurred by medical employers and providers.

## II. HISTORY AND BACKGROUND OF THE LATEX ALLERGY

### A. Prevalence of the Allergy

According to the National Institute of Allergy and Infectious Diseases, at least fifty million Americans have some type of allergic disease, and allergies are the sixth leading cause of chronic disease costing the health care industry eighteen billion

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<sup>3</sup>*Id.*

<sup>4</sup>Caroline C. Tesiorowski, *Latex Allergies in the Health Care Worker*, J. PERIANESTHESIA NURSING, Feb. 2003, at 18, *quoting* Chardin H, Desvaux FX, Mayer C, et al., *Protein and Allergen Analysis of Latex Mattresses*, 119 INT ARCH ALLERGY IMMUNOL 239-46 (1999); Mahler V, Fischer S, Fuchs T, et al., *Prevention of Latex Allergy by Selection of Low-Allergen Gloves*, 30 CLIN. EXP. ALLERGY 509-20 (2000).

<sup>5</sup>Tesiorowski, *supra* note 4, at 21.

<sup>6</sup>National Institute of Occupational Safety and Health, *Niosh Facts: Latex Allergy*, at <http://www.cdc.gov/niosh/latexfs.html> (last modified Aug. 12, 1997).

<sup>7</sup>Karen Markus, *Latex and the Law-Know Your Rights and Risks*, at <http://www.nurseweek.com/features/99-7/legal705.html> (last visited Oct. 30, 2003).

dollars annually.<sup>8</sup> The prevalence of latex allergy in the general population varies widely, with estimates ranging from less than one percent up to six percent.<sup>9</sup> However, recent estimates show that latex allergies currently affect 10% to 12% of health care workers and up to 24% of anesthesiologists.<sup>10</sup> Why is the percentage of latex allergies so much higher in the medical field? The answer is the increased use of powdered latex gloves. This was triggered by the issuance of universal precautions from the Centers for Disease Control in the early 1980's to prevent the spread of AIDS, hepatitis C and other blood-borne pathogens.<sup>11</sup> Latex glove use increased dramatically, from 12 billion pairs in 1987 to more than 200 billion pairs in the next decade.<sup>12</sup>

#### *B. Sources and Processing of Latex Products*

Natural rubber latex mainly comes from the sap of the rubber tree, *Hevea brasiliensis*, which grows in Africa, Asia and South America.<sup>13</sup> While harvesting rubber, the trees are scribed to create wounds producing milky sap. The tree invokes a defense response to the wounding by forming defense proteins within the sap that eventually becomes the latex product.<sup>14</sup> Several rubber proteins have been found to be linked to allergies, and when these proteins leach out of the gloves into the wearer's skin, an allergic reaction can be triggered.<sup>15</sup>

Rubber processing involves many complex chemical reactions which require numerous chemical additives to give the rubber its needed properties. These

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<sup>8</sup>National Institute of Allergy and Infectious Diseases, *Allergy Statistics*, at <http://www.niaid.nih.gov/factsheets/allergystat.htm> (last visited Oct. 30, 2003), quoting American Academy of Allergy, Asthma and Immunology, *The Allergy Report: Science Based Findings on the Diagnosis & Treatment of Allergic Disorders* (1996-2001).

<sup>9</sup>*Id.* quoting Poley GE and Slater JE, *Latex Allergy*, 105 J. OF ALLERGY AND CLINICAL IMMUNOLOGY 1054-62 (2000); Neugut AL, Ghatak AT and Miller RL, *Anaphylaxis in the United States: An Investigation into its Epidemiology*, 61 ARCHIVES OF INTERNAL MEDICINE 15-21 (2001).

<sup>10</sup>Tesiorowski, *supra* note 4, at 19, quoting Mahler V, Fischer S, Fuchs T, et al., *Prevention of Latex Allergy by Selection of Low-Allergen Gloves*, 30 CLIN. EXP. ALLERGY 509-20 (2000); Holzman RS, Katz JD, *Editorial Reviews*, 89 ANESTHESIOLOGY 287-89 (1998).

<sup>11</sup>*Id.* at 18, quoting Chardin H, Desvaux FX, Mayer C, et al., *Protein and Allergen Analysis of Latex Mattresses*, 119 INT ARCH ALLERGY IMMUNOL 239-46 (1999); Mahler V, Fischer S, Fuchs T, et al., *Prevention of Latex Allergy by Selection of Low-Allergen Gloves*, 30 CLIN. EXP. ALLERGY 509-20 (2000).

<sup>12</sup>*Id.* quoting Veach M, *Allergies to Latex Gloves Hand Health Workers a Growing Concern*, at <http://www.latexallergylinks.tripod.com> (last visited June 14, 2002).

<sup>13</sup>American Association of Nurse Anesthetists, *Talking Points about Latex Allergies*, at <http://www.aana.com/press/2002/041102b.asp> (last visited Nov. 12, 2003).

<sup>14</sup>Tesiorowski, *supra* note 4, at 20, quoting Posch A, Chen-Heimsoth M, *Latex Allergens: A Review of Current Knowledge*, 51 PNEUMOLOGIE 1058-62 (1977).

<sup>15</sup>*Id.* quoting Tomazic VJ, Shampaine EL, Lamanna A, et al., *Cornstarch Powder on Latex Products is an Allergen Carrier*, 93 J. ALLERGY CLIN. IMMUNOL. 751-58 (1994); Lundberg M, Wrangsjö K, Johansson SGO, *Latex Allergens in Glove Powdering Slurries*, 50 ALLERGY 378-80 (1995).

additives include fungicides, stabilizers, blocking agents and the like.<sup>16</sup> Due to the high demand for the gloves starting in the 1980's, many inexperienced firms rushed to begin producing gloves at high volumes by cutting corners on quality. To decrease production time, for example, necessary wash and rinse cycles were reduced. To quicken reaction times, the latex was overdosed with accelerators, activators and sulfur. This excessive use of chemicals was greater than the solubility of the rubber, thus producing a leaching effect. This caused the additives, along with the latex proteins, to contact the glove wearer's skin to an extent never seen before.<sup>17</sup> In fact, cost cutting methods such as insufficient rinsing and excessive use of chemical reagents account for the varied concentrations of extractable latex proteins in different brands of gloves, up to a 3,000 fold difference. Large variations also occur between different lots of gloves made by the same manufacturer.<sup>18</sup>

The problems are exacerbated because the latex proteins bind with the cornstarch powder used inside many gloves to ease their removal. This, in turn, releases the proteins into the air when the gloves are snapped off.<sup>19</sup> This process results in the inhalation of the aerosolized proteins and entry through the eyes and mucous membranes seriously increasing exposure levels, thus creating a major risk to health care personnel and those around them who may use dozens of pairs of gloves per day.<sup>20</sup> In fact, in 1996, FDA Medwatch data shows 28 reported deaths and 225 anaphylactic events associated with latex products.<sup>21</sup>

### C. Latex Reactions

There are three recognized types of reactions to latex products: Type IV non-allergic irritant contact dermatitis; Type IV cell-mediated allergies; and Type I IgE-mediated allergies.<sup>22</sup> The least serious of the three types is non-allergic contact

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<sup>16</sup>*Id.* at 21, quoting Epstein E, Maibach HI, *Formaldehyde Allergy*, 94 ARCH. DERMATOL. 186 (1966); Speit G, Merk O, *Evaluation of Mutagenic Effects of Formaldehyde in Vitro: Detection of Crosslinks and Mutations in Mouse Lymphoma Cells*, 17 MUTAGENESIS 183-87 (2002); Merk O, Speit G, *Significance of Formaldehyde-Induced DNA-Protein Crosslinks for Mutagenesis*, 32 ENVIRON. MOL. MUTAGEN. 260-68 (1998).

<sup>17</sup>*Id.*, quoting Jones R, Scheppmann D, Heilman D, et al., *Prospective Study of Extractable Latex Allergen Contents of Disposable Medical Gloves*, 73 ANN. ALLERGY 321-25 (1994); Yunginger J, Jones R, Fransway A, et al., *Extractable Latex Allergens and Proteins in Disposable Medical Gloves and Other Rubber Products*, 93 J. ALLERGY CLIN. IMMUNOL. 836-42 (1994).

<sup>18</sup>National Institute for Occupational Safety and Health, *Preventing Allergic Reactions to Natural Rubber Latex in the Workplace*, DHHS (NIOSH) Publication No. 97-135 at <http://www.cdc.gov/niosh/latexalt.html> (last modified Sept. 25, 1998), quoting Yunginger JW, et al., *Extractable Latex Allergens and Proteins in Disposable Medical Gloves and Other Rubber Products*, 93 J. ALLERGY CLIN. IMMUNOL. 832-836 (1994); Beezhold D, *LEAP: Latex ELISA for Antigenic Protein*, 61 GUTHRIE J. 77-81 (1992).

<sup>19</sup>American Association of Nurse Anesthetists, *supra* note 13.

<sup>20</sup>*Id.*

<sup>21</sup>Lawrence D. Duffield, *Latex Allergy: Everyone's Concern*, J. MICH. DENTAL ASS'N, June 1998, at <http://www.latexallergylinks.org/MDA.html> (last visited Jan. 9, 2004).

<sup>22</sup>American Association of Nurse Anesthetists, *supra* note 13.

dermatitis, which causes skin rash and rough dry patches on the hands directly where contact was made.<sup>23</sup> Type IV cell-mediated allergies are the most common allergic reaction to latex.<sup>24</sup> These are delayed reactions that mimic a poison ivy type reaction.<sup>25</sup> They might not develop for several days but may last for weeks while spreading over the surface of the skin.<sup>26</sup> These latex allergies come not from the latex proteins themselves but as a sensitization to the over 300 plus chemicals used in processing and manufacturing latex. The major concern regarding this type of reaction is that continued exposure substantially increases the likelihood of developing antibodies that trigger Type I Latex Allergy.<sup>27</sup> Type I IgE-mediated allergies are a reaction to the actual latex proteins and are the most serious of the reactions because their unpredictability.<sup>28</sup> Onset of symptoms can occur within minutes of exposure or may occur without warning hours later.<sup>29</sup> Type I allergic reactions are systemic rather than localized in nature, resulting most commonly in hives, swelling of the lips, throat or tongue and difficulty breathing or swallowing. Severe symptoms can kill within minutes due to swelling that blocks the airways or a fatal drop in blood pressure.<sup>30</sup>

There is virtually no treatment for people with Type I Latex Allergy other than avoidance.<sup>31</sup> Once an attack does occur, the only option is to administer an immediate injection of epinephrine, commonly known as adrenaline, which constricts blood vessels, relaxes lung muscles and reverses swelling.<sup>32</sup> Epinephrine reverses the symptoms of the anaphylactic attack for approximately twenty minutes, allowing the individual to seek emergency medical care which provides the full treatment necessary to end the reaction.<sup>33</sup> Another serious problem involving latex

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<sup>23</sup>*Id.*

<sup>24</sup>*Id.*

<sup>25</sup>Certified Registered Nurse Anesthetists, *AANA Latex Protocol*, at <http://www.aana.com/crna/prof/latex.asp> (last visited Nov. 12, 2003).

<sup>26</sup>Deanna Reed, *Home Study Program: Update on Latex Allergy among Health Care Personnel*, 78 AORN J. 409, 410 (Sept. 2003).

<sup>27</sup>American Association of Nurse Anesthetists, *supra* note 13.

<sup>28</sup>*Id.*

<sup>29</sup>Tesiorowski, *supra* note 4, at 22-23.

<sup>30</sup>American Latex Allergy Association, *Ask the Expert: How Do I Protect Myself In Case of a Severe Allergic Reaction?* at [http://www.latexallergyresources.org/ask\\_expert/reaction\\_protection.cfm](http://www.latexallergyresources.org/ask_expert/reaction_protection.cfm) (last visited Jan. 9, 2004). Other symptoms include a metallic taste or itching in the mouth; generalized flushing, itching or redness of the skin; abdominal cramps, nausea, vomiting or diarrhea; increased heart rate; plunging blood pressure (and accompanying paleness); a sudden feeling of weakness; anxiety or an overwhelming sense of doom; collapse and unconsciousness.

<sup>31</sup>Pacific Northwest Foundation, *supra* note 2.

<sup>32</sup>American Latex Allergy Association, *supra* note 30.

<sup>33</sup>*Id.* Epinephrine comes in the form of an EpiPen auto-injector which is a pre-measured dose of epinephrine for self injection available through prescription. It is safe for latex-allergic patients because, unlike many syringes or IV tubes, EpiPen contains no latex. Since it is

allergy is that a large percentage of those found to be sensitized to the latex products are asymptomatic. These people have produced Type I IgE antibodies and if they subsequently encounter latex proteins a Type I reaction can occur without notice. For some individuals, the first symptom of the allergy is anaphylaxis.<sup>34</sup>

Compounding the problem is the abundance of cross-reactants, which mimic latex proteins in their shape and composition.<sup>35</sup> These substances are found in many common fruits, vegetables, nuts and many man-made materials.<sup>36</sup> Cross-reactant proteins exacerbate latex sensitivity making everyday activities a risk in addition to a person's employment activities.<sup>37</sup>

#### D. Diagnosing Latex Allergies

Considering the many dangers involved with latex sensitivity, detection of the allergy is of high priority, especially for health care workers. It is important to be conscious of employees who exhibit symptoms and to proactively conduct tests ruling out latex allergy because once that person is sensitized, continued daily workplace exposure may lead to serious, or even fatal, health consequences.<sup>38</sup>

The first step to a diagnosis of latex allergy is to take a complete medical history and perform a physical examination.<sup>39</sup> A family history of allergies is the single most telling factor that an individual themselves will develop an allergy.<sup>40</sup> Other risk factors include a patient history of unrelated allergies, allergic reactions to certain foods, or a history of multiple surgical procedures as a result of injury or chronic

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impossible to predict which allergic individuals will suffer an anaphylactic reaction, even those who have experienced a mild allergic reaction to latex should be equipped with this device. According to the American Academy of Allergy, Asthma and Immunology, people who have experienced symptoms of anaphylaxis previously are at risk for subsequent reactions and should consult their doctors about carrying an epinephrine auto-injector and administering it at the first sign of an allergic reaction.

<sup>34</sup>Pacific Northwest Foundation, *supra* note 2.

<sup>35</sup>Tesiorowski, *supra* note 4, at 21-22.

<sup>36</sup>*Id.* at 22, 25. Common examples of fruits and nuts include apple, apricot, avocado, banana, cherry, chestnut, coconut, fig, kiwi fruit, loquat, mango, melons, papaya, passion fruit, peach, strawberries, sunflower seed and watermelon. Vegetables include buckwheat, carrot, pepper, potato, tomato and turnip; Animal products include: crustacea, fish, shellfish, snails. Other allergens are auto tire dust, bacterial endotoxins, birch and cedar pollens, certain anesthetic agents, sunflower, tobacco, and *Ficus benjamina*.

<sup>37</sup>*Id.*

<sup>38</sup>*Id.* at 25-26. The warning signs of the latex allergy include irritated red hands; irritation involving nasal passages, sinuses, eyes; shortness of breath, coughing or wheezing; hives; or unexplained shock.

<sup>39</sup>*Id.* at 26.

<sup>40</sup>American Academy of Allergy, Asthma & Immunology, *Tips to Remember: What is an Allergic Reaction?* at <http://www.aaaai.org/patients/publicedmat/tips/whatisallergicreaction.stem> (last visited Oct. 30, 2003). If one parent has an allergic disease, the estimated risk of the child to develop allergies is 48%; the risk grows to 70% if both parents have allergies.



conditions.<sup>41</sup> Finally, in-vitro and/or serological laboratory testing methods may also be performed.<sup>42</sup>

The in-vitro skin prick test is still considered the best method of testing for latex allergy.<sup>43</sup> Latex protein is introduced into the skin and a positive result will produce reddening and swelling of the area.<sup>44</sup> Although there are standardized protocols for skin testing, no standardized latex protein extract is available at this time. There are only commercially available extracts, latex glove extracts, and extracts of hevea leaves.<sup>45</sup> The difficulty about the testing is that it must be performed with the correct allergen against which the patient is presumed to be allergic. The commercially available extracts may not contain the particular allergen.<sup>46</sup> Glove extracts are often used as they are made with a standardized method of soaking glove material. However, highly variable levels of proteins in different brands of gloves create a danger of serious reaction. On the other hand, there is a risk that false-negative tests may occur with extracts of gloves with low latex protein content.<sup>47</sup> Skin-prick testing, although the most accurate, may lead to anaphylactic shock, and should be performed only under the supervision of an allergy specialist and with the necessary emergency back-up equipment readily available.<sup>48</sup>

Other testing methods include the RAST and ELISA tests which identify specific IgE antibodies in the patient's blood. The RAST test has a sensitivity approaching 100%.<sup>49</sup> Therefore, an invitro test such as RAST is commonly used to confirm a diagnosis rather than initially detect the latex allergy.<sup>50</sup> To combat the inconsistencies of testing, the FDA is soon expected to approve a serum for standardized skin prick testing.<sup>51</sup>

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<sup>41</sup>Reed, *supra* note 26.

<sup>42</sup>*Id.* at 417.

<sup>43</sup>*Id.* at 410, quoting Kleinbeck SM, et al., *A Criterion-Referenced Measure of Latex Allergy Knowledge*, 68 AORN J. 384-92 (Sept. 1998).

<sup>44</sup>Tesiorowski, *supra* note 4, at 26.

<sup>45</sup>*Id.*

<sup>46</sup>*Id.*

<sup>47</sup>*Id.*, quoting Yunginger JW, *Diagnostic Skin Testing for Natural Rubber Latex Allergy*, 102 J. ALLERGY CLIN. IMMUNOL. 351-52 (1998); Yunginger JW, *Latex Allergy in the Workplace: An Overview of Where We Are*, 83 ANN. ALLERGY ASTHMA IMMUNOL. 630-33 (1999).

<sup>48</sup>American Association of Nurse Anesthetists, *supra* note 13. A small, diluted amount of one or more of the latex proteins in question is injected under the skin, to a scratch or a puncture on the patient's arm or back during the skin prick test. The proteins produce a small, raised area surrounded by redness within 15 minutes in allergic patients.

<sup>49</sup>*Id.*

<sup>50</sup>American Association of Nurse Anesthetists, *supra* note 13.

<sup>51</sup>*Id.*

*E. Current Issues Facing the Health Care Worker*

## 1. Continuing Workplace Exposure

There are a variety of issues brought about by the latex allergy crisis that are specific to the health care worker. First, there is still a demand for use of latex gloves in the health care setting for certain types of situations. Many healthcare workers find that the latex gloves are their “barrier of choice” while working with blood products that are known to be or are possibly infected with HIV, Hepatitis B or other blood-borne pathogens.<sup>52</sup> Latex gloves do not interfere with the manual dexterity required in certain procedures, and they are a more durable barrier than vinyl gloves which lose their protective properties within the first 15 minutes of use.<sup>53</sup>

Second, many healthcare industry insiders feel that replacing latex products with non-latex substitutes would be cost-prohibitive due to the high price of synthetic alternatives, especially since the number of workers and patients with the allergy represent a minority of the healthcare employees and consumers.<sup>54</sup>

Third, workers employed at large publicly funded health care systems may be at increased risk since these employers typically depend on “least-cost” contractors for their supplies.<sup>55</sup>

Unfortunately, this reluctance to eliminate latex gloves has serious repercussions for healthcare workers with latex sensitivities and ultimately for those not yet sensitized. In addition, studies have shown that simply offering non-latex gloves may not be sufficient.<sup>56</sup> The existence of minute respirable particles associated with either the powder or a bacteriological contaminate formed during production of the gloves have carried these small particles into the air supply via the explosive snapping as the gloves are removed. The HVAC ventilation systems ensure that the particles are distributed and re-circulated throughout the facility.<sup>57</sup> The amount of the particulate matter does not need to be extreme to cause an effect.<sup>58</sup> Studies have

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<sup>52</sup>*Id.* Latex gloves do provide a better fit because they are able to conform to the shape of the wearers hand and the gloves stretch to five times their original size without tearing.

<sup>53</sup>*Id.*

<sup>54</sup>American Association of Nurse Anesthetists, *supra* note 13. Research from the FDA has indicated that synthetic rubber gloves, such as vinyl, exceed by more than 105% the price of their latex counterparts.

<sup>55</sup>Tesiorowski, *supra* note 4, at 25.

<sup>56</sup>*Id.* at 24.

<sup>57</sup>*Id.* at 24, 25, quoting Charous BL, Schuenemann PJ, Swanson MC, *Passive Dispersion of Latex Aeroallergen in a Health Care Facility*, 85 ANN. ALLERGY ASTHMA IMMUNOL. 285-90 (2000).

<sup>58</sup>*Id.* at 19. It has been noted in one study that even while using personal latex precautions, a dental assistant with a latex allergy and occupational asthma was still exposed to latex aeroallergens in the work-place because of latex that had settled into or was part of the clinic upholstery fabric, as well as carpet dust. *Id.*, quoting Charous BL, et al., *Passive Dispersion of Latex Aeroallergen in a Healthcare Facility*, 85 ANN. ALLERGY ASTHMA IMMUNOL. 285-90 (2000).

shown that it takes as little as four molecules of latex to cause a reaction in a highly sensitized individual.<sup>59</sup> Considering that the only way to protect oneself from a Type I latex allergic reaction is avoidance, these studies show that it is nearly impossible to do so simply by replacing the gloves in the workplace.<sup>60</sup>

## 2. Exposure Outside of the Workplace

The latex sensitive healthcare worker is faced with many exposures on the job, but these are only exacerbated by the myriad of products containing latex used in everyday activities that may act as sensitizers. There are over 40,000 consumer products that contain latex, including many household items.<sup>61</sup> This makes even the simplest of activities a cause for heightened awareness, such as eating at restaurants where a large number of food service workers use latex gloves which contaminate the food.<sup>62</sup> The very act of attending a child's birthday party may be risky for someone with the allergy due to the abundance of balloons.<sup>63</sup>

## 3. The Healthcare Worker as Patient

The healthcare worker as a patient also has considerable risks in receiving treatment at a facility where latex products are part of the surroundings, especially during surgery. Latex protocols have been adopted to prevent a serious allergic response during surgical procedures. Recommendations include making the latex

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<sup>59</sup>Pacific Northwest Foundation, *supra* note 2.

<sup>60</sup>Tesiorowski, *supra* note 4, at 19, 24.

<sup>61</sup>Liz Kowalczyk, *Allergy Hazard*, THE PATRIOT LEDGER, Apr. 1997, at <http://www.latexallergylinks.org/ledger.html> (last visited Jan. 9, 2004). Just a few products that give cause for alarm are as follows: paints, markers, balloons, balls, rubber gloves, condoms, elastic on diapers, underwear and clothing, toys, rubber bands, pantyhose, carpet backing, newsprint, and shoe soles.

<sup>62</sup>Pacific Northwest Foundation, *supra* note 2. Even the ordinary act of flying became a cause for concern: On November 19, 2001, President George W. Bush signed the Aviation and Transportation Security Act into law. Part of this law established the Transportation Security Administration (TSA), which is designed to promote passenger security while ensuring freedom of movement. As of January 1, 2003, the TSA began screening all checked baggage at all commercial airports in the U.S. Often, this screening happens behind the scenes, out of sight of travelers. As an organization that advocates for consumer safety, there was concern that baggage screeners might wear NRL gloves while manually searching luggage contents. Specifically, there was concern that if powdered NRL gloves were being worn, the powder could contaminate the clothing and personal items in the suitcase. If a traveler happened to have an NRL allergy, this was a setup for allergic reactions, potentially without the traveler's knowledge of where the exposure was coming from. Diane Flanagan, the President of the American Latex Allergy Association, contacted the TSA to inquire about their policy on NRL gloves. The TSA spokesperson stated that the TSA uses nitrile and vinyl gloves, and does not utilize NRL gloves. Because all baggage screeners are now federal employees overseen by the TSA, there should not be any NRL gloves in use for baggage screening. American Latex Allergy Association, News: The TSA and Baggage Safety, <http://www.latexallergyresources.org/newsletter.cfm?NewsletterID=7> (last visited Jan. 9, 2004).

<sup>63</sup>Lisa Legge, *Living with Latex*, NURSING MINNESOTA, Aug. 1997, at <http://www.latexallergylinks.org/NursingMN.html> (last visited Jan. 9, 2004).

sensitive individual the first patient of the morning, thus allowing the latex dust to be removed the night before, removing latex products from the operating room, noting that much of the standard anesthesia equipment and products are made of latex, and placing clearly visible signs on the doors warning all that enter of the patient's latex allergy.<sup>64</sup> Pretreatment before surgery with steroids, antihistamines, and H2 blockers is also an option for patients with a confirmed latex allergy, although it remains controversial. These agents will not prevent a reaction, but may lessen the severity of an attack. This is often a preferred method for children's surgeries.<sup>65</sup> It is also extremely important to make all hospital departments aware of the patient's special needs. It is recommended that pharmacy, central supply, radiology, respiratory therapy, housekeeping, food service, and post-operative care units take appropriate precautions to protect the patient.<sup>66</sup> Still, even with those precautions, there is the risk that a latex sensitized patient will cross-react with certain anesthetic agents.<sup>67</sup>

#### F. Overall Progress and Continuing Challenges

Obviously, there are many hurdles to overcome in protecting healthcare personnel from their environments, in and out of the workplace, and some progress has been made. Previous concerns over the lack of labeling of latex gloves was addressed by the FDA, which now requires labeling on all medical devices containing latex with the following warning: "This product contains natural rubber latex which may cause allergic reactions in sensitized individuals."<sup>68</sup> Further, the FDA issued a final ruling that labeling of medical devices containing natural rubber that is likely to come in contact with humans, shall not contain the term "hypoallergenic."<sup>69</sup> The label had been used with latex gloves which had reduced powder content but were not latex free.<sup>70</sup> In 1991, the FDA outlined a two-step washing process of gloves to the manufacturers to better remove the latex proteins.<sup>71</sup>

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<sup>64</sup>Certified Registered Nurse Anesthetists, *supra* note 25.

<sup>65</sup>*Id.*

<sup>66</sup>*Id.*

<sup>67</sup>Tesiorowski, *supra* note 4, at 25. Types of anesthesia equipment containing latex include: stethoscope tubing, rubber masks electrode pads, e.g., electrocardiogram, peripheral nerve stimulator, contact pads, head straps rubber tourniquets, esmarch bandages rubber, oral, nasal; pharyngeal airways, teeth guards, eyeshields, bite blocks, blood pressure cuffs (inner bladder, and tubing), breathing circuits containing rubber, reservoir breathing bags, disposable oxygen masks, nasal cannulae, rubber ventilator hoses and bellows, rubber endotracheal tubes, latex cuffs on plastic endotracheal tubes, latex injection ports on intravenous tubing, stopcocks, certain epidural catheter injection adapters, multidose vial stoppers, patient controlled analgesia syringes, rubber suction catheters, specimen traps, IV solutions and tubing systems (injections ports). Certified Registered Nurse Anesthetists, *AANA Latex Protocol*, at <http://www.aana.com/crna/prof/latex.asp>(last visited Nov. 12, 2003).

<sup>68</sup>Duffield, *supra* note 21.

<sup>69</sup>*Latex Allergy Litigation: Federal Government Debates Latex Regulations*, at <http://www.gelmans.com/Updates/latex0499.htm/index.html> (last visited Oct. 30, 2003).

<sup>70</sup>Pacific Northwest Foundation, *supra* note 2.

<sup>71</sup>American Association of Nurse Anesthetists, *supra* note 13.

Also, the National Institute of Occupational Safety and Health (“NIOSH”) has recommended that employers provide non-latex gloves to their workers for use in food industry.<sup>72</sup> In addition, employers must provide alternatives to latex gloves due to the 1991 standard issued by the U.S. Occupational Safety and Health Administration which directs that, “[g]love liners, powderless gloves, or other alternatives must be readily accessible to employees who are allergic to the gloves normally provided.”<sup>73</sup>

Overall, some positive steps have been taken and knowledge regarding the latex allergy has substantially increased. Unfortunately, the latex genie has been let out of the bottle, and it has devastated many lives not just careers. As long as latex products continue to exist in the medical setting, accommodation and prevention must be utilized to reduce the risks to employees.

### III. RELIEF SOUGHT THROUGH THE COURT SYSTEM

Due to the devastating effect of the latex allergy, many of those employed in the health care setting are being forced to abandon their chosen careers. As in Tina’s case, this may result in a substantial loss of earning power and necessitate costly retraining. Many of those afflicted with severe latex allergies are fighting back by bringing lawsuits against the major manufacturers of latex gloves under product liability and negligence causes of action. Others are choosing to fight to receive workers’ compensation. Therefore, it is both necessary and beneficial to examine the various types of relief that have been awarded by the courts, and to assess the relative success of each strategy in compensating the plaintiff for their injuries.

#### A. *Products Liability: Federal and State*

Many healthcare workers suffering from Type I latex allergy have commenced lawsuits against the manufacturers, suppliers and distributors of latex gloves under a variety of products liability theories. These plaintiffs are advancing several legal arguments. They claim that manufacturers of latex products knew of possible dangers from exposure and failed to warn latex glove wearers. Plaintiffs assert defects in the manufacturing process, claiming that lowered processing standards used to speed up manufacturing made the gloves more likely to create allergic reactions in wearers. Finally, plaintiffs urge that the manufacturers have not taken steps to make the gloves safer.<sup>74</sup>

Six major latex glove defendants make up 80% of the latex glove market share.<sup>75</sup> However, almost every U.S. latex glove manufacturer is a target of product liability suits. A partial list of defendants includes Safeskin Corporation, Ansell Inc., Smith & Nephew, Tillotson Corporation, Baxter Healthcare Corporation, Johnson &

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<sup>72</sup>Pacific Northwest Foundation, *supra* note 2.

<sup>73</sup>American Association of Nurse Anesthetists, *supra* note 13.

<sup>74</sup>Markus, *supra* note 7.

<sup>75</sup>Leonard, O’Brien, Spencer, Gale & Sayre, Ltd., *In re: Latex Glove Litigation*, MDL No. 1148, at <http://www.losgs.com/Latex.htm> (last visited Sept. 18, 2003). The six major manufacturers are Baxter Healthcare (now Allegiance Healthcare Corporation); Ansell, Inc.; Johnson & Johnson; Becton-Dickinson; Smith & Nephew Perry (which was acquired by Ansell and is now known as Ansell Perry); and Safeskin Corporation.

Johnson, Inc., MBF USA Inc., Kendall International, and Becton Dickinson & Co.<sup>76</sup> By 1996, there were actions pending in various federal district courts under causes of action including strict product liability for defective design and/or manufacture and failure to warn, negligence, intentional and negligent infliction of emotional distress, willful misrepresentation of material facts, negligent misrepresentation and fraudulent concealment.<sup>77</sup> Due to common fact patterns in the products liability claims, over 400 federal court cases filed in the United States were consolidated.<sup>78</sup> One plaintiff, whose action was pending in the Eastern District of Pennsylvania, moved for centralization of all pending cases to that district under 28 U.S.C. § 1407, the federal Multi-District Litigation statute. On February 26, 1997, all 400 cases were transferred to the Eastern District of Pennsylvania for pretrial proceedings.<sup>79</sup> Likewise, most of the companion state court cases are similarly subject to state-wide coordination as ordered by the highest court of that State. Therefore, most if not all state latex cases are assigned to one state judge for overall case management.<sup>80</sup>

In 2002, the first federal latex glove mass tort case to reach trial was decided in favor of the defendant glove manufacturer. *Kennedy vs. Baxter Healthcare Corporation* was decided in the United States District Court for the District of Minnesota, where the jury absolved the defendant of all liability, finding that the product design and the warnings were adequate.<sup>81</sup> Plaintiff claimed that the gloves were unusually allergenic and the product warnings inadequate. The jury apparently viewed the plaintiff's case as weak because she had suffered many pre-existing allergies that had previously caused anaphylactic shock. The defendant successfully argued that those allergies, and not the latex gloves, were the actual cause of her reactions. The evidence showed that even after the plaintiff left her job and tried to avoid all latex products, she still suffered an additional 17 anaphylactic reactions.<sup>82</sup> Plaintiff's counsel admitted that those facts made it difficult to establish clear causation during the trial.<sup>83</sup> Difficulty in establishing causation is a common weakness present in both the federal and state court cases. As more fully explained below, causation acts as a major barrier to achieving success for plaintiffs via most products liability causes of action.<sup>84</sup>

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<sup>76</sup>*Latex Allergies Lead to Litigation*, EUROPEAN RUBBER J., Apr. 1997, at 20.

<sup>77</sup>Williamson & Williams, *Latex Allergy*, at <http://www.williamslaw.com/latex.html> (last visited Nov. 13, 2003).

<sup>78</sup>Kim Williams, *Latex Glove Injury Claims-Potential Third Party Recovery*, Washington Self-Insurers Association, at <http://www.wsiassn.org/news/latex.htm> (last visited Nov. 13, 2003).

<sup>79</sup>Williamson & Williams, *supra* note 77.

<sup>80</sup>Segal, McCambridge, Singer & Mahoney, Ltd., *Latex Glove Allergy Litigation*, at [www.smsm.com/practice\\_latex.html](http://www.smsm.com/practice_latex.html) (last visited Nov. 13, 2003).

<sup>81</sup>Michael M. Bowden, *Defense Prevails in First Federal Latex Glove Case*, 2002 LWUSA 449 (2002), at <http://www.lawyersweeklyusa.com/reprints/latex.htm> (last visited Nov. 13, 2003).

<sup>82</sup>*Id.*

<sup>83</sup>*Id.*

<sup>84</sup>Guide to Toxic torts § 10.01 (2003).

*B. The Main Theories Under Products Liability*

Plaintiffs who have filed suit against the various manufacturers of latex gloves generally argue at least one of several causes of action under the general heading of products liability. This section will explore in detail each of the theories put forth to establish liability against the manufacturers in latex glove litigation.

1. Strict Liability

Strict liability theory, adopted in Section 402A of The Restatement (Second) of Torts, is a key pro-plaintiff measure under a products liability cause of action. Strict liability eliminates the need to prove fault, therefore, the plaintiff need not show that the defendant intended to cause the injury or that defendant's conduct did not meet a reasonable industry standard. The plaintiff must show only that the conduct of the defendant caused a compensable injury.<sup>85</sup> Section 402A will apply to a case if the product, "was defective in design or due to an impurity or defect in the manufacturing process, or unreasonably dangerous due to a failure to adequately warn of the product's effects."<sup>86</sup> Currently, most states have adopted its formulation of strict liability standards, either verbatim, or with certain modifications.<sup>87</sup>

Recently, this theory was successful in a Wisconsin state case against a major latex glove manufacturer. In 2001, the Supreme Court of Wisconsin affirmed the decision of the Wisconsin Court of Appeals in favor of Linda M. Green against glove manufacturer Smith & Nephew AHP, Inc. ("S&N") under a theory of strict liability.<sup>88</sup> Plaintiff began her employment at St. John's Hospital in Milwaukee in 1978, where she started as a radiology technician, and in 1986, worked as a CT scan technologist.<sup>89</sup> Hospital rules required that plaintiff wear protective gloves around

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<sup>85</sup>Guide to Toxic Torts § 3.07 (2003). *Id.* The cornerstone of tort law in our Anglo-American system of jurisprudence is based upon three generally accepted principles. The first is that by awarding any individual monetary damages after their injury, we can make them whole, and the second is the concept of the reasonable prudent person. The third...is that liability is imposed, and the corresponding right to recovery is created, not because of the fact that the plaintiff is injured, but because the injury is the result of the defendant's fault. Fault, as each first year law student is quick to learn, is either based upon the fact that the defendant was negligent in bringing about injury, or in the alternative, that the defendant intended or was substantially certain that the harm would result as the natural consequence of their behavior. The largest percentage of our tort litigation is involved with these issues. A smaller number however, are concerned with scenarios where culpability is not an issue. The defendant's liability will result in these cases because our system of jurisprudence has dictated that blame is not an element of recovery. Instead, liability is imposed simply because of the relationship between the parties, or due to the fact that the defendant has undertaken the activity which resulted in injury. This is of course, liability without fault, or as it is more commonly known, strict liability. Charles E. Cantu, *Distinguishing the Concept of Strict Liability for Ultra-Hazardous Activities From Strict Products Liability Under Section 402A of the Restatement (Second) of Torts: Two Parallel Lines of Reasoning That Should Never Meet*, 35 AKRON L. REV. 31, 31-33 (2001).

<sup>86</sup>*Id.* at § 3.07 [2][a][ii].

<sup>87</sup>Guide to Toxic Torts § 3.07 [2][a][i](2003).

<sup>88</sup>Green v. Smith & Nephew, AHP, Inc., 629 N.W.2d 727 (2001).

<sup>89</sup>*Id.* at 732.

patients. Green wore powdered latex gloves manufactured by Smith & Nephew.<sup>90</sup> She wore few gloves initially, but upon her promotion in 1986, the usage increased until she was up to approximately forty pairs of gloves per shift.<sup>91</sup> Although Green had never had allergies before, by 1990 her symptoms required several hospitalizations. In 1991, she was diagnosed with latex allergy.<sup>92</sup> Green commenced the suit against the defendant in 1994, alleging that the gloves “were defective in two respects: (1) the gloves contained excessive levels of allergy-causing latex proteins; and (2) the cornstarch with which S&N powdered its gloves increased the likelihood that persons would inhale the latex proteins.”<sup>93</sup>

Green also argued that the defendant could have significantly decreased the levels of the proteins in the gloves and discontinued the use of cornstarch powder by adjusting its production processes; however, defendant chose to continue the process that maintained the defects in the gloves.<sup>94</sup> Green then claimed that these defects “created the unreasonable danger that S&N’s gloves would cause consumers to develop latex allergy and suffer latex-allergy symptoms.” Therefore, plaintiff Green argued that S&N should be held strictly liable for her injuries.<sup>95</sup> The law relating to Green’s strict product liability claim was explained by the court:

A manufacturer of a product who sells or places on the market a defective product which is unreasonably dangerous to the ordinary user or consumer and which is expected and does reach the consumer without substantial change in the condition in which it is sold is regarded by law as responsible for harm caused by the product even though he or she has exercised all possible care in the preparation and sale of the product provided the product was being used for the purposes for which it was designed and intended to be used . . . . A defective product is unreasonably dangerous . . . when it is dangerous to an extent beyond that which would be contemplated by the ordinary user or consumer possessing the knowledge of the product’s characteristics which were common to the community.<sup>96</sup>

This explanation reflects Wisconsin’s adherence to this rule of strict liability under the Restatement (Second) of Torts Section 402A, beginning in 1967.<sup>97</sup> Although Green’s case was successful in Wisconsin, strict liability causes of action are not recognized in some states including Delaware, North Carolina, and Virginia.<sup>98</sup> Strict liability remains a controversial, if not widely rejected, theory of recovery because

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<sup>90</sup>*Id.*

<sup>91</sup>*Id.*

<sup>92</sup>*Id.*

<sup>93</sup>*Green*, 629 N.W.2d at 732.

<sup>94</sup>*Id.* at 732-33.

<sup>95</sup>*Id.* at 733.

<sup>96</sup>*Id.* at 735.

<sup>97</sup>*Green*, 629 N.W.2d at 736.

<sup>98</sup>Guide to toxic Torts §3.07 [2][a][ii] (2003).



our tort system assesses liability based on whether the defendant's conduct was wrongful.<sup>99</sup> The consumer expectations test used to determine whether a product is abnormally dangerous, as applied by the Court in *Green*, has been criticized as an inappropriate standard for judging design defects.<sup>100</sup> In fact, in her dissent, Justice Sykes recommended adopting the Restatement (Third) of Torts.<sup>101</sup> This version provides that a defect or failure to warn claim should be assessed "according to the 'foreseeable risks of the harm posed by the product' at the time that the product was manufactured."<sup>102</sup> Thus, the *Green* case, although successful, is somewhat of an anomaly and should not be considered the status quo in litigating a latex claim.

## 2. Breach of Warranty

A second cause of action under the umbrella of products liability is a breach of warranty claim. A breach of warranty for personal injury may be express or implied and is usually brought under the warranty of merchantability provision of the Uniform Commercial Code ("UCC"); it may also be brought under the misrepresentation provisions of the Restatement (Second) of Torts, Section 402B. The preliminary requirement for a warranty claim is that defendant made a representation about the product.<sup>103</sup> Express warranties are those representations that include any conduct by the seller which affirms a fact, promises something, describes the product, or involves showing a model or sample.<sup>104</sup> The UCC also provides for implied warranty of merchantability by sellers who are merchants for that type of goods and who regularly sell that type of goods. This warranty requires goods to be "for the ordinary purposes for which such goods are used."<sup>105</sup>

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<sup>99</sup>Victor E. Schwartz, *The Re-Emergence of Super Strict Liability: Slaying the Dragon Again*, 71 U. CIN. L. REV. 917 (2003). Many scholars find that "[t]he Wisconsin Supreme Court's final aberrant move in the *Green* decision was its revival of the nearly abolished doctrine of super strict liability. The court held that even though the defendants did not know about the risk of allergic reaction posed by their product, and could not have known about the danger, the manufacturer could nevertheless be held liable for the resulting injury. The court stated that 'regardless of whether a manufacturer could foresee potential risks of harm inherent in its . . . product, strict products liability holds that manufacturer responsible for injuries caused by the product.' The Wisconsin Supreme Court's holding essentially requires manufacturers to make a product safer than is possible and renders the company an insurer of its products. In a small number of other states, manufacturers may be liable for the risks imposed by a product regardless of what the manufacturer could have known at the time the product was manufactured. [However], some states that have imposed super strict liability have wisely retreated from that decision, either through the courts themselves, or through the legislature." *Id.* at 933-34.

<sup>100</sup>*Id.* at 918.

<sup>101</sup>*Id.* at 922.

<sup>102</sup>*Id.* at 918 n.6.

<sup>103</sup>Guide to Toxic Torts § 3.08 (2003).

<sup>104</sup>U.C.C. § 2-313(1998).

<sup>105</sup>U.C.C. § 2-314 (1998).

Breach of warranty claims are especially important in states that do not permit a strict liability cause of action.<sup>106</sup> Proof of product defect in an implied warranty of merchantability action is essential to the case, and to succeed in a breach of warranty of merchantability claim, “a plaintiff must prove (1) that a merchant sold goods; (2) which were defective at the time of sale; (3) causing injury to the ultimate consumer; (4) proximate cause of which was the defective nature of the goods; and (5) that the seller received notice of the injury.”<sup>107</sup> These claims are akin to strict liability because they apply regardless of any specific wrongdoing on the part of the seller.

Latex allergy plaintiffs have achieved some limited success by advancing breach of warranty causes of action. For example, in *Whitson v. Safeskin*,<sup>108</sup> plaintiff sued manufacturers Safeskin Corporation and Johnson & Johnson Medical, Inc., for *inter alia*, a claim of breach of implied warranty.<sup>109</sup> Plaintiff was a registered nurse who was eventually diagnosed with latex sensitivity due to her use of defendants’ gloves during her employment.<sup>110</sup> Defendants argued defenses of failure of timely notice by plaintiff and expiration of the statute of limitations, as established by Pennsylvania law.<sup>111</sup> The judge ruled that the notice given by the plaintiff at the time the Complaint was filed, more than two years after the discovered manufacturers defect, must be analyzed by a jury and not dismissed via summary judgment. The Pennsylvania law requires only that it be a reasonable time after discovery or constructive discovery of the breach . . . that the buyer must notify the seller . . . or be barred from any remedy.”<sup>112</sup> The court made clear that the notice provision was designed to defeat commercial bad faith and not to deprive a consumer of a remedy.<sup>113</sup> In considering the statute of limitations claim, the judge applied Pennsylvania’s four-year statute of limitations for warranty claims which states that they “accrue on the date the seller tenders delivery of the goods . . . .”<sup>114</sup> Some of plaintiff’s claims were barred because

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<sup>106</sup>Guide to Toxic Torts, *supra* note 103.

<sup>107</sup>*Id.*

<sup>108</sup>134 F. Supp. 2d 415 (E.D. Pa. 2001).

<sup>109</sup>*Id.*

<sup>110</sup>*Id.* at 417.

<sup>111</sup>*Id.*

<sup>112</sup>*Id.* at 422, *quoting* 13 Pa. C.S.A. § 2607(c)(1); UCC § 2-607(3)(a).

<sup>113</sup>*Whitson*, 134 F. Supp. 2d at 423, *quoting* 13 Pa. C.S.A. § 2607(c)(1); cmt.4. The policies behind requiring notification have been stated as: (1) opening the way for settlement through negotiations between all parties; and (2) minimizing the possibility of prejudice to the seller by allowing ample opportunity to cure the defect, inspect the goods, investigate the claim, or do whatever may be necessary to properly defend or minimize damages while the facts are fresh in the minds of the parties. *See Standard Alliance Indus. v. Black Clawson*, 587 F.2d 813, 826 (6th Cir. 1978).

<sup>114</sup>*Id.* at 423, *quoting* 13 Pa. C.S.A. § 2725; *Northampton County Area Comm. Coll. v Dow Chem.*, U.S.A., 566 A.2d 591, 599 (1989). Pennsylvania’s statute of limitations for warranty claims is as follows: (a) General rule – An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued . . . (b) Accrual of cause of action. – A cause of action accrues when the breach occurs, regardless of the aggrieved party’s lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and

of the date of accrual, but any of her claims based on deliveries after December 27, 1993 were still permissible.<sup>115</sup>

It is evident that this cause of action has potentially troublesome issues of notice and actual or constructive discovery of the injury by the plaintiff which must be timely to satisfy the statute of limitations requirements. However, if those limitations can be overcome, negligence on the part of the defendants' need not be proved, lightening plaintiff's burden of proof.

### 3. Negligence

A person who suffers from a latex injury can also bring a suit to establish negligence against the manufacturer or retailer of the product.<sup>116</sup> The plaintiff must prove that the defendant owed a reasonable duty of care, that the defendant breached that duty, and that breach proximately caused the injuries.<sup>117</sup>

Unreasonable conduct must be shown by the defendant to prove negligence and, often in latex glove cases, unreasonable conduct includes failure to warn the consumer of any dangers of the product. Liability for failure to warn occurs if the manufacturer or supplier, "(1) Knows or has reason to know that the product is or is likely to be dangerous for the use for which it is supplied; (2) Has no reason to believe that those for whose use the product is supplied will realize its dangerous condition; and (3) Fails to exercise reasonable care to inform potential users of the product's dangerous condition or of the facts which make it likely to be dangerous."<sup>118</sup> The plaintiff must show that the failure of the defendant to provide adequate warning caused his injury, and that had plaintiff been provided a warning, he would have altered the use of the product or taken precautions to avoid injury.<sup>119</sup> Further, if the plaintiff was already aware of the danger posed by the product, then he cannot establish causation based on failure to warn.<sup>120</sup>

Courts will also entertain negligence actions based on inadequate warning. There is no precise list of factors that make a warning adequate; however, at a minimum, the warning "should reflect the nature of the product, the user, and the danger, likelihood and seriousness of the resulting harm."<sup>121</sup>

Plaintiffs may also try to prove negligence in the manufacturing of the product. In latex cases, plaintiffs may contend that the manufacturer cut corners during production, which resulted in gloves containing unusually high levels of the latex protein and powder, increasing the risk of sensitization, and that these manufacturers knew of the danger of continuous latex exposure but failed to change their

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discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered. 13 Pa. C.S.A. § 2725.

<sup>115</sup>*Id.* at 423.

<sup>116</sup>Guide to Toxic Torts § 3.02 [1] (2003).

<sup>117</sup>Guide to Toxic Torts § 3.02 [2] (2003).

<sup>118</sup>Guide to Toxic Torts § 3.02 [3] [a] (2003).

<sup>119</sup>*Id.* at § 3.02[3][d].

<sup>120</sup>*Id.*

<sup>121</sup>*Id.* at § 3.02[3][b].

production methods.<sup>122</sup> Negligence actions have been difficult to successfully litigate as plaintiffs must prove a causal connection between the defendant's conduct and the plaintiff's injury.<sup>123</sup> In addition to proving product defect causation, plaintiffs in these cases must prove that the injuries were proximately caused by exposure to the defendant's defective products.<sup>124</sup> Proving causation in latex cases requires the use of expert testimony due to the complexity of the evidence.<sup>125</sup> Causation must be legally proven by a preponderance of the evidence standard; however, expert witnesses often find themselves uncomfortable with that standard since it is often difficult to isolate one single factor as the cause of an event. This inability to rule out other causes has often been fatal to plaintiffs' claims in product liability claims based on negligence.<sup>126</sup>

Another major stumbling block to plaintiffs' proof of causation is obtaining a solid manufacturer and product identification. It is often difficult if not impossible to identify the proper defendant(s) where a plaintiff has been exposed to multiple products made by multiple defendants.<sup>127</sup> Finally, since this is a tort based claim, the statute of limitations period is less relatively short, and it can prove to be most difficult to bring suit in a timely fashion because of the latent effect of the allergy.<sup>128</sup> In latex cases, as noted earlier, Type I allergy symptoms may not occur until years after the initial exposure, which can easily exceed the customary two year period for tort claims. Unfortunately, the plaintiff only gets one chance to bring all his claims and must prove all past, present and future injuries in a single lawsuit.<sup>129</sup> Therefore, it is of utmost importance to determine when the statute of limitations started to

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<sup>122</sup>Peter Kohn, *The Legal Implications of the Latex Allergy*, RN Magazine, Jan. 1999, <http://www.latexallergylinks.org/RN.html> (last visited Jan 9, 2004).

<sup>123</sup>Guide to Toxic Torts § 10.01 [2][a] (2003).

<sup>124</sup>*Id.* at § 10.01[1].

<sup>125</sup>*Id.* at § 10.01.

<sup>126</sup>*Id.* at § 10.01[3][b]. Historically, causation in fact did not present many difficult issues in tort litigation. There were, of course, issues involving preexisting conditions, intervening causes and mutual contributing causes. However, in the typical case the question of causation was left to the jury after submission of a minimal amount of evidence on the subject. There rarely was a question that the traumatic injury observed immediately after the tortious conduct was caused by the conduct. Even if there was a question, it was normally a matter that could be resolved by the jury based on observational testimony. In toxic tort litigation, however, causation is not a simple matter for the jury. The plaintiff must establish by a preponderance of evidence the presence of the injury-causing substance, that he or she has been exposed to the substance, and that the exposure has resulted in certain injuries. It is a general rule that a jury is incapable of determining cause and effect relationships on scientific and medical matters without expert testimony. Thus, unlike traditional tort litigation, in which causal connections can be established by circumstantial evidence, toxic tort litigation, which relies so heavily on scientific evidence, requires that the causal chain be established by expert testimony. Therefore, it is not surprising that in toxic tort litigation a great proportion of the evidence will be testimony from expert witnesses. *Id.* at § 10.01 [3][a].

<sup>127</sup>Guide to Toxic Torts § 10.02[7] (2003).

<sup>128</sup>Guide to Toxic Torts § 9.01 [1] (2003).

<sup>129</sup>*Id.* at § 10.02[2][a].

run.<sup>130</sup> There are various occurrences that could trigger the statute to run, but the majority of states follow the discovery rule. With this standard, the clock starts running when the plaintiff discovers or should have discovered the injury.<sup>131</sup> Again, application of this rule is made difficult when an injury may be caused by multiple products or defendants.<sup>132</sup> Overall, to date, jury verdicts have been about evenly split between plaintiffs and defendants in causes of action involving negligence.<sup>133</sup>

### C. Workers' Compensation

Many health care workers suffering from a latex allergy have brought claims under workers' compensation statutes. A typical workers' compensation statute has certain features including (1) entitlements to certain benefits whenever the employee suffers an injury arising out of and in the course of employment; (2) provisions making negligence and fault immaterial; (3) coverage limited to employees and not to independent contractors; (4) benefits such as cash-wage benefits, and hospital, medical and rehabilitation expenses; (5) employee's waiver of the common-law right to sue the employer; and (6) employee's retention of the right to sue a third party for negligence.<sup>134</sup>

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<sup>130</sup>*Id.*

<sup>131</sup>Guide to Toxic Torts § 9.01 [4][c]; 9.01[4][d] (2003).

<sup>132</sup>*Id.* at § 9.01[4][c]. The landmark decision adopting the discovery rule was *Urie v. Thompson*, 337 U.S. 163 (1949), a FELA action in which plaintiff developed silicosis from exposure to silica dust over a ten-year period. The court rejected the defendant's argument that the injury occurred years before the filing of the suit, holding instead the statute began to run when the plaintiff discovered the injury. *Id.*

The discovery rule varies between states with some having slightly different criteria under the rule. Examples of some of those rules are as follows: (1) Discovery of Injury: States such as Delaware, Mississippi, and New Mexico start the statute running when the plaintiff discovered or should have discovered his or her injury; (2) Discovery of Injury and its Cause: In some states, the statute of limitations does not begin to run until the plaintiff discovers not only the nature of his or her injury, but also its cause. States following this two-step approach include, Arizona, Arkansas, Hawaii, Illinois, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, New Hampshire, Ohio, Pennsylvania, Puerto Rico, Rhode Island, Wisconsin, and Texas; (3) Requiring that Plaintiff know of Existence of Cause of Action: States including New Jersey, South Carolina, Vermont, and Wyoming hold that the statute of limitations does not accrue until plaintiff knows he or she has a cause of action; (4) Requiring that Plaintiff know the identity of the Defendant: Several states, including Arizona, insist that the statute of limitations does not accrue until plaintiff knows the name of the manufacturer or seller of the allegedly defective product; (5) Inquiry Notice: In states such as Kentucky, the discovery rule focuses not on when the plaintiff has actual knowledge of a legal cause of action, but whether the plaintiff acquired knowledge of existing facts to put the party on inquiry. *Id.* at § 9.01[4].

<sup>133</sup>Bowden, *supra* note 81.

<sup>134</sup>Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 1.01 (2003). Workers' compensation legislation arose out of conditions produced by modern industrial development, and the inability of common-law remedies to cope with injuries suffered by workers. The philosophy underlying workers' compensation laws is that industrial accidents are inevitable incidents of modern industry and that their burden should not be borne by the victim. The application of common-law negligence principles to modern industrial accidents was frequently unjust to the worker because the causes of injury were

An important issue in workers' compensation is whether the injury arose from employment. As a general rule, the plaintiff "must show by a preponderance of the evidence that the injury arose out of the course of her employment."<sup>135</sup> Further, an injury only arises out of employment if there is a causal connection usually established by expert testimony as weighed by the finder of fact.<sup>136</sup>

Additionally, although a latex sensitized worker may have been predisposed to the allergy, that usually does not preclude a claim, "if the employment aggravated, accelerated or combined with the disease or infirmity to produce . . . the disability for which compensation is sought."<sup>137</sup> In *Gray*, a case of first impression, the Supreme Court of Iowa upheld the finding of the workers' compensation commissioner that Gray's allergy was a predisposition that was worsened by her workplace exposure to latex based on the evidence provided by her expert witness.<sup>138</sup>

Another important victory for plaintiffs came from the Supreme Court of Nebraska that affirmed the lower court's workers' compensation decision that a nurse was totally and permanently disabled due to her work related latex allergy.<sup>139</sup> The Court ruled that although Morris was first diagnosed with a latex related injury while working for a different employer, Morris's anaphylactic attack which occurred on the job at her previous company's successor in interest, Nebraska Health System, qualified as the date of her injury. In other words, the court ruled that Morris's Type I reaction was a separate "accident" that resulted in her permanent and total disability.<sup>140</sup> This was a major victory for workers' compensation claimants because many courts previously considered a disease and accident as mutually exclusive, thereby dismissing any claims for injury on account of disease.<sup>141</sup> Courts now adhere to the notion that any disease is compensable which follows, "as a natural

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often obscure and complex and the expense and delay required to determine such causes were often great, leaving the worker to bear the greater part of the resulting economic loss. Workers' compensation is not insurance in the ordinary sense of the term and is not intended to replace general health and accident insurance. It is not substitute for a pension; those who are entitled to a pension may receive both workers' compensation and the pension. It does not rest upon any implied contract between the employer and the employee, nor is the right to workers' compensation based upon a theory of damages for a wrong. Rather, workers' compensation acts discard negligence as the basis of recovery and replace it with a statutory scheme. Such laws provide a form of strict liability requiring employers, regardless of fault, to compensate employees for injuries arising out of and in the course of employment. The basic test of workers' compensation liability is work connection, rather than fault, and liability is imposed as an incident of the employment relationship, a cost to be borne by the business enterprise.

82 AM JUR 2D *Workers' Compensation* § 1 (2003).

<sup>135</sup>St. Luke's Hosp. v. Gray, 604 N.W.2d 646, 652 (Iowa 2000) quoting Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 150 (Iowa 1996); see Iowa Code § 85.3(1).

<sup>136</sup>*Id.* quoting Dunlavy v. Economy Fire & Cas. Co., 526 N.W.2d 845, 853 (Iowa 1995).

<sup>137</sup>*Id.* at 651.

<sup>138</sup>*Id.* at 652.

<sup>139</sup>Morris v. Neb. Health Sys., 664 N.W.2d 436 (Neb. 2003).

<sup>140</sup>*Id.* at 439.

<sup>141</sup>Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 42.03 (2003).

consequence of an injury that qualifies independently as accidental."<sup>142</sup> Therefore, a disease acquired by repeated inhalations or impacts over a few hours to a few years, is considered a disease brought on by accident.<sup>143</sup> By ruling that the latex allergy is a separate event rather than a long period of occupational exposure, workers' compensation claims are more easily obtained.<sup>144</sup>

Obviously, progress has been made in achieving positive results from the workers suffering from the allergy as evidenced by the fact that, of all the reported cases brought for Type I latex allergy, 70% have resulted in awarded benefits to the worker.<sup>145</sup> However, there are still many issues that go unresolved by workers' compensation law. As noted earlier, workers' compensation generally applies to all employees, but there exists an exclusion for independent contractors. This leaves out a significant portion of latex allergy healthcare professionals such as doctors, dentists and other persons who generally contract with a hospital or medical facility.<sup>146</sup> Secondly, the burden of the statute of limitations is significant since the plaintiff may have as little as one year to bring a claim for benefits.<sup>147</sup> In addition, if the plaintiff is in a state with an accident based statute of limitations, the claims period starts to run on the date of the accident. Thus, the worker could detect a latent injury well after the filing period and have no recourse for his injury.<sup>148</sup> This is in stark contrast to states which follow an injury based statute starting the claims period on the date the injury becomes apparent.<sup>149</sup> Currently, there is roughly an equal amount of states that follow the accident rule as follow the injury based rule.<sup>150</sup> Finally, employers

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<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> Jon L. Gelman, *Practice Areas-Latex Litigation F.A.Q.*, at [www.gelmans.com/FrontEnd/PracticeArea/practice\\_areas.asp?show=faq&Practice](http://www.gelmans.com/FrontEnd/PracticeArea/practice_areas.asp?show=faq&Practice) (last visited Oct. 30, 2003).

<sup>146</sup> Kowalczyk, *supra* note 61.

<sup>147</sup> Larson, *supra* note 134 at § 126.01.

<sup>148</sup> Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 126.01[i] (2003).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* A rigid claims period may operate unfairly not only because the nature, seriousness, and work-connection of the injury could not reasonably be recognized by the claimant, or perhaps even by the claimant's doctor, but in many cases because the injury itself does not exist in compensable degree during the claims period. This latent or delayed injury problem presents in the sharpest relief the senselessness of uncompromising time periods. The classic illustration is that of the apparently trivial accident that matures into a disabling injury after the claim period has expired. A worker is struck in the eye by a metal chip, but both he and the company doctors dismiss the accident as a petty one, and of course no claim is made, since there is no present injury or disability. Eighteen months later a cataract develops as the direct result of the accident. If the statute bars claims filed more than one year after the "accident," and if the court applies the statutory language with draconian literalism, the worker can never collect for the injury no matter how diligent he or she is: the worker cannot claim during the year, because no compensable injury exists; he or she cannot claim after the year, because the statute runs from the accident. The choice of the date of accident as the automatic starting point for the claims period is undoubtedly motivated by fear that the alternative "injury" date would be too indefinite and would permit many questionable claims. The answer is that the

are required to obtain their own liability coverage. Therefore, “the burden of compensation liability does not remain upon the employer but passes to the consumer, since compensation premiums, as part of the cost of production, will be reflected in the price of the product.”<sup>151</sup>

Although workers’ compensation claims do seem to be a better alternative for latex allergy sufferers than product liability claims, these remaining issues are problematic and as such, this type of claim is not a cure all for the severity of the problem facing the healthcare industry.

#### IV. ACCOMMODATING HEALTHCARE WORKERS UNDER THE ADA

##### A. Background of the ADA and Title I

The 1990 Americans with Disabilities Act (“ADA”) was essentially a congressional mandate providing protection for disabled individuals who suffered discrimination “in the critical areas of employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting and access to public services.”<sup>152</sup> Congress’s intent was to establish a consistent and strong set of standards and federal means of enforcing those standards on behalf of individuals with disabilities.<sup>153</sup> There are three federal agencies charged with the responsibility of enforcing the ADA through the issuance of regulations. The Equal Employment Opportunity Commission (“EEOC”) addresses issues of discrimination in employment under Title I of the ADA. The Department of Justice regulates discrimination in government services, public accommodations and commercial facilities under Title II and Title III. Finally, The Department of Transportation controls issues which relate to transportation for disabled individuals under Title II Subtitle B and Title III.<sup>154</sup> In addition to enforcing the provisions of the ADA, the above mentioned agencies supply opinions clarifying and supplementing the definition of the term “disability.”<sup>155</sup>

##### B. Establishing Disability Under the ADA

Under the ADA, a disability is “a physical or mental impairment that substantially limits one or more of the major life activities of the individual, a record of such impairment and being regarded as having such an impairment.”<sup>156</sup> According

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claimant must still prove a case, including work-connection and due care in discovering the nature of the injury. If this occasionally requires an employer to defend a claim based on an accident several years earlier, this inconvenience is not to be compared with the shocking injustice of refusing compensation for blindness because the claimant, through a technicality which involves no fault of his or her own, could never at any time have filed a valid claim. *Id.* at § 126.06[1]; 126.06[3].

<sup>151</sup>Larson, *supra* note 134.

<sup>152</sup>NTS AM. JUR. 2D *Americans with Disabilities Act: Analysis and Implications* § 1 (2003).

<sup>153</sup>*Id.*

<sup>154</sup>*Id.* at § 2.

<sup>155</sup>NTS AM. JUR. 2D *Americans with Disabilities Act: Analysis and Implications* § 2 (2003).

<sup>156</sup>*Id.* at § 3.



to the ADA, a physical impairment includes any physiological disorder or condition which affects one or more bodily systems such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin and endocrine.<sup>157</sup> Secondly, the Act requires that this impairment must “substantially limit one or more or an individual’s major life activities.” Those activities include but are not limited to “caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”<sup>158</sup> Further, major life activities are construed as “those basic activities that the average person in the general population can perform with little or no difficulty.”<sup>159</sup> In most cases, a latex allergy sufferer would likely bring a claim that their respiratory system and/or skin is the bodily organ system affected by their disorder and that their inability to work is the basis for the impairment, although the major life activities of breathing or eating are often claimed as well.

Because working is considered a major life activity, the ADA has defined “substantially limits,” as it applies to work, as meaning that the individual is considerably restricted in the ability to perform a class of jobs or a broad range of jobs in various classes as compared to an average person with comparable training skills and abilities.<sup>160</sup> The Act is restrictive in its language as it applies to persons with specialized training, skills, or knowledge in their work, providing that the inability to perform a single particular job or an inability to do a job requiring extraordinary skill or talent does not constitute a major limitation.<sup>161</sup> In *Sutton v. United Airlines, Inc.*,<sup>162</sup> the Supreme Court held that the employee must, at a

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<sup>157</sup>*Id.* at § 7.

<sup>158</sup>*Id.* at § 10.

<sup>159</sup>29 C.F.R. § 1630.2(i) App. (2004).

<sup>160</sup>NTS AM. JUR. 2D *Americans with Disabilities Act: Analysis and Implications* § 11 (2003). Factors to be considered when making a determination of whether the limitation in working is substantial are as follows: (1) The geographical area to which the individual has reasonable access; (2) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or (3) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes). 29 C.F.R. § 1630.2(j) App. (2004).

<sup>161</sup>29 C.F.R. § 1630.2 (j) App. (2004).

<sup>162</sup>119 S. Ct. 2139 (1999). Petitioners are twin sisters, both of whom have severe myopia. Each petitioner's uncorrected visual acuity is 20/200 or worse in her right eye and 20/400 or worse in her left eye, but "with the use of corrective lenses, each . . . has vision that is 20/20 or better." Consequently, without corrective lenses, each "effectively cannot see to conduct numerous activities such as driving a vehicle, watching television or shopping in public stores," but with corrective measures, such as glasses or contact lenses, both "function identically to individuals without a similar impairment". In 1992, petitioners applied to respondent for employment as commercial airline pilots. They met respondent's basic age, education, experience, and FAA certification qualifications. After submitting their applications for employment, both petitioners were invited by respondent to an interview and to flight

minimum, allege that they are unable to work in a broad class of jobs.<sup>163</sup> Further, if jobs utilizing a person's skills are available, or if a host of different types of jobs are available, then the individual is not precluded from a broad range of jobs.<sup>164</sup> The result is that an employee cannot claim to be disabled where the disability precludes specifically working a particular job.<sup>165</sup>

To aid in determining whether an individual is "substantially limited" in the major life activity of working, certain factors are taken into consideration: "(1) the nature and severity of the impairment; (2) the duration or expected duration of the impairment; and (3) the permanent or long term impact, or the expected permanent or long term impact resulting from the impairment."<sup>166</sup> This evaluation will be made in comparison to the abilities of the average person and decided on a case-by-case basis.<sup>167</sup> The above mentioned standard has been applied to environmental illnesses such as latex allergy.<sup>168</sup>

What about any mitigating factors used in aiding those with an alleged disability? The ADA states that those aids such as medications or other medical devices should not be considered in the question of whether an individual is "substantially

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simulator tests. Both were told during their interviews, however, that a mistake had been made in inviting them to interview because petitioners did not meet respondent's minimum vision requirement, which was uncorrected visual acuity of 20/100 or better. Due to their failure to meet this requirement, petitioners' interviews were terminated, and neither was offered a pilot position. In light of respondent's proffered reason for rejecting them, petitioners filed a charge of disability discrimination under the ADA with the Equal Employment Opportunity Commission (EEOC). After receiving a right to sue letter, petitioners filed suit in the United States District Court for the District of Colorado, alleging that respondent had discriminated against them "on the basis of their disability, or because [respondent] regarded [petitioners] as having a disability" in violation of the ADA. Specifically, petitioners alleged that due to their severe myopia they actually have a substantially limiting impairment or are regarded as having such an impairment, and are thus disabled under the Act. The District Court dismissed petitioners' complaint for failure to state a claim upon which relief could be granted. Because petitioners could fully correct their visual impairments, the court held that they were not actually substantially limited in any major life activity and thus had not stated a claim that they were disabled within the meaning of the ADA. The court also determined that petitioners had not made allegations sufficient to support their claim that they were "regarded" by the respondent as having an impairment that substantially limits a major life activity. The court observed that "the statutory reference to a substantial limitation indicates . . . that an employer regards an employee as handicapped in his or her ability to work by finding the employee's impairment to foreclose generally the type of employment involved." But petitioners had alleged only that respondent regarded them as unable to satisfy the requirements of a particular job, global airline pilot. Consequently, the court held that petitioners had not stated a claim that they were regarded as substantially limited in the major life activity of working. Employing similar logic, the Court of Appeals for the Tenth Circuit affirmed the District Court's judgment. *Id.* at 2143-4.

<sup>163</sup>*Id.* at 2151.

<sup>164</sup>*Id.*

<sup>165</sup>*Id.*

<sup>166</sup>NTS AM. JUR. 2D *Americans with Disabilities Act: Analysis and Implications* § 15 (2003).

<sup>167</sup>*Id.*

<sup>168</sup>*Id.* at § 16.

limited.”<sup>169</sup> However, the Supreme Court has interpreted that the determination of disability should include these factors.<sup>170</sup> The Court felt that Congress’ intent was to exclude all persons whose disability could be corrected with mitigating measures.<sup>171</sup>

Two final factors that qualify an individual disability involve proof of the affliction or proof of being regarded as having an affliction. First, to prove actual impairment, the individual must show a record of impairment, meaning a history such as would be contained in education, medical or employment records to satisfy the definition of a disability.<sup>172</sup> Alternatively, the individual can claim to be regarded by others as having an impairment. This rationale covers, among other things, persons who may be discriminated against in employment decisions because of a perception by the employer of an individual’s disability.<sup>173</sup> To illustrate, a federal court found that an iron worker who was moved to a less favorable permanent position due to his asthma condition could be considered “disabled” since the move could be viewed as evidence that the employer viewed him as substantially limited in a major life activity of breathing.<sup>174</sup>

### C. Application of the ADA to Healthcare Workers with the Latex Allergy

Healthcare workers who have contracted the latex allergy may bring a claim against employers under Title I of the ADA for failure to reasonably accommodate the disability and/or for discrimination in employment practices due to disability, both of which are covered under this Title.<sup>175</sup>

#### 1. Preliminary Requirements

Prior to bringing suit in federal court against an employer for violation of the ADA, an employee must exhaust all administrative remedies. Consequently, the individual must first file a timely complaint with the EEOC.<sup>176</sup> After the administrative process has been completed without satisfaction to the employee, he must be granted a right-to-sue letter from the agency.<sup>177</sup> Moreover, the claims brought in the succeeding litigation must bear similarities to or be related to the EEOC charges that were previously filed.<sup>178</sup> Thus, an employee must take into

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<sup>169</sup>NTS AM. JUR. 2D *Americans with Disabilities Act: Analysis and Implications* § 17 (2003).

<sup>170</sup>Sutton, 119 S. Ct. at 2145-49.

<sup>171</sup>*Id.* at 2147.

<sup>172</sup>NTS AM. JUR. 2D *Americans with Disabilities Act: Analysis and Implications* § 18 (2003).

<sup>173</sup>*Id.* at § 19

<sup>174</sup>*See Riemer v. Illinois Dept. of Transp.*, 148 F.3d 800 (7th Cir. 1998).

<sup>175</sup>42 USCS §§ 12111 et seq. (2003).

<sup>176</sup>*See Basith v. Cook County*, 241 F.3d 919 (7th Cir. 2001). In order to recover for violations of Title I of ADA plaintiff must file charge of discrimination with EEOC within 180 days of alleged violation, if he does not file initial charge with state agency, and failure to exhaust administrative remedies by filing EEOC claim is fatal to the ADA claim.

<sup>177</sup>*See Schmitt v. Beverly Health & Rehab. Servs.*, 962 F. Supp. 1379 (Dist. Kan. 1997).

<sup>178</sup>*See Doe v. Kohn Nast & Graf, P.C.*, 866 F.Supp 190 (E.D. Pa 1994). Where plaintiff’s judicial complaint was reasonably related to his EEOC charge in that facts which appeared in

consideration court rulings which provide that a charge of discrimination and a charge of failure to accommodate the employee's disability are two separate and distinct claims and will be subject to different analysis under the law. If both claims are not utilized together in the original EEOC complaint, the court will not likely hear them both at trial.<sup>179</sup>

## 2. Establishing the Prima Facie Case

Once the employee is able to bring a suit for discrimination under Title I of the ADA, the employee must show that the employer discriminated in terms of employment activities such as application, hiring or advancement.<sup>180</sup> Consequently, to establish a prima facie case of employment discrimination, the plaintiff must demonstrate that, "(1) he is disabled under the meaning of the ADA, (2) he is qualified to perform the essential functions of his job either with or without reasonable accommodation, and (3) he suffered from an adverse employment decision because of his disability."<sup>181</sup>

The determination of whether an individual with a disability is "qualified" can be made in two steps. First, it must be decided if the person satisfies the prerequisites of the desired position, by possessing, for example, the appropriate educational background, employment experience, skills and licenses. This is often referred to as determining whether the individual is "otherwise qualified" for the position.<sup>182</sup> Second, there must be a determination of whether the individual can perform the "essential functions" of the position.<sup>183</sup> These functions are the specific duties that the individual who is employed at that position must be able to perform unaided or with the assistance of reasonable accommodation. They are functions that the employer asserts are essential and that are actually required of the job.<sup>184</sup> Any individual who cannot perform the essential function of the job, even with reasonable accommodations, or any employee that has claimed to be totally disabled on an application for long term disability benefits is not an "otherwise qualified" individual under the requirements of the ADA.<sup>185</sup>

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administrative charge also supported plaintiff's judicial claims, plaintiff has not failed to exhaust his administrative remedies.

<sup>179</sup>See *Green v. Nat'l Steel Corp.*, 197 F.3d 894 (7th Cir. 1999). Claim of failure to accommodate is separate and distinct from claim of discriminatory treatment under the ADA, and these two types of claims are analyzed differently under law and are therefore not reasonably related to one another; consequently, where employee raised only discriminatory treatment claim in EEOC charge and neglected to make failure to accommodate argument, employee was barred from raising failure to accommodate claim in district court.

<sup>180</sup>42 U.S.C.S. § 12112(a) (2004).

<sup>181</sup>See *Pugh v. City of Attica*, 259 F.3d 619, 626 (7th Cir. 2001).

<sup>182</sup>29 C.F.R. § 1630.2(m) App. (2004).

<sup>183</sup>*Id.*

<sup>184</sup>29 C.F.R. § 1630.2(n) App. (2004).

<sup>185</sup>See *Downs v. Hawkeye Health Servs.*, 148 F.3d 948 (8th Cir. 1998); *Pena v. Houston Lighting & Power Co.*, 154 F.3d 267 (5th Cir. 1998).

### 3. Reasonable Accommodation

If the person is disabled, the employer must take reasonable steps to accommodate the disability. But what is a reasonable accommodation? A claim made on the basis of failure to reasonably accommodate can be challenging, as the "reasonableness" requirement is ambiguous. Accommodation is a change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities. One important accommodation for healthcare workers with the latex allergy would be "making existing facilities used by employees . . . usable by, individuals with disabilities."

<sup>186</sup>These areas include the primary work area where the employee is to perform essential job functions, as well as the non-work areas utilized by employees, such as a break room or lunch room. The employer may also be required to restructure non-essential job functions and/or reassign the employee to another available position.<sup>187</sup> However, the ADA protects employers by directing that if an accommodation produces an undue hardship, it is not required. Undue hardship means that the accommodation would produce "significant difficulty or expense in, or resulting

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<sup>186</sup>29 C.F.R. § 1630.2(o) App. (2004). (1) Reasonable accommodation means:

(i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or  
 (ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or  
 (iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.(2) Reasonable accommodation may include but is not limited to: (i) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (ii) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.(3) To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations. 29 C.F.R. § 1630.2(o) (2004).

<sup>187</sup>*Id.* The term essential functions means the fundamental job duties of the employment position the individual with a disability holds or desires. The term "essential functions" does not include the marginal functions of the position. A job function may be considered essential for any of several reasons, including but not limited to the following: (i) The function may be essential because the reason the position exists is to perform that function; (ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or (iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function. Evidence of whether a particular function is essential includes, but is not limited to: (i) The employer's judgment as to which functions are essential; (ii) Written job descriptions prepared before advertising or interviewing applicants for the job; (iii) The amount of time spent on the job performing the function; (iv) The consequences of not requiring the incumbent to perform the function; (v) The terms of a collective bargaining agreement; (vi) The work experience of past incumbents in the job; and/or (vii) The current work experience of incumbents in similar jobs. 29 C.F.R. § 1630.2(n) (2004).

from, the provision of the accommodation.”<sup>188</sup> This takes into account “any accommodation that would be unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business.”<sup>189</sup> Other exceptions protecting employers include provisions that an employee’s impairment constitutes a “direct threat” that may cause significant risk to the health and safety of others that cannot be eliminated by reasonable accommodation and that the directives of the Act do not apply to employers with 15 or fewer employees.<sup>190</sup>

Overall, the ADA has been instrumental in helping many individuals who have suffered discrimination due a physical or mental impairment. However, the story of the latex allergy sufferer has been disappointing with regard to successful rulings under this statute.

*D. The Current Response to ADA Claims of Healthcare Workers  
with the Latex Allergy*

Generally, ADA guidelines and the courts have created standards that are very difficult for healthcare workers with the latex allergy to meet. This is in part due to ignorance of the extreme limiting effect the allergy may have on the life of the individual and in part due to the restrictive nature of what constitutes a “disability” under the ADA statute. An examination of the current state of ADA claims made by healthcare workers with the allergy and evaluating the response of employers and the courts illustrates these points.

A federal district court recently decided a Title I latex allergy case against the plaintiff who was a prospective employee of the defendant hospital.<sup>191</sup> Kimberly

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<sup>188</sup>29 C.F.R. § 1630.2(p) App. (2004).

<sup>189</sup>*Id.* In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include: (i) The nature and net cost of the accommodation needed under this part, taking into consideration the availability of tax credits and deductions, and/or outside funding; (ii) The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources; (iii) The overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type and location of its facilities; (iv) The type of operation or operations of the covered entity, including the composition, structure and functions of the workforce of such entity, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity; and (v) The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business. 29 C.F.R. § 1630.2(p) (2004).

<sup>190</sup>29 C.F.R. § 1630.2(r) App. (2004); 42 U.S.C.S. § 12111(5)(A) (2003). Determining whether an individual poses a significant risk of substantial harm must be made on a case-by-case basis. For individuals with physical disabilities, the employer must identify the aspect of the disability that would pose the threat. The employer should consider the following four factors: (1) The duration of the risk; (2) The nature and severity of the risk; (3) The likelihood that the potential harm will occur; and (4) The imminence of the potential harm. An employer is also permitted to require that an individual not pose a direct threat of harm to his or her own safety or health. 29 C.F.R. § 1630.2 (R) App.(2004).

<sup>191</sup>*Watson v. Hughston Sports Medicine Hosp.*, 231 F. Supp. 2d 1344 (M.D. Ga. 2002). *Watson*, a registered nurse, applied for a position as a PRN (as needed) nurse at Hughston on March 10, 2000. Hughston's Risk Manager and Employee Health Nurse and Hughston's

Watson applied for a nursing position and during a medical evaluation performed by the defendant, was discovered to have a significant allergy to latex. Defendant Hughston then refused to hire the plaintiff because of that latex allergy, as it would result in a "substantial risk" to Watson and her patients. Plaintiff then filed a charge of discrimination with the EEOC and later sued Hughston, claiming the refusal to hire was discrimination based on her latex allergy which she argued was as a disability under the ADA.<sup>192</sup> Watson contended that she was disabled because her impairment substantially limited the major life activities of breathing and working.<sup>193</sup> The court held that plaintiff did not provide sufficient evidence that her allergy was an impairment that "substantially limited" her ability to breathe or work. Consequently, plaintiff was not considered to be disabled under the ADA standards.<sup>194</sup>

In making its ruling, the court reasoned that although breathing is a major life activity, Watson faced no substantial limitations in that regard. While her testing revealed that she had a severe latex allergy, her reactions thus far had not been severe. Further, her only restriction as a result of the allergy is to avoid latex at work and at home. Therefore, although the court found that the allergy was indeed a permanent impairment, it ruled that it only minimally affected her breathing as the

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Director of Human Resources were aware that Watson was employed as a nurse when she applied for the PRN job at Hughston. Watson interviewed for the PRN position and Hughston made Watson a conditional offer of employment. One of the conditions on the offer was that Watson satisfactorily complete a standard pre-employment physical examination. Moreover, as part of their pre-employment paper work, prospective employees like Watson are required to complete a latex sensitivity screening tool questionnaire. Hughston is a surgical hospital and uses numerous products containing latex materials. The hospital cannot be rendered latex-free without a significant expenditure of time and money. Based upon these concerns, Hughston conditions its offers of employment on the potential employee being screened for latex sensitivity. The screening process starts with a questionnaire. According to Hughston's guidelines for the care of employees with latex sensitivities or allergies, new employees who indicate on the questionnaire that they have had reactions to latex should also be referred to their personal physician for a follow-up evaluation. Watson completed Hughston's latex sensitivity screening tool questionnaire on March 27, 2000, in conjunction with her pre-employment paperwork. On the questionnaire, Watson indicated that she had suffered reactions from coming in contact with balloons, rubber gloves, and a tourniquet. Watson disclosed that she had experienced various reactions to contact with latex, including difficulty breathing, itching of the hands, eyes, and face, a runny nose, and sinus congestion. In light of Watson's positive responses, Watson underwent a RAST test to evaluate her possible sensitivity to latex. The results indicated that, on a scale of zero to five--zero indicating no latex sensitivity and five indicating a severe latex sensitivity--Watson scored a four, confirming her sensitivity to latex. Watson was then informed that, given the proliferation of latex at Hughston, there was no way to ensure that she would not come into contact with latex if she were employed there. Watson suggested that she could perform the job as long as she was provided with powder-free, latex-free gloves. Based upon Watson's latex allergy, Hughston concluded that it could not subject Watson nor its patients to the risks associated with latex exposure. Therefore, the hospital informed Watson that it could not hire her. *Id.* at 1346-7.

<sup>192</sup>*Id.* at 1345.

<sup>193</sup>*Id.* at 1349.

<sup>194</sup>*Id.* at 1349-51.

allergy is dormant unless it is activated by exposure to latex. As evidence, the court pointed to the fact that Watson was currently working as a nurse and she had described only a few occurrences where she has had trouble breathing due to her allergy.<sup>195</sup> As to her claim that she is substantially limited in the activity of working, the court found that Watson was able to work in an environment where there was a lower level of latex and by using non-latex gloves. Watson was not limited because she simply could not work in defendant's hospital because of her allergy.<sup>196</sup>

Watson presented an alternative argument under the ADA, that the Defendant "regarded her as disabled" when it refused to hire her due to her allergy. The court also dismissed this claim stating that "Hughston's requirement that its employees must be able to work in a latex-rich environment without the risk of harming themselves or their patients does not, of itself, establish a claim that Hughston regarded Watson as substantially limited in the life activity of working."<sup>197</sup> The Court quoted *Sutton*, which held that the employer is "free to decide that some limiting, but not substantially limiting, impairments make individuals less than ideally suited for a job."<sup>198</sup> The requirement that an employee of the defendant not be latex sensitive is a valid job requirement based on an EEOC regulation that authorizes an employer to refuse to hire an employee who may pose a threat to himself or others.<sup>199</sup> Ultimately, the Court determined that Watson was impaired but not substantially so, and that she was "generally employable" as a nurse in other medical settings using a lower level of latex products.<sup>200</sup>

*Scanlon v. Temple University*,<sup>201</sup> provides a different viewpoint of application of the ADA standards to what is considered substantially limiting impairment. In *Scanlon*, the plaintiff was employed by Temple University as a nurse. Plaintiff claimed that she was terminated due to her disability, a latex allergy, and that defendant failed to accommodate her disability under the ADA guidelines. She argued that she was substantially limited in the life activities of breathing, sleeping, eating, working and interacting with others.<sup>202</sup> The defendant filed for summary judgment, arguing that plaintiff's allergy did not substantially limit any major life activity; therefore, it did not qualify as a disability as defined in the ADA.<sup>203</sup> Plaintiff presented evidence from her physician describing her allergy as life

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<sup>195</sup>*Watson*, 231 F. Supp. 2d at 1349-51.

<sup>196</sup>*Id.* at 1351.

<sup>197</sup>*Id.* at 1351-52.

<sup>198</sup>*Id.* quoting *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 490 (1999).

<sup>199</sup>*Watson*, 231 F. Supp. 2d at 1353, 1353 n.4., quoting *Chevron USA, Inc. v. Echazabal*, 536 U.S. 73 (2002).

<sup>200</sup>*Id.* at 1353.

<sup>201</sup>No. 01-243, 2001 U.S. Dist. LEXIS 25044 (E.D. Pa. Nov. 28, 2001).

<sup>202</sup>*Id.* at \*1, \*3.

<sup>203</sup>*Id.* at \*1.



threatening because of her breathing difficulty when exposed to latex. Her reactions were also triggered by foods that are cross-reactive in latex allergy patients.<sup>204</sup>

Defendant argued that Scanlon had presented no evidence that she was substantially limited by her allergy when she was in a latex-free environment. Defendant also contended that plaintiff had shown no evidence to establish that she was precluded from working in the field of nursing or any particular class of nursing jobs.<sup>205</sup> Using mitigation of the allergy as a factor, defendant claimed that this case is similar to *Sutton*, in that the plaintiff can control her allergy through medication and avoidance of latex, so although she has an impairment, it can be corrected; hence, it does not rise to the level of a substantial limitation of a major life activity.<sup>206</sup>

The *Scanlon* court distinguished its case from *Sutton*, noting that in *Sutton*, the plaintiffs, who were pilots, sued on grounds that they were disabled due to their myopia. However, the court noted that plaintiffs could control their condition by wearing glasses while flying planes. This plaintiff, however, demonstrated that she has no such control over her environment if she leaves the house.<sup>207</sup> The court then relied on the Supreme Court's instruction that "whether a person is disabled under the ADA is an individualized inquiry" in ruling that it is for a jury to decide if plaintiff's allergy imposes substantial limitation on her life activities.<sup>208</sup> In terms of the latex allergy limiting her ability to work, the court rejected defendant's argument that she can perform all her duties as a nurse in a latex free environment. The court found that plaintiff's impairment was of the type described in the Code of Federal Regulations Interpretive Guidance Section:

Suppose an individual has an allergy to a substance found in most high rise office buildings . . . making breathing difficult. Since this individual would be substantially limited in the ability to perform a broad range of jobs in various classes that are conducted in high rise office buildings . . . he or she would be substantially limited in working.<sup>209</sup>

Because Scanlon's allergy is to a substance that is found more often in a hospital setting than in any other work environment, the court decided that it should also be for a jury to decide "whether latex is used in the health care profession to a sufficient degree that it substantially limits Mrs. Scanlon's ability to work in her chosen profession."<sup>210</sup> Unfortunately, a jury verdict on December 6, 2001, pronounced that plaintiff's latex allergy did not qualify as a disability for purposes of the ADA. The

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<sup>204</sup>*Id.* at \*4.

<sup>205</sup>*Scanlon*, 2001 U.S. Dist. LEXIS 25044, at \*4-5.

<sup>206</sup>*Id.* at \*5, quoting *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482-83 (1999).

<sup>207</sup>*Id.* at \*6.

<sup>208</sup>*Id.* at \*6-7 quoting *Sutton*, 527 U.S. at 483 (quoting *Bragdon v. Abbott*, 524 U.S. 624, 641-42 (1998)).

<sup>209</sup>*Scanlon*, 2001 U.S. Dist. Lexis 25044, at \*8, quoting 29 C.F.R. § 1630.2(j) App.

<sup>210</sup>*Id.* at \*9.

jury accepted the defense's argument that Scanlon's allergy cannot be a disability because it could be mitigated by medication and by avoiding latex altogether.<sup>211</sup>

*E. The Latex Allergy as a "Disability per se"*

At present, latex allergy has not been declared a "disability per se" by the Supreme Court.<sup>212</sup> In fact, the Court has frowned on attempts to declare classes of impairments as disabilities per se.<sup>213</sup> Rather, as mentioned earlier, the EEOC and the courts have been considering these claims on a case-by-case basis.<sup>214</sup> In *Albertson's, Inc. v Kirkingburg*,<sup>215</sup> the Supreme Court, "rejected a lower court's apparent conclusion that monocular vision was a disability per se, without regard to the extent of a particular individual's impairment." The Court declared that "[c]ase by case determinations were clearly required by statutory language defining a disability 'with respect to an individual' and in terms of the impact of an impairment on 'such individual.'"<sup>216</sup>

On the other hand, the Justices did not completely shut the door on the possibility that some impairments may, without question, cause a substantial limitation on a major life activity.<sup>217</sup> In *Bragdon v. Abbott*,<sup>218</sup> the Court held that infection with the Human Immunodeficiency Virus (HIV) constituted a disability within the meaning of the ADA.<sup>219</sup> The facts indicate that the plaintiff, infected with HIV, sued her dentist for discrimination in the enjoyment of a public accommodation, when he refused to fill her cavity in his office, but offered to perform the procedure at a hospital.<sup>220</sup> Even though her infection was completely asymptomatic at the time of the incident, the Court felt that "from the moment of infection" the virus had a "constant and detrimental effect" on her bodily systems and therefore, it constituted a disability.<sup>221</sup>

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<sup>211</sup>Shannon P. Duffy, *Latex Allergy Not an ADA Disability, Federal Jury Finds*, The Legal Intelligencer, Dec. 12, 2001, <http://www.law.com/jsp/statearchive.jsp?type=Article&oldid=ZZZ44RVV5VC> (last visited Nov. 13, 2003).

<sup>212</sup>John E. Theuman, *Annotation: Who is a Qualified Individual with a Disability, for Purposes of the Americans with Disabilities Act of 1990, as Amended (ADA) (42 USCS §§ 12101 et seq.) – Supreme Court Cases*, 143 L. Ed. 2d 1133, at \*2 (2003).

<sup>213</sup>*Id.*

<sup>214</sup>*Id.* at \*4.

<sup>215</sup>527 U.S. 555 (1999).

<sup>216</sup>Theuman, *supra* note 212, at \*4, *quoting* *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999).

<sup>217</sup>*Id.*

<sup>218</sup>524 U.S. 624 (1998).

<sup>219</sup>Theuman, *supra* note 212, at \*7.

<sup>220</sup>*Id.*

<sup>221</sup>*Id.* From a review of the record, the Supreme Court noted that HIV infections typically assaulted the body's immune systems immediately, damaging white blood cells and causing mononucleosis-like symptoms for about 3 months, before concentrating in the lymph nodes and lapsing into the asymptomatic stage, which was (1) only relatively symptomless, and (2)

Arguably, the same may be said for latex sensitized workers. Once exposed, every additional work exposure, as well as every exposure outside the workplace, may cause greater harm to those with a severe latex allergy, leading to incurable, possibly life threatening health problems. Given that the standards for showing a disability under the ADA are difficult to meet, defendants have prevailed on the majority of claims by asserting undue hardship or direct threat from the employee as very effective affirmative defenses.

Undoubtedly, reasonable accommodations do not occur because: (1) the cost of non-latex gloves is substantially higher than non-latex; (2) latex gloves are still considered the best protection of choice by many employees, and (3) the idea of providing low latex or a latex free environment may seem economically unfeasible for a hospital or facility in terms of cost. Therefore, when an employee seeks accommodations, many employers still find it more appealing to gamble on terminating those workers rather than bearing the additional expense of accommodation.<sup>222</sup> Further, since the ADA does not require creation of a new position for the disabled worker who cannot perform his previous job or retraining of the worker for a different position, this severely limits the person's options in the health care field, especially given that a latex allergy sufferer's best option for risk reduction is latex avoidance.<sup>223</sup> Many health care workers are asymptomatic but sensitized to the latex proteins, and those already experiencing type IV allergies are at high risk of developing the Type I version; thus, if these workers are denied accommodations or discriminated against they may feel forced to subject themselves to the dangers of working in latex laden environments. This results in an even greater likelihood that more workers will become burdened with this illness and forced out of the industry.

Recognizing latex allergy as a disability per se could act as a catalyst in the further elimination of latex products by exposing hospitals to greater risk of liability. A declaration by the Court could fuel employers' desire to avoid litigation thus providing a substantial impetus for healthcare facilities to eventually become "latex free." However, if the allergy were to be declared a disability per se, there must be a tightening of standards on what qualifies as an undue burden to the employer. Currently this defense, in effect, provides a simple way for healthcare facilities to avoid the hassle of creating a safe environment for its employees.

Unfortunately, it is highly unlikely that the Supreme Court will decide to declare latex allergy as a disability per se. The Court's attitude toward the latex allergy, as well as most impairments, is heavily in favor of a case-by-case analysis for each individual. Supporting the Court's rationale for an individualized inquiry is the fact

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could last several years before the full Acquired Immune Deficiency Syndrome (AIDS) developed. In light of the immediacy with which the virus began to damage the infected person's white blood cells- and in light of the severity of the disease- the Supreme Court concluded that an HIV infection constituted a physical impairment, within the meaning of the ADA's 42 USCS § 12102(2)(A) definition of a disability.

<sup>222</sup>David J. Goldberg, *Can I Terminate My Nurse who Refuses to Wear Latex Gloves?*, *Dermatology Times*, Jan. 1, 2002, at <http://www.dermatologytimes.com/dermatologytimes/article/articleDetail.jsp?id=6977> (last visited Feb. 28, 2004); American Association of Nurse Anesthetists, *supra* note 13.

<sup>223</sup>*See* McDonald v. Dept. of Corrs., 880 F. Supp. 1416 (D. Kan. 1995); Turco v. Hoechst Celanese Chem. Group, 906 F. Supp. 1120 (S. D. Tex. 1995).

that latex allergy develops into different levels of severity for different individuals. Regrettably, the Court's analysis disregards the fact that severity is likely to increase from continued exposure over time.

#### V. COSTS AND BENEFITS OF ACCOMMODATION AND PREVENTION

At this point, it is important to examine the best course of action to balance the interests of both the healthcare worker and the healthcare employer. Looking at the results of the product liability and workers' compensation suits makes it plain to see that these are only band-aids covering the real problem. Prevention and accommodation is the best way to attack this crisis. These methods go hand in hand to solve the problems of health care workers already afflicted with the allergy and to prevent widespread development of new cases. Obviously, these measures are going to involve costs to the employer. On the other hand, there is data that suggests that, in the long run, these practices will cost the industry less on the whole.<sup>224</sup> Further, as noted previously, "disability" is difficult to prove, and the ADA does not cover all healthcare workers due to its exception for independent contractors and for employers with 15 or less employees. Therefore, the focus needs to be primarily on education about these methods which is the recommended method of dealing with this problem prescribed by leading authorities on the subject of latex allergies.<sup>225</sup>

An important way to combat the latex allergy is to require a prevention protocol for all medical facilities. A wise investment for any larger health care facility would be a latex consultant who is also an allergist. This individual could develop mandatory educational programs for all employees and assist in developing the proper course of action in all situations.<sup>226</sup> Of course, the prevention and accommodation method that would arguably make the most impact in any setting would be to strictly limit or eliminate the use of latex gloves, especially powdered versions. However, the data shows that non-latex gloves can cost an average of 105% more than a latex counterpart.<sup>227</sup> That being said, realistically it is clear that many facilities will not soon voluntarily choose to go latex-free. To compromise, appropriate use of latex products is stressed to reduce risk and this may involve eliminating any gloves that contain cornstarch powder which renders the proteins airborne, buying synthetic gloves for non-invasive procedures, and purchasing latex gloves containing low levels of allergens from processing with extra chlorination to remove more of the proteins.<sup>228</sup>

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<sup>224</sup>American Association of Nurse Anesthetists, *supra* note 13.

<sup>225</sup>42 USCS § 12111(5) (2003); National Institute for Occupational Safety and Health, *supra* note 18.

<sup>226</sup>Certified Registered Nurse Anesthetists, *supra* note 25.

<sup>227</sup>American Association of Nurse Anesthetists, *supra* note 13.

<sup>228</sup>Legge, *supra* note 63. Although lubrication of the NRL glove surface can be accomplished with various dusting powders, the powder can be rubbed off and become airborne during use. A more permanent method of reducing surface drag in natural rubber latex products is known as halogenation. When carried out using chlorine as the active element - as is commonly done with NRL gloves - the process is called chlorination. Chlorination of the NRL gloves is performed by immersing the gloves in a dilute solution containing free chlorine ions. The chlorine reacts with the natural rubber surface to reduce the natural tackiness of the natural latex, hence eliminating the need to add a dusting powder to the glove. After immersion of the

The air circulation in many facilities exacerbates the problem of inhaling latex particles and other contaminants. To curb this situation, medical facilities can more stringently filter the air and clean upholstery, carpets and other products that may have absorbed the aerosolized proteins.<sup>229</sup> Since routine cleaning is a critical aspect of health care facilities, instituting these methods would seem a reasonable way to accommodate the sensitized employee and keep others from being affected. Many workers have suggested that hospitals go entirely latex free, and some have done just that.<sup>230</sup> Also, some employers have voluntarily reached agreements with workers unable to perform their job due to the allergy to retire and receive workers' compensation. In addition, these employers agreed to help pay for retraining the employees for jobs outside the hospital setting.<sup>231</sup> Unfortunately, this level of accommodation is certainly the exception rather than the rule.

Therefore, the prevention methods advocated earlier are likely the best compromise for the moment. Convincing employers to progressively reduce latex to a low level can be achieved by stressing the potential cost savings to their facilities. The Mayo Clinic in Rochester, Minnesota, among others, actually saved money and lowered workers' compensation claims by creating a latex-safe environment.<sup>232</sup> With the recent nursing and healthcare employment shortages, it seems that providing a safe environment and keeping existing health care workers safe would be most cost beneficial to all involved.

Currently, there are several important proposals being considered to further reduce the risk to latex sensitive individuals working in facilities still containing latex products. The American Latex Allergy Association has put forth a plan to ASTM International, an organization providing a forum for the development of voluntary written standards, to code gloves according to standardized colors. This could improve safety and prevent errors due to look-a-like gloves.<sup>233</sup> Further, the

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glove into the dilute chlorine solution, the gloves are washed in water, dipped in a neutralizing solution (e.g., 1% ammonia solution), rinsed again, and then dried. This extra washing performed during and after chlorination greatly reduces the level of extractable latex proteins in the product. Some latex proteins are even converted to insoluble forms during chlorination itself. One significant drawback to using chlorinated NRL gloves is that some of the mechanical and physical properties of the natural latex are compromised. Also, the chlorination process adversely affects shelf life, grip and in-use durability of the glove. In addition, strong odors may be present in chlorinated gloves, as well as possible skin irritants. U.S. Food and Drug Administration, *Medical Glove Powder Report*, Sept. 1997, at <http://www.fda.gov/cdrh/glvpwd.html> (last visited Feb. 28, 2004).

<sup>229</sup>National Institute for Occupational Safety and Health, *supra* note 18.

<sup>230</sup>American Association of Nurse Anesthetists, *supra* note 13.

<sup>231</sup>Kowalczyk, *supra* note 61.

<sup>232</sup>American Association of Nurse Anesthetists, *supra* note 13.

<sup>233</sup>American Latex Allergy Association, *News*, July 31, 2003, <http://www.latexallergyresources.org/newsarticle.cfm?ArticleID=31> (last visited Jan. 9, 2004). The proposal provides that natural rubber latex glove coloration shall be limited to buff, beige and tan tones reflective of their historical appearance. This limitation also applies to natural rubber latex/synthetic blends. Alternatively, the presence of latex may be distinguished by so designating on each individual glove; Synthetic gloves must be readily distinguished from natural rubber latex by limiting their finished appearance to colors other than buff, beige or tan tones. Alternatively,

association is recommending that latex gloves be totally restricted in the use of food preparation and handling since it has been shown that the latex allergens are transferred to the food itself.<sup>234</sup> The American Latex Allergy Association, among others, strongly supports the proposals of the American College of Allergy, Asthma and Immunology advocating that “a) the FDA regulate maximum levels of extractable allergens in gloves, and expedite approval of a latex extract for skin testing; b) appropriate governmental agencies conduct or fund epidemiological studies to identify the prevalence and causes of latex allergy; and c) appropriate government agencies implement studies of synthetic glove materials including their in-use barrier effectiveness.”<sup>235</sup> These measures, if approved, should help to ameliorate the problems facing the health care system and its workers due to the latex allergy.

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gloves may be distinguished by identifying “synthetic” or the base material composition (e.g., vinyl) on each individual glove.

<sup>234</sup>*Id.*

<sup>235</sup>American Latex Allergy Association, *About Us*, at <http://www.latexallergyresources.org/about.cfm> (last visited 1-9-04). The American Latex Allergy Association is a national non-profit, tax exempt organization that provides information about latex allergy and supports latex-allergic individuals. Originally, the organization was formed by 30 health care workers who acquired latex allergy. The goals of the organization are: (1) To provide educational materials to organizations, schools and government agencies; (2) To provide emotional support for individuals and their families who are affected by the allergy; (3) To promote latex allergy policies in health care facilities; (4) To minimize latex exposure in the workplace; and (5) To promote research on latex allergy. *Id.*

In efforts to prevent latex allergy, recently, the Consumer Product Safety Commission (CPSC) received a petition from Debi Adkins, editor of Latex Allergy News, requesting that the CPSC issue a rule declaring natural rubber latex (NRL) to be a strong sensitizer under the Federal Hazardous Substances Act, and that consumer products containing NRL be labeled. In March 2000, the CPSC requested comments on the petition and received a total of 85. Unfortunately, after reviewing the petition, comments, and other relevant information, the CPSC staff is recommending that the CPSC deny the petition. The staff concludes that available data do not support that NRL is a strong sensitizer as defined in the Federal Hazardous Substances Act. The CPSC staff states that current scientific information about the development of NRL allergy from consumer products is limited, and it does not appear that further information will be developed in the near future. The American Latex Allergy Association supports the petition for the health and safety of consumers. While it's a positive step that medical products are now required to be labeled for latex content, it's the consumer products that people come in contact with everyday that are likely to be the greater cost and safety issue in the development of NRL allergy. In addition, there are currently no guidelines regulating the level of allergenic protein contained in consumer products. Considering NRL is present in almost 40,000 products, it's impossible to eliminate all NRL exposure from daily life. Without accurate labeling, consumers may not even be aware that NRL is an allergen and that it's present in products around them every day. If consumers experience symptoms when exposed to NRL, but don't know the cause, or that it's allergy related, how will they even begin to learn to avoid NRL before the allergy progresses to chronic asthma or anaphylaxis? American Latex Allergy Association, *News*, <http://www.latexallergyresources.org/newsletter.cfm?NewsletterID=9> (last visited Feb. 28, 2004).

## VI. CONCLUSION

The latex allergy crisis in the healthcare industry has raised many issues and leaves many problems unresolved. It seems clear that the current legal environment has not been overly positive for employees who bring claim to the courts. Victories for healthcare workers have been few and far between. Declaring the allergy as a disability under Title I of the ADA could be the catalyst for employers to finally consider the needs of employees affected by the allergy. However, it is clear that that Court is not likely to make that finding any time soon, if ever.

Although some medical facilities have voluntarily gone latex free, there are many who continue to put their workers in jeopardy for a life long illness with no cure. Employers need to begin to make the reasonable accommodations necessary for the health and safety of the industry as a whole. A combination of education, repeated employee allergy testing, latex protocols, scientific research and agency regulations are the best alternative to costly litigation via the court system.<sup>236</sup> As was previously mentioned, accommodation techniques are possible without being cost prohibitive. On the contrary, they have been shown to reduce costs overall. The necessary attitude shift by employers, workers and government agencies will likely be due to the efforts of organizations that support those with the allergy and advance the understanding of its dangers. The concentrated efforts of those groups can promote reform by lobbying for preventative regulatory measures and promoting an open dialogue within the medical community.

LYNN CHERNE-BRECKNER

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<sup>236</sup>*Id.*; Certified Registered Nurse Anesthetists, *supra* note 25.