EMPLOYMENT

Brief No. 17
July 2011

Legal Briefings

Prepared by:

Barry C. Taylor, Legal Advocacy Director, Alan M. Goldstein, Senior Attorney, and Lauren Lowe, Staff Attorney, Equip for Equality[1]

DRUGS, ALCOHOL AND CONDUCT RULES UNDER THE ADA

Introduction

When an individual has alcoholism or has engaged in illegal drug use due to addiction, the individual may be covered as a person with a disability under the Americans with Disabilities Act (ADA). However, the disability of addiction is subject to additional rules that do not apply to other types of disabilities. This legal brief will examine the unique way that drug and alcohol use is treated under the ADA, discussing related EEOC regulations, and court interpretations. Part I will discuss addiction to illegal drugs, including the "substantially limits" requirement, "currently engaging" and rehabilitation exceptions, and individuals who are "regarded as" having an addiction. Parts II and III will focus on addiction to alcohol and to prescription drugs. Part IV will discuss disability-related inquiries as well as drug and alcohol testing; Part V will address the related confidentiality requirements for employers. Part VI will examine reasonable accommodations that an employee with addiction may be entitled to. Part VII will discuss disparate treatment, disparate impact, and the difference between the two concepts. Parts VIII and IX will focus on workplace conduct rules and off-duty conduct. Finally, Part X will address the "direct threat" defense that may justify refusal to hire, medical inquiries and examinations, or termination.

I. Does Addiction to Illegal Drugs Constitute a Disability Under the

Addiction to alcohol, illegal drugs, and legal or prescription drugs can qualify as a disability under the ADA as amended.[2] Former drug or current alcohol addiction will not qualify as a disability *per se*, rather the addiction must substantially limit one or more major life activity.[3] The ADA has specific rules regarding drug addiction as a disability. The ADA states that "a qualified individual with a disability shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.[4]" However, this exclusion does not apply to anyone who:

> (1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;
> (2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or
> (3) is erroneously regarded as engaging in such use, but is not engaging in such use.[5]

Additionally, the ADA protects individuals who have a "record of" a "physical or mental impairment that substantially limits one or more major life activities." [6]

Note that alcohol addiction is not covered by the "currently engaging" exception, rather the exception is limited to the "illegal use of drugs." However, the unlawful use of prescription drugs may be subject to the "currently engaging" test

A. Substantially Limits

Finding for the Employee

In ***Brock v. Lucky Stores, Inc.*, No. C 98-4758 SI, 2000 WL 288395 (N.D. Cal. March, 14 2000)**, Plaintiff, employed as a truck driver for seventeen years, was terminated after a random drug test conducted by the employer was positive for cocaine. Plaintiff claimed that he was an individual with a disability under the ADA because his addiction to illegal drugs substantially limited him in the major life activity of working. The court agreed, finding that Plaintiff's "long record of excessive absenteeism" was sufficient evidence of a substantial limitation.[7]

Although not employment cases, the following court decisions demonstrate the "substantially limits" analysis as applied to plaintiffs with drug addiction. In ***Kula v. Malani*, 539 F. Supp. 2d 1263 (D. Haw. 2008)**, Plaintiff, an individual incarcerated in state prison, alleged that prison officials violated the ADA when they excluded him from a drug treatment program. The court noted that under the ADA a disability must substantially limit one or more major life activity, however the court did not specify which major life activity was limited in this case. Instead, the court found that plaintiff was an individual with a disability under the ADA when he stated that he was a "known drug addict" and was participating in a supervised rehabilitation program.[8] Plaintiff's claims were dismissed on other grounds.

Similarly, in ***Thompson v. Davis*, 295 F.3d 890 (9th Cir. 2002)**, Plaintiffs, two California state prisoners with drug addiction, alleged that various officials had violated Title II of the ADA by denying them full and fair consideration for parole based on their disability. The Ninth Circuit held that the Plaintiffs had a disability within the meaning of the ADA because they successfully alleged that their past drug addiction substantially limited certain major life activities, including their ability to learn and work.

Finding for the Employer

In ***Mandujano v. Geithner*, No. C 10-01226 LB, 2011 WL 2550621 (N.D. Cal. June 27, 2011)**, Plaintiff, a U.S. Mint Police Officer, was terminated by his employer for failing to maintain a driver's license and sustaining a conviction for driving under the influence of alcohol. Plaintiff testified that he never missed work as a result of drinking, did not report to work intoxicated, and never missed any important events for his children because of his drinking. The court followed the Tenth and Eleventh Circuits in holding that driving by itself does not constitute a major life activity.[9] The court granted summary judgment to the employer, finding Plaintiff did not submit any evidence to establish that his alcohol addiction was substantially limiting in one or more major life activity.

In ***Tyson v. Oregon Anesthesiology Group*, No. 03-1192-HA, 2008 WL 2371420 (D. Or. June 6, 2008)**, Plaintiff advanced the theory that his drug addiction substantially limited him in the major life activities of working, interacting with others, and accessing medical care. The court held that Plaintiff failed to present substantive evidence of permanent or long-term restrictions on his ability to work or to interact with others, and that his ability to access medical care fell short of being a major life activity.

In ***Rhoads v. Board of Education of Mad River Local School*, 103 Fed. App'x 888 (6th Cir. 2004)**, the court held, "to prove that a history of drug or alcohol addiction constitute[s] a record of a disability under ADA, a Plaintiff must demonstrate that he was actually addicted to drugs or alcohol in the past, and that this addiction substantially limited one or more of his major life activities.[10]" The court found that Plaintiff failed to prove that she was an individual with a disability covered by the ADA because she produced very little medical evidence that she had suffered from a drug addiction. Instead, she relied primarily on her own testimony that she believed she had a drug

addiction because she began using marijuana at age sixteen, and sometimes smoked marijuana for an entire day. Furthermore, Plaintiff presented no evidence indicating the extent the purported addiction affected her ability to perform a major life activity.

B. Currently Engaging

As noted above, the ADA does not cover someone who is currently engaging in the illegal use of drugs. Interpretive guidance on Title I of the ADA clarifies the term "currently engaging" but does not create a bright line rule:

> The term "currently engaging" is not intended to be limited to the use of drugs on the day of, or within a matter of days or weeks before, the employment action in question. Rather, the provision is intended to apply to the illegal use of drugs that has occurred recently enough to indicate that the individual is actively engaged in such conduct.[11]

Courts have also declined to adopt a bright line rule. Instead, whether an individual is "currently engaging" is decided on a case by case basis.

In a case arising under Title II of the ADA, ***New Directions Treatment Services v. City of Reading*, 490 F.3d 293 (3d Cir. 2007)**, the Third Circuit held that a Pennsylvania law banning methadone clinics within 500 feet of schools, churches, and homes violated the ADA and the Rehabilitation Act. In *dicta*, the court stated that because the "currently engaging" exception is found in both 42 U.S.C. § 12114(a) where it applies to Title I of the ADA and in Title V: Miscellaneous Provisions § 510, the exception is applicable to the entire ADA. Declining to articulate a bright line rule, the court found that "[m]ere participation in a rehabilitation program is not enough, and that covered entities are entitled to seek reasonable assurances that no illegal use of drugs is occurring.[12] "Holding that the question of whether in individual is "currently engaging" in drug use is a factual inquiry best left to the district courts, the court remanded with instructions that the district court consider whether three drug-free months were sufficient.

Finding for the Employee

In ***McFarland v. Special-Lite, Inc.*, No. 1:09-CV-704, 2010 WL 3259769 (W.D. Mich. Aug. 17, 2010)**, Defendant, a manufacturing company and Plaintiff's former employer, claimed that Plaintiff admitted to drug use by telling his supervisor that a January 2009 drug test "might" be positive. However, Plaintiff maintained that he did not make any drug use admission, and the January 2009 drug test was in fact negative. The district court denied Defendant's motion for summary judgment on the issue of whether Plaintiff was "currently engaging" in drug use at the time of his termination.

In ***Teahan v. Metro-North Commuter R.R.*, 951 F.2d 511 (2d Cir. 1991)**, Plaintiff, an individual with alcohol addiction, filed a Rehabilitation Act claim against his employer, alleging that he was dismissed solely by reason of his disability.[13] The Second Circuit held that the relevant time to assess Plaintiff's "current" status is the time of his actual firing. The question of whether Plaintiff was, in fact, a "current" user was remanded to the district court. On remand, the district court held that Plaintiff was not a "current user" when he had not consumed illegal drugs or alcohol for a little over three months prior to his discharge, and had successfully completed a rehabilitation program.[14]

Finding for Employer

In ***Daniels v. City of Tampa*, No. 8:09-CV-1151T33AEP, 2010 WL 1837796 (M.D. Fla. Apr. 12, 2010)**, the court found that Plaintiff was "currently engaged" in the illegal use of drugs. Plaintiff tested positive for drugs or alcohol during a random drug test at his place of employment in 1998 and enrolled in the Substance Abuse program. In 2005, Plaintiff was involved in a vehicle accident and the required post-accident drug/alcohol test was positive for cocaine.

In ***Nader v. ABC Television, Inc.*, 150 F. App'x 54 (2d Cir. 2005)**, Plaintiff, an employee of ABC television, was terminated after a well-publicized arrest for selling cocaine to an undercover police officer. Plaintiff was terminated three weeks after his arrest for violating a "morals clause" in his contract, and was considered a "current" user of illegal drugs by the court.

In ***Wood v. Indianapolis Power & Light Co.*, 210 F.3d 377 (7th Cir. 2000) (unpublished)**, Plaintiff, a meter reader employed by the company, tested positive for cocaine or marijuana in three separate drug tests required by the employer. The company terminated plaintiff pursuant to its three-strikes policy. The court held that Plaintiff was not protected by the ADA since he was "currently engaging" in illegal drug use.

In ***Zenor v. El Paso Healthcare System Ltd.*, 176 F.3d 847 (5th Cir. 1999)**, Plaintiff, a pharmacist, called in sick to work reporting he was under the influence of cocaine. He then entered a residential treatment facility. The employer notified Plaintiff that he was terminated five weeks after he last used cocaine, and the discharged occurred at the end of his FMLA leave. The Fifth Circuit affirmed judgment as a matter of law in favor of the employer. First, the court held that the relevant date for purposes of determining whether Plaintiff was a "current" user of illegal drugs was the date he was notified of his termination, not the date that the termination took place.[15]

In ***Salley v. Circuit City Stores, Inc.*, 160 F.3d 977 (3d Cir. 1998)**, the court found that Plaintiff was not covered by the ADA when he had refrained from using illegal drugs for three weeks prior to his discharge. The court noted that it knew of "no case in which a three-week period of abstinence has been considered long enough to take an employee out of the status of 'current' user."[16]

In ***Shafer v. Preston Memorial Hospital Corp.*, 107 F.3d 274 (4th Cir. 1997)**, Plaintiff, employed as a nurse, had an addiction to prescription medication and was stealing the medication from her employer. Plaintiff was put in inpatient drug rehabilitation lasting less than one month, and the hospital terminated her after she finished her rehabilitation. The court held that a "current" user of illegal drugs is a person who has used illegal drugs "in a periodic fashion during the weeks and months prior to discharge."[17]

C. Rehabilitation Exception

As previously discussed, a person who is addicted to illegal drugs can be a qualified individual with a disability under the ADA if she is no longer engaging in drug use and (a) has successfully completed a supervised drug rehabilitation program, (b) has otherwise been rehabilitated successfully, or (c) is participating in a supervised rehabilitation program. [18]

Finding for the Employee

In **Christian v. Southeastern Pennsylvania Transit Authority, No. 97-3621, 1997 WL 736867 (E.D. Pa. Nov. 18, 1997),** Plaintiff, a SEPTA employee, was granted a two year emergency leave of absence to seek treatment for his drug addiction. Plaintiff traveled to an inpatient rehabilitation center in Colorado. Two months later, SEPTA terminated his employment. The court stated although current drug users are excluded from the category of qualified individual with a disability, "§ 12114(b)(2) also provides that anyone 'participating in a supervised rehabilitation program and is no longer engaging in [the illegal use of drugs]' is not excluded as a qualified individual with a disability, and thus is entitled to protection." The court denied Defendant's motion to dismiss, holding that a genuine issue of material fact remained as to whether Plaintiff was a qualified individual with a disability.

Finding for the Employer

In **Brown v. Lucky Stores, Inc., 246 F.3d 1182 (9th Cir. 2001),** Plaintiff, a grocery store employee, was terminated based on absences following her arrest on drunk driving and drug charges. The court held: Mere participation in a rehabilitation program is not enough to trigger the protections of § 12114(b); refraining from illegal use of drugs also is essential. Employers are entitled to seek reasonable assurances that no illegal use of drugs is occurring or has occurred recently enough so that continuing use is a real and ongoing problem. [19]

Because Plaintiff's continuing use of drugs and alcohol was an ongoing problem at least as recently as her incarceration for driving while intoxicated and possession of methamphetamine, the Ninth Circuit found she had not refrained from the use of drugs for a sufficient length of time, and therefore was not entitled to the protections of the ADA.

In **Mauerhan v. Wagner Corp., Nos. 09–4179, 09 –4185, WL 1467571 (10th Cir. Apr. 19, 2011)**, Plaintiff failed a drug test and was fired with the reservation that he could return to work if he passed a drug treatment program. Immediately after completing a 30 day in-patient program with a "guarded" prognosis, Plaintiff reapplied to work for the corporation. [20] He was told that he could return to work, but with different responsibilities and a lower level of compensation. Plaintiff filed a disability discrimination claim and the district court granted summary judgment in favor of the employer, finding Plaintiff was a "current" drug user. The Tenth Circuit affirmed, holding "an individual is currently engaging in the illegal use of drugs if the drug use was sufficiently recent to justify the employer's reasonable belief that the drug abuse remained an ongoing problem. [21]"The court did not determine a safe harbor, stating only that the longer a person refrains from drug use, the more likely that individual will be to receive ADA protection.

In **Collings v. Longview Fibre Co., 63 F.3d 828 (9th Cir. 1995),** Plaintiffs, employees at a manufacturing company, were fired after using illegal drugs at the facility. Plaintiffs claimed that they were in the process of rehabilitation at the time they were fired, and thus were not "current" users. Additionally, a number of the employees took and passed drug tests at the time of their termination in an effort to prove that they were not "current" users. Despite this, the court found that Plaintiffs were not protected by the ADA because they had used illegal drugs in the weeks and months prior to their discharge.

In **McDaniel v. Mississippi Baptist Medical Center, 877 F. Supp 321 (S.D. Miss.), aff'd, 74 F. 3d 1238 (5th Cir. 1995) (unpublished),** Plaintiff used illegal drugs and entered a drug treatment program prior to his termination. Plaintiff testified that he had not used drugs for a few weeks. The court held that even though Plaintiff entered treatment, he was not protected by the ADA because he had not stopped using drugs for a "considerable length" of time. [22]

D. Regarded As

The ADA protects individuals who are erroneously regarded as engaging in illegal drug use, but who are not in fact engaging in such use. [23]

Finding for Employee

In **Warshaw v. Concentra Health Services, 719 F. Supp. 2d 484 (E.D. Pa. 2010),** Plaintiff, an individual who has attention deficit hyperactivity disorder (ADHD), was subjected to a preemployment drug test. The test resulted in a false positive for methamphetamine, due to Plaintiff's legal use of the prescription drug Desoxyn. Plaintiff worked for three days and then was terminated for disputed reasons. The court found there was a triable issue of fact as to whether employer regarded Plaintiff as a person with a disability because of his ADHD diagnosis or due to the erroneous perception that he engaged in illegal drug use.

In **Miners v. Cargill Communications, Inc. 113 F.3d 820 (8th Cir. 1997),** Plaintiff, a promotions director for a radio station, drank alcohol on the job in violation of company policy. Plaintiff alleged that the company violated the ADA by firing her because she was regarded as a person with alcoholism, not because she violated a company rule. In support of her claim, Plaintiff submitted evidence that the policy against alcohol consumption was not enforced against management employees. The court found that Plaintiff established a prima facie case under the ADA, holding that evidence of inconsistent enforcement of company policy was relevant in showing discrimination against Plaintiff.

Finding for Employer

In **Muhammed v. City of Philadelphia, 186 Fed. App'x 277, (3d Cir. 2006),** Plaintiff told his employer that he was not willing to see a city doctor because "I'm going to come up positive for cocaine or heroin or something. [24]" The court held Plaintiff could not be erroneously regarded as engaging in illegal drug use because he admitted that he would test positive for drugs.

In **Hoffman v. MCI Worldcom Communications, Inc., 178 F. Supp. 2d 152 (D. Conn. 2001),** Plaintiff failed to establish his "regarded as" claim. The court held that the ADA only recognizes that an individual is "regarded as" having the disability

of drug addiction when the perception is premised on erroneous perception of drug use. Plaintiff admitted that he used drugs over an extended period of time while employed, thus the court found that any perception of drug use by his employer was not erroneous.

E. Record Of

Finding for Employee

The following case involves an employee with mental illness, however the "record of" analysis could also apply to an individual with addiction. In **Doe v. Salvation Army in the United States, 531 F.3d 355 (6th Cir. 2008),** Plaintiff, an individual with paranoid schizophrenia, interviewed for a position with Salvation Army. Plaintiff was asked about his medications during the interview. [25] After he admitted he had used psychotropic medications for mental illness, the interviewer terminated the interview. Plaintiff brought an action against the employer under the Rehabilitation Act. [26] The Second Circuit found that Plaintiff had a "record of" a disability when he submitted numerous doctor reports and evaluations stating that he has a record-supported history of paranoid schizophrenia disorder, which caused substantial limitations to his major life activities of self-care, thinking, learning, and working. Additionally, the court held that the employer acted improperly when it refused to hire Plaintiff based on his record.

II. Does Alcohol Addiction Constitute a Disability Under the ADA

Courts have held that alcoholism is a protected disability under the ADA. [27] As mentioned above alcoholism is not subject to the "currently engaging" exception. The Sixth Circuit explained, "the plain language of § 12114(a) does not exclude alcoholics from ADA coverage because alcohol is not a 'drug' within the meaning of the statute. The statute treats drug addiction and alcoholism differently, and an alcoholic is not automatically excluded from ADA protection because of current use of **alcohol."** [28]

While alcohol addiction is not subject to the "currently engaging" exception, employers are allowed to restrict the use of alcohol in the workplace. The text of the ADA and the EEOC regulations have adopted identical language, stating that an employer:

1) may prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;
2) may require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;
3) may require that employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 et seq.);
4) may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee. [29]

A. Alcohol Addiction Constitutes a Disability

The Sixth Circuit has upheld the plain language of the ADA protecting individuals with alcohol addiction whether they are current or former users. In **Mararri v. WCI Steel, Inc., 130 F.3d 1180 (6th Cir. 1997),** Plaintiff, a steel worker, alleged he was improperly terminated in violation of the ADA as a result of his alcoholism. The employer required Plaintiff to submit to random alcohol and drug tests, and specified that positive results at any level would be grounds for termination. Plaintiff failed one of the tests and the employer subsequently discharged him. The district court held that Plaintiff was not protected by the ADA because he was a current user of illegal drugs. The Sixth Circuit held that the district court was in error, noting that the plain language of the does not exclude an individual who is currently using alcohol. However, the error was not grounds for reversal because the district court properly upheld the discharge on other grounds.

Although courts generally have held that an individual with alcoholism is covered under the ADA, the Tenth Circuit has held that when the

disability of alcoholism is not at issue, juries need not be instructed that alcohol addiction is a per se disability. In **Renaud v. Wyoming Department of Family Services, 203 F.3d 723 (10th Cir. 2000),** Plaintiff, superintendent of the Wyoming Boys' School, alleged he was improperly terminated due to his alcoholism. One of Plaintiff's co-workers reported that Plaintiff came to work intoxicated on one occasion. After the allegation was reported, Plaintiff requested sick leave and checked himself into a voluntary alcohol treatment program. The district court instructed the jury that disability means a physical or mental impairment that substantially limits one or more major life activity. The district court refused to instruct the jury that alcoholism is a disability in all cases under the ADA. Plaintiff claimed that this instruction constituted reversible error. The Tenth Circuit affirmed the district court's jury instructions in favor of the employer, holding that status of being addicted to alcohol may merit protection under the ADA. The court reasoned that there was no reversible error because the instructions did not require the jury to determine whether alcoholism was a disability under the ADA, rather whether Plaintiff's disability was the basis for his termination.

B. Substantially Limits

As mentioned above, courts have held that alcoholism is not a disability *per se*, rather an individual with alcoholism is only protected under the ADA if the addiction substantially limits one or more major life activity.

Finding for the Employee

In **Office of the Senate Sergeant at Arms v. Office of Senate Fair Employment Practices, 95 F.3d 1102 (Fed. Cir. 1996),** Plaintiff, a dispatcher employed by the United States Capital Police, alleged he was protected under the ADA due to the disability of alcoholism. The Federal Circuit agreed with Plaintiff, reasoning that he was "substantially limited" in the major life activity of his performance in his job when he was not able to report to work regularly nor to comply with the call-off rule. However, the court found for the employer on the issue of whether Plaintiff was entitled to a retroactive accommodation such as a "fresh start" for his disability.

Although not an employment case, the following court decision demonstrates the "substantially limits" analysis as applied to plaintiffs with alcoholism. In **Regional Economic Community Action Program, Inc. v. City of Middletown, 294 F.3d 35 (2d Cir. 2002),** Plaintiff, an organization that operates halfway houses for recovering individuals with alcoholism, brought suit against the city of Middletown under the ADA, FHA, and Rehabilitation Act. Plaintiff alleged that the city discriminated against individuals with alcoholism through zoning ordinances and a retaliatory refusal to honor a prior funding commitment. The Second Circuit denied summary judgment to the city, finding in part that the individuals recovering from alcoholism who would have been residents of proposed halfway house had a disability for purposes of ADA. The court reasoned that the prospective residents were "substantially limited" under the ADA because they were unable to abstain from alcohol abuse without continued care, they could not adequately care for themselves, and their impairment was long term.

Finding for Employer

In **Ames v. Home Depot USA Inc., 629 F.3d 665 (7th Cir. 2011),** Plaintiff had informed her manager that she had a problem with alcohol and needed assistance through the employer's employee assistance program. Plaintiff enrolled in the program and signed an agreement stating that she could be tested for drugs and alcohol at any time and terminated if she failed the test. After an assistant manager suspected Plaintiff was under the influence of alcohol, she was given a blood test, tested positive for alcohol, and was subsequently terminated. The district court granted summary judgment to the employer. The Seventh Circuit affirmed, finding that Plaintiff could not show that her alcoholism substantially limited a major life activity. In her testimony, Plaintiff stated that her addiction did not affect her ability to work. The court also found that she could not demonstrate a failure to provide a reasonable accommodation. Rather, the employer terminated her for working under the influence of alcohol, which demonstrated her failure to meet the employer's legitimate expectations for its employees.

Likewise, in **Larkin v. Methacton School District,**

2011 WL 761548 (E.D. Pa. Feb. 23, 2011), Plaintiff, a high school physical-education and health teacher, alleged that she had alcoholism and that the school district denied her reasonable accommodation request and engaged in retaliation in violation of the ADA. The court held that Plaintiff was not entitled to relief because she did not have a disability under the ADA. Although Plaintiff attended a treatment center for her alcoholism and remained out of work for a period of time after she left the center, the court found that Plaintiff failed to show that she was substantially limited in one or more major life activity.

III. Does Prescription Drug Addiction Constitute a Disability Under the ADA?

Addiction to prescription drugs can qualify as a disability under the ADA. Additionally, an individual who is "erroneously regarded as" engaging in illegal drug use, or who has a "record of" drug addiction can qualify for protection under the ADA. [30] Interpretive guidance on Title I of the ADA clarifies, "(i)llegal use of drugs refers both to the use of unlawful drugs, such as cocaine, and to the unlawful use of prescription drugs." [31]

Employers may also have liability if they discriminate against an employee who uses prescription narcotic medication. According to the EEOC, an employer may prohibit an employee from taking a legally prescribed narcotic medication, but the employer must give the employee a reasonable amount of time to change the medication regimen. [32] The EEOC recently filed suit against Tideland Electric Membership Corporation in the Eastern District of North Carolina on this issue. [33] The EEOC's complaint alleges that Plaintiff, a lineman with a chronic pain condition, was unlawfully terminated when the corporation learned he was taking a legally prescribed narcotic pain medication.[34] EEOC contends the corporation failed to provide a reasonable accommodation when it terminated Plaintiff without giving him a reasonable amount of time to change his medication in order to keep his employment.[35]

Finding for Employee

In **Dvorak v. Clean Water Services, 319 Fed. App'x 538 (9th Cir. 2009),** Plaintiff, an individual with severe neck pain and migraines, used prescription narcotic painkillers to manage his symptoms. Plaintiff's employer placed him on leave, alleging that his prescription medications made him incapable of working. Defendant moved for summary judgment on the issues of whether Plaintiff was regarded as an individual with a disability or had a record of a disability. The court observed "Plaintiffs must show that an employer regarded limitations as precluding an employee from a broad class of jobs.[36] " In other words, in order for Plaintiff to prevail the employer must regard him as substantially limited in the major life activity of working. Here, Defendant received a medical opinion that Plaintiff was dependent on narcotic painkillers when it placed Plaintiff on leave. [37] Supervisors told Plaintiff that they "wouldn't even put [him] behind a computer," or allow him to return to his field position, suggesting that they may have believed that Plaintiff was precluded from a wide range of jobs.[38] The court held the evidence was sufficient to raise a genuine issue of material fact as to whether Defendant regarded Plaintiff to have a disability because of drug addiction. [39] Additionally, Plaintiff demonstrated a material issue of fact as to whether he had a record of impairment when the employer knew he used painkillers and received summaries of Plaintiff's medical records.

Finding for the Employer

In **Shafer v. Preston Memorial Hospital Corp., 107 F.3d 274 (4th Cir. 1997),** Plaintiff, employed as a nurse, had an addiction to prescription medication and was stealing the medication from her employer. Plaintiff was put in inpatient drug rehabilitation lasting less than one month, and the hospital terminated her after she finished her rehabilitation. The court held Plaintiff was a "current" abuser of prescription drugs and was not entitled to the protection of the ADA.

IV. Disability-Related Inquiries and Testing

A. Preemployment Inquiries

The EEOC has issued guidance regarding preemployment disability-related questions and medical examinations.[40] In general, an employer may ask about current illegal use of drugs because

such use is not protected under the ADA.[41] However, an employer may not ask applicants about their lawful drug use because questions about current or prior lawful drug use are likely to elicit information about a disability.[42] Employers are permitted to inquire about lawful drug use if the employer is administering a test for illegal use of drugs and an applicant has tested positive for illegal use. [43] Specifically, an employer may validate a positive test result by asking about lawful drug use or other possible explanations for the result.[44]

Employers are also permitted to inquire about prior illegal drug use provided that the particular question is not likely to elicit information about a disability.[45] In March 2011, the EEOC issued an informal discussion letter that clarifies the extent to which employers may ask about prior illegal drug use.[46] Questions about treatment or counseling received, and inquiries about the number of times and dates illegal drugs were used are disability-related questions that are prohibited in the EEOC's view.[47]

Employers may ask applicants about their drinking habits, unless the particular question is likely to elicit information about alcoholism.[48] For example, an employer is permitted to ask whether an applicant drinks alcohol or has been arrested for driving under the influence. [49] However, questions asking how much alcohol an applicant drinks or whether the applicant has participated in an alcohol rehabilitation program are likely to elicit information about whether the applicant has alcoholism. For example, a question about alcohol use and treatment during the past seven years would be impermissible according to the EEOC. [50]

B. Preemployment Drug and Alcohol Testing

The ADA prohibits employers from administering medical tests to job applicants. However, for purposes of the ADA, drug tests are not considered medical examinations.[51] Employers cannot use "qualification standards, employment tests, or other selection criteria that screen out or tend to screen out an individual with a disability . . . unless the . . . criteria, . . . is shown to be job-related for the position in question and is consistent with business necessity."[52]

In addition, the ADA contains separate rules regarding medical examinations and inquiries, depending on whether the individual is a job applicant, an applicant who received a conditional job offer but has not yet begun working, or an employee.[53] If an individual is a job applicant, an employer may make preemployment inquiries of the applicant's ability "to perform job-related functions" but not into whether the applicant has a disability.[54] If an applicant has received a conditional offer of employment but has not yet started work, an employer may require a medical exam and make an offer of employment conditional on the results of the exam. [55] An employer can only require a medical exam following a conditional offer if all employees are subject to the inquiry, and the information obtained is maintained separately and treated as confidential. [56] Finally, the results of the medical inquiry can be used only "as long as the employer does not discriminate on the basis of the applicant's disability." [57]

Alcohol tests are considered medical examinations and are prohibited at the preemployment stage. [58] Post-offer, an employer may require alcohol tests if the test is administered to all individuals in the same job category. [59] Once employment had begun, and employer may only administer an alcohol test if it is "job-related and consistent with business necessity." [60]

Finding for the Employee

In **Connolly v. First Personal Bank, 623 F. Supp. 2d 928, 931 (N.D. Ill. 2008),** Plaintiff was offered a position of Senior Vice President, contingent on her satisfactory completion of a drug test. Prior to the drug test, Plaintiff informed the company that she had recently undergone a medical procedure that might result in additional medication showing up on the test. The test showed a positive result for Phenobarbital, and the company rescinded its offer of employment. The company declined to open a letter from Plaintiff's doctor explaining the nature of the lawfully prescribed medication she was taking at the time of the drug test. The district court denied Defendant's motion to dismiss, holding:

> For purposes of the ADA, tests to determine illicit drug use are clearly not medical examinations. However, a test for illicit drug use may also, as in this case, return results for legal drug use that could affect the functioning of the employee in the specific job setting. . . . In these

> circumstances there is a minimal cost to determine whether the presence of Phenobarbital was legal. The exemption for drug testing was not meant to provide a free peek into a prospective employee's medical history and the right to make employment decisions based on the unguided interpretation of that history alone.[61]

Finding for the Employer

In **Ozee v. Henderson County, No. 4:08CV-5-JHM, 2009 WL 1208182 (W.D. Ky. May 1, 2009),** Plaintiff, an individual with sleep epilepsy, interviewed with Defendant for a position as a Deputy Jailer at the Henderson County Detention Center. Plaintiff was offered the position, contingent upon passing a preemployment drug test. The test came back positive for PCP. Plaintiff suggested that a reaction between her sleep epilepsy and allergy medications may have caused a false positive. She requested a reasonable accommodation, asking that the employer verify the first drug test, accept a second negative test, or some similar accommodation. The court held the employer had no obligation to engage in the interactive process when nothing in the record showed that an interaction between Plaintiff's medications could have caused a false positive. Therefore, Plaintiff had not shown that the positive result on the drug test was a barrier to job performance caused by her sleep epilepsy.

C. Drug Testing Current Employees

Finding for the Employer

Under the Sixth's Circuit's reasoning in **Bates v. Dura Automotive Systems, Inc., 625 F.3d 283 (6th Cir. 2010),** an individual without a disability would not be able to challenge a drug test under the ADA. In Bates, Defendant set up a procedure to screen its employees for substances it believed could be dangerous in the workplace, including twelve substances commonly found in legal prescription drugs. Several of the employees who tested positive for the prohibited substances claimed that the corporation conducted an improper medical examination in violation of the ADA.[62] The district court held that individuals do not need to have a disability in order pursue a claim under ADA Title I. The Sixth Circuit reversed, holding that only individuals with disabilities can challenge an employer's actions under the ADA.[63]

In **Buckley v. Consolidated Edison Company of New York, 155 F.3d 150 (2d Cir. 1998),** Plaintiff, an individual with a record of alcoholism, claimed he was discharged in violation of the ADA because of his inability to provide urine samples for company-administered drug tests due to his neurogenic bladder condition. The employer had a policy of testing employees who had recovered from drug addiction every twenty-five days, while all other employees were tested approximately once every five years. First, the Second Circuit held that the employer did not violate the ADA by administering drug tests to former illegal drug users more frequently than it administered the tests to employees not identified as former illegal drug users. Second, the court held that because the neurogenic bladder condition was not related to his status as an individual who has recovered from drug addiction—the only condition Plaintiff alleged to be a disability—the impairment was not a disability under the ADA. Thus, the employer was not required to provide a reasonable accommodation for the condition by giving the employee extra time to urinate.

V. Confidentiality

The ADA specifies that preemployment medical examinations and inquiries must remain confidential. [64] An employer may require medical examinations or inquiries of current employees if the exam is job-related and consistent with business necessity. Additionally, the employer may conduct "voluntary" medical examinations and inquiries. Such examinations or inquiries of current employees must also comply with the following rules to ensure confidentiality.[65] Specifically:

> (B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that--
>
> (i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations; (ii) first aid and safety personnel may be informed, when appropriate, if the disability might

require emergency treatment; and (iii) government officials investigating compliance with this chapter shall be provided relevant information on request.[66]

The EEOC has issued guidance on the ADA's confidentiality requirements.[67] According to EEOC guidelines, medical information may be given to "appropriate decision-makers involved in the hiring process" meaning the information can be given on a need-to-know basis.[68] Additionally, medical information can be shared with third parties to determine whether a reasonable accommodation is possible, so long as the information is kept confidential.[69] Furthermore, the confidentiality obligation extends to medical information that an employee has voluntarily disclosed and medical information cannot be kept in a regular personnel file.[70] Finally, the employer's confidentiality obligation does not end when an individual is no longer an applicant or an employee.[71]

Finding for Employee

In **Giaccio v. City of New York, 502 F.Supp.2d 380 (S.D.N.Y. 2007),** Plaintiff was employed as a boilermaker by the Department of Transportation and was subject to random drug tests during the course of his employment. Twice Plaintiff tested positive for marijuana, was placed on medical leave without pay, and then returned to full duty. Following a Staten Island Ferry accident, the results of Plaintiff's drug test were leaked to the press. The court held that Plaintiff presented a triable issue of fact because the newspaper article created an inference that confidential drug testing records were disclosed by a city official with access to Plaintiff's records. However, Plaintiff was unable to establish damages as no adverse employment action occurred as a result of the confidentiality breach.

VI. Reasonable Accommodations

District courts are in disagreement as to whether individuals with drug or alcohol addiction are entitled to reasonable accommodations in the workplace. A few district court decisions in Connecticut have prohibited reasonable accommodations for employees with addiction. However, most districts allow reasonable accommodations. One common reasonable accommodation that has been mandated by courts is leave for drug or alcohol treatment programs. "[A]dditional unpaid leave for necessary treatment" is specifically identified as a reasonable accommodation in the EEOC's Interpretive Guidance to Title I of the ADA.[72] No appellate court has yet decided the issue.

Finding for Employee

In **Schmidt v. Safeway, 864 F. Supp. 991 (D. Ore. 1994),** the court held that an employer must provide a leave of absence so the employee could obtain medical treatment for alcoholism. However, "an employer would not be required to provide repeated leaves of absence (or perhaps even a single leave of absence) for an alcoholic employee with a poor prognosis for recovery."

Similarly, in **Corbett v. National Products Co., 94 -2652, 1995 WL 133614 (E.D. Pa. March 27, 1995),** Plaintiff requested leave to attend a 28-day in-patient alcohol treatment program. The court held the employer must grant a leave of absence for the employee to obtain treatment for alcoholism.

Finding for the Employer

As with other types of disabilities, an employee with alcohol or drug addiction must demonstrate that the employer was aware of the disability in order to prevail in a reasonable accommodation claim. In **Rock v. McHugh, No. DKC 10-0829, 2011 WL 2119035 (D. Md. May 26, 2011),** Plaintiff, an employee at the United States Army Research Laboratory, claimed his employer discriminated against him because he has an alcohol addiction. Plaintiff conceded that he never informed his supervisors of his alcoholism. As a result, the court did not reach the question of whether Plaintiff requested a reasonable accommodation. The court granted summary judgment in favor of the employer, holding that Defendant could not have failed to accommodate Plaintiff's disability because it was not aware of his disability.

In **Ozee v. Henderson County, No. 4:08CV-5-JHM, 2009 WL 1208182 (W.D. Ky. May 1, 2009),** the court held the employer had no obligation to reconsider the result of her positive drug test as a reasonable accommodation when nothing in the record showed that an interaction between

Plaintiff's medications could have caused a false positive.

Several decisions in Connecticut have stated in dicta that the ADA does not require reasonable accommodations for people with alcoholism or drug addiction. Such statements are inconsistent with the plain language of the ADA, however this proposition has not yet been overruled.

In **Nanos v. City of Stamford, 609 F. Supp. 2d 260 (D. Conn. 2009)** the court stated, "[p]ursuant to 42 U.S.C. § 12114(c)(4), employers need not make any reasonable accommodations for employees who are illegal drug users and alcoholics. . . . in marked contrast to all other disabilities, where the ADA does require that the employer extend reasonable accommodations."[73]

In **Vandenbroek v. PSEG Power Connecticut, L.L.C., No. 3:07-cv-869, 2009 WL 650392 (D. Conn. Mar. 10, 2009),** Plaintiff, an individual with an alcohol addiction, was terminated from his employment after violating the company's no call/no show policy. In dicta, the court stated, "under [§ 12114(c)(4)] of the ADA, employers are not required to make any reasonable accommodations for employees who are illegal drug users or alcoholics."[74]

VII. Disparate Treatment and Disparate Impact

Employers are prohibited from taking actions that will result in the disparate treatment or disparate impact of their employees. Though sometimes conflated, the two refer to different phenomena. Disparate treatment refers to a policy or practice that affects otherwise similar employees differently because one has a disability and another does not. The EEOC gives this example:

> An employer has a lax attitude about employees arriving at work on time. One day a supervisor sees an employee he knows to be a recovered alcoholic come in late. Although the employee's tardiness is no worse than other workers and there is no evidence to suggest the tardiness is related to drinking, the supervisor believes such conduct may signal that the employee is drinking again. Thus, the employer reprimands the employee for being tardy. The supervisor's actions violate the ADA because the employer is holding an employee with a disability to a higher standard than similarly situated workers.[75]

On the other hand, disparate impact theory examines whether a facially neutral policy unfairly affects one protected class of people over another. For example, a policy against hiring any person who had ever attended a Narcotics Anonymous meeting would likely have a disparate impact on individuals who have recovered from drug addiction. The following cases involve the disposition of both disparate treatment and disparate impact claims.

Finding for Employee

In Flynn v. Raytheon Co., 868 F. Supp. 383, 388 (D. Mass. 1994), the court found Plaintiff stated a claim upon which relief can be granted when he alleged that Defendant enforced its no alcohol rule more strictly against him on account of his disability than it did against other employees who did not have alcoholism, but who nonetheless came to work under the influence of alcohol.

Finding for Employer

In **Lopez v. Pacific Maritime Association, 636 F.3d 1197 (9th Cir. 2011),** employer had a one-strike rule, which eliminated any applicant who tested positive for drug or alcohol use during the preemployment screening process from consideration. When determining if there was disparate impact, Plaintiff's expert economist defined the protected group as recovered individuals with drug addiction who applied to work for Defendant and were rejected because they failed a drug test. The Ninth Circuit acknowledged that the one-strike rule imposed a harsh penalty on applicants who test positive for drug use. However, the court affirmed summary judgment in favor of the employer, holding that Plaintiff failed to establish the one-strike rule disparately affected recovered drug addicts because the protected group was incorrectly defined. The Ninth Circuit reasoned that by defining the protected group as the number of individuals who have recovered from drug addiction and who previously were rejected because they failed a drug test, Plaintiff

assumed his own conclusion. Instead the protected group should have been defined as individuals who have recovered from drug addiction.

In **Raytheon Co. v. Hernandez, 540 U.S. 44 (2003),** Plaintiff, a technician for Defendant corporation, resigned in lieu of termination after he tested positive for cocaine use. More than two years later, Plaintiff had gone through rehabilitation, was no longer using drugs, and reapplied for a position. The company did not hire him, citing its policy not to rehire former employees who were terminated for workplace misconduct. Plaintiff sued, alleging disparate treatment by his employer on the basis of his record of a drug addiction, and/or on the basis of being regarded as having a drug addiction. In response to his employer's motion for summary judgment, Plaintiff argued that even if his employer's no-rehire policy was facially neutral, it had a disparate impact on people with disabilities, and therefore still violated the ADA. The Supreme Court, careful not to conflate the disparate treatment and disparate impact analyses, explained that with regard to disparate treatment, the employer provided a neutral no-rehire policy that applies to all former employees terminated for workplace misconduct, not just former employees with disabilities. This policy constituted a legitimate, nondiscriminatory reason for its decision not to rehire Plaintiff. With regard to the disparate impact of the facially neutral policy, Plaintiff did not timely raise this argument as it was first raised on appeal. Because the Court of Appeals conflated the disparate treatment and impact issues, the Supreme Court vacated its judgment and remanded the case.[76] On remand, the Ninth Circuit held in **Hernandez v. Huges Missile Systems Co., 362 F.3d 564 (9th Cir. 2004)** that there was a genuine issue of material fact as to whether the company truly had a neutral no-rehire policy or whether the employee was not rehired because of his history of addiction.

VIII. Workplace Conduct Rules

The ADA will not protect employees who violate workplace conduct rules, provided the rules are job -related and consistent with business necessity, including employees whose conduct is caused by disability.[77] EEOC guidance provides that, "employers may hold all employees, disabled (including those disabled by alcoholism or drug addiction) and nondisabled, to the same performance and conduct standards.[78] "Specifically, the EEOC has stated that an employer may discipline an employee who violates a workplace policy prohibiting alcohol or illegal drugs in the workplace, as long as the employee is subject to the same discipline as any other employee. [79] Employers are permitted to take disciplinary action even if an employee's violation of a drug or alcohol policy stems from addiction.[80] Additionally, employers are permitted, but not required, to refer an employee to an Employee Assistance Program instead of or in conjunction with discipline. [81] After an employee has engaged in misconduct, she may state that the violation was caused by a disability and request a reasonable accommodation. In that case, there are two possible courses of action. If the misconduct warrants termination, the employer does not need to engage in a discussion about the employee's disability or requested accommodation.[82] On the other had, if the discipline is something less than termination and the employee mentions disability as an explanation, the employer may inquire about the relevance of disability to the misconduct; if the employee requests an accommodation, the employer must begin the "interactive process." [83]

In **Dovenmuehler v. St. Cloud Hospital, 509 F.3d 435 (8th Cir. 2007),** Plaintiff, employed as a nurse, had the disability of chemical dependency. Plaintiff was terminated from her previous employment for allegedly stealing narcotics. Plaintiff voluntarily reported herself to Minnesota's Health Professional Services Program (HPSP) seeking help for chemical dependency. Plaintiff received an HPSP plan requiring her to be supervised when accessing controlled substances. The court found the employer did not discriminate based on disability when it terminated Plaintiff because it could not accommodate her disability. The court held that the illegal conduct of stealing prescription medications is not protected by the ADA.

In **Daft v. Sierra Pacific Power Co., 251 Fed. App'x 480 (9th Cir. 2007),** Plaintiff, an electrical worker, claimed he was terminated in violation of the ADA because he had alcoholism. Plaintiff was convicted of several instances of driving under the

influence. One of the conditions of Plaintiff's continued employment was that he submit to random alcohol tests. Plaintiff failed one of the random tests as well as a confirmation test conducted fifteen minutes later. The Ninth Circuit affirmed summary judgment in favor of the company, finding that the alcohol test failure was a legitimate, non-discriminatory reason for termination and did not violate the ADA.

In **Lopez v. Potter, EEOC Appeal No. 01996955 (Jan. 16, 2002),** Plaintiff, an individual with alcoholism, was terminated from his employment in violation of the Rehabilitation Act. Plaintiff stated that that he would drink alcohol to cope with his personal problems and to help him fall asleep at night. As a result, he would wake up late and consequently arrive at work late. The court found the employer did not have to excuse Plaintiff's persistent tardiness due to alcoholism, and thus the employer's use of progressive discipline and termination were lawful.

In **Martin v. Barnesville Exempted Village School District, 209 F.3d 931 (6th Cir. 2000),** Plaintiff, a custodial employee, applied for a transfer to a position driving school buses. Plaintiff was the most senior worker to bid for the position, however the school district denied his application, citing a prior incident where he was caught drinking alcohol on the job. Plaintiff alleged that the school district engaged in disability discrimination because he was regarded as having an alcohol addiction. The Sixth Circuit affirmed summary judgment in favor of the employer, holding "[t]he ADA does not protect plaintiff from his own bad judgment in drinking on the job." [87]

In **Renaud v. Wyoming Department of Family Services, 203 F.3d 723 (10th Cir. 2000),** Plaintiff, superintendent of the Wyoming Boys' School, alleged he was improperly terminated due to his alcoholism. One of Plaintiff's co-workers reported that Plaintiff came to work intoxicated on one occasion. After the allegation was reported, Plaintiff requested sick leave and checked himself into a voluntary alcohol treatment program. The Tenth Circuit affirmed the district court's jury instructions in favor of the employer. The court noted that alcoholism may merit protection under the ADA, but alcohol-related misconduct is not protected.

IX. Off-Duty Conduct

Courts have held that direct threat may extend to cases where the threat stems from off-duty conduct. However, it must be noted that thus far, the cases are almost entirely limited to unsafe, off-duty conduct by police officers with alcoholism or drug use.

In **Budde v. Kane County Forest Preserve, 603 F. Supp. 2d 1136 (N.D. Ill. 2009),** Plaintiff, a police chief with alcoholism, was terminated after he was involved in an off-duty car accident and was charged with driving under the influence. Plaintiff was not yet convicted of the DUI when he was terminated, but his license had already been revoked. The court granted a motion for summary judgment in favor of Defendant, finding that the employer did not violate the ADA because Plaintiff violated a standard operating procedure that "all employees and members of the Department . . . may be made the subject of disciplinary action for violating any Federal, State, County, or Municipal law." [88]

In **Nader v. ABC Television, Inc., 150 F. App'x 54 (2d Cir. 2005),** Plaintiff, an actor at ABC television, was terminated after a well-publicized arrest for selling cocaine to an undercover police officer. The employer fired Plaintiff due to his breach of the morals clause in his contract. The court granted summary judgment in favor of ABC, holding that Plaintiff failed to show that the legitimate non-discriminatory explanation for his termination was pretextual.

In **Pernice v. City of Chicago, 237 F.3d 783 (7th Cir. 2001),** Plaintiff, a city employee, alleged he was terminated in violation of the ADA because of his drug addiction. While off-duty, Plaintiff was arrested and charged with possession of cocaine. Plaintiff was never convicted on these charges, but he sought treatment for his "self-acknowledged drug addiction.[89] " The city terminated Plaintiff for violations of personnel rules stemming from his arrest. The Seventh Circuit found in favor of the city, holding that terminating Plaintiff for possessing illegal drugs did not violate the ADA. The court noted that this was different from terminating Plaintiff for drug addiction because the addiction did not compel the illegal conduct.

In **Maull v. Division of State Police, 141 F. Supp. 2d 463 (D. Del. 2001),** Plaintiff, a state trooper, was involved in two off-duty automobile accidents while intoxicated. In a separate incident, Plaintiff was reprimanded for reporting to work with a blood alcohol content of .07 percent. Plaintiff had a disciplinary record for several other on-duty incidents, such as inappropriately drawing his revolver, however it is not clear whether such incidents involved alcohol consumption. The court held that because "ensuring public health and safety is the sine quo non of [a police officer's] job," a state trooper's alcoholism—including drinking while off-duty—so affected his performance that he "pose[d] a considerable threat to the health and safety of the public and his fellow troopers," such that he was not qualified for his employment.[90]

In **Nielsen v. Moroni Feed Co., 162 F.3d 604 (10th Cir. 1998),** Plaintiff, President of the Moroni Feed Company, was terminated from his employment after repeated incidents in which he was found, uninvited, in private homes in the local community. Plaintiff alleged that the company erroneously believed he was engaging in the illegal use of prescription painkillers, and that the company discriminated against him based on that belief in violation of the ADA. Unlike other cases involving off-duty conduct, Plaintiff in this case did not argue that the conduct stemmed from his addiction. Rather, plaintiff underwent an evaluation during his employment determining that he was not addicted to drugs and thus his conduct of going into homes uninvited could not be explained by drug addiction. Only then did the company terminate Plaintiff. The Tenth Circuit granted summary judgment in favor of the employer. The court held that the company properly determined it could no longer employ a president who inappropriately entered homes and Plaintiff failed to produce any evidence that the company fired him on the basis of an erroneously perceived disability based on illegal drug use or on the basis of conduct believed to be caused by such use.

In **Maddox v. University of Tennessee, 62 F.3d 843 (6th Cir. 1995),** Plaintiff, an assistant football coach at the university, was discharged after his an arrest for driving under the influence of alcohol. During the arrest, Plaintiff was combative and refused to take a breathalyzer test. Plaintiff claimed he was unlawfully terminated for his alcohol addiction because the arrest was the result of his alcoholism. The Sixth Circuit affirmed summary judgment in favor of the employer, finding that the misconduct could be separated from the alcoholism and that Plaintiff was properly terminated for his misconduct.

X. Direct Threat

An employer may be justified in conducting medical inquiries or examinations, terminating, or refusing to hire an individual with a disability if the disability poses a "direct threat" to the safety of the individual or others that cannot be eliminated by reasonable accommodation.[91] A direct threat analysis may consider: (1) the duration of the risk, (2) the nature and severity of the potential harm, (3) the likelihood that the potential harm will occur, and (4) the imminence of the potential harm.[92]

Finding for the Employee

In **Rosado v. American Airlines, 743 F. Supp. 2d 40 (D.P.R. 2010),** Plaintiff, a cargo clerk employed by Defendant, was HIV positive, addicted to cocaine, and had bipolar disorder and depression. Plaintiff had a positive safety record during his twenty-three years as a cargo clerk. Defendant argued that Plaintiff "posed a direct safety threat to himself and others due to his chronic drug addiction." [93] Citing **Bragdon v. Abbott, 524 U.S. 624, 649 (1998),** the court emphasized that direct threat requires not just a risk but a "significant" risk of substantial harm. Although it was undisputed that Plaintiff had a longstanding drug problem, the court held that there was a triable issue of fact as to whether Plaintiff was a "direct threat" because Defendant offered no evidence showing how Plaintiff's impairments and substance abuse made him unable to perform his essential job functions.

Finding for the Employer

In **Bekker v. Humana Health Plan, Inc., 229 F.3d 662 (7th Cir. 2000),** Plaintiff, employed as a physician, was regarded as an individual with alcoholism. The employer terminated Plaintiff after repeated reports from patients and co-workers that she smelled of alcohol while at work. There was no evidence to indicate that Plaintiff failed an alcohol

test or made any poor medical decision. The district court stated that direct threat was determined by Plaintiff's "present ability to perform safely the essential functions of her job and the likelihood she would cause future harm" [94] First, the district court found that employee and patient reports of her smelling of alcohol constituted sufficiently objective evidence. Second, the district court rejected Plaintiff's argument that she would not have been a direct threat if the employer had adopted her suggestion of daily testing as a reasonable accommodation to her perceived disability. The district court reasoned that the cost of dialing testing outweighed the benefit, in part because it would not determine whether Plaintiff had used alcohol after she was tested. The Seventh Circuit affirmed the district court's direct threat analysis.

The following case involves a plaintiff with mental illness; however the direct threat analysis involves illegal drug use and would be applicable to a plaintiff with drug or alcohol addiction. In **McKenzie v. Benton, 388 F.3d 1342 (10th Cir. 2004),** the court noted that being a sheriff was an inherently dangerous job. Nevertheless, the Plaintiff officer's "reckless and dangerous" off-duty conduct, including firing her service revolver into her father's grave, inflicting wounds on herself, and overdosing on drugs, justified placing the burden on the Plaintiff to prove she did not pose a direct threat.[95]

Conclusion

Drug and alcohol addiction pose unique challenges for both employees and employers. Employees who have engaged in illegal drug use due to addiction are subject to special restrictions in order to qualify for protection under the ADA. Employers face a maze of regulations regarding disability-related inquiries and drug testing both before and during employment. District courts are in disagreement regarding reasonable accommodations for individuals with addiction. However, the law surrounding workplace conduct rules is relatively clearer. Employees with alcoholism or who have engaged in illegal drug use may be afforded protection by the ADA, and employers should be aware of their responsibilities to employees with addiction.

Notes:

1. This legal brief was written by Barry C. Taylor, Legal Advocacy Director at Equip for Equality, Alan M. Goldstein, Senior Attorney with Equip for Equality, and Lauren Lowe, Equip for Equality Staff Attorney. Equip for Equality is the Illinois Protection and Advocacy Agency (P&A) for people with disabilities. Equip for Equality is providing this information under a subcontract with the DBTAC: Great Lakes ADA Center, University of Illinois at Chicago, U.S. Department of Education, National Institute on Disability Rehabilitation and Research Award No. H133A060097.
2. 42 U.S.C. § 12102(2). Note the ADA Amendments Act did not specifically address how drug and alcohol addiction is treated under the ADA, however rules requiring a liberal interpretation of "substantial limitation" would apply.
3. *Tyson v. Or. Anesthesiology Group*, No. 03-1192-HA, 2008 WL 2371420 (D. Or. June 6, 2008).
4. 42 U.S.C. § 12114(a).
5. 42 U.S.C. § 12114(b).
6. 42 U.S.C. § 12102(1)(b).
7. *Brock*, 2000 WL 288395 at *5.
8. *Kula*, 539 F. Supp. 2d at 1268.
9. *Mandujano*, 2011 WL 2550621 at *5 (citing *Kellogg v. Energy Safety Servs. Inc.*, 544 F.3d 1121, 1126 (10th Cir. 2008); *Chenoweth v. Hillsborough County*, 250 F.3d 1328, 1329 (11th Cir. 2001)).
10. *Rhoads*, 103 Fed. App'x at 893 (quoting *Buckley v. Consol. Edison Co.*, 127 F.3d 270, 274 (2d Cir. 1997) (internal quotation marks omitted).
11. 29 C.F.R. Pt. 1630, app. § 1630.3(a)–(c).
12. *New Directions*, 490 F.3d at 309 (quoting *Brown v. Lucky Stores, Inc.*, 246 F.3d 1182, 1188 (9th Cir. 2001)) (internal quotation marks omitted).
13. Rehabilitation Act cases are analyzed in the same manner as cases arising under the ADA.
14. *Teahan v. Metro-North Commuter R.R.*, No. 88 CIV. 5376 (BN), 1994 WL 719720 (S.D.N.Y. Dec. 27, 1994).
15. *Zenor*, 176 F.3d at 854 (rejecting the Second Circuit's approach in *Teahan v. Metro-North Commuter R.R.*, 951 F.2d 511 (2d Cir. 1991) evaluating "current" on the date of termination).
16. *Salley*, 160 F.3d at 980.
17. *Shafer*, 107 F.3d at 278, abrogated on other grounds, *Baird ex rel. Baird v. Rose*, 192 F.3d 462 (4th Cir.1999).
18. 42 U.S.C. § 12114(a)(1).
19. *Brown*, 246 F.3d at 1188 (internal quotation marks omitted).
20. *Mauerhan*, 2011 WL 1467571 at *1.
21. *Id.* at *4.
22. *McDaniel*, 877 F. Supp at 327.
23. 42 U.S.C. § 12114(b)(3).
24. *Muhammed*, 186 Fed. App'x at 279.
25. Note employer may have inappropriately asked Doe about the medications he was taking.
26. *Doe v. Salvation Army in U.S.*, 531 F.3d 355, 357 (6th Cir. 2008) ("We review claims brought under the Rehabilitation Act as we would claims brought under the Americans with Disabilities Act of 1990.").
27. *See, e.g. Brown*, 246 F.3d at 1187.
28. *Mararri*, 130 F.3d at 1185.
29. 42 U.S.C. § 12114(c); 29 C.F.R. § 1630.16(b)(4).
30. 42 U.S.C. § 12114(a); 42 U.S.C. § 12102(1)(b).
31. 29 C.F.R. Pt. 1630, app. § 1630.3(a)–(c).
32. Press Release, EEOC, EEOC Sues Tideland EMC for Disability Discrimination (June 23, 2011), http://www.eeoc.gov/eeoc/newsroom/release/6-23-11.cfm.
33. *Equal Employment Opportunity Commission v. Tideland Electric Membership Corp.*, No. 4:11-CV-00108-BO (E.D.N.C. filed June 23, 2011). *See also* Press Release, EEOC, http://www.eeoc.gov/eeoc/newsroom/release/6-23-11.cfm.
34. Press Release, EEOC, http://www.eeoc.gov/eeoc/newsroom/release/6-23-11.cfm.
35. *Id.*
36. *Dvorak*, 319 Fed. App'x at 540 (quoting *Thompson v. Holy Family Hospital*, 121 F.3d 537, 541 (9th Cir. 1997).
37. *Id.*
38. *Id.*
39. 42 U.S.C. § 12102(3) (Under the ADA Amendments Act of 2008, a plaintiff no longer has to show that an employer has regarded the employee as being substantially limited in a major life activity).
40. EEOC, Enforcement Guidance:

Preemployment Disability-Related Questions and Medical Examinations, No. 915.002 (1995) [hereinafter EEOC Preemployment Guidance], *available at* http://www.eeoc.gov/policy/docs/preemp.html (last updated July 6, 2000). *See also* U.S. Dep't of Justice, Questions and Answers: The Americans with Disabilities Act and Hiring Police Officers, (1997) *available at* http://www.ada.gov/copsq7a.htm (last updated April 4, 2006).

41. EEOC Preemployment Guidance, *available at* http://www.eeoc.gov/policy/docs/preemp.html.
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. EEOC, Rehabilitation Act and Title VII: Applicant Screening using Disability-related Inquiries, Criminal History Inquiries, and Financial History Inquiries in SF 85P and SF 85P-S, (2011) *available at* http://www.eeoc.gov/eeoc/foia/letters/2011/rehabact_titlevii_85p.html [hereinafter EEOC Rehab Act and Title VII] (last updated May 17, 2011).
47. *Id.*
48. EEOC Preemployment Guidance, *available at* http://www.eeoc.gov/policy/docs/preemp.html.
49. *Id.*
50. EEOC Rehab Act and Title VII *available at* http://www.eeoc.gov/eeoc/foia/letters/2011/rehabact_titlevii_85p.html.
51. EEOC Preemployment Guidance, *available at* http://www.eeoc.gov/policy/docs/preemp.html.
52. 42 U.S.C. § 12112(b)(6).
53. 42 U.S.C. § 12112(d).
54. 42 U.S.C. § 12112(d)(2).
55. 42 U.S.C. § 12112(d)(3); 29 C.F.R. § 1630.14 (b).
56. 42 U.S.C. § 12112(d)(3); 29 C.F.R. § 1630.14 (b).
57. *Connolly v. First Personal Bank*, 623 F. Supp. 2d 928, 930 (N.D. Ill. 2008).
58. EEOC Preemployment Guidance, *available at* http://www.eeoc.gov/policy/docs/preemp.html.
59. EEOC, Informal Guidance letter from Christopher J. Kuczynski, Assistant Legal Counsel (Sept. 9, 1999) [hereinafter EEOC Informal Guidance], *available at* http://www.governmentattic.org/2docs/EEOC-Guidance-Letters_1997-1999.pdf.
60. *Id.*
61. *Connolly*, 623 F. Supp. 2d at 931.
62. 42 U.S.C. § 12112(b)(6).
63. Note the Sixth Circuit's holding is a minority view. The majority of circuits allow employees without disabilities to pursue a claim under Title I.
64. 42 U.S.C. § 12112(d)(3)(b).
65. 29 C.F.R. § 1630.14.
66. 42 U.S.C. § 12112(d)(3)(b); 29 C.F.R. § 1630.14.
67. EEOC Preemployment Guidance, *available at* http://www.eeoc.gov/policy/docs/preemp.html.
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. 29 C.F.R. Pt. 1630, app.
73. *Nanos*, 609 F. Supp. 2d at 265.
74. *Vandenbroek*, 2009 WL 650392 at *5 (citing *Den Hartog v. Wasatch Acad.*, 129 F.3d 1076, 1086 (10th Cir. 1997)).
75. EEOC, The Americans with Disabilities Act: Applying Performance and Conduct Standards to Employees with Disabilities, at Question 25, *available at* http://www.eeoc.gov/facts/performanceconduct.html#fn86 [hereinafter EEOC Performance & Conduct Guidance] (last updated Jan. 20, 2011).
76. It is interesting to compare the description in the facts by Justice Thomas with the facts described in the first Appellate Court decision, *Hernandez v. Hughes Missile Systems Co.*, 292 F.3d 1038 (9th Cir. 2002). The evidence discussed by the Appellate Court showed that the employer did have information regarding the reason Plaintiff left his employment the first time. However, the Supreme Court accepted the employer's position that it did not have such information, despite the evidence to the contrary. This is especially important as *Raytheon* has been cited for the proposition that an employer must know of a disability to be liable for discrimination. *See, e.g.*, *Woodman v. WWOR-TV, Inc.*, 411 F.3d 69 (2nd Cir. 2002).
77. EEOC Performance & Conduct Guidance, at Question 9, *available at* http://www.eeoc.gov/facts/performance-conduct.html#fn86.
78. EEOC Compliance Manual § 902.2(c)(4) nn.11, 2009 WL 4782107, *available at* http://www.eeoc.gov.
79. EEOC Performance & Conduct Guidance, at Question 26, *available at* http://www.eeoc.gov/facts/performance-conduct.html#fn86.

80. *Id.*
81. *Id.*
82. *Id.* at Question 10.
83. *Id.*
84. *See, e.g.*, *Nielsen v. Moroni Feed Co.*, 162 F.3d 604, 609 (10th Cir. 1998).
85. *Gambini v. Total Renal Care, Inc.*, 486 F.3d 1087 (9th Cir. 2007) (finding that the district court abused its discretion when it declined to give the instruction that "conduct resulting from a disability is part of the disability and not a separate basis for termination.").
86. EEOC Informal Guidance, *available at* http://www.governmentattic.org/2docs/EEOC-GuidanceLetters_1997-1999.pdf.
87. *Martin*, 209 F.3d at 935.
88. *Budde*, 603 F. Supp. 2d at 1141 (internal quotation marks omitted).
89. *Pernice*, 237 F.3d at 784.
90. *Maull*, 141 F. Supp. 2d at 474–75.
91. *See* 42 U.S.C. §§ 12111, 12113.
92. *Bekker v. Humana Health Plan, Inc.*, 229 F.3d 662, 668 (7th Cir. 2000).
93. *Rosado*, 743 F. Supp. 2d at 50.
94. *Bekker*, 229 F.3d at 668 (emphasis in original).
95. *McKenzie*, 388 F.3d at 1355–56.