U.S. Commission on Civil Rights

Sharing the Dream: Is the ADA Accommodating All?

Chapter 4

Substance Abuse under the ADA

It has been reported that 10 percent to 25 percent of the American population is sometimes on the job under the influence of alcohol or some illicit drug. [1] The social and economic costs of substance abuse in America are staggering. In a report issued in 1998 by the National Institute on Alcohol Abuse and Alcoholism and the National Institute on Drug Abuse, it is estimated that the cost of alcohol and drug abuse for 1995 was $276.4 billion, of which $166.5 billion was for alcohol abuse and $109.8 billion was for drug abuse.[2]

Title I of the Americans with Disabilities Act[3] specifically permits employers to ensure that the workplace is free from the illegal use of drugs and the use of alcohol, and to comply with other federal laws and regulations regarding drug and alcohol use. At the same time, the ADA provides limited protection from discrimination for recovering drug abusers and for alcoholics.[4]

The following is an overview of the current legal obligations for employers and employees:

- An individual who is currently engaging in the illegal use of drugs is not an individual with a disability when the employer acts on the basis of such use.
- An employer may not discriminate against a person who has a *history* of drug addiction but who is not currently using drugs and who has been rehabilitated.
- An employer may prohibit the illegal use of drugs and the use of alcohol at the workplace.
- It is not a violation of the ADA for an employer to give tests for the illegal use of drugs.
- An employer may discharge or deny employment to persons who currently engage in the illegal use of drugs.
- Employees who use drugs or alcohol may be required to meet the same standards of performance and conduct that are set for other employees.
- Employees may be required to follow the Drug-Free Workplace Act of 1988 and rules set by federal agencies pertaining to drug and alcohol use in the workplace.[5]

WHEN ARE DRUG USERS COVERED UNDER THE ADA?

The ADA provides that any employee or job applicant who is currently engaging in the illegal use of drugs is not a qualified individual with a disability. [6] Therefore, an employee who illegally uses drugs whether the employee is a casual user or an addict is not protected by the ADA if the employer acts on the basis of the illegal drug use.[7] As a result, an employer does not violate the ADA by uniformly enforcing its rules prohibiting employees from illegally using drugs.[8] However, qualified individuals under the ADA include those individuals:

- who have been successfully rehabilitated and who are no longer engaged in the illegal use of drugs;[9]
- who are currently participating in a rehabilitation program and are no longer engaging in the illegal use of drugs;[10] and
- who are regarded, erroneously, as illegally using drugs.[11]

A former drug *addict* may be protected under the ADA because the addiction may be considered a substantially limiting impairment.[12] However, according to the EEOC Technical Assistance Manual on the ADA, a former *casual* drug user is not protected:

> [A] person who casually used drugs illegally in the past, but did not become addicted is not an individual with a disability based on the past drug use. In order for a person to be substantially limited because of drug use, s/he must be addicted to the drug.[13]

What Is a Current Drug User?

The definition of current is critical because the ADA only excludes someone from protection when that person is a current user of illegal drugs. In her testimony before the Commission, Nancy Delogu, counsel to the Institute for a Drug-Free Workplace,[14] stated, There is insufficient law on the issue right now and it is causing great difficulty for employers to determine exactly when they may take discipline against an employee. [15]

Mark Rothstein, professor of law and director of the Health, Law and Policy Institute at the University of Houston, concurred with Ms. Delogu, testifying before the Commission that the EEOC should engage in some sort of interpretive statement and, after consulting with experts in the rehabilitation community,

> could offer guidance that would be very helpful to employers in this area such as stating a particular length of time that an individual must be stable and making progress or require certification of an individual who had a substance abuse problem from some professional that they were making good progress before they would be covered [by the ADA], because . . . employers are having a difficult time making a determination. The courts have been reluctant to set out specific time periods, and this is an area that has caused a great deal of concern.[16]

The EEOC has defined current to mean that the illegal drug use occurred recently enough to justify the employer's reasonable belief that drug use is an ongoing problem.[17] The EEOC Technical Assistance Manual on the ADA provides the

following guidance:

- If an individual tests positive on a drug test, he or she will be considered a current drug user, so long as the test is accurate.
- Current drug use is the illegal use of drugs that has occurred recently enough to justify an employer's reasonable belief that involvement with drugs is an ongoing problem.
- Current is not limited to the day of use, or recent weeks or days, but is determined on a case-by-case basis.[18]

The Circuit Courts of Appeals have held that a person can still be considered a current user even if he or she has not used drugs for a number of weeks or even months. For example, in *Zenor v. El Paso Healthcare Systems, Ltd.*,[19] the court held that the employee, a pharmacist, was a current user because he had used cocaine five weeks prior to his notification that he was going to be discharged. In *Salley v. Circuit City Stores, Inc.*,[20] 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. [21]

In *Shafer v. Preston Memorial Hospital Corp.*,[22] the court considered the ADA claim of a nurse who was stealing medication to which she had become addicted. [23] While the hospital investigated the matter, the nurse was put in drug rehabilitation.[24] The day after she finished her inpatient drug rehabilitation, she was notified that she had been terminated for gross misconduct involving the diversion of controlled substances. [25]

In concluding that the plaintiff was still a current illegal drug user, the court noted that the ordinary or natural meaning of the phrase currently using drugs does not require that a drug user have a heroin syringe in his arm or a marijuana bong to his mouth at the exact moment contemplated. [26] Rather, according to the court, someone is a current user if he or she illegally used drugs in a periodic fashion during the weeks and months prior to discharge. [27]

Can Enrolling in a Rehabilitation Program Provide ADA Protection?

A question sometimes arises as to whether a drug addicted employee who breaks the company rules can, before being disciplined, enroll in a supervised drug rehabilitation program, and then claim ADA protection as a former drug addict who no longer illegally uses drugs. In her testimony before the Commission, Nancy Delogu stated:

> It is causing great difficulty for employers to determine exactly when they may take discipline against an employee who may have had a disciplinary problem, tests positive or admits to a substance abuse problem, comes into rehabilitation for maybe 30 days. The employer waits until the employee returns to the work force and then says, All right, now we're going to talk about the problems we have, and the employee says, Hey, I'm disabled, I'm now covered by the ADA. . . . This provision actually serves as something of a disincentive to employers to offer rehabilitation and other services to employees before addressing any substantive performance problems.[28]

The EEOC Technical Assistance Manual on the ADA states that such claims made by an applicant or employee will not be successful:

> An applicant or employee who tests positive for an illegal drug cannot immediately enter a drug rehabilitation program and seek to avoid the possibility of discipline or termination by claiming s/he is now in rehabilitation and is no longer using drugs illegally. A person who tests positive for illegal use of drugs is not entitled to the protection that may be available to former users who have been or are in rehabilitation.[29]

Notwithstanding the EEOC's clear language, employees still attempt to use the argument in courts. When they do, the employer will argue and usually with success that the employee is a current user despite his or her recent admission into a drug rehabilitation program.[30]

For example, in *Collings v. Longview Fibre Co.*,[31] the employer fired several employees for using illegal drugs at the facility.[32] In their ADA lawsuit, seven of the eight plaintiffs said they had either completed drug rehabilitation programs or were in the process of rehabilitation at the time they were fired, so they were not current users.[33] Some of the plaintiffs even took drug tests shortly after they were discharged to prove they were not currently using illegal drugs.[34]

The court said current use was not limited to the use of drugs on the day of, or within a matter of days or weeks before the employment action in question.[35] Rather, said the court, 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. [36] The plaintiffs were held to be current users and, despite the fact that they had entered or had completed a drug rehabilitation program, were not protected by the ADA.[37]

Reasonable Accommodation for Drug Addicts

The duty to provide reasonable accommodations to qualified individuals with disabilities is considered one of the most important statutory requirements of the ADA.[38] If a recovering drug addict is not currently illegally using drugs, then he or she may be entitled to reasonable accommodation. This would generally involve a modified work schedule so the employee could attend Narcotics Anonymous meetings or a leave of absence so the employee could seek treatment.[39]

WHEN ARE ALCOHOL USERS COVERED UNDER THE ADA?

Individuals who abuse alcohol may be considered disabled under the ADA if the person is an alcoholic or a recovering alcoholic.[40] Courts have usually held that alcoholism is a covered disability. For example, in *Williams v. Widnall*,[41] the court flatly stated, without discussion, that alcoholism is a covered disability. [42]

Some courts have questioned whether alcoholism should automatically be designated as a covered disability. For example, in *Burch v. Coca-Cola*,[43] the court held that alcoholism is not a per se disability and found that the plaintiff's alcoholism was not a covered disability because it did not substantially limit any of his major life activities.[44] Similarly, in *Wallin v. Minnesota Department of Corrections,*[45] the court suggested that it would analyze alcoholism on a case-

by-case basis and noted that the plaintiff had not presented evidence that his alcoholism impaired a major life activity. [46] Moreover, both *Burch* and *Wallin* are consistent with the United States Supreme Court's ruling in *Sutton v. United Airlines, Inc.*,[47] which stated clearly that an individualized inquiry will be conducted to determine whether an impairment substantially limits a major life activity. As the Court explained in *Sutton*:

> A disability exists only where an impairment substantially limits a major life activity, not where it might, could, or would be substantially limiting if corrective measures were not taken. Second, because subsection (A) [of 42 U.S.C. 12102(2)] requires that disabilities be evaluated with respect to an individual and be determined based on whether an impairment substantially limits the individual's major life activities, the question whether a person has a disability under the ADA is an individualized inquiry.[48]

Even though courts may determine that alcoholism is a covered disability, the law makes it clear that employers can enforce rules concerning alcohol in the workplace. The ADA provides that employers may:

- prohibit the use of alcohol in the workplace;[49]
- require that employees not be under the influence of alcohol in the workplace;[50] and
- hold an employee with alcoholism to the same employment standards to which the employer holds other employees even if the unsatisfactory performance or behavior is related to the alcoholism.[51]

The EEOC Technical Assistance Manual giving further guidance on the ADA provides that employers are free to discipline, discharge or deny employment to an alcoholic whose use of alcohol adversely affects job performance or conduct to the extent that s/he is not qualified. [52] The manual elaborates with the following example:

> If an individual who has alcoholism often is late to work, or is unable to perform the responsibilities of his/her job, an employer can take disciplinary action on the basis of the poor job performance and conduct. However, an employer may not discipline an alcoholic employee more severely than it does other employees for the same performance or conduct.[53]

For example, if an alcoholic employee and a non-alcoholic employee are caught having a beer on the loading dock, the employer cannot fire the alcoholic employee while giving the other employee only a written warning.[54] In *Flynn v. Raytheon Co.*,[55] the court dealt with this precise issue. It held that even though an employer can enforce its rules against intoxication on the job, it could not selectively enforce its rules in a way that treats alcoholics more harshly.[56] In short, whatever policies the employer enacts must be uniformly applied.[57]

Reasonable Accommodation for Alcoholics

The duty to provide reasonable accommodations to qualified individuals with disabilities is considered one of the most important statutory requirements of the ADA.[58] Reasonable accommodation for an alcoholic would generally involve a modified work schedule[59] so the employee could attend Alcoholics Anonymous meetings, or a leave of absence[60] so the employee could seek treatment. In *Schmidt v. Safeway, Inc.*,[61] for example, the court held that the employer must provide a leave of absence so the employee could obtain medical treatment for alcoholism.[62]

The ADA does not require an employer to provide an alcohol rehabilitation program or to offer rehabilitation in lieu of disciplining an employee for alcohol-related misconduct or performance problems. In Senate proceedings, Senator Daniel Coats (R-IN) asked Senator Tom Harkin (D-IA), the ADA's chief sponsor, Is the employer under a legal obligation under the act to provide rehabilitation for an employee who is using . . . alcohol? In response, Senator Harkin stated, No, there is no such legal obligation. [63] The Senate report echoes Senator Harkin's response that reasonable accommodation does not affirmatively require that a covered entity must provide a rehabilitation program or an opportunity for rehabilitation . . . for any current employee who is [an] alcoholic against whom employment-related actions are taken for performance or conduct reasons.[64]

The EEOC has held that federal employers are no longer required to provide the reasonable accommodation of firm choice under Section 501 of the Rehabilitation Act. [65] Firm choice generally entails a warning to employees with alcohol-related employment problems that they will be disciplined if they do not receive alcohol treatment. The EEOC's rationale is that the Rehabilitation Act was amended in 1992 to apply ADA standards, and that the ADA does not require an employer to excuse misconduct for poor performance, even if it is related to alcoholism. In EEOC's Enforcement Guidance on Reasonable Accommodation and Undue Hardship statement, the EEOC reiterated that an employer has no obligation to provide firm choice or a last chance agreement as a reasonable accommodation. [66]

Moreover, an employer is generally not required to provide leave to an alcoholic employee if the treatment would appear to be futile. For example, in *Schmidt v. Safeway, Inc.*,[67] the court said 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. [68] And in *Fuller v. Frank*, [69] the court held that the employer was not required to give an alcoholic employee another leave of absence when alcohol treatment had repeatedly failed in the past.[70]

Finally, an employer generally has no duty to provide an accommodation to an employee who has not asked for an accommodation and who denies having a disability. In *Larson v. Koch Refining Co.*,[71] the court dealt with this precise issue and held that the employer had no obligation to provide accommodation to an employee with alcoholism when the employee did not ask for an accommodation, and in fact expressly denied having an alcohol problem.[72]

Blaming Misconduct on Alcoholism

Courts routinely hold that employees cannot blame misconduct on alcoholism. For example, in *Renaud v. Wyoming Department of Family Services*,[73] the court noted that even if alcoholism is assumed to be a disability, the ADA distinguishes

between alcoholism and alcoholism-related misconduct.[74] The court determined that the employer could lawfully terminate the employee (a school superintendent) for coming to work drunk, even though he claimed the conduct resulted from his alcoholism.[75]

In *Labrucherie v. Regents of the University of California*,[76] the court stated it was not discriminatory to fire an employee because he was incarcerated after his third arrest for drunk driving.[77] The court noted that a termination based on *misconduct stemming from a disability*, rather than the disability itself, is valid. [78]

Likewise, in *Maddox v. University of Tennessee*,[79] the university fired an assistant football coach after his third arrest for drunk driving.[80] During the arrest, the assistant coach was combative and would not take a Breathalyzer test. [81] The employee claimed that he was discriminated against based on his alcoholism because his drunk driving was a result of the alcoholism.[82] The court agreed with the university that the misconduct could be separated from the alcoholism and that the assistant coach was properly terminated due to the misconduct.[83]

It is clear that an employer does not, as a reasonable accommodation, have to forgive misconduct because the misconduct resulted from alcoholism. In *Flynn v. Raytheon Co.*,[84] the lower court noted that an employee who broke the company's policy prohibiting being under the influence of alcohol in the workplace cannot belatedly avail himself of the reasonable accommodation provisions of the ADA to escape discipline for his misconduct.[85] The First Circuit also noted that the ADA does not require an employer to rehire a former employee who was lawfully discharged for disability-related failures to meet its legitimate job requirements. [86]

DIRECT THREAT POSED BY SUBSTANCE ABUSE

The defense of direct threat is one that is raised frequently by employers in dealing with issues of substance abuse. The ADA defines direct threat as a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation. [87] The ADA permits employers to require, as a job qualification, that an individual not pose a direct threat to the health or safety of other individuals in the workplace. [88] Moreover, an employer may institute such a requirement even if an employer s reliance on such a qualification might screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability. [89]

The determination that an individual with a disability poses a direct threat shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job.[90] In determining whether an individual would pose a direct threat, the factors to be considered include:

- the duration of the risk;
- the nature and severity of the potential harm;
- the likelihood that the potential harm will occur; and
- the imminence of the potential harm.[91]

Evidence used in making the determination may include information from the individual, including the individual's experience in previous similar situations, and the opinions of doctors, rehabilitation counselors, or physical therapists who have expertise in the specific disability or who have direct knowledge of the individual. [92]

Moreover, the EEOC has emphasized, in its Interpretive Guidance on Title I of the ADA, that an employer may not deny employment to an individual with a disability merely because of a slightly increased risk. The risk can only be considered when it poses a significant risk, i.e., high probability of substantial harm; a speculative or remote risk is insufficient. [93]

EEOC v. Exxon Corporation

In *EEOC v. Exxon Corporation*,[94] the courts were forced to analyze the ADA's direct threat [95] defense and how it interacts with the business necessity [96] defense. With respect to substance abuse and the ADA, courts have generally recognized an employer's prerogative to formulate and rely upon safety-based job qualifications, even though they may screen out individuals with disabilities.

In *Exxon*, the EEOC brought suit against Exxon on behalf of several employees, [97] alleging that the company's blanket policy of prohibiting individuals who have ever been treated for drug or alcohol abuse from working in safety-sensitive designated positions [98] (approximately 10 percent of Exxon's positions) violated the ADA.[99] The EEOC argued that the company's policy was invalid on its face because it did not provide, as mandated by ADA regulations, for an individualized assessment of whether former drug abusers were qualified to work in any of the designated safety-sensitive positions.[100]

The company countered by claiming that the ADA does not require an individualized assessment of an employee's risk of relapse where such an assessment would be impractical or impossible.[101] The company argued that the risk of relapse for rehabilitated substance abusers is too great to permit them to work in the designated safety-sensitive positions, and that the inability to predict a relapse makes individualized assessments futile.[102]

The U.S. District Court found that the ADA permits an exception to the individualized assessment ordinarily required under the law.[103] The court relied on the ADA's emphasis on protecting employers from the risks posed by recently rehabilitated employees, and on other employment discrimination statutes that permit blanket exclusions where safety is an issue and the employer has reason to believe that all of the disqualified employees would be unable to perform safely. [104]

In its appeal, the EEOC relied on its Interpretive Guidance to argue that employers must meet the direct threat defense:

> With regard to safety sensitive requirements that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, an employer must demonstrate that the requirement, as applied to the individual, satisfies the direct threat standard . . . in order to show that the requirement is job-related and consistent with a business necessity.[105]

The Fifth Circuit Court of Appeals examined the text of the ADA and held while direct threat focuses on the individual employee and examines the specific risk posed by the employee's disability, business necessity addresses whether the qualification standard can be justified as an across-the-board requirement.[106] The court determined that while Exxon's blanket across-the-board policy might exclude individuals with disabilities without an individualized analysis as to whether they could perform the essential functions of the position, this exclusion was appropriate if the employer could demonstrate that it is justified by business necessity.[107]

The *Exxon* case generated significant debate during the Commission's ADA hearing. Nancy Delogu, counsel to the Institute for a Drug-Free Workplace, said it was important to resolve the issue. She testified:

> Alcoholism and substance abuse are chronic conditions for which the risk of relapse cannot be well . . . predicted. And for certain very, very highly safety-sensitive positions, those which have no . . . direct supervision and for which a lapse in judgment could lead to a catastrophic error, employers wish to be able to exclude those employees from those positions. Whether they're required to transfer them to another position would certainly be something open to a policy debate, but currently this is quite a concern.[108]

Kenneth Collins, formerly the manager of the Employee Assistance Program at Chevron Corporation and currently vice president for Value Options, the nation s second largest provider of behavioral health care services, testified that the Chevron Corporation conducted a study on accident rates of its workers.[109] The study concluded that workers who had completed Employee Assistance Program-monitored substance abuse rehabilitation had no more on-the-job or off-the-job accidents than did the regular Chevron population.[110] Mr. Collins testified:

> It certainly is my position based on my experience and the research done within Chevron and at other similar oil companies who have tightly structured employee assistance programs that, in fact, you can return individuals to highly safety-sensitive positions and not expose the company to increased risks of accidents or errors in judgment. But that is premised on having a rigorous follow-up program [which involves weekly follow-up testing].[111]

The *Exxon* case suggests that an employer should carefully consider the context in which medical guidelines will be used; i.e., will medical guidelines be used as a basis for formulating job qualifications for safety-based reasons, or will they be used to assess, during a medical examination, whether an individual poses a direct threat. The ruling in *Exxon* suggests that an employer's reliance on medical guidelines may be more defensible when they are used to formulate a broad-based qualification than to assess an individual case.

Some experts suggest that partly because of the publicity surrounding notorious cases like *Exxon*, companies can become too quick to designate a position as safety sensitive. Mark Rothstein, professor of law and director of the Health, Law and Policy Institute at the University of Houston, testified before the Commission that some employers have indeed been overly inclusive in the process of determining which positions are safety sensitive:

> I think some employers have an overly broad view of what a safety-sensitive position is and have . . . declared many jobs permanently unavailable to individuals who have ever had any sort of substance abuse problem, no matter how many years in the past. And I think that these policies are not substantiated by the scientific evidence and I think are directly counter to the purposes of the ADA.[112]

Mr. Rothstein testified that while he thought a blanket policy was understandable in the *Exxon* case, he thought it ill-advised to adopt a basically irrebuttable presumption that anyone who has ever had a substance abuse problem should be barred for his or her lifetime from engaging in an activity that the employer deems to be safety sensitive.[113] To illustrate his point, Mr. Rothstein referred to the case of *Knox County Education Association v. Knox County Board of Education*.[114]

In *Knox County*, the Sixth Circuit upheld the drug testing of school personnel, including principals, teachers, aides, secretaries, and bus drivers, on the ground that because these individuals play a unique role in the lives of children, all the positions were deemed to be safety sensitive, including the people who worked in the office.[115] Mr. Rothstein testified:

> It seems to me that if you broaden the concept of safety sensitive as far as that court and applied it in the workplace, now you're basically saying that anyone who ever had a minor substance abuse problem in college 25 or 30 years ago, they're now barred from who knows how many jobs. That strikes me as not being based on any good facts or any good policy.[116]

Ellen Weber, director of the national office of the Legal Action Center, a law and policy office that specializes in alcohol, drug, and AIDS issues, concurred with Mr. Rothstein. She testified before the Commission, We . . . agree to a great extent with . . . what Mr. Rothstein has said with regard to the issues of employers overly expanding the list of safety-sensitive jobs to which people are rejected from blanketly. [117]

PRE-EMPLOYMENT INQUIRIES ABOUT DRUG AND ALCOHOL USE

An employer may make certain pre-employment, pre-offer inquiries regarding use of alcohol or the illegal use of drugs.[118] An employer may ask whether an applicant drinks alcohol or whether he or she is currently using drugs illegally. [119] However, an employer may not ask whether an applicant is a drug abuser or alcoholic, or inquire whether he or she has ever been in a drug or alcohol rehabilitation program.[120] Indeed, the EEOC has provided extensive guidance of what can and cannot be asked through its Enforcement Guidance titled Pre-employment Disability-Related Questions and Medical Examinations. [121]

After a conditional offer of employment, an employer may ask any question concerning past or present drug or alcohol use as long as it does so for all entering employees in the same job category.[122] The employer may not, however, use such information to exclude an individual with a disability, on the basis of a disability, unless it can show that the reason for exclusion is job related and consistent with business necessity, and that legitimate job criteria cannot be met with a reasonable accommodation.[123]

DRUG TESTING

An employer may conduct tests to detect illegal use of drugs.[124] The ADA does not prohibit, require, or encourage drug tests. Drug tests are not considered medical examinations, and an *applicant* can be required to take a drug test before a conditional offer of employment has been made.[125] An *employee* also can be required to take a drug test, whether or not such a test is job related and necessary for the business.[126]

An employer may refuse to hire an applicant or may discharge or discipline an employee based upon a test result that indicates the illegal use of drugs. The employer may take these actions even if an applicant or employee claims that he or she recently stopped illegally using drugs.[127]

Tests for illegal use of drugs also may reveal the presence of lawfully used drugs, i.e., prescription medications. If a person is excluded from a job because the employer erroneously regarded him or her to be a drug abuser, currently using drugs illegally, and a drug test revealed the presence of a lawfully prescribed drug, the employer would be liable under the ADA.[128] There was testimony at the Commission's ADA hearing to suggest that this problem should be examined more closely to see if it is leading to costly and unnecessary litigation in the workplace. Nancy Delogu told the Commission:

> With drug abuse in the workplace and the number of individuals who are subject to drug testing, anyone who ever has a positive drug test, theoretically, can claim to be perceived as disabled by his or her employer or would-be employer. As a result, many cases have been brought, and many which are quite frivolous based on a positive drug test. The employer is going to do whatever they are going to do and then the employee says, Well you saw me as disabled and I'm going to sue. Unfortunately, that's an issue of fact that requires usually lengthy discovery and litigation costs before that can be resolved.[129]

To avoid such potential liability, the employer would have to determine whether the individual was using a legally prescribed drug. An employer may not ask what prescription drugs an individual is taking before making a conditional job offer; however, an employer may validate a positive test result by asking about an applicant's lawful use of drugs or for other possible explanations for the positive test result. Alternatively, the EEOC Technical Assistance Manual on the ADA suggests:

> [O]ne way to avoid liability is to conduct drug tests after making an offer, even though such tests may be given at anytime under the ADA. Since applicants who test positive for illegal drugs are not covered by the ADA, an employer can withdraw an offer of employment on the basis of illegal drug use.[130]

Mark Rothstein, professor of law and director of the Health, Law and Policy Institute at the University of Houston, endorses this EEOC recommendation. He testified at the Commission's ADA hearing:

> This is a problem that can be avoided very simply by employers who defer drug testing until the post-offer stage, that is the pre-placement stage when there are no restrictions on inquiries regarding medical conditions or substances that could cause cross-reactivity. The reason that many employers don't want to . . . defer the testing until the post-offer stage is they think it's cheaper to screen out workers or potential workers on the basis of a positive drug test than it is to review their r sum's and applications and references and to actually look at the individual. And that may well be true, but I think that's a rather unconvincing reason to me, at least, for subjecting individuals to this violation of their privacy that Congress otherwise said was impermissible.[131]

If the results of a drug test indicate the presence of a lawfully prescribed drug, such information must be kept confidential, in the same way as any medical record. If the results reveal information about a disability in addition to information about drug use, the disability-related information is to be treated as a confidential medical record.[132]

OTHER LAWS AND REGULATIONS CONCERNING DRUGS AND ALCOHOL

The ADA does not interfere with an employer's ability to comply with other federal laws and regulations concerning the use of drugs and alcohol, including the Drug-Free Workplace Act of 1988; regulations applicable to particular types of employment, such as law enforcement positions; regulations of the Department of Transportation for airline employees, interstate motor carrier drivers, and railroad engineers; and regulations for safety-sensitive positions established by the Department of Defense and the Nuclear Regulatory Commission. Employers may continue to require that their applicants and employees comply with such federal laws and regulations.[133]

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[1] *See* Federico E. Garcia, The Determinants of Substance Abuse in the Workplace, *Social Science Journal*, vol. 33 (1996), pp. 55, 56. *See also* National Institute on Alcohol Abuse and Alcoholism, U.S. Department of Health and Human Services, *Sixth Special Report to the U.S. Congress on Alcohol and Health*, no. 22 (1987).

[2] The main components of the estimated costs of alcohol abuse include health care expenditures (12.3 percent); productivity losses due to premature death (21.2 percent); productivity impairment due to alcohol-related illness (45.7 percent); and property and administrative costs of alcohol-related

motor vehicle crashes (9.2 percent). The main components of the estimated costs of drug abuse include health care expenditures (10.2 percent); lost productivity of incarcerated perpetrators of drug-related crimes (18.3 percent); lost legitimate production due to drug-related crime careers (19.7 percent); other costs of drug-related crime, including police, legal, and corrections services, federal drug traffic control, and property damage (18.4 percent); and impaired productivity due to drug-related illness (14.5 percent). National Institute on Alcohol Abuse and Alcoholism (NIAAA) and the National Institute on Drug Abuse (NIDA), *The Economic Costs of Alcohol and Drug Abuse in the United States,* May 13, 1998.

[3] 42 U.S.C. 12111 12117 (1994).

[4] 42 U.S.C. 12111 12117.

[5] Equal Employment Opportunity Commission, Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act 8.2, January 1992 (hereafter cited as EEOC Technical Assistance Manual on the ADA).

[6] 42 U.S.C. 12114(a) (1994); 29 C.F.R. 1630.3(a) (1999). *See*, *e.g.*, Shafer v. Preston Mem l Hosp. Corp., 107 F.3d 274 (4th Cir. 1997) (current illegal drug user is not covered). Ellen Weber, director of the national office of the Legal Action Center, a law and policy office that specializes in alcohol, drug, and AIDS issues, said in her testimony before the Commission that prior to passage of the ADA, individuals with current drug problems were protected under the Rehabilitation Act against discrimination to the extent they could perform their jobs. [The] decision to eliminate coverage, Ms. Weber testified, was based on nothing other than the pure political decision that nobody wanted to appear soft on drugs. . . . Ellen Weber, testimony before the U.S. Commission on Civil Rights, hearing, Washington, D.C., Nov. 12 13, 1998, transcript, p. 25 (hereafter cited as Hearing Transcript). Ms. Weber argued that this change in the law did nothing more than . . . deter some individuals from getting into treatment and driving the problem underground in an effort to hide that problem from an employer. Ibid., pp. 25 26.

[7] Under the ADA, illegal use is broader than just the use of drugs that are commonly viewed as illegal. It includes the use of illegal drugs that are controlled substances (e.g., cocaine) as well as the illegal use of prescription drugs that are controlled substances (e.g., Valium). For example, in Nielsen v. Moroni Feed Co., 162 F.3d 604, 611, fn. 12 (10th Cir. 1998), the court stated there is no doubt that, under the ADA, illegal drug use includes the illegal misuse of pain-killing drugs which are controlled by prescription as well as illegal street drugs like cocaine.

[8] EEOC Technical Assistance Manual on the ADA 8.3. *See, e.g.*, Wood v. Indianapolis Power & Light, 2000 U.S. App. LEXIS 1769 (7th Cir. 2000), No. 99-1652 (meter reader who tested positive for cocaine and marijuana use was not protected by the ADA).

[9] 42 U.S.C. 12114(b) (1994).

[10] 42 U.S.C. 12114(b) (1994). A rehabilitation program may include inpatient, outpatient, or employee assistance programs, or recognized self-help programs such as Narcotics Anonymous. EEOC Technical Assistance Manual on the ADA 8.5.

[11] 42 U.S.C. 12114(b). *See* Ackridge v. Dept of Human Servs., City of Philadelphia, 3 AD Cases (BNA) 575, 576 (E.D. Pa. 1994), in which the plaintiff claimed that she was discriminated against because she was incorrectly regarded as an alcoholic and/or a substance abuser. In dicta, the court noted that if the plaintiff was in fact regarded as a drug abuser (and if she was not using drugs), or if she was regarded as an alcoholic, she might have a valid ADA claim. *Id.* at 576. *See also* EEOC Technical Assistance Manual on the ADA, which states that tests for illegal use of drugs also may reveal the presence of lawfully-used drugs. If a person is excluded from a job because the employer

erroneously regarded him/her to be an addict currently using drugs illegally when a drug test revealed the presence of a lawfully prescribed drug, the employer would be liable under the ADA. Ibid. at 8.9.

[12] *See* EEOC Technical Assistance Manual on the ADA 8.5. *See also* Hartman v. City of Petaluma, 841 F. Supp. 946, 949 (N.D. Cal. 1994) (there must be some indicia of dependence to be considered substantially limiting a major life activity).

[13] EEOC Technical Assistance Manual on the ADA 8.5.

[14] The Institute for a Drug-Free Workplace, a nonprofit corporation, was established in 1989 as an independent private sector coalition. Its membership includes major employers and employer organizations, including leading American companies in petrochemical, manufacturing, high technology, construction, pharmaceutical, hospitality, retail, and transportation industries. The institute is active on legislative, legal, and regulatory issues at the federal, state, and local levels. *See 1999 2000 Guide to State and Federal Drug-Testing Laws*, by Mark A. de Bernardo and Nancy N. Delogu, published by the Institute for a Drug-Free Workplace, Washington, D.C.

[15] Nancy Delogu Testimony, Hearing Transcript, p. 12.

[16] Mark Rothstein Testimony, Hearing Transcript, p. 17.

[17] *See* 29 C.F.R. 1630.3, app. at 357 (1999).

[18] EEOC Technical Assistance Manual on the ADA 8.3.

[19] 176 F.3d 847, 867 (5th Cir. 1999).

[20] 160 F.3d 977 (3d Cir. 1998).

[21] *Id.* at 980.

[22] 107 F.3d 274 (4th Cir. 1997).

[23] *Id.* at 275.

[24] *Id.*

[25] *Id.*

[26] *Id.* at 278.

[27] *Id.*

[28] Delogu Testimony, Hearing Transcript, p. 12.

[29] EEOC Technical Assistance Manual on the ADA 8.3.

[30] *See* Cong. Rep. 336, 101st Cong. 2d Sess. (1990).

[31] 63 F.3d 828 (9th Cir. 1995), *cert. denied*, 516 U.S. 1048 (1996).

[32] *Id.* at 830.

[33] *Id.* at 833.

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] Similarly, in McDaniel v. Mississippi Baptist Med. Ctr., 877 F. Supp. 321 (S.D. Miss. 1994), *aff d,* 74 F.3d 1238 (5th Cir. 1995), the plaintiff had illegally used drugs and entered a drug treatment center prior to his termination. The court held that even though the plaintiff had entered treatment, he still was not protected by the ADA because he had not been drug free for a considerable length of time. In this case, the plaintiff said that he had not used drugs for only a few weeks.

[38] Employers do not have to provide an accommodation that causes an undue hardship, meaning significant difficulty or expense. The analysis used to determine undue hardship focuses on the particular employer's resources, and on whether the accommodation is unduly extensive, substantial, or disruptive, or would fundamentally alter the nature or operation of the business. 42 U.S.C. 12111(10) (1994); 29 C.F.R. 1630.2(p) (1999). Another defense to an allegation of discrimination is direct threat, meaning a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation. *See* 42 U.S.C. 12111(3); 29 C.F.R. 1630.2(r), 1630.15(b)(2).

[39] *See* 42 U.S.C. 12111(9) (1994); 29 C.F.R. 1630.2(o)(2) (1999).

[40] *See*, *e.g.*, Adamczyk v. Baltimore County, No. 97-1240, 1998 U.S. App. LEXIS 1331 (4th Cir. 1998) (alcoholism is covered under the Rehabilitation Act); Mararri v. WCI Steel, Inc., 130 F.3d 1180, 1185 (6th Cir. 1997) (the ADA treats drug addiction and alcoholism differently).

[41] 79 F.3d 1003 (10th Cir. 1996). *See also* Adamczyk v. Baltimore County, 1998 U.S. App. LEXIS 1331 (4th Cir. 1998) (alcoholism is covered under the Rehabilitation Act); Miners v. Cargill Communications, Inc., 113 F.3d 820 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 441 (1997) (where plaintiff could show she was regarded as being an alcoholic, she was disabled within the meaning of the ADA); Office of the Senate Sergeant-at-Arms v. Office of Senate Fair Employment Practices, 95 F.3d 1102 (Fed. Cir. 1996) (it is well-established that alcoholism meets the definition of a disability).

[42] 79 F.3d 1003 (10th Cir. 1996).

[43] 119 F.3d 305 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 871 (1998).

[44] *Id.* at 322.

[45] 153 F.3d 681 (8th Cir. 1998).

[46] *Id.* at 686.

[47] 119 S. Ct. 2139, 527 U.S. 471 (1999).

[48] 119 S. Ct. at 2142.

[49] 42 U.S.C. 12114. *See* Walker v. Consol. Biscuit Co., 522 U.S. 1028 (1997) (the court held that the employer could terminate an employee for violating its rule prohibiting employees from being under the influence of alcohol in the workplace).

[50] 42 U.S.C. 12114 (1994).

[51] 42 U.S.C. 12114 (1994).

[52] EEOC Technical Assistance Manual on the ADA 8.4.

[53] Ibid.

[54] Ibid.

[55] 868 F. Supp. 383 (D. Mass. 1994); *aff d* 94 F.3d 640 (1st Cir. 1996).

[56] *See also* Miners v. Cargill Communications, Inc., 113 F.3d 820 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 441 (1997), in which the court found that evidence of inconsistent enforcement of a policy concerning alcohol use (e.g., not enforcing the policy against management employees) was relevant in showing discrimination against an employee regarded as being an alcoholic.

[57] EEOC Technical Assistance Manual on the ADA 8.7.

[58] *See* the preceding discussion under Reasonable Accommodation for Drug Addicts in this chapter.

[59] 42 U.S.C. 12111(9) (1994); 29 C.F.R. 1630.2(o)(2) (1999).

[60] 42 U.S.C. 12111(9); 29 C.F.R. 1630.2(o)(2).

[61] 864 F. Supp. 991 (D. Ore. 1994).

[62] *Id.* at 996.

[63] 135 CONG. REC. S10777 (daily ed. Sept. 7, 1989).

[64] S. REP. NO. 101-116 (1989).

[65] *See* Johnson v. Babbitt. Pet. No. 03940100, MSPB No. SF-0752-93-0613-I-1 (EEOC 3/28/96).

[66] *See* Equal Employment Opportunity Commission, Enforcement Guidance on Reasonable Accommodation and Undue Hardship, no. 915.002 (Mar. 1, 1999). *See also* Adamczyk v. Baltimore County, 1998 U.S. App. LEXIS 1331 (4th Cir. 1998), where the employer fired a police officer for misconduct allegedly caused by alcoholism, and the employer was not required to permit the officer to seek treatment before taking adverse action.

[67] 864 F. Supp. 991 (D. Ore. 1994).

[68] *Id.* at 997.

[69] 916 F.2d 558, 562 (9th Cir. 1990).

[70] Similarly, in Evans v. Fed. Express Corp., 133 F.3d 137 (1st Cir. 1998), the court held that the employer was not required to provide a second leave of absence to an employee for substance abuse treatment. The court noted, It is one thing to say that further treatment made medical sense, and quite another to say that the law required the company to retain [the employee] through a succession of efforts.

[71] 920 F. Supp. 1000 (D. Minn. 1995).

[72] *Id.* at 1006.

[73] 203 F.3d 723 (10th Cir. 2000).

[74] *Id.* at 730.

[75] *Id.* at 730 731.

[76] 1997 U.S. app. LEXIS 17755 (9th Cir. 1997).

[77] *Id.* at *3.

[78] *Id.* (emphasis added).

[79] 62 F.3d 843 (6th Cir. 1995).

[80] *Id.* at 845.

[81] *Id.*

[82] *Id.*

[83] Other courts, too, have held that an employer may terminate an employee because of improper conduct, even if the conduct is a direct result of alcoholism. In Williams v. Widnall, 79 F.3d 1003 (10th Cir. 1996), it was held that an employer lawfully fired an employee because of his threatening conduct, even though the conduct may have been a result of alcoholism. And in Newland v. Dalton, 81 F.3d 904 (9th Cir. 1996), it was held that an employer lawfully fired an employee because of a drunken rampage, even if it was related to alcoholism.

[84] 868 F. Supp. 383 (D. Mass. 1994), *aff d*, 94 F.3d 640 (1st Cir. 1996).

[85] *Id.* at 387.

[86] *Id.*

[87] 42 U.S.C. 12111(3) (1994).

[88] 42 U.S.C. 12113(b) (1994). An employer is also permitted to require that an individual not pose a direct threat of harm to his or her own safety or health. *See* 29 C.F.R. 1630.2(r), app. at 356 (1999).

[89] 42 U.S.C. 12113(a) (1994).

[90] 29 C.F.R. 1630.2(r) (1999). The regulations state that the assessment shall be based on a medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence.

[91] 29 C.F.R. 1630.2(r) (1999).

[92] 29 C.F.R. 1630.2(r), app. at 356 (1999).

[93] 29 C.F.R. 1630.2(r), app. at 356 (1999). *See also* EEOC Technical Assistance Manual on the ADA 8.7, which states: An employer cannot prove a high probability of substantial harm simply by referring to statistics indicating the likelihood that addicts or alcoholics in general have a specific probability of suffering a relapse. A showing of significant risk of substantial harm must be based upon an assessment of the particular individual and his/her history of substance abuse and the specific nature of the job to be performed.

[94] 967 F. Supp. 208 (N.D. Tex. 1997); *reversed and remanded in* 203 F.3d 871 (5th Cir. 2000).

[95] The ADA defines direct threat as a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation. EEOC v. Exxon, 967 F. Supp. 210. *See* 42 U.S.C. 12111(3) (1994).

[96] The ADA states: It may be a defense to a charge of discrimination under this Act that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this title. *Id.* at 210. *See* 42 U.S.C. 12113(a) (1994).

[97] 967 F. Supp. 209 10. The named plaintiffs were two Exxon employees who had been working as flight engineers but were demoted in 1994 to mechanics when they were asked whether they had a history of drug or alcohol abuse. Salvatore Filippone, who was in his late 40s, had been convicted of abusing a prescription drug when he was 19 years old. He went into rehabilitation, never abused drugs again, and in 1983 joined Exxon, where he was responsible for monitoring aircraft systems during flight, according to EEOC documents filed in federal court. Glenn Hale, who went into treatment for alcohol abuse in 1985, was hired by Exxon as a flight engineer in 1988. He abstained from drinking and never had a relapse, according to the EEOC court filing. *Id.*

[98] *Id.* at 210. The company defined a designated position as one in which failure could cause a catastrophic incident, and for which the employee plays a key and direct role with either no direct or very limited supervision. *Id.*

[99] *Id.* at 209 10. Exxon adopted its substance abuse policy after the Exxon Valdez ran aground in Alaska and dumped 11 million gallons of oil into the Prince William Sound. The company, eager to avoid another Valdez disaster, applied the policy to plant operators, drivers, and ships mates after news reports surfaced that the captain of the Valdez, Joseph Hazelwood, had been drinking and that Exxon officials knew he had sought treatment for his drinking problem four years before the accident. Mr. Hazelwood was later cleared by a jury of intoxication charges. *See* Seahawk Seafoods, Inc. v. Alyeska Pipeline Serv. Co., 206 F.3d 900 (9th Cir. 2000); State v. Hazelwood, 946 P.2d 875 (Alaska 1997).

[100] *See* 29 C.F.R. 1630.2(r), app. at 356 (1999), which states, Determining whether an individual poses a significant risk of substantial harm to others must be made on a case by case basis.

[101] 967 F. Supp. 210.

[102] *Id.*

[103] *Id.* at 214.

[104] These statutes included the Rehabilitation Act, the Age Discrimination in Employment Act (ADEA), and Title VII because these statutes are similar in purpose to the ADA and have often been relied upon in interpreting the ADA. *Id.* at 212. *See* Buchanan v. City of San Antonio, 85 F.3d 196, 200 (5th Cir. 1996); Daigle V. Liberty Life Ins. Co., 70 F.3d 394, 396 (5th Cir. 1995). The court noted that Rehabilitation Act case law is especially persuasive given that the ADA is modeled after the Rehabilitation Act and Congress has directed that the two acts judicial and agency standards be harmonized. 967 F. Supp. 212.

[105] 203 F.3d 871, 873 (5th Cir. 2000).

[106] *Id.* at 874.

[107] *Id.* The court stated: We have found nothing in the statutory language, legislative history or case law that persuades that the direct threat provision addresses safety-based qualification standards in cases where an employer has developed a standard applicable to all employees of a given class. We hold that an employer need not proceed under the direct threat provision of 12113(b) in such cases but rather may defend the standard as a business necessity. *Id.* at 874.

[108] Delogu Testimony, Hearing Transcript, p. 14. Ms. Delogu testified later in the hearing that employers should not be able to exclude all former substance abusers for some very broad and undefined categories of safety-sensitive jobs. I do believe, however, . . . that there should be a mechanism for those very safety-critical positions to make this exception. Ibid., pp. 39 40.

[109] Kenneth Collins Testimony, Hearing Transcript, p. 16.

[110] Ibid.

[111] Ibid. *See also* testimony of Dr. Joseph Autry, the acting deputy administrator in the Substance Abuse and Mental Health Services Administration of the Department of Health and Human Services, who also emphasized the importance of follow-up treatment: Increasingly research is indicating that relapse prevention following treatment and drug testing or alcohol testing are probably the most important things in keeping someone drug and alcohol free as they return to the workplace. . . . There needs to be ongoing rehabilitation, if you will, or relapse prevention, interventions, coupled with testing in order to maintain sobriety or to be drug free. Joseph Autry Testimony, Hearing Transcript, pp. 35 36.

[112] Rothstein Testimony, Hearing Transcript, p. 19.

[113] Ibid., p. 32.

[114] 158 F.3d 361 (6th Cir. 1998), *cert. denied*, 120 S. Ct. 46 (1999).

[115] *Id.* at 363. *But see* Chandler v. Miller, 520 U.S. 305 (1997), in which the Supreme Court held that a Georgia policy requiring all candidates for public office to submit to drug tests violated the Fourth Amendment's requirement that a search be justified either by particularized suspicion or by special needs beyond crime detection.

[116] Rothstein Testimony, Hearing Transcript, p. 31. Mr. Rothstein testified later in the hearing that drug testing, where necessary, should be limited to the smallest group of people possible, not demonstrated as a badge that the company disapproves of illicit substances. Ibid., p. 41.

[117] Ellen Weber Testimony, Hearing Transcript, p. 21.

[118] EEOC Technical Assistance Manual on the ADA 8.8.

[119] Ibid.

[120] Ibid.

[121] Pre-employment Disability-Related Questions and Medical Examinations was issued by the EEOC on Oct. 10, 1995.

[122] EEOC Technical Assistance Manual on the ADA 8.8.

[123] Ibid.

[124] Ibid. 8.9.

[125] Ibid.

[126] Ibid.

[127] Ibid.

[128] Ibid. 8.6, 8.9.

[129] Delogu Testimony, Hearing Transcript, p. 13.

[130] EEOC Technical Assistance Manual on the ADA 8.9.

[131] Rothstein Testimony, Hearing Transcript, pp. 18 19.

[132] EEOC Technical Assistance Manual on the ADA 8.9. For example, if drug test results indicate that an individual is HIV positive, or that a person has epilepsy or diabetes because use of a related prescribed medicine is revealed, this information must remain confidential. Ibid.

[133] Ibid. 8.10.