Drugs, Alcohol and the ADA

By Equip for Equality[1]

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). 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 drug and alcohol use is treated under the ADA, discussing related EEOC regulations, and court interpretations. Part I will discuss the definition of disability and its application to individuals with an addiction to alcohol and illegal drugs, including the ADA's exceptions and limitations for individuals who are "currently engaging" in illegal drugs and rehabilitation exceptions. Part II will discuss disability-related inquiries as well as drug and alcohol testing, and the related confidentiality requirements for employers. Part III will examine reasonable accommodations that an employee with addiction may be entitled to due to their addiction. Parts IV will discuss disparate impact versus disparate treatment theories, while Part V will focus on conduct rules, both on and outside of the workplace. Finally, Part VI will address the "direct threat" defense that may justify refusal to hire, medical inquiries and examinations, or termination.

I. Definition of Disability

In certain instances, an individual with an addiction to alcohol, illegal drugs or the unlawful use of legal drugs, can qualify as having a disability under the ADA.[2] Like other disabilities, to bring a claim under the ADA, a plaintiff must show that she has an ADA-qualifying disability by showing: (1) a physical or mental impairment that substantially limits one or more of the major life activities ("actual disability"); (2) a record of such an impairment ("record of"); or (3) been regarded as having such impairment ("regarded as").[3]

A. Actual Disability / Record of: Substantially Limits

For individuals asserting that their addiction causes (or previously caused) an actual disability or a record of a disability, one potential hurdle is demonstrating a substantial limitation in a major life activity. This is a concept that applies to everyone seeking ADA

protection, but that often comes up in cases based on an individual's addiction to drugs or alcohol.

Like other disabilities, it is important for plaintiffs seeking ADA coverage to remember that a diagnosis alone is generally insufficient to establish a disability covered by the ADA. For instance, in ***Chamberlain v. Securian Financial Group, Inc*., 180 F. Supp. 3d 381 (W.D.N.C. 2016),** the court dismissed the plaintiff's ADA claim because he testified and repeatedly stated that he had no limitations as a result of his alcoholism.[4] Without any limitations to any major life activities, the court held the plaintiff failed to establish that he had a "record of" an impairment despite his history of alcoholism.

Similarly, in ***Mandujano v. Geithner*, 2011 WL 2550621 (N.D. Cal. June 27, 2011)**, the plaintiff, a U.S. Mint Police Officer, was fired for failing to maintain a driver's license and for sustaining a conviction for driving under the influence of alcohol.[5] 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 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. ***See also Ames v. Home Depot USA Inc*., 629 F.3d 665 (7th Cir. 2011)** (affirming summary judgment and finding that plaintiff could not show that her alcoholism substantially limited a major life activity because she testified that it in no way impacted her work).

However, courts find plaintiffs to have ADA-qualifying disabilities when they are able to explain the impact of their addiction on major life activities. For instance, in ***Quinones v. Univ. of Puerto Rico,* 2015 WL 631327 (D.P.R. 2015)**, the plaintiff was employed as a resident at the University of Puerto Rico School of Medicine and was fired from the program after her addiction to various prescription drugs—Soma, Ambien, and Adderall—affected her ability to comply with the program.[6] The court recognized that the illegal use of drugs includes the unlawful use of legal prescription drugs. The plaintiff alleged that she suffered from visual disturbances, speech problems, and dizziness that affected her work, concentration, school attendance, learning, and social interactions. The court found that the plaintiff alleged sufficient facts to show that her illegal drug use substantially limited one or more major life activities.

Similarly, in ***Fowler v. Westminister College of Salt Lake*, 2012 WL 4069654 (D. Utah Sept. 17, 2012)**, the plaintiff, who was employed as a supervisor of a college mailroom for twenty-one years, was terminated after a drug test showed "an excess amount" of drugs in his system.[7] The plaintiff claimed that he was an individual with a disability under the ADA because his addiction to opiate drugs substantially limited him in the major life activities of sleeping and thinking. The court agreed that the plaintiff's addiction to opiates affected his ability to think and sleep, each of which has been recognized as a major life activity.

B. Regarded As

Congress included the "regarded as" prong in the ADA's definition of "disability" to protect people from discriminatory actions based on "myths, fears, and stereotypes" about a disability that may occur even when a person does not have a substantially limiting impairment.[8] The ADA's regarded as prong protects individuals who are erroneously regarded as engaging in illegal drug use or alcohol use, but who are not in fact engaging in such use.[9] It also protects individuals who are perceived to have an impairment, even if it is not substantially limiting.

The ADA Amendments Act (ADAAA) redefined the "regarded as" prong of the definition of disability by significantly broadening who is eligible for coverage—specifically, it removed the requirement that an individual demonstrate that he was "regarded as" having an impairment that substantially limits a major life activity. Now, under the ADAAA, an individual only needs to show that he is "regarded as" having an impairment, regardless of whether the impairment is perceived to limit a major life activity or perceived to be substantially limiting.[10]

This principle was recently discussed in a case brought by an employee with alcoholism. In ***Alexander v. Washington Metropolitan Area Transit Authority*, 826 F.3d 544 (D.C. Cir. 2016),** the D.C. Circuit Court stated that the "'regarded-as-prong' has become the primary avenue for bringing" most claims of discrimination.[11] In ***Alexander***, an employee with alcoholism had used alcohol at work, was suspended and was later allowed to return to work subject to periodic alcohol tests. After failing a test, he was fired but told that he could reapply after one year if he completed an intensive alcohol dependency treatment program. The employee did that but was not rehired. He filed a lawsuit and the issue before the court was whether he was a person with a disability. The district concluded that he was not because the plaintiff's alcoholism did not substantially limit one or more major life activities. The D.C. Circuit Court reversed the decision, and made a number of strong statements about the breadth and scope of the "regarded as" clause. It reasoned

that here, there was no dispute that alcoholism is an impairment under the ADAAA and that all the plaintiff needed to do was show that the employer took a prohibited action against an employee because of a perceived impairment, which he did.

In ***Warshaw v. Concentra Health Services*, 719 F. Supp. 2d 484 (E.D. Pa. 2010)**, the plaintiff, an individual with attention deficit hyperactivity disorder (ADHD), was subjected to a pre-employment drug test.[12] The test resulted in a false positive for methamphetamine, due to the plaintiff's legal use of the prescription drug Desoxyn. The 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 the employer regarded the 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.

Note, however, that not all courts are applying the ADA Amendment Act's directive. In ***Ferrari v. Ford Motor Company*, 826 F.3d 885 (6th Circ. 2016)**, the Sixth Circuit concluded that the employee could not bring a claim that she was regarded as having a disability because she did not specify what major life activity her employer believed was limited by her opioid addiction.[13] However, under the ADA Amendments Act, the relevant issue is whether an employer perceived an individual to have an impairment—not a substantially limiting impairment. This case appears to be an outlier as other courts have interpreted the regarded as prong consistently with the Congressional directive in the ADA Amendments Act.

C. Currently Engaging

Unlike other disabilities, 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."[14] The unlawful use of prescription drugs is also subject to the "currently engaging" test. The EEOC has stated that "(i)llegal use of drugs refers both to the use of unlawful drugs, such as cocaine, and to the unlawful use of prescription drugs."[15]

Alcohol addition, however, falls outside the scope of this exclusion. The statute treats drug addiction and alcoholism differently, and an individual with alcoholism is not automatically excluded from ADA protection because of current use of alcohol.

Courts have considered how close in proximity an individual's illegal drug use must be to an adverse action to be considered to be "currently engaging" in the illegal use of drugs.

Clearly if an individual fails a drug test, they fall within the exception. For instance, in ***Daniels v. City of Tampa*, 2010 WL 1837796 (M.D. Fla. Apr. 12, 2010)**, the court found

that the plaintiff was "currently engaged" in the illegal use of drugs when the plaintiff was involved in a vehicle accident and the required post-accident drug/alcohol test was positive for cocaine.

If an individual passes a drug test, and there is no other true indication that they are otherwise currently engaged in drugs, the plaintiff is not "currently engaged." For example, in ***McFarland v. Special-Lite, Inc.*, 2010 WL 3259769 (W.D. Mich. Aug. 17, 2010)**, the defendant, a manufacturing company and the plaintiff's former employer, claimed that the plaintiff admitted to drug use by telling his supervisor that a January 2009 drug test "might" be positive. However, the 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 the defendant's motion for summary judgment on the issue of whether the plaintiff was "currently engaging" in drug use at the time of his termination.

The more complicated question is how long an employee must be drug or alcohol-free not to be considered currently engaging. Courts have declined to adopt a bright line rule. Instead, whether an individual is "currently engaging" is decided on a case-by-case basis.

This was explained in ***Mauerhan v. Wagner Corp.*, 649 F.3d 1180 (10th Cir. 2011),** a Tenth Circuit case highlighting the legislative history of this provision of the ADA.[16] The court explained that it would be inappropriate to establish a firm cut off for protection under the ADA in relation to someone who may fall under the currently engaging exception. The Tenth Circuit further provided the following excerpt from Congressional legislative history:

> The provision excluding an individual who engages in the illegal use of drugs from protection . . . is not intended to be limited to persons who use 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 a person whose illegal use of drugs occurred recently enough to justify a reasonable belief that a person's drug use is current.[17]

Courts have held that a plaintiff was a current user even though it was clear that the individual had been drug free for a little over three months. In ***Quinones v. Univ. of Puerto Rico,* 2015 WL 631327 (D.P.R. 2015)**, the court found that the plaintiff was "

currently engaging" in the use of illegal drugs when she was terminated from her medical residency program.[18] The court stated that the fact that the plaintiff was drug-free at the time of termination and for a little over three months afterwards was not a sufficiently long enough period of time to be classified as a recovering drug user. The court also reiterated

the well-established principle that an employee-plaintiff cannot be brought under the safe harbor's protection by merely entering into a rehabilitation program after termination.

D. Acting on Basis of Such Use

It is important to remember that the ADA's exclusion of individuals currently engaged in the illegal use of drugs is only relevant if the employer's action is based on such use. Questions of pretext can be discussed in these cases. For instance, in ***EEOC v. Pines of Clarkston*, 2015 WL 1951945 (E.D. Mich. Apr. 29, 2015),** the court denied summary judgment, concluding a reasonable jury could find that the true reason for the employee's termination was her epilepsy—not the fact that she used medical marijuana to treat her epilepsy.[19] As evidence, the court pointed to the fact that the individual was questioned extensively about her epilepsy during her interview.

E. Rehabilitation Exception

Under the ADA, a person who is addicted to illegal drugs can still 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.[20]

This provision requires employees to actually complete the rehabilitative program, however. In ***Shirley v. Precision Castpats Corp.*, 726 F.3d 675 (5th Circ. 2013)**, the plaintiff was employed for twelve years as an operator at an extrusion press before he was terminated for failing twice to complete a drug-rehabilitation program.[21] The court found that the plaintiff's refusal to complete an inpatient treatment program, unwillingness to stop taking an opiate pain reliever, and his continued use of Vicodin following detox, supported its finding that the plaintiff was a continued drug user and that his drug use was still an issue at the time of termination. The court additionally stated that "self-reporting" does not bring a plaintiff under the safe harbor's protection even if a plaintiff entered a rehabilitation program before the adverse employment action.[22] The court added that a

significant period of recovery is required for an employee to qualify for the safe harbor provision.[23]

In addition to participating in a rehabilitative program, the employee must also refrain from using illegal drugs. In an older case, ***Brown v. Lucky Stores, Inc.*, 246 F.3d 1182 (9th Cir. 2001)**, the plaintiff, a grocery store employee, was terminated based on absences following her arrest on drunk driving and drug charges.[24] 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.[25]

Because the 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.

F. Illegal Drug Use and Medical Marijuana

The meaning of "illegal" drug use has been a topic of recent litigation as more states pass their own medical marijuana laws. Many employers require drug testing for their employees and applicants, and have commonly maintained zero-tolerance policies with regard to employee use of drugs, including marijuana. The resulting legal question is whether an employee, who uses marijuana for medicinal and disability purposes, is excluded from the ADA's protections as a result of such use.

Generally speaking, employers have been able to defend against wrongful termination claims brought by employees who were licensed medical marijuana users under their respective state laws by explaining that the ADA is a federal statute and defines illegal drug use based on the federal Controlled Substance Act ("CSA") and/or arguing that the ADA and CSA preempt such state laws. Because the CSA classifies marijuana as an illegal controlled substance, and makes no exception for its medicinal use,[26] courts have found such individuals are excluded from the ADA's protections because they are current users of illegal drugs.[27]

However, a number of courts in states with laws authorizing medical marijuana use, and which provide explicit employment protections in that context, have started to rule in favor of employees who used medical marijuana. Such decisions, however, are under state law, not under the ADA. In ***Barbuto v. Advantage Sales and Marketing, LLC***, **477 Mass. 456 (Mass. 2017)**, the defendants terminated the plaintiff after the plaintiff's drug examination returned positive for cannabis, even though the plaintiff informed the defendant of her medical marijuana prescription.[28] The defendants contended that because the prescribed medication is marijuana, which is illegal under federal law, an accommodation that would allow the employee to continue using marijuana would be per se unreasonable.[29] However, the court looked to Massachusetts state law to determine the unreasonableness and subsequently found that the use and possession of medically prescribed marijuana by a qualifying patient is as lawful as the use and possession of any other prescribed medication.[30] Therefore, the court allowed the case to proceed under state discrimination law without even discussing the ADA. The court also stated that nearly ninety percent of states, including Puerto Rico and the District of Columbia, allow the limited possession of marijuana for medical treatment.[31] By contrast, federal law still holds marijuana as a Schedule 1 controlled substance under the CSA, rendering possession and distribution illegal.[32] This leaves a qualifying patient in states that allow for medical marijuana use in an uncomfortable position – either be subject to federal criminal prosecution for possession or employ the protection of state law.

Similarly, in ***Callaghan v. Darlington Fabrics***, **2017 WL 2321181 (R.I.Super. May 23, 2017),** the Rhode Island Superior Court found that an employer had violated the anti-discrimination provisions of the state's medical marijuana law by denying employment to an applicant who held a state-issued medical marijuana card.[33] In its ruling, the court noted that plaintiff's possession of the card should have put the employer on notice of the plaintiff's status as a person with a disability (in this case, a chronic and debilitating medical condition), which the employer should have recognized was the basis on which plaintiff had qualified for the card to begin with.[34] This in turn placed an obligation upon the employer to engage in the interactive process with plaintiff and to provide reasonable accommodations, and its failure to do either constituted disability discrimination.[35] Furthermore, the court found that the CSA did not preempt the anti-discrimination provisions of the state law, as the purposes of the state and federal laws were different.[36]

Further, at least one court has specifically found that federal law does not preempt the applicable state law protections. In ***Noffsinger v. SSC Niantic Operating Co. LLC*, 2017 WL 3401260 (D. Conn. Aug. 8, 2017),** the U.S. District Court for the District of

Connecticut ruled in favor of a medical marijuana user whose employment was terminated after she tested positive for marijuana in the course of the job application process.[37] The court found that the ADA did not preempt the state medical marijuana law's anti-discrimination employment provision, and that the state statute did not conflict with the relevant federal laws because the latter were not intended to preempt state anti-discrimination laws. This represents the first federal ruling to recognize that the CSA does not preempt a state law's anti-discrimination provisions.

II. Disability-Related Inquiries, Drug and Alcohol Testing, and Confidentiality

Although the ADA restricts employers from asking certain disability-related inquiries and conducting medical tests, generally speaking, employers may ask about current illegal use of drugs and/or require testing for illegal drugs. This complies with the ADA because drug tests are not considered medical exams.[38] However, employers cannot use drug tests as "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."[39]

In ***Connolly v. First Personal Bank*, 623 F. Supp. 2d 928, 931 (N.D. Ill. 2008)**, the plaintiff was offered the position of Senior Vice President, contingent on her satisfactory completion of a drug test.[40] Prior to the drug test, the 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 the 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 the 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.[41]

A similar result was reached in a case involving company-wide drug testing of sitting employees. In ***Bates v. Dura Automotive Systems, Inc*., 767 F.3d 566 (6th Cir. 2014),** employees were required to submit to drug testing because of concerns about illegal drug use in the workplace.[42] As a result, several employees were removed from work because they failed initial drug screening tests due to their legal use of prescription drugs. Although these employees were not individuals with disabilities under the ADA, the Sixth Circuit held that was not necessary for an individual to claim that a medical inquiry violated the ADA. The court based this determination on Congress' efforts to "curtail all questioning that would serve to identify and exclude persons with disabilities from consideration for employment." (internal quotation marks omitted).[43] The court determined that the employer's policy went further than what the ADA's drug-testing exception permitted but did not clearly fit into the definition and examples established by the EEOC. As such, the court remanded the case for trial.

Employers are permitted to inquire about prior illegal drug use provided that the particular question is not likely to elicit information about a disability. In March 2011, the EEOC issued an informal discussion letter that clarifies the extent to which employers may ask about prior illegal drug use.[44] 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.[45]

Employers 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.[46] The exception to this is if an employer is administering a test for illegal drugs, to which an employee tests positive.[47] Then the employer may validate a positive result by asking the employee about lawful drug use or other explanations for the positive result.[48]

In ***Lewis v. Gov't of D.C.*, 282 F. Supp. 3d 169 (D.D.C. 2017)**, the court denied the employer's motion for summary judgment in a case where the plaintiff was required to disclose her alcohol and prescription-drug use.[49] In this case, the city announced that the plaintiff's office was moving to another facility. As a condition to retaining employment during the move, the city required all staff to submit to a number of background tests, including a drug test. The staff was also required to disclose all medications they were on, or risk being terminated. The plaintiff refused to comply with this requirement and alleged she was retaliated against repeatedly for doing so and eventually terminated. The plaintiff then brought suit against the city alleging, in part, that she was subject to an

improper medical inquiry under the ADA. In denying the employer's motion, the court noted that "[t]he business necessity standard is quite high, and is not to be confused with mere expediency" and that employer failed to establish beyond dispute that the medical inquires met this standard.

Employers may ask applicants about their drinking habits, unless the particular question is likely to elicit information about alcoholism.[50] For example, an employer is permitted to ask whether an applicant drinks alcohol or has been arrested for driving under the influence.[51] However, questions about 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.[52]

Unlike tests for illegal drugs, alcohol tests are considered medical examinations and are prohibited at the pre-employment stage.[53] Post-offer, an employer may require alcohol tests if the test is administered to all individuals in the same job category.[54] Once employment had begun, an employer may only administer an alcohol test if it is "job-related and consistent with business necessity."[55]

Any medical or disability-related information gathered through such tests must be kept confidential. Title I of the ADA requires employers to collect all information obtained regarding an applicant or employee's medical condition or history on separate forms and in separate medical files and to treat such information as confidential medical records.[56] This protection covers all applicants or employees, regardless of whether they are a qualified individual with a disability under the ADA.[57]

However, the ADA does carve out three exceptions from this general confidentiality mandate: (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 provision of the ADA shall be provided relevant information upon request.[58]

The unauthorized disclosure of one individual's alcohol-related disability was found to be reasonable in ***Foos v. Taghleef Industries, Inc.*, 132 F.Supp.3d 1034 (S.D. Ind. 2015)**.[59] The plaintiff in this case worked at a factory that used dangerous heavy machinery. After taking a stint of FMLA leave due to injuries that had been incurred during a bar fight, the plaintiff requested additional FMLA leave and in so doing provided a certificate from his

doctor indicating that he had alcoholic pancreatitis. The factory's health and wellness manager then disclosed this information to the plaintiff's supervisor, concerned that the plaintiff may be arriving to work impaired. The Court found that given the legitimate safety concern of an impaired employee around heavy machinery, this disclosure qualified as notifying a supervisor of a necessary work restriction that was permissible under the ADA. This reasoning is analytically imperfect—there is no indication that the plaintiff had any on-the-job restrictions due to alcoholic pancreatitis—but it is comprehensible when viewed through the lens of the plaintiff's supervisor needing to know the information for purposes of operational safety.

Similarly, in ***Giaccio v. City of New York*, 502 F.Supp.2d 380 (S.D.N.Y. 2007)**, the plaintiff was employed as a boilermaker by the Department of Transportation (DOT) and was subject to random drug tests during the course of his employment.[60] Twice the 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 the plaintiff's drug test were leaked to the press. The court held that the 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 the plaintiff's records.

However, the plaintiff was unable to establish damages as no adverse employment action occurred as a result of the confidentiality breach.

The established rule is that health information is only confidential under the ADA if it was provided to the employer in response to a medical inquiry or exam concerning the applicant or employee.[61] This means that information provided to employers either voluntarily or as the result of a non-medical inquiry is not confidential under the ADA and may be disclosed by the employer.

III. 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.[62] ***See also Corbett v. National Products Co.*, 1995 WL 133614 (E.D. Pa. March 27, 1995)** (holding plaintiff's request for leave to attend a 28-day in-patient alcohol treatment program was reasonable); ***Schmidt v. Safeway*, 864 F. Supp. 991 (D. Ore. 1994)** (holding that an employer must provide a leave of absence so the employee could obtain medical treatment for alcoholism although "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").

Another common accommodation request is a waiver or modification of a company's drug testing policy, usually due to medical marijuana use. In ***Ozee v. Henderson County*, 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 the plaintiff's medications could have caused a false positive.[63]

In a similar vein, the state court decisions referenced prior regarding medical marijuana suggest that an employer may need to consider modifying a drug-free workplace policy as a reasonable accommodation under state law—not under the ADA. ***See Barbuto v. Advantage Sales and Marketing, LLC*, 477 Mass. 456 (Mass. 2017)** (permitting case to proceed under state anti-discrimination law despite plaintiff's drug test showing that she uses medical marijuana); ***Callaghan v. Darlington Fabrics Corp*., 2017 WL 2321181 (R.I.Super. May 23, 2017)** (finding employer to violate state anti-discrimination law by failing to engage in an interactive process to discuss potential accommodations with individual who used medical marijuana for a chronic and debilitating medical condition).

With a majority of states now having adopted legislation authorizing the legal use of medical marijuana, this trend in the case law suggests that employers will need to examine their state law and possibly take greater care to engage in the interactive process with employees who are medical marijuana users, and must be prepared to accept this use at least in certain cases as a reasonable accommodation.

Finally, it is worth noting that several decisions in Connecticut have stated in *dicta* that the ADA does not require reasonable accommodations for people with alcoholism or drug addiction. For instance, 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."[64] However, such statements are inconsistent with the plain language of the ADA.

IV. 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.[65]

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.

Disparate impact under the ADA was recognized by the Supreme Court in ***Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003)**.[66] The plaintiff, a technician for the defendant-corporation, resigned in lieu of termination after he tested positive for cocaine use. More than two years later, the 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. The 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, the 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 the plaintiff. With regard to the disparate impact of the facially neutral policy, the 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.[67] 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.[68]

The difference between disparate treatment and disparate impact case can be seen in ***Lopreato v. Select Specialty Hosp. N. Ky*., 2016 WL 374086 (6th Cir. Jan. 29, 2016)**.[69] In this case, the defendant implemented a policy whereby it did not hire any nurses who had current or former license restrictions. The plaintiffs were nurses who had previously been caught stealing narcotic drugs and who had entered a recovery program. The plaintiffs had also agreed to have restrictions placed on their licenses, which had since been revoked. Consequently, these plaintiffs were not hired (or retained when a new company took over). They brought a claim under disparate treatment—not disparate impact. The Sixth Circuit upheld the court's entry of summary judgment to the hospital, finding that the defendant applied a neutral policy, which was a legitimate, non-discriminatory reason for its decision, and was not a pretext. The plaintiffs then argued that the policy disproportionally impacted people in recovery from drug addiction, but the

court found that argument irrelevant given that the plaintiffs had filed a claim about disparate treatment, not disparate impact.

V. Workplace Conduct Rules

Employers are allowed to restrict the use of alcohol and drugs in the workplace. The text of the ADA and the EEOC regulations have adopted identical language, stating that an employer:

- may prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;
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- may require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;
- 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.);
- 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.[70]

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.[71] 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."[72] 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.[73] Employers are permitted to take disciplinary action even if an employee's violation of a drug or alcohol policy stems from addiction.[74] Additionally, employers are permitted, but not required, to refer an employee to an Employee Assistance Program instead of or in conjunction with discipline.[75] 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.[76] On the other hand, 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."[77]

Courts have noted that, "unsatisfactory conduct caused by alcoholism and illegal drug use does not receive protection under the ADA or the Rehabilitation Act."[78] Uniquely, the Ninth Circuit has ruled that under the ADA, disability-related conduct can be disciplined but cannot result in termination.[79] The EEOC has issued informal guidance stating that if an employer prohibits alcohol in the workplace and an employee fails an alcohol test, "the employer may discipline the employee as it does all others that violate its substance use policies, regardless of whether the employee has alcoholism and is disabled under the ADA." [80]

In ***Jones v. City of Boston*, 752 F.3d 38 (1st Cir. 2014),** a group of officers brought a claim alleging that they were fired, after testing positive for cocaine use, based on a perception that they had a drug addiction.[81] The court rejected this argument, concluding that the officers failed to proffer evidence that they were fired due to a belief that they were addicted to drugs, rather than the belief that they were currently using illegal drugs.

Similarly, in ***Dovenmuehler v. St. Cloud Hospital*, 509 F.3d 435 (8th Cir. 2007)**, the plaintiff with a chemical dependency was employed as a nurse. The plaintiff was terminated from her employment for allegedly stealing narcotics. The plaintiff voluntarily reported herself to Minnesota's Health Professional Services Program (HPSP) seeking help for chemical dependency. The 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 the 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.

Conduct rules can also apply to off-duty conduct, and the overwhelming majority of cases about off-duty conduct relate to conduct of police officers. In ***Budde v. Kane County Forest Preserve*, 597 F.3d 860 (7th Cir. 2010),** the 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.[82] The 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 the defendant, finding that the employer did not violate the ADA because the 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."[83]

A related topic is whether an individual's diagnosis renders them unqualified for the position. For instance, in ***Jarvela v. Crete Carrier Corp.*, 776 F.3d 822, 831 (11th Cir. 2015),** the plaintiff was seeking to return from work as a commercial motor vehicle driver after taking leave to undergo treatment for alcoholism.[84] He was diagnosed with

alcoholism seven days before the termination. He was not permitted to return, because his employer found that his diagnosis rendered him unqualified under the federal regulatory requirement that he not have a "a current clinical diagnosis of alcoholism." 49 C.F.R. § 391.41(b)(13). The court upheld this determination, finding that he could not perform the essential functions of a commercial motor vehicle driver job. An issue of interest in this case, but not one that was ultimately compelling to the court, was that DOT

itself reviewed the plaintiff's history and cleared him to return. Nonetheless, the employer's decision was upheld.

VI. 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.[85] 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.[86]

Direct threat is a high bar, however, and requires more than a general risk. In ***Rosado v. American Airlines*, 743 F. Supp. 2d 40 (D.P.R. 2010)**, the plaintiff, a cargo clerk employed by the defendant, was HIV positive, addicted to cocaine, and had bipolar disorder and depression.[87] The plaintiff had a positive safety record during his twenty-three years as a cargo clerk. The defendant argued that the plaintiff "posed a direct safety threat to himself and others due to his chronic drug addiction." 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 the plaintiff had a longstanding drug problem, the court held that there was a triable issue of fact as to whether the plaintiff was a "direct threat" because the defendant offered no evidence showing how the plaintiff's impairments and substance abuse made him unable to perform his essential job functions.

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.

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[1] This legal brief was updated in 2018 by Barry C. Taylor, Vice President of Civil Rights and Systemic Litigation, Rachel M. Weisberg, Staff Attorney and Manager, Employment Rights Helpline, and Lauren Rushing, PILI Fellow, Equip for Equality. This legal brief was originally written in 2011 by Barry C. Taylor, Legal Advocacy Director, Alan M. Goldstein, Senior Attorney, and Hannah Weinberger-Divack, Legal Intern Equip for Equality. Equip for Equality is the protection and advocacy system for the State of Illinois and is providing this information under a subcontract with Great Lakes ADA Center.

[2] Americans with Disabilities Act, 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] Americans with Disabilities Act, 42 U.S.C. §§ 12102(2), 12112(B)(4).

[4] *Chamberlain v. Securian Financial Group, Inc*., 180 F. Supp. 3d 381, 398 (W.D.N.C. 2016).

[5] *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)).

[6] *Quinones v. Univ. of Puerto Rico,* 2015 WL 631327 (D.P.R. Feb. 13, 2015).

[7] *Fowler v. Westminister College of Salt Lake*, 2012 WL 4069654 (D. Utah Sept. 17, 2012).

[8] *Sutton,* 527 U.S. at 490 (quoting 29 C.F.R. pt. 1630, App. §1630.2 (*l*)).

[9] 42 U.S.C. § 12114(b)(3).

[10] 42 U.S.C. § 12012(3).

[11] *Alexander v. Wash. Metro. Area Transit Authority*, 826 F.3d 544 (D.C. Cir. 2016).

[12] *Warshaw v. Concentra Health Services*, 719 F. Supp. 2d 484 (E.D. Pa. 2010).

[13] *Ferrari v. Ford Motor Company*, 826 F.3d 885 (6th Circ. 2016).

[14] 42 U.S.C. § 12114(a).

[15] 29 C.F.R. Pt. 1630, app. § 1630.3(a)–(c).

[16] *Mauerhan v. Wagner Corp.*, 649 F.3d 1180 (10th Cir. 2011).

[17] *Id.*

[18] *Quinones v. Univ. of Puerto Rico,* 2015 WL 631327, at *4-5 (D.P.R. 2015),

[19] *EEOC v. Pines of Clarkston*, 2015 WL 1951945, at *5 (E.D. Mich. Apr. 29, 2015).

[20] 42 U.S.C. § 12114(a)(1).

[21] *Shirley v. Precision Castpats Corp.*, 726 F.3d 675 (5th Circ. 2013).

[22] *Id.* at 680.

[23] *Id.*

[24] *Brown v. Lucky Stores, Inc.*, 246 F.3d 1182 (9th Cir. 2001).

[25] *Id.* at 1188 (internal quotation marks omitted).

[26] 21 U.S.C. § 801 *et seq*.

[27] See, e.g., *Ross v. RagingWire Telecommunications, Inc*., 174 P.3d 200 (Cal. 2008); *Johnson v. Columbia Falls Aluminum Co*., LLC, 213 P.3d 789 (Mont. 2009); *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus*., 230 P.3d 518 (Or. 2010); *Roe v. TeleTech Customer Care Mgmt.*, 257 P.3d 586 (Wash. 2011).

42 U.S.C. § 12114 (a).

[28] *Barbuto v. Advantage Sales and Marketing, LLC*, 477 Mass. 456 (Mass. 2017).

[29] *Id.* at 464.

[30] *Id.*

[31] *Id.* at 459-60.

[32] *Id.* at 460.

[33] *Callaghan v. Darlington Fabrics Corp*., 2017 WL 2321181 (R.I.Super. May 23, 2017).

[34] *Id.* at *9, *11.

[35] *Id.* at *13.

[36] *Id.* at *13-14.

[37] *Noffsinger v. SSC Niantic Operating Co. LLC*, 2017 WL 3401260 (D. Conn. Aug. 8, 2017).

[38] 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).

[39] 42 U.S.C. § 12112(b)(6).

[40] *Connolly v. First Personal Bank*, 623 F. Supp. 2d 928, 931 (N.D. Ill. 2008).

[41] *Id.* at 931.

[42] *Bates v. Dura Automotive Systems, Inc*., 767 F.3d 566 (6th Cir. 2014).

[43] Courts have differed on whether a plaintiff must have an ADA disability in order to bring suit for discriminatory inquiries and medical exams. The majority is that plaintiffs can bring such cases without establishing an ADA disability. *See, e.g., Harrison v. Benchmark Electronics Huntsville, Inc.,* 2010 WL 60091 (11th Cir. Jan. 11, 2010) (involving an individual with epilepsy in a suit brought before the ADA Amendments Act).

[44] 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).

[45] *Id.*

[46] EEOC Preemployment Guidance.

[47] *Id.*

[48] *Id.*

[49] *Lewis v. Gov't of D.C.*, 282 F. Supp. 3d 169 (D.D.C. 2017).

[50] EEOC Preemployment Guidance, *available at* http://www.eeoc.gov/policy/docs/preemp.html.

[51] *Id.*

[52] EEOC Rehab Act and Title VII *available at* http://www.eeoc.gov/eeoc/foia/letters/2011/rehabact_titlevii_85p.html.

[53] EEOC Preemployment Guidance, *available at* http://www.eeoc.gov/policy/docs/preemp.html.

[54] 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.

[55] *Id.*

[56] Americans with Disabilities Act, 42 U.S.C. § 12112(d)(3)(B); §12112(d)(4)(C).

[57] *McPherson v. O'Reilly Automotive, Inc.*, 491 F.3d 726 (8th Cir. 2007).

[58] Americans with Disabilities Act, 42 U.S.C. § 12112(d)(3)(B)(i)-(iii).

[59] *Foos v. Taghleef Industries, Inc.*, 132 F.Supp.3d 1034 (S.D. Ind. 2015).

[60] *Giaccio v. City of New York*, 502 F.Supp.2d 380 (S.D.N.Y. 2007).

[61] *Taylor v. City of Shreveport*, 798 F.3d 276 (5th Cir. 2015)(citing *E.E.O.C. v. Thrivent Financial for Lutherans*, 700 F.3d 1044 (7th Cir. 2012)). *See also*, *E.E.O.C. v. C.R. England, Inc.*, 644 F.3d 1028, 1046-1048 (10th Cir. 2011).

[62] 29 C.F.R. Pt. 1630, app.

[63] *Ozee v. Henderson County*, 2009 WL 1208182 (W.D. Ky. May 1, 2009).

[64] *Nanos v. City of Stamford*, 609 F. Supp. 2d 260 (D. Conn. 2009).

[65] 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).

[66] *Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003).

[67] 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).

[68] *Hernandez v. Huges Missile Systems Co.*, 362 F.3d 564 (9th Cir. 2004).

[69] *Lopreato v. Select Specialty Hosp.-N. Ky.*, 2016 WL 374086 (6th Cir. Jan. 29, 2016).

[70] 42 U.S.C. § 12114(c); 29 C.F.R. § 1630.16(b)(4).

[71] EEOC Performance & Conduct Guidance, at Question 9, *available at* http://www.eeoc.gov/facts/performance-conduct.html#fn86.

[72] EEOC Compliance Manual § 902.2(c)(4) nn.11, 2009 WL 4782107, *available at* http://www.eeoc.gov.

[73] EEOC Performance & Conduct Guidance, at Question 26, *available at* http://www.eeoc.gov/facts/performance-conduct.html#fn86.

[74] *Id.*

[75] *Id.*

[76] *Id.* at Question 10.

[77] *Id.*

[78] *See, e.g*., *Nielsen v. Moroni Feed Co.*, 162 F.3d 604, 609 (10th Cir. 1998).

[79] *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.").

[80] EEOC Informal Guidance, *available at* http://www.governmentattic.org/2docs/EEOC-GuidanceLetters_1997-1999.pdf.

[81] *Jones v. City of Boston*, 752 F.3d 38 (1st Cir. 2014).

[82] *Budde v. Kane County Forest Preserve*, 597 F.3d 860 (7th Cir. 2010).

[83] *Id.* at 1141 (internal quotation marks omitted).

[84] *Jarvela v. Crete Carrier Corp.*, 776 F.3d 822, 831 (11th Cir. 2015).

[85] *See* 42 U.S.C. §§ 12111, 12113.

[86] *Bekker v. Humana Health Plan, Inc.*, 229 F.3d 662, 668 (7th Cir. 2000).

[87] *Rosado v. American Airlines*, 743 F. Supp. 2d 40 (D.P.R. 2010).