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Tips for Handling Workplace Substance Abuse Under Americans with Disabilities Act

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Tips For Handling Workplace Substance Abuse Under ADA

By Robert Usinger and Barry Temkin
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The opioid crisis has focused attention on workplace substance abuse like never before. In August, President Donald Trump declared the opioid crises “a national emergency,” the likes of which “this country has never seen before.” State and federal political leaders from both parties, in a rare display of bipartisanship, have agreed that substance abuse — including prescription painkillers — has risen to unprecedented levels. Drug overdoses have risen to alarming levels.

Given the amount of public debate on the opioid crisis, it is inevitable to foresee a rise in workplace disputes involving drug and alcohol abuse, especially given the status of alcoholism and substance abuse under the Americans with Disabilities Act. In light of these developments, a review of the law regarding substance abuse in the workplace under the ADA is timely.

During working hours employers are permitted under Title I of the Americans with Disabilities Act to maintain a drug- and alcohol-free work environment. Specifically, under the ADA and the Drug Free Workplace Act of 1988, employers are permitted to completely prohibit the use of drugs and alcohol in the workplace, drug test applicants at the pre-employment phase of hiring, test current employees for the illegal use of drugs, and discharge or terminate employees who are found to currently engage in illegal drug use. Further, most states have laws prohibiting on-the-job use of alcohol and/or controlled substances.

For most employees, it is quite simple to avoid using drugs and/or alcohol at the workplace. However, for a small subset of the workforce who suffer from drug addiction and/or alcoholism, this is a much more complex matter. According to the National Survey on Drug Abuse and Health, between 2008 to 2012, 8.7 percent of full-time workers aged 18 to 64 admitted to using alcohol heavily within the past month, 8.6 percent admitted to using illicit drugs within the past month, and 9.5 percent admitted that they were dependent on or abused alcohol or illicit drugs in the past year. Further, according to recent data collected from Quest Diagnostics, a provider of clinical laboratory services, the percentage of employees testing positive for illegal drugs has increased for the second year in a row since 2014. Additionally, according to recent surveys, the trend among many employers has been to enhance and expand their screening of drug and alcohol use in the workplace. Herein a significant problem presents itself: How can employers maintain a drug- and alcohol-free work environment while at the same time
accommodate those employees who suffer from drug addiction and/or alcohol abuse?

Take Steve Sarkisian for example. Sarkisian, a former University of Southern California football coach, recently filed a lawsuit against the university alleging that it fired him without “accommodating” his efforts to seek treatment for his disability — alcoholism. The details and allegations are dramatic, such as Sarkisian being fired by email while on a plane to a rehabilitation clinic.[1] Sarkisian’s claims have been since referred to binding arbitration. Unfortunately, this case is just one of many involving employees who suffer from drug addiction and/or alcohol abuse. There are an increasing number of cases similar to Sarkisian’s that have employers scratching their heads about how to best handle employees who are addicts and/or alcoholics.

The first step in dealing with this complex issue is to understand the difference between addicts and alcoholics in terms of who is afforded protection under the ADA and who is not. Historically, addicts who are currently engaging in the use of drugs have not been afforded protection under the ADA. However, an employer may not discriminate against a qualified employee with a history of drug addiction but who is not currently using drugs and who has been rehabilitated, or is in rehabilitation. On the other hand, employees who currently abuse alcohol and employees who are recovering alcoholics may be considered disabled under the ADA, depending on whether their condition substantially limits their major life activities. Thus, it is evident the ADA views the employee with an alcohol addiction in a slightly more favorable light than the employee with a drug addiction.

Addicts and alcoholics have not fared well in litigation which sought rulings in their favor for discrimination claims. This is in part due to the fact that drug addiction and alcoholism are inherently dissimilar to traditional disabilities that fit more neatly into the protections afforded by the ADA, and it is often difficult for employees with drug addiction and/or alcoholism to show that they are disabled such that they are unable to perform major life activities, yet still able to perform their essential job functions. In addition, as set forth above, there is an inherent tension between trying to protect the legal rights of addicts and alcoholics and the employers’ indisputable right to prevent the use of drugs and alcohol in the workplace.

Under the ADA, to meet the burden of proof for a discrimination claim, a plaintiff must plead and prove the following: (1) the plaintiff has a disability within the meaning of the ADA; (2) the plaintiff was qualified for the position and able to perform its essential functions, with or without a reasonable accommodation; and (3) the plaintiff’s disability was a motivating factor in the adverse job action.

In order to make out a prima facie case under the ADA, addicts or alcoholics have to make their employer aware of their disability. In the context of alcoholism and addiction, this seems like a highly unlikely event to occur. One can only imagine the consequences to an employee following such a conversation due to the stigmas attached to addiction and also, perhaps the genuine fear on the part of the employer concerning how to handle such an admission.

Additionally, to make out a prima facie case under the ADA, an employee would need to prove that his/her disability “substantially limits a major life activity.” [2] Failure to prove this would be grounds for dismissal of the lawsuit. Under the ADA, addicts and alcoholics generally find the “substantially limited” burden nearly insurmountable. The case of Maull v. Division of State Police, Department of Public Safety illustrates this point.[3]

Maull argued that his alcoholism rose to the level of a disability but, at the same time, did not affect his performance on the job. Maull was a state trooper who had a very extensive history of consequences
related to his alcoholism, including multiple incidents of driving while intoxicated, automobile accidents, including single-car collisions, calling in sick due to alcoholism and showing up to work intoxicated. His employer’s knowledge of his struggles was not in question and he underwent formal treatment for alcoholism. However, after several suspensions, Maull was terminated as a result of his actions while under the influence of alcohol in the workplace. Despite Maull’s checkered history, the court held that he did not demonstrate that his alcoholism substantially limited a major life activity. If Maull could not prove that his major life functions were “substantially limited,” it seems hard to imagine any alcoholic who could.

On the other hand, even if Maull had been able to demonstrate that his drinking substantially limited a major life activity, it is likely Maull would have still lost his case. If Maull’s drinking substantially impaired a major life activity, his employer could have made the argument that Maull’s alcoholism affected his ability to do his job, because the ADA does not require an employer to lower its job performance expectations in order to accommodate an employee with alcoholism. Indeed, that was an alternative basis for denying Maul’s claim, as the court wrote, “Plaintiff’s continued employment as a State Trooper would pose a considerable threat to the health and safety of the public and his fellow troopers, such that plaintiff is not qualified for employment as a State Trooper.”[4] As such, Maull’s termination would not have been unlawful.

The catch-22 for addicts and alcoholics under the ADA is always that if they are able to prove that their addiction substantially limits a major life activity, they would tend to prove in the process that they are incapable of doing their job and could be lawfully discharged. For example, it is permissible under the ADA to dismiss an employee who shows up to work under the influence of alcohol or engages in the illegal use of drugs in the workplace. This begs the question of how someone can be substantially limited by his/her addiction if he/she is able to exert enough control over his/her disability that it does not infiltrate working hours. Many of the cases confronting the legal dilemma posed by substance abuse under the ADA have misperceived the nature of addiction and thus far have proven unwilling to carve out exceptions to promote protections for these groups of individuals.

The Fifth Circuit’s decision in Burch v. Coca-Cola Co., is also illustrative of the plaintiff’s dilemma of proving a “substantial limitation” of major life functions under the ADA yet remaining competent to perform one’s job as mandated by the courts.[5] Burch was a regional sales manager for Coca-Cola who claimed that he was fired for alcoholism. The company countered that Burch was terminated for profane and threatening conduct at a national sales meeting. Burch actually won his case before a jury at the lower level but the appellate court reversed, declaring that: “Permanency, not frequency, is the touchstone of a substantially limiting impairment.”[6] Burch was simply not drunk often enough in the court’s view to be “substantially limited” by his alcoholism. But, had he introduced evidence that he was permanently intoxicated, most likely his employer would have been able to dismiss him for not being able to perform his job or for being drunk on the job.

Under some circumstances the ADA may require an employer to make reasonable accommodations for addicts and/or alcoholics who ask for them. Reasonable accommodation in this context typically arises where an employee requests leave to participate in a rehabilitation program, which in turn likely leads to future inquiry concerning the ability of the employee to perform his/her job or even termination as in the case of Sarkisian or Burch. Indeed, some courts have ruled that reasonable accommodation for a substance abuser should be limited in scope, as there is a limit to the number of leaves of absence that an employer must provide to a recovering addict under the ADA.[7] An employee may not stave off discharge indefinitely by enlisting in an endless cycle of rehabilitation programs. For example, as the
Ninth Circuit has noted in a case involving a government worker, a reasonable accommodation for an alcoholic may have five steps, leading up to discharge:

The employer should (1) inform the employee of available counseling services; (2) provide the employee with a "firm choice" between treatment and discipline; (3) afford an opportunity for outpatient treatment, with discipline for continued drinking or failures to participate; (4) afford an opportunity for inpatient treatment, if outpatient treatment fails; and (5) absent special circumstances, discharge the employee for any further relapse.[8]

While employers generally enjoy success in defending ADA claims made by addicts and/or alcoholics, they do sometimes run into problems when there is inconsistency in the treatment of employees. In Flynn v. Raytheon Co., a district court ruled that it would be perfectly permissible to terminate an employee of nine years for a single offense of showing up for work intoxicated.[9] Flynn, however, alleged that the employer had not enforced its zero-tolerance policy against others in the past, and for this reason, the employer’s motion to dismiss was denied. Similarly, in Miners v. Cargill Communications Inc., the plaintiff defeated summary judgment by introducing evidence showing that other employees who had driven company vehicles after consuming alcohol (the offense for which she was allegedly fired), were not terminated.[10] The Miners court went further in implying that the defendants actually created a new rule with the plaintiff in mind.[11]

Employers should note that changes have been made to expand protection for those employees who are addicts and/or alcoholics. In 2009, Congress enacted The Americans With Disabilities Amendments Act (ADAAA). The intent of this act is to broaden and clarify the scope of protections afforded by the original ADA. It is likely that the broadening and “clarification” of the ADAAA will lead to more favorable outcomes for addicts and alcoholics, as its stated purpose is to expand the definition of disability. The ADAAA seeks to broaden the definition of disability, expand the definition of major life activity and modify the regulatory definition of “substantially limits.” Perhaps most importantly for the addict and/or alcoholic, the ADAAA seeks to clarify that “disability” includes an impairment that is episodic or in remission provided that an employee can show that it substantially limits a major life activity. It goes without saying that the ADAAA is likely to reduce some of the hurdles that prevent addicts and/or alcoholics from successfully litigating their claims, while also heightening scrutiny of employers’ treatment of this group of individuals.

In fact, the early results illustrate this likelihood. In U.S. Equal Employment Opportunity Commission v. Dillard’s Inc., the EEOC survived a motion to dismiss, and ultimately settled with the employer for $2 million, after challenging Dillard’s policy of requiring employees to disclose the medical reasons for requested sick leave.[12] The EEOC established that several Dillard’s employees were fired for refusing to provide details of their medical conditions, in some instances on advice of their physicians. This case has important implications for the addict and alcoholic, as it could prevent the employee from having to implicate himself in activity that would be justifiable grounds for his termination under the prior interpretation of the ADA.

Based on the Dillard’s case, it is clear that privacy is a central focus of the ADAAA and not just for addicts and/or alcoholics. Following the Dillard’s settlement the EEOC issued a press release stating, in part that: “Policies and practices that permit medical inquiries without proof of a valid business necessity run afoul of the law ... All employers should carefully examine their own policies and practices to ensure compliance with federal law.” As such, employers should be cautious about probing into the medical justifications for employee leave.
Moving forward, as the courts and employers attempt to navigate the implications of the ADAAA’s broadened definition of disability, employers who are considering terminating an addict and/or alcoholic should be certain they have been consistent with their treatment of other employees in the past concerning drug use and drinking in the workplace. Employers should ensure that their employee manuals clearly prohibit drug and alcohol use during work hours. Furthermore, when in doubt, employers should always consult legal counsel to make sure they are not running afoul of the ADA or the ADAAA when handling employees who suffer from drug and/or alcohol addiction.

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[8] Fuller v. Frank, 916 F. 2nd 558 (9th Cir. 1990) (quoting from Rogers v. Lehman, 869 F. 2nd 253 (4th Cir. 1989)) (government letter carrier was properly discharged and failed to make out claim under ADA)


