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ALCOHOL, DRUGS AND THE ADA

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ABSTRACT

The Americans with Disabilities Act of 1990 [1] (ADA) is the first comprehensive federal statute prohibiting discrimination in employment against individuals with disabilities. The employment provisions of the act became effective on July 26, 1992 for employers having twenty-five or more employees. On July 26, 1994, the law extends to employers with fifteen or more employees [1, §12111(5)(A), §12111 nt]. The ADA protects a "qualified individual with a disability" from discrimination in employment [1, §12112(a)] and requires covered employers to provide such individuals with "reasonable accommodation" that would not result in a "undue hardship" [1, §12112(b)(5)(A)]. Each of these terms is loosely defined in the statute and will be subject to further interpretation through decisions of the federal courts. A violation of the ADA may be remedied through a lawsuit against the employer in federal court [1, §12117(2)].

The focus of this article is on how the ADA interacts with the efforts of private employers, supported and encouraged by the state and federal governments, to attack the problem of drug and alcohol abuse in the workplace. Although on the face of the statute the ADA appears to have been drafted in a manner that would avoid any conflict with the drug prevention efforts of private employers, a closer reading of the statute suggests that the ADA may be used to attack drug and alcohol prevention programs.

COVERAGE OF DRUG ABUSERS

The ADA contains an explicit exclusion from the coverage for "any employee or applicant who is currently engaging in the illegal use of drugs" [1, §12114(a)]. This exclusion seems to indicate a congressional intent to relieve employers from

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any liability for testing, disciplining or discharging employees who are users of illegal drugs. Another section of the act makes it clear that a covered employer may prohibit illegal use of drugs in the workplace; may require that employees not be engaging in illegal use of drugs at the workplace; may require employees to behave in conformance with the Drug-Free Workplace Act of 1988; and may hold an employee who engages in the illegal use of drugs to the same qualification standards for employment or job performance and behavior that the employer holds other employees, even if the unsatisfactory performance or behavior is related to the use of drugs [1, §12114(c)].

The statute contains no clear definition of what constitutes "current drug use." The legislative history indicates that a person who tests positive for drug use is deemed to be currently engaging in the illegal use of drugs [2]. Furthermore, the exclusion of current drug users from coverage clearly was not intended to be limited to individuals who use drugs on the day of, or within a matter of days or weeks before, the employment action in question. The legislative history states that the exclusion was intended to apply to an individual whose use of illegal drugs occurred recently enough to justify a "reasonable belief" that that person's use is current [2].

Clearly, at some point a current drug user not covered by the act may become a former drug user who is protected. The legislative history indicates that this point does not occur within days or even weeks of the last use of drugs [2]. But the exact point in time at which a former user of drugs becomes covered by the ADA remains unclear. Indeed, the Equal Employment Opportunity Commission (EEOC) has stated that this issue is to be determined on a "case-by-case" basis [3].

The exclusion for current drug users is further qualified in the act. First, an individual who was addicted to illegal drugs and who has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs or who has otherwise been rehabilitated successfully and is no longer engaging in such use may be covered under the act [1, §12114(b)(1)]. It is important to note that to be covered by the ADA, the former illegal drug user must have been actually addicted to drugs. A person who casually used drugs in the past is not considered an individual with a disability because, absent addiction, drug use does not "substantially limit" a major life activity [3, §8.5].

The legislative history indicates that to be rehabilitated the individual must have participated in an in-patient, out-patient, or employee assistance program that provides professional (but not necessarily medical) assistance and counseling [2]. The EEOC has also stated that a recognized self-help problem, such as Narcotics Anonymous, will qualify as a "rehabilitation program" [3, §8.5].

Furthermore, an individual who has been addicted to drugs but is currently participating in a supervised rehabilitation program and who is no longer engaging in drug use may also be covered by the act even though the individual has not successfully completed the rehabilitation program [1, §12114(b)(2)]. Merely participating in a drug treatment program is insufficient to bring a drug user within

the coverage of the act: the individual must also refrain from illegal use of drugs. Again, the length of time the individual must have refrained from drug use is not set forth.

The EEOC has recognized that an employer may refuse to hire an applicant with a past history of illegal drug use, even if the applicant no longer uses drugs, if the employer can show that the policy is job-related and consistent with business necessity [3, §8.7]. It appears that this "business necessity" defense will be narrowly construed. Furthermore, before applying such an automatic exclusion, the employer must analyze whether its job-related concerns could be alleviated through some form of reasonable accommodation, such as job restructuring.

An employer may also exclude an applicant with a history of illegal drug use or alcoholism if the employer can demonstrate that the individual poses a direct threat to health or safety [3, §8.7]. The employer must demonstrate a high probability of substantial harm to the applicant or to others that cannot be reduced through reasonable accommodation. The EEOC noted that this "high probability" cannot be proved through general statistics indicating the likelihood of addicts or drug users suffering a relapse [3, §8.7]. The employer must assess the particular individual, that individual's history of substance abuse, and the specific nature of the job involved.

Finally, an employee who is erroneously regarded as an engaging in illegal drug use, but is not engaging in drug use, may be covered under the act [1, §12114(b)(3)]. It is this limitation on the exclusion of current drug users from coverage under the ADA that will surely generate much litigation. The legislative history makes it clear that Congress did not intend to prevent individuals from challenging a positive drug test result by alleging that they are erroneously regarded as current users of drugs [2, p. 65]. One can well imagine that any employee or applicant who tests positive in employment drug testing and thereby loses employment will be tempted to challenge the results of the drug test and the procedures by which that test was administered.

The ADA states that drug testing is not considered to be a "medical examination" and therefore is not directly subject to the act's restrictions on medical examinations [1, §12114(d)(1)]. Furthermore, the legislative history of the ADA makes it clear that the act does not provide any standard by which the accuracy or validity of a drug test result is to be determined [2, p. 65]. Nonetheless, through a challenge to the validity of the results of an individual drug test, an employer's drug testing policies and procedures will be subject to review by the federal courts. Although the ADA itself does not suggest standards of validity for drug testing, employers may wish to adopt the procedures and standards employed by the federal government itself for testing employees under the various federal drug-testing regulations [4].

A key issue sure to arise in litigation challenging a drug test is who bears the burden of proving the validity, or lack thereof, of the drug test. In lawsuits under other federal discrimination statutes, the plaintiff generally has the burden of

proving that he or she is a member of the class of persons protected by the statute (see, e.g., [5]). It would seem that under the ADA, the employee or applicant would bear the burden of showing that he or she was erroneously regarded as engaging in drug use but was not actually engaging in such use. Thus, the employee or applicant would bear the burden of proving that a positive result of a drug test was invalid.

Similarly, an employee who claims that a positive drug test was the result of a lawfully prescribed medication may be protected under the ADA as an individual erroneously regarded as using illegal drugs [3, §8.6, 8.9]. To protect against this eventuality, employers who drug test may use pretest questionnaires to seek information about prescription drug use. Such questionnaires may be given to applicants only after a conditional offer of employment has been made [3, §8.9]. Employers may also use a medical review officer to review positive drug test results and to verify an individual's use of prescription drugs. Information obtained through the questionnaire or by the medical review officer must be treated as confidential medical information [3, §8.9].

Questions under the ADA may also arise concerning whether employees who are drug users and who suffer from psychoactive substance use disorders are covered under the ADA. Such disorders resulting from current drug use are explicitly excluded from coverage under the ADA [1, §12211(b)(3)]. However, no explicit exclusion is stated for physical disability resulting from drug use, or psychoactive substance use disorders resulting from past drug use. By implication, individuals with these disabilities may be covered under the ADA.

USE OF ALCOHOL AND THE ADA

The treatment of alcoholism under the ADA differs substantially from that of illegal drug use. An employer may prohibit alcohol use in the workplace, require that employees not be under the influence of alcohol while on the job, and require alcoholic employees to meet the same standards of job performance and behavior as any other employee [1, §12114(c)]. However, unlike current drug users, current users of alcohol are not excluded as a class from coverage.

Thus, it appears that an employee who is currently abusing alcohol is protected under the ADA, so long as the individual does not use alcohol or is not under the influence of alcohol while on the job, and so long as the use of alcohol does not otherwise adversely affect work performance. Only if the employee violates rules of conduct or fails to meet standards of performance to which all other employees are subject, may the employee be disciplined or discharged.

Issues involving the discipline of employees who abuse alcohol are likely to arise in situations where the employer disciplines an individual for off-duty and off-premises conduct. Statements made by proponents of the ADA during debate indicate that an employer might legitimately discipline an employee for off-duty conduct if that conduct reflects poorly on the employer's public reputation or

otherwise can be connected to job performance in the workplace [6]. Similar issues have arisen under the just cause provisions of collective bargaining agreements, and labor arbitration decisions on this issue may provide some guidance to employers and to the courts in determining when off-duty conduct is sufficiently "job-related" to support discipline or discharge [7].

PREEMPLOYMENT INQUIRIES ABOUT DRUGS AND ALCOHOL

The ADA prohibits an employer from asking a job applicant about the existence, nature, or severity of a disability. In determining the legality of a preemployment inquiry, the ADA distinguishes between inquiries made before a conditional offer of employment and those made after such an offer.

Before a conditional offer of employment has been made, the employer may ask whether an applicant drinks alcohol and whether the applicant is currently using drugs illegally [3, §8.8]. An employer may not, however, ask whether an applicant is an alcoholic or drug addict, nor may the employer inquire whether the applicant has ever been in drug or alcohol rehabilitation [3, §8.8]. Likewise, the employer may not at this juncture ask whether an employee is taking any prescribed drugs [3, §8.9]. These limitations apply to questions both in job interviews and on job application forms.

After a conditional offer of employment has been made, the employer may inquire further concerning past or present drug or alcohol use in accordance with the ADA's provisions dealing with medical examinations or medical questionnaires [3, §8.8]. The employer may not use such information to exclude an individual with a disability on the basis of that disability unless it can be shown that the exclusion is for a job-related reason and consistent with business necessity and that the job criteria cannot be met with a reasonable accommodation.

TESTING FOR DRUGS OR ALCOHOL

As noted above, the ADA excludes drug testing from the definition of a medical examination. Thus, a drug test may be required of applicants or employees at any time, whether or not such a test is job-related and justified by business necessity. An employer may refuse to hire an applicant or may discharge an employee based on a positive result to a drug test, even if the applicant or employee claims that he or she recently stopped using illegal drugs [3, §8.9].

Testing of individual blood alcohol level, however, is a completely different situation. A blood alcohol test is considered a "medical examination" under the ADA. As such, an applicant may be required to take such a test only after a conditional offer of employment has been made [3, §8.9]. Such an examination must be given to all entering employees in a particular job category, and may not be limited to individuals whom the employer suspects may be alcoholics.

Test for drugs or alcohol may reveal that an employee or applicant may be taking prescribed medication. Such information must be kept confidential [3, §8.9]. It may not be disclosed to supervisors or other decision makers. The information may be recorded in files separate from the general personnel files and access to these files must be limited [3, §6.5].

Employers who are subject to drug or alcohol testing requirements contained in other federal laws and regulations may continue to comply with these mandates. Included are regulations implemented by the Department of Transportation for airline employees [8], interstate motor carrier drivers [9], and railroad engineers [10], and regulations for safety sensitive positions established by the Department of Defense [11] and the Nuclear Regulatory Commission [12].

CONCLUSION

Clearly, the implementation of the Americans with Disabilities Act will raise significant legal issues for employers in dealing with drug and alcohol abuse in the workplace. Although in some respects the law appears to defer to the employer in dealing with employees who use illegal drugs or who abuse alcohol in the workplace, the law also provides a vehicle for employees to challenge an employer's actions under a drug and alcohol policy. Key areas of challenge arise with regard to when an employee may legitimately be treated as a "current user" of drugs; what standards of proof apply when an employee challenges disciplinary action on the basis that the employee is erroneously regarded as a current user; and when an employer may discipline an employee for alcohol abuse that occurs off duty and off premises. Each of the issues will be subject to judicial interpretation, and a final answer must await the development of case law under the ADA.

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