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News Letter

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The Pitfalls of Prescription Drugs: What To Do When You Think An Employee Is Addicted

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All human resources professionals are aware of the Americans with Disabilities Act and its capacity for trapping well-meaning employers. Human resources professionals must be particularly careful in deciding how to deal with an employee whose circumstances may implicate the ADA.

Suppose an employee begins exhibiting erratic or strange behavior or otherwise changes the quality of his or her typical work performance. You suspect the employee is using drugs. Your first instinct is to fire the employee. Before you act, though, you should be concerned about two issues: First does it matter for ADA purposes whether the employee is hooked on “street” drugs or prescription drugs. Second, are you allowed to ask the employee whether he is using drugs?

I. The Basics

Congress passed the ADA “to protect individuals from employment discrimination by employers on the basis of an actual or perceived disability, provided that the disability

substantially limits or is perceived to limit substantially a major life activity.”¹ The ADA, therefore, prohibits covered employers from discriminating against a “qualified individual with a disability” on the basis of such disability in its treatment of the employee.² “Disability” for ADA purposes includes: “(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.”³

An employer is required to make a “reasonable accommodation” for a qualified individual with a disability. Such accommodation, however, need not constitute an “undue hardship” on the employer.⁴ So long as the employer provides a reasonable accommodation for the employee’s disability, the employer can hold the employee “to any performance criteria that are job-related and consistent with business necessity”⁵ Further, employers can take action against a disabled employee who poses a “direct threat” to the health or safety of others in the workplace.⁶

Generally, then, the ADA protects an employee from adverse employment action both because she is disabled and because of misconduct stemming from her disability. The Act, however, provides room for employers to remove employees whose behavior is unreasonably detrimental to the business.⁷

¹ *Nielsen v. Moroni Feed Co.*, 162 F.3d 604, 608 (10th Cir. 1998).

² 42 U.S.C. § 12112(a).

³ 42 U.S.C. § 12102(2).

⁴ 42 U.S.C. § 12112(b)(5)(A).

⁵ 42 U.S.C. § 12113(a).

⁶ 42 U.S.C. § 12113(b).

⁷ *See Nielsen*, 162 F.3d at 608.

II. Drugs and Alcohol

While the ADA may seem at least minimally clear in its general provisions, like so many parties, the addition of drugs or alcohol makes things much more hazy. The ADA distinguishes between a disability and disability-caused misconduct where the disability is related to alcoholism or illegal use of drugs.⁸

This disparate treatment arises from Congress's intention to remove alcoholism and drug use from the statutory protections of the ADA.⁹ Thus, employers can hold employees who engage in the illegal use of drugs or who are alcoholics to the same standards for employment and behavior to which they hold their other employees, even though any unsatisfactory performance or behavior is related to the employee's illegal use of drugs or alcoholism.¹⁰ The ADA simply does not protect detrimental conduct caused by illegal use of drugs or alcoholism.¹¹

Thus, Congress provided that a person who is "currently engaging in the illegal use of drugs" is not a "qualified individual with a disability."¹² The ADA does not protect those "currently engaging in the illegal use of drugs,"¹³ even though one's status as an illegal drug user

⁸ See, e.g., *id.* The Second Circuit, however, has taken a different approach. It has held conduct caused by alcoholism and drug use is protected to the same extent as the disability itself. See *Teahan v. Metro-North Commuter RR Co.*, 951 F.2d 511, 517 (2d Cir. 1991); *Cushing v. Moore*, 970 F.2d 1103, 1108 (2d Cir. 1992).

⁹ *Nielsen*, 162 F.3d at 608.

¹⁰ See 42 U.S.C. § 12114(c)(4).

¹¹ See *Nielsen*, 162 F.3d at 609.

¹² 42 U.S.C. § 12114(a).

¹³ *Id.* at 609-10 citing 42 U.S.C. § 12114(a); 29 C.F.R. § 1630.3 App. ("Employers . . . may discharge or deny employment to persons who illegally use drugs, on the basis of such use, without fear of being held liable for discrimination."); *Shafer v. Preston Mem'l Hosp. Corp.*, 107 F.3d 274, 280 (4th Cir. 1997) ("we conclude that an employee illegally using drugs in the weeks and months prior to discharge is a 'current' illegal user of drugs for purposes of the ADA . . .").

or alcoholic may receive protection.¹⁴ The Act protects those who (1) have successfully completed a supervised drug rehabilitation program and are no longer using illegal drugs, or have otherwise been rehabilitated successfully and are no longer using illegal drugs; (2) are participating in a supervised rehabilitation program and are no longer engaging in such use; or (3) are erroneously regarded as engaging in such use, but are not engaged in such use.¹⁵

The key in all this is whether the employee's drug use is "illegal" because only "illegal use of drugs" merits exclusion from the qualified individual with a disability class. The ADA defines that term as "the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act." The ADA specifically excludes use of drugs under the supervision of a licensed health care professional from the term.¹⁶ Illegal drug use for ADA purposes includes illegal misuse of prescription drugs as well as use of illegal "street" drugs.

Accordingly, the ADA protects employees who are disabled because of their proper use of prescription drugs under the supervision of a licensed health care professional. Therefore, a plaintiff's allegation that he took prescription drugs under the supervision of a licensed health care professional will defeat an employer's motion to dismiss a lawsuit based on the employer's claim that it fired the plaintiff because he was engaged in the "illegal use of drugs."¹⁷

Otherwise, though, employers can terminate employees whose work performance or behavior does not meet expectations, even if drugs (or alcohol) are behind the employee's failings. One court upheld an employee's termination for on-the-job misconduct. The court held

¹⁴ See 42 U.S.C. § 14112(b); see also, e.g., *Duda v. Bd. of Ed. Of Franklin Park School Dist. No. 84*, 133 F.3d 1054, 1059 n.10 (7th Cir. 1998) (citing cases); *Marrari v. WCI Steel, Inc.*, 130 F.3d 1180, 1182 (6th Cir. 1997).

¹⁵ *Nielsen*, 162 F.3d at 610 citing 42 U.S.C. § 12114(b).

¹⁶ See 42 U.S.C. § 12111(6)(A).

¹⁷ See *Toscano v. Nat'l Broadcasting Co., Inc.*, No. 99 Civ. 10006 DLC, 2000 WL 1742097, at * 3 (S.D. N.Y. Nov. 28, 2000).

the termination was based on the employee's conduct, not his drug use.¹⁸ Another court held an employer did not violate the ADA when it terminated an employee for repeatedly entering private residences without permission during his off-duty hours even though some directors believed the employee was addicted to prescription painkillers at the time.¹⁹

III. Employer's Notice and Duty to Inquire

Now that it is clear that employers must accommodate employees with the status of illegal drug user but not those currently engaging in the illegal use of drugs, we turn to the final question: Whether employers can or should inquire about their suspicions?

Obviously employers should not randomly inquire of employees whether they have a disability. An employer's "duty to accommodate arises only when it knows of a disability"²⁰ Because employers need only accommodate "known" physical or mental limitations of a qualified individual with a disability,²¹ employers do not have to provide unrequested accommodations.²² As such, "[w]hen an employee has a disability, disclosure of the disability is thus a prerequisite to the employer's duty to make accommodation."²³ To inquire about disabilities with employees who have given no indication of a physical or mental limitation could create liability where none otherwise exists.

¹⁸ See *Fitzgerald v. Caldera*, No. 99-5079, 2000 WL 869508, at * 4 (10th Cir. June 27, 2000).

¹⁹ See *Nielsen*, 162 F.3d at 612.

²⁰ *Office of Senate Sergeant at Arms v. Office of Senate Fair Employment Practices*, 95 F.3d 1102, 1107-08 (Fed. Cir. 1996).

²¹ *Id.* citing H.R. Rep. No. 485 (II), 101st Cong., 2d Sess. (1990), reprinted in 1990 U.S.C.C.A.N. 347.

²² *Office of Senate Sergeant at Arms*, 95 F.3d at 1107-08 citing H.R. Rep. No. 485 (III), 101st Cong., 2d Sess. (1990), reprinted in 1990 U.S.C.C.A.N. 462.

²³ *Office of Senate Sergeant at Arms*, 95 F.3d at 1108.

The analysis is different, though, if the employer believes an employee is addicted to drugs or alcohol. Faced with such a suspicion, the employer does not violate the ADA by inquiring with the employee or requesting that he enroll in a rehabilitation program.²⁴ In fact, the employer not only can but must ask an employee it suspects is addicted to confirm its suspicions.

The failure to make such an inquiry led the Eighth Circuit Court of Appeals in *Miners v. Cargill Comms., Inc.*, to set aside a summary judgment in favor of the employer and let a case go to trial. After seeing the employee drink alcohol outside the office then drive a company van in violation of company policy, the employer ordered the employee to undergo counseling for alcoholism. The court rejected the employer's claim that this direction was its attempt at accommodating the employee's alcoholism. Because the employer never inquired with the employee, its argument failed. "Without actual knowledge that Miners was an alcoholic, Cargill cannot now argue that it attempted to accommodate Miners, and it certainly lacks a basis to claim that Miners' refusal of treatment warranted her termination."²⁵

The court continued by stating that, "[h]ad Cargill acted on its perception that Miners suffered from alcoholism by attempting to establish that she was an alcoholic and demonstrated performance problems related to her alcoholism, it might have been able to avail itself of the opportunity to accommodate Miners' disability."²⁶ In sending the case to trial, the court specifically distinguished *Sergeant at Arms*, where a court dismissed a claim because the plaintiff admitted his alcoholism and related performance problems.²⁷

²⁴ See, e.g., *Nielsen*, 162 F.3d at 613.

²⁵ *Miners v. Cargill Comms., Inc.*, 113 F.3d 820, 825 (8th Cir. 1997).

²⁶ *Id.* (footnote omitted).

²⁷ *Id.*

Employers, therefore, cannot force an employee they suspect has a drug or alcohol problem into treatment without proof the employee in fact has a problem that impacts the employee's performance or behavior. If the employee admits having a problem when confronted, the employer may then direct the employee to undergo rehabilitation. An employer's awareness that an employee has completed a treatment program does not establish that a subsequent termination of the employee was based on the employee's illegal use of drugs or alcoholism.²⁸

Even after the employer is aware of the employee's impairment, the ADA still only protects against discrimination based on disability, not conduct. Thus, the employer may redress the employee's violation of reasonable rules of conduct even if the conduct is related to the disability.²⁹ Employers can use "last chance agreements" to avail themselves of this distinction.

The Sixth Circuit Court of Appeals upheld the termination of an alcoholic employee who violated a "last chance agreement."³⁰ The employer twice terminated an employee for coming to work drunk. On both occasions, the employer terminated the employee but reinstated him after he entered a last chance agreement requiring him to undergo rehabilitation, attend Alcoholics Anonymous, and consent to random alcohol tests for five years.³¹ The employer terminated the employee when he tested positive for alcohol within the term of the second last chance agreement.³²

²⁸ See, e.g., *Maull v. State of Delaware*, 141 F.Supp.2d 463, 476 (D. Del. 2001) quoting *Salley v. Circuit City Stores, Inc.*, 160 F.3d 977, 981 (3d Cir. 1998) ("the mere fact that an employer is aware of an employee's impairment is insufficient to demonstrate . . . that the perception caused the adverse employment action.").

²⁹ *Marrari*, 130 F.3d at 1183.

³⁰ *Id.* at 1185.

³¹ *Id.* at 1186.

³² *Id.*

The court held the employer had terminated the employee for his conduct – violating the last chance agreement – rather than for his alcoholism.³³ The last chance agreement was the employer’s legally-required attempt at accommodating the employee’s disability.³⁴ Because the last chance agreement was a valid contract which the employee violated,³⁵ the court affirmed summary judgment for the employer.³⁶

IV. Conclusion

Prescription drugs used properly are beneficial to society and to employers by healing the sick so they can be more productive. Alcohol used responsibly by those of legal age creates few problems. Yet, these elixirs ensnare too many people in addiction. Our mixed feelings toward those who fall into addiction – Should we punish their weakness? Help them through their suffering? – are reflected in the ADA.

The ADA, thus, protects individuals who have undergone treatment and given up their illegal drugs or conquered their alcoholism. Current users of illegal drugs and current alcoholics, however, are not protected by the ADA. Because of this disparate treatment of current and past users, employers who suspect, based on conduct, that an employee is using illegal drugs or abusing alcohol must inquire about their suspicions. The employer who fails to inquire opens itself up to liability. The employer may be held liable for discrimination under the ADA if the employee is neither currently using illegal drugs nor an alcoholic or the employee’s suspicious behavior resulted from the effects of properly using prescribed medication. If the inquiry

³³ *Id.* at 1182-83.

³⁴ *Id.* at 1183.

³⁵ *Id.*

³⁶ *Id.* at 1185; *see also generally Longen v. Waterous Co.*, 347 F.3d 685 (8th Cir. 2003) (upholding termination for violation of last chance agreement).

demonstrates the employee is using illegal drugs or abusing alcohol, though, the employer will be insulated from liability and free to impose discipline based on the employee's unsatisfactory workplace conduct.