

## Welcome to the 2011 Legal Issues Webinar Series

The content and materials of this training are property of the DBTAC - Great Lakes ADA Center and cannot be distributed without permission. This training is developed under NIDRR grant #H133A060097. For permission to use training content or obtain copies of materials used as part of this program please contact us by email at [adaconferences@adagreatlakes.org](mailto:adaconferences@adagreatlakes.org) or toll free 877-232-1990 (V/TTY).

DBTAC  
*great lakes*  
ADA Center  
A member of the ADA National Network

## Webinar Features

- **Closed captioning** – click **CC** icon (top of screen) or control-F8 and adjust your screen
- **Questions** - type and submit questions in the Chat Area Text box or press control-M and enter text in the Chat Area
- Please do not use emoticons or hand-raising features during this session

## Drugs, Alcohol and Conduct Rules Under the ADA

Presented by Barry Taylor, Legal Advocacy Director and  
Alan Goldstein, Senior Attorney, Equip for Equality

July 20, 2011

## Continuing Legal Education Credit for Illinois Attorneys



- This session is eligible for 1.5 hours of continuing legal education credit for Illinois attorneys.
- Illinois attorneys interested in obtaining continuing legal education credit should contact Barry Taylor at:  
[barryt@equipforequality.org](mailto:barryt@equipforequality.org)
- This slide will be repeated at the end.

## Overview



- I. Alcohol and Illegal Drug Use – Who is Covered?
- II. Pre-Employment Inquiries
- III. Drug Testing
- IV. Confidentiality
- V. Reasonable Accommodation Issues
- VI. Workplace Conduct Rules
- VII. Direct Threat
- VIII. Practice Tips

## Illegal Drugs and Alcohol, Who is Covered?

**See DBTAC: Great Lakes ADA Center briefs on the ADAAA and Major Life Activities, Medical Inquiries, Direct Threat, and other relevant topics available at: [www.adagreatlakes.org/Publications](http://www.adagreatlakes.org/Publications).**

## ADA Statute: Illegal Drug Use



- **General Exclusion:** "A qualified individual with a disability shall not include any employee or applicant who is **currently engaging** in the illegal use of drugs, when the covered entity acts on the basis of such use." [42 U.S.C. § 12114\(a\)](#).
- The "currently engaging" exclusion does not apply to anyone who:
  - (1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;
  - (2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or
  - (3) is erroneously regarded as engaging in such use, but is not engaging in such use. [42 U.S.C. § 12114\(b\)](#).

## ADA Statute and Regulations: Illegal Drug Use



- The ADA statute provides that employers:
  - (1) may prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;
  - (2) may require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;
  - (3) may require that employees [comply with] the Drug-Free Workplace Act;
  - (4) may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards [as] other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee;.... [42 U.S.C. § 12114\(c\)](#); [29 C.F.R. §1630.16\(b\)](#).
- ADA Regulations state that 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." [29 C.F.R. § 1630.3 App.](#)

## Illegal Use of Drugs: Things to Note



- “Illegal use of drugs refers both to the use of unlawful drugs, such as cocaine, and to the unlawful use of prescription drugs.”  
[29 C.F.R. Pt. 1630, app. § 1630.3\(a\)–\(c\)](#).
- “Currently engaging” exclusion does not include alcohol use.
- “Record of” and “regarded as” coverage also apply.
- Individuals must show which major life activity is implicated.
- Drug tests are not medical examinations under the ADA, but alcohol tests are. See [EEOC Enforcement Guidance: Disability-related Inquiries and Medical Examinations of Employees Under the ADA](#).
- ADAAA did not specifically address drug and alcohol use, however rules requiring a liberal interpretation of “substantial limitation” apply.

## ADA Interpretive Guidance: Illegal Drug Use



- “Currently engaging” is 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.”
- Applies to “illegal use of drugs that has occurred **recently enough to indicate that the individual is actively engaged** “ in drug use.  
[29 C.F.R. Pt. 1630, app. § 1630.3\(a\)–\(c\)](#)
- **Query:** Including rehabilitation, what period of time without drug use should elapse before someone is no longer “currently engaging”?
  - A. Three weeks
  - B. One month
  - C. Two to three months
  - D. Four to six months

## Cases: “Currently Engaging”



- Stating a drug test “might” be positive, when the test was negative, is not “currently engaging” and does not constitute a 2d drug offense. ***McFarland v. Special-Lite, Inc.***, 2010 WL 3259769 (W.D. Mich. 8/1710).
- Termination was proper while employee was starting a 90-day inpatient rehab program as “the ‘safe harbor’ provision applies only to employees who have refrained from using drugs for a significant period of time.” ***Brown v. Lucky Stores, Inc.***, 246 F.3d 1182 (9th Cir. 2001).
- Violation of a “three-strike rule” is “currently engaging.” ***Wood v. Indianapolis Power & Light Co.***, 210 F.3d 377 (7th Cir. 2000) (unpublished).

## Cases: “Currently Engaging”



- Three weeks after an arrest for selling cocaine is “currently engaging.” ***Nader v. ABC Television, Inc.***, 150 F. App’x 54 (2d Cir. 2005).
  - ✦ Michael Nader played the “dashing” Count Dimitri Marickll on *All My Children*. (*People Magazine*).
- Drug use three and one-half weeks ago is still “currently engaging.” ***McDaniel v. Mississippi Baptist Medical Center***, 877 F. Supp 321 (S.D. Miss.), *aff’d*, 74 F. 3d 1238 (5th Cir. 1995) (unpublished).
- Termination five weeks after a positive test is “currently engaging.” ***Zenor v. El Paso Healthcare System Ltd.***, 176 F.3d 847 (5th Cir. 1999).
- Use of illegal drugs in the weeks and months leading up to termination is “currently engaging.” ***Collings v. Longview Fibre Co.***, 63 F.3d 828 (9th Cir. 1995).

## Recent Case: “Currently Engaging”

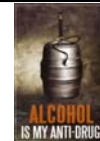
**POSITIVE RESULTS**

*Mauerhan v. Wagner Corp.*, 2011 WL1467571 (10th Cir. Apr. 19, 2011)

- An individual was terminated after a positive drug test and was told he would be reinstated if he completed a rehabilitation program.
- Upon completion of a thirty-day inpatient rehab program, he was told his compensation would be lowered and he would lose some accounts.
  - ✦ Plaintiff refused and filed suit.
- **Court:** “No formula can determine if an individual qualifies for the safe harbor for former drug users or is ‘currently’ using drugs.”
  - ✦ Plaintiff was a current drug user as “the drug use was sufficiently recent to justify the employer’s reasonable belief that the drug abuse remained an ongoing problem.”
  - ✦ Plaintiff admitted the prognosis for “anyone coming fresh out of the rehab is guarded.”
  - ✦ “At least ninety days of recovery was necessary to ensure significant improvement.”

See Legal Brief on this topic at: [www.adagreatlakes.org/Publications](http://www.adagreatlakes.org/Publications)

## “Currently Engaging” Exclusion Applies Only to Drugs, Not Alcohol



- The plain language of the ADA’s “currently engaging” provision does not exclude an individual who is currently using alcohol (and Nyquil) although employee’s discharge is upheld for violation of a last chance agreement.  
*Mararri v. WCI Steel, Inc.*, 130 F.3d 1180 (6th Cir. 1997).

## “Regarded As” Cases: Finding for the Employee



- Employee may have a “regarded as” claim when his ADHD prescription medication, Desoxyn, caused a false positive for methamphetamine on a pre-employment drug test. *Warshaw v. Concentra Health Services*, 719 F. Supp. 2d 484 (E.D. Pa. 2010).
- A person terminated for drinking on the job may have a “regarded as” claim due to inconsistent enforcement of workplace rules on drinking. *Miners v. Cargill Communications, Inc.* 113 F.3d 820 (8th Cir. 1997).

## “Regarded As” Cases: Finding for the Employer



- An employee who states he was not willing to see a city doctor because “I’m going to come up positive for cocaine or heroin or something” was not erroneously “regarded as” engaging in illegal drug use. *Muhammed v. City of Philadelphia*, 186 Fed. Appx. 277, (3d Cir. 2006).
- When an employee admits drug use over an extended period of time, there is no “regarded as” claim as any perception of drug use was not erroneous. *Hoffman v. MCI Worldcom Communications, Inc.*, 178 F. Supp. 2d 152 (D. Conn. 2001).
- President of a feed company was not “regarded as” having a drug addiction as he was terminated for entering private homes uninvited after an evaluation showed he was not addicted to drugs. *Nielsen v. Moroni Feed Co.*, 162 F.3d 604 (10th Cir. 1998).



## “Record Of” Case



*Doe v. The Salvation Army in the U.S.*, 2008 WL 2572930 (6th Cir. 2008)

- After an applicant admitted he had used psychotropic medications for mental illness, the job interview was terminated.
- **Court:** Applicant has a “record of” a disability.
- Employer acted unlawfully by refusing to hire him based on this record.
- **Note:** Rehabilitation Act case - same analysis as in ADA cases.
- **Query:** Is this also a “regarded as” case? Please answer “Yes” or “No.”

## “Record Of” & “Regarded As” Case: In Prison



*Thompson v. Davis*, 295 F.3d 890 (9th Cir. 2002)

- Two California state prisoners with drug addiction alleged that various officials had violated Title II of the ADA by denying them full and fair consideration for parole based on their disability.
- **Court:** Plaintiffs had a disability within the meaning of the ADA because they successfully alleged that their past drug addiction substantially limited certain major life activities, including their ability to learn and work.

## Substantial Limitation of a Major Life Activity



Employees must show substantial limitation of a major life activity.

- Driving is not a major life activity.  
*Mandujano v. Geithner*, U.S. Dist. LEXIS 68582 (N.D. Cal. June 27, 2011).
- Accessing medical care is not a major life activity.  
*Tyson v. Or. Anesthesiology Group*, 2008 WL 2371420 (D. Or. June 6, 2008).
- Plaintiff failed to show a substantial limitation in working.  
*Ames v. Home Depot USA Inc.*, 629 F.3d 665 (7th Cir. 2011).
- A teacher, claiming that students are “triggers for her to drink,” failed to allege facts showing a substantial limitation in her “ability to care for herself and to think clearly to avoid succumbing to the next drink.”  
*Larkin v. Methacton School District*, 2011 WL 761548 (E.D. Pa. Feb. 23, 2011).
- **Query:** What major life activity might be implicated by an addiction to drugs or alcohol?  
A. Interacting with others   B. Thinking   C. Concentrating   D. Staying sober

## Pre-employment Inquiries

**See DBTAC: Great Lakes ADA Center  
Brief on Medical Inquiries available at:  
[www.adagreatlakes.org/Publications](http://www.adagreatlakes.org/Publications)**

## Pre-employment Disability Inquiries: In General



- Employers may ask about current illegal use of drugs because such use is not protected under the ADA.
- Employers may also ask about prior illegal drug use provided that the particular question is not likely to elicit information about a disability.
- Employers may not ask applicants about their lawful drug use because such questions are likely to elicit information about a disability.
  - ✦ **Exception:** Employers are permitted to inquire about lawful drug use if the employer administered a test for illegal use of drugs and an applicant has tested positive for illegal use. Such questions may validate a positive test result or provide other possible explanations for the result.

*EEOC: Enforcement Guidance: Pre-employment Disability-Related Questions and Medical Examinations*, No. 915.002 (1995) available at: [www.eeoc.gov/policy/docs/preemp.html](http://www.eeoc.gov/policy/docs/preemp.html) (last updated 7/6/00); See also U.S. Dep't of Justice, *Questions and Answers: The Americans with Disabilities Act and Hiring Police Officers*, (1997) available at: [www.ada.gov/copsq7a.htm](http://www.ada.gov/copsq7a.htm) (last updated 4/4/06).



(877) 232 – 1990 (V/TTY)  
<http://www.ada-audio.org>

21

## Pre-employment Disability Inquiries: Prior Illegal Drug Use



- **March 2011 - EEOC Informal Discussion Letter:** Questions about treatment or counseling received for prior illegal drug use, and inquiries about the number of times and dates illegal drugs were used, are disability-related questions that are prohibited.

*EEOC: Rehabilitation Act and Title VII: Applicant Screening using Disability-related Inquiries, Criminal History Inquiries, and Financial History Inquiries in SF 85P and SF 85P-S*, (2011) available at: [www.eeoc.gov/eeoc/foia/letters/2011/rehabact\\_titlevii\\_85p.html](http://www.eeoc.gov/eeoc/foia/letters/2011/rehabact_titlevii_85p.html) (last updated May 17, 2011).



(877) 232 – 1990 (V/TTY)  
<http://www.ada-audio.org>

22

## Pre-employment Disability Inquiries: EEOC Guidance on Alcohol Use

- Employers may ask applicants about their drinking habits, unless the particular question is likely to elicit information about alcoholism.
- For example, an employer is permitted to ask whether an applicant drinks alcohol or has been arrested for driving under the influence.
- However, questions asking how much alcohol an applicant drinks or whether s/he has participated in an alcohol rehabilitation program are likely to elicit information about whether the applicant has alcoholism.

*EEOC: Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations, No. 915.002 (1995) available at: [www.eeoc.gov/policy/docs/preemp.html](http://www.eeoc.gov/policy/docs/preemp.html) (last updated 7/6/00).*

## Pre-employment Disability Inquiries: Case



*Doe v. The Salvation Army in the U.S., 2008 WL 2572930 (6th Cir. 2008)*

- Doe offered the information that he could not work on Fridays because it was the day he went to the psychiatrist to pick up his medicine.
- Employer then asked as to the types of medications Doe took and Doe replied “psychotropic drugs.”
- The job interview was then terminated.
- **Court:** Employer may have inappropriately asked Doe about the medications he was taking.
- **Query:** Is there a benefit to knowing about an applicant’s past illegal drug use?  
A. Yes                      B. No                      C. Only if it was within the past 0-5 years

# Drug Testing Under the ADA



## EEOC Guidance: Drug Tests



- Whether a medical test /inquiry is lawful depends on the stage of employment.
  - Drug tests are not considered medical examinations
  - Alcohol tests are considered medical examinations.
  - Employers cannot use “qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability... unless the... criteria,... is shown to be job-related for the position in question and is consistent with business necessity.” 42 U.S.C. § 12112(b)(6).
  - Employer must show that criterion cannot be satisfied and essential functions cannot be performed with a reasonable accommodation. 42 U.S.C. §12111 (8).
- 42 U.S.C. § 12112; EEOC Guidance on Disability-Related Medical Inquiries No. 915.002 (1995) available at: <http://www.eeoc.gov/policy/docs/preemp.html>.
- **Query:** Other than cost, are there any possible negatives for employers in drug testing? Please answer “Yes” or “No.”

## Drug Testing Case



### ***Connolly v. First Personal Bank,*** 2008 WL 4951221 (N.D. Ill. Nov. 18, 2008)

- Applicant took a legally prescribed controlled substance.
  - ✦ Was given an injection of phenobarbital for a back condition.
- After a drug test, bank rescinded its offer without opening information from the employee documenting that she had a prescription(s).
- **Court:** “The exemption for drug testing was not meant to provide a free peek into a prospective employee’s medical history.”
- Denied bank’s S/J motion - Although pre-employment drug tests do not violate the ADA, when the tests cover legally prescribed drugs and are used to make employment decisions beyond the prohibition of illicit drug use, then the use of those tests may violate the ADA.

## Drug Testing Case



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

- A Plaintiff with sleep epilepsy was offered a position as a deputy jailer contingent upon passing a pre-employment drug test.
  - ✦ The test came back positive for PCP.
- Plaintiff thought her sleep epilepsy and allergy medications may have interacted, causing a false positive and requested reasonable accommodations-
  - ✦ Asking that the employer verify the first drug test, accept a second negative test, or a similar accommodation.
- **Court:** Employer had no obligation to engage in the interactive process when nothing in the record showed that an interaction between Plaintiff’s medications could have caused a false positive.
- **Note:** The result may have been different had the Plaintiff offered evidence to show a false positive was a possibility.

## Drug Testing Case and the Appeal



*Bates v. Dura Automotive Systems, Inc.*, 625 F.3d 283 (6th Cir. 2010)

- Employer had employees submit to drug testing due to concerns
  - Several employees were removed due to use of prescription drugs.
- **District Court:** Employees need not have a disability to challenge drug tests. *Bates v. Dura Auto. Systems, Inc.*, 650 F.Supp.2d 754 (M.D. Tenn. April 23, 2009).
  - Inflexibility of the employer's policy and tendency to screen out people with disabilities raised questions of fact for trial.
  - "Selection criteria" must be "job-related and consistent with business necessity."
  - Employees submitted medical information showing ability to perform jobs.
  - None of the seven employees were found to have a current disability although one employee did have a "record of" a disability
- **Sixth Circuit Appellate Court:** For six employees, reversed the court's holding that employees did not need a disability to challenge the drug test.
- **Note:** Most courts do not require an individual to have a disability to challenge improper medical inquiries.

## Confidentiality



## Confidentiality: ADA Statute and Regulations

CONFIDENTIAL

- **ADA Statute:** Information obtained regarding the medical condition or history of the applicant must be collected and maintained on “separate forms and in separate medical files and treated as a confidential medical record, except that
  - (i) supervisors and managers may be informed regarding necessary restrictions on the work or duties... and necessary accommodations;
  - (ii) first aid and safety personnel.. when appropriate; and
  - (iii) government officials investigating compliance...”  
[42 U.S.C. §12112\(d\)\(3\)\(B\).](#)
- **Regulations:** Confidentiality applies to: entrance exams; medical exams; and info for “voluntary” health programs. [29 C.F.R. § 1630.14.](#)

## Confidentiality: EEOC Guidance

CONFIDENTIAL

- Confidentiality applies to all voluntarily disclosed medical information.
- Employers must obtain a release to speak to an employee’s doctor.
  - ✦ The release should be clear as to what information will be requested.
- Medical information may be given to “appropriate decision-makers involved in the hiring process” on a need-to-know basis.
  - ✦ Medical information can be shared with third parties as part of the reasonable accommodation process but must be kept confidential.
  - ✦ Confidentiality must be maintained even after employment or the application process ends.

*EEOC Guidance on Reasonable Accommodation and Undue Hardship Under the ADA*  
found at: [www.eeoc.gov/policy/docs/accommodation.html](http://www.eeoc.gov/policy/docs/accommodation.html); *EEOC Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations*, Number 915.002 Date 10/10/95, found at: [www.eeoc.gov/policy/docs/preemp.html](http://www.eeoc.gov/policy/docs/preemp.html).



## Confidentiality Case



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

- Plaintiff was employed as a boilermaker by the N.Y. Department of Transportation and was subject to random drug tests.
- Plaintiff tested positive for marijuana on two occasions and was placed on medical leave without pay, and then returned to full duty.
  - ✦ The last positive test was June 24, 2003.
- Following a Staten Island Ferry accident in November 2003, the results of Plaintiff's prior drug tests were leaked to the press.
- **Court:** The newspaper article created an inference that confidential drug testing records were improperly disclosed by a city official.
  - ✦ However, Plaintiff could not establish any adverse employment action or damages, so the case was dismissed.
  - ✦ No evidence that Plaintiff was addicted to drugs.

## What Information is Protected from Disclosure?



### *EEOC v. Ford Motor Credit Co.*, 2008 WL 152780 (M.D. Tenn. Jan. 14, 2008)

- Employee with HIV needed intermittent FMLA leave to participate in a clinical drug trial and disclosed his HIV status to his supervisor.
- Supervisor disclosed condition to his HIV to his co-workers causing him shame, humiliation, and depression.
- **Court:** Disclosure was not voluntary and was job-related as it was a pre-requisite to receive leave from work, so confidentiality applied.

**Note:** There may also be state laws regarding confidentiality in addition to HIPAA and ADA requirements.

## Reasonable Accommodation Issues

Accommodation

DBTAC  
*great lakes*  
ADA Center  
A member of the ADA National Network

### Reasonable Accommodations: In General

- Employers are not required to excuse past misconduct, as “reasonable accommodation is always proactive.”
- **Rationale:** Employer generally must provide a reasonable accommodation only after it is requested.
  - ✦ The employer does not have to rescind any warnings or discipline imposed prior to accommodation request.
- Employers must make reasonable accommodation to enable employee with a disability to meet such a conduct standard in the future.
- Current alcohol use may need to be accommodated, but not current drug use.

*EEOC Enforcement Guidance on the ADA  
and Psychiatric Disabilities (3/25/97), at page 31.*

## Reasonable Accommodations: In General



- “It is well-established that alcoholism meets the definition of a disability” although a retroactive accommodation such as a “fresh start” is not required.

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

- Per the EEOC, an employer may prohibit an employee from taking a legally prescribed narcotic medication, but must give the employee a reasonable amount of time to change the medication regimen.

EEOC Press Release, EEOC Sues Tideland EMC For Disability Discrimination (June 23, 2011),  
<http://www.eeoc.gov/eeoc/newsroom/release/6-23-11.cfm>.

## Reasonable Accommodations: In General



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

- Disability-caused misconduct is subject to performance criteria that are job-related and consistent with business necessity, so long as the disabled employee is given the opportunity to meet such performance criteria by a reasonable accommodation.

See also, EEOC Enforcement Guidance on the ADA  
and Psychiatric Disabilities (3/25/97),  
<http://www.eeoc.gov/policy/docs/psych.html>, at page 31.

## Reasonable Accommodations: Cases for the Employee



### *Schmidt v. Safeway*, 864 F. Supp. 991 (D. Ore. 1994)

- Employer must provide a leave of absence for an employee to obtain medical treatment for alcoholism.
- However, “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.”

### *Corbett v. National Products Co.*, 1995 WL 133614 (E.D. Pa. 3/27/95)

- Employer must grant leave to an employee with alcoholism to attend a 28-day in-patient alcohol treatment program.

## Reasonable Accommodations: Cases for the Employer



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

- No duty to accommodate when Plaintiff provided no evidence that an interaction between her medications could have caused a false positive.
- **Note:** Several courts in Connecticut have stated in dicta that the ADA does not require reasonable accommodations for people with alcoholism or drug addiction although this seems to contradict the plain language of the ADA. See e.g., *Nanos v. City of Stamford*, 609 F. Supp. 2d 260 (D. Conn. 2009) (“employers need not make any reasonable accommodations for employees who are illegal drug users and alcoholics...”); *Vandenbroek v. PSEG Power Connecticut, L.L.C.*, No. 3:07-cv-869, 2009 WL 650392 (D. Conn. Mar. 10, 2009), (“employers are not required to make any reasonable accommodations for employees who are illegal drug users or alcoholics.”)

# Requesting Accommodations



***Rock v. McHugh***, No. DKC 10-0829, 2011 WL 2119035 (D. Md. May 26, 2011)

- Where Plaintiff concedes that he never informed his supervisors of his alcoholism, there cannot be an adverse employment action on the basis of Plaintiff's disability because it was not aware of his disability.

***Rask v. Fresenius Medical Care North America***, 2007 WL 4258620 (8th Cir. 2007)

- An employee telling her employer that she was "having problems" with her medication and might "miss a day here and there because of it" did not sufficiently request a reasonable accommodation as she must "specifically identify the disability and resulting limitations..."
- **Query:** What are possible reasonable accommodations for drug or alcohol addiction?  
A. Modified work schedule    B. Leave for treatment    C. Allowing use during breaks  
D. Permitting personal calls to sponsors                      E. A, B, & D above



(877) 232 - 1990 (V/TTY)  
<http://www.ada-audio.org>

41



## Alcohol, Drugs, and Conduct Rules

### Workplace Conduct Rules



## Workplace Conduct Rules: In General



- **Standard:** It is permissible for employers to have workplace conduct rules on a variety of issues including drug and alcohol use, workplace safety, workplace violence and attendance.
- **EEOC:** Employers may hold all employees, disabled and nondisabled, to the same performance and conduct standards. [EEOC Compliance Manual, 902.2\(c\)\(4\) nn. 11&12.](#)
- **EEOC:** If misconduct resulted from a disability, including drug or alcohol addiction, the employer must demonstrate the conduct rule is job-related and consistent with business necessity. [EEOC Enforcement Guidance on ADA and Psychiatric Disabilities \(3/25/97\).](#)
- **Supreme Court:** Upheld workplace conduct rule prohibiting rehiring employees who previously left employment due to drug use. [Raytheon Co. v. Hernandez, 124 S. Ct. 513 \(2003\).](#)

## Workplace Conduct Rules: In General



- **EEOC:** Employers are permitted, but not required, to refer an employee to an EAP instead of, or in conjunction with, discipline.
- After engaging in misconduct, an employee may claim the violation was caused by a disability and request reasonable accommodation.
  - ❖ If the misconduct warrants termination, the employer does not need to engage in a discussion about reasonable accommodation.
  - ❖ If the discipline is something less than termination, the employer may inquire about the relevance of disability to the misconduct.
    - If an accommodation is requested, the employer must begin the “interactive process.”

See [EEOC Enforcement Guidance: The ADA: Applying Performance and Conduct Standards to Employees with Disabilities](#), available at <http://www.eeoc.gov/facts/performance-conduct.html> (last updated 1/20/11).

## Workplace Conduct Rules: Case



*Daft v. Sierra Pacific Power Co.*, 251 Fed. App'x 480 (9th Cir. 2007)

- Plaintiff was an electrical worker with alcoholism.
- He was convicted of several instances of driving under the influence.
  - ❖ One condition of continued employment was random alcohol testing.
- Plaintiff failed a random test and a confirmation test 15 minutes later.
- **Court:** Affirmed summary judgment for the company – the alcohol test failure was a legitimate, non-discriminatory reason for termination and did not violate the ADA.

## Workplace Conduct Rules: Cases



*Renaud v. Wyoming Dept. of Family Serv.*, 203 F.3d 723 (10th Cir. 2000)

- Coming to work intoxicated is not protected by the ADA.

*Dovenmuehler v. St. Cloud Hospital*, 509 F.3d 435 (8th Cir. 2007)

- Illegal conduct of stealing prescription medications is not protected.

*Martin v. Barnesville Exempted Village Sch. Dist.*, 209 F.3d 931 (6th Cir. 2000)

- No transfer for Plaintiff due to drinking on the job in the past.
  - ❖ Plaintiff raised a “regarded as” claim.
  - ❖ **Court:** “ADA does not protect plaintiff from his own bad judgment in drinking on the job.”

## Workplace Conduct Rules: Cases



### ***Lopez v. Potter***, EEOC Appeal No. 01996955 (January 16, 2002)

- Employer did not have to excuse employee's persistent tardiness due to alcoholism and thus its use of progressive discipline, culminating in termination, was lawful.

### ***Bekker v. Humana Health Plan, Inc.***, 229 F.3d 662, 672 (7th Cir. 2000)

- Termination of physician for treating patients while under the influence of alcohol was proper.

## Workplace Conduct Rules: Off-Duty Conduct



### ***Nader v. ABC Television, Inc.***, 150 F. App'x 54 (2d Cir. 2005)

- Termination due to arrest for selling cocaine did not violate ADA.

### ***Budde v. Kane County Forest Preserve***, 603 F. Supp. 2d 1136 (N.D. Ill. 2009)

- Termination of a police chief with alcoholism for an off-duty DUI and car accident is proper - standard operating procedure that "all employees... may be ... subject of disciplinary action for violating any ... law." See also, ***Maul v. Div. of State Police***, 141 F. Supp. 2d 463 (D. Del. 2001).



## Workplace Conduct Rules: Off-Duty Conduct



### *Pernice v. City of Chicago*, 237 F.3d 783 (7th Cir. 2001)

- City employee was arrested for cocaine possession but was not convicted and sought treatment for his “self-acknowledged drug addiction.”
  - Terminated for violations of personnel rules.
- **Court:** Termination for possessing illegal drugs did not violate the ADA -Plaintiff’s drug addiction did not compel the illegal conduct.

### *Maddox v. Univ. of Tenn.*, 62 F.3d 843 (6th Cir. 1995)

- Upheld football coach’s termination because although alcoholism may have compelled employee to drink, it did not force him to drive or engage in other inappropriate conduct.
- **Query:** Should off-duty conduct be relevant for all jobs? Please Answer “Yes” or “No.”

## Consistent Enforcement of Workplace Rules



- **General Rule:** Workplace rules must be consistently enforced to avoid a disparate treatment claim.  
*See, e.g., Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003).
- **EEOC Example:** An employer with a lax attitude about employees arriving at work on time cannot discipline a person with alcoholism for being late when others are not disciplined, even if it is thought the lateness may signal the employee is drinking again.  
*See EEOC Enforcement Guidance: The ADA: Applying Performance and Conduct Standards to Employees with Disabilities*, available at <http://www.eeoc.gov/facts/performance-conduct.html> (last updated 1/20/11), Example 46.

## Consistent Enforcement of Workplace Rules: Cases

**Raytheon**

*Flynn v. Raytheon Co.*, 868 F. Supp. 383, 388 (D. Mass. 1994)

- Plaintiff stated a disparate treatment claim by alleging his employer enforced its no alcohol rule more strictly against him due to his alcoholism than it did against employees without alcoholism who came to work under the influence.

*Buckley v. Consolidated Edison Co. of NY, Inc.*, 155 F.3d 150 (2nd Cir. 1998)

- **Appellate Court:** Requiring monthly drug tests of an employee with drug addiction and a neurogenic bladder, (unable to urinate on demand), while employees with neurogenic bladders who did not have drug addiction were tested every five years, may be discrimination.
- **Appellate Court Rehearing En Banc:** Reversed – No ADA violation.
  - ✦ “The more frequent testing of ... former substance abusers is not prohibited.”
  - ✦ As Plaintiff only alleged disability only due to status as a recovering drug user, not due to his neurogenic bladder condition, a reasonable accommodation of giving the employee extra time to urinate was not required.

ADA  ONLINE  
LEARNING

(877) 232 – 1990 (V/TTY)  
<http://www.ada-audio.org>

51

ADA  ONLINE  
LEARNING

**Direct Threat**



DBTAC  
*great lakes*  
ADA Center  
A member of the ADA National Network

## Direct Threat Definition



### Direct Threat Definition

- “A significant risk of substantial harm to the health or safety of the individual or others...”
- “...that cannot be eliminated or reduced by reasonable accommodation.”
  - ❖ Requires an “individualized assessment...based on a reasonable medical judgment that relies on...the most current medical knowledge and/or on the best available objective evidence.”

42 U.S.C. §§ 12111, 12113; 29 C.F.R. §1630.2(r)

## Direct Threat Case



### *Rosado v. Am. Airlines*, 743 F. Supp. 2d 40 (D.P.R. 2010)

- Plaintiff, a cargo clerk, was addicted to cocaine, HIV positive, and had bipolar disorder and depression.
- Had a positive safety record during his twenty-three years as a cargo clerk.
- Defendant claimed Plaintiff “posed a direct safety threat to himself and others due to his chronic drug addiction.”
- **Court:** Emphasized that direct threat requires not just a risk but a “significant” risk of substantial harm. *Bragdon v. Abbott*, 524 U.S. 624, 649 (1998).
- Undisputed that Plaintiff had a longstanding drug problem, but there is a triable issue of fact as to whether Plaintiff posed a “direct threat.”
  - ❖ Defendant offered no evidence showing how Plaintiff’s impairments and substance abuse made him unable to perform his essential job functions.
- **Note:** Direct threat was probably used as there was no drug policy.

## Direct Threat Case: Prescription Drug Use



### *Dvorak v. Clean Water Services*, 2009 WL 631247 (9<sup>th</sup> Cir. 2009)

- Employee took narcotic painkillers for neck pain and migraines and was placed on leave pending a medical evaluation.
  - ❖ Co. Dr. concluded employee was dependent on painkillers and wouldn't allow him to RTW in any position due to a direct threat. (Supervisor: "Wouldn't even put him "behind a computer," much less in the field.)
- **Court:** Whether these medications freed Dvorak of substantial limitations or imposed such limitations is a factual question for the jury.
  - ❖ Was medication a mitigating measure allowing employee to perform job?
  - ❖ Or, was medication a dangerous limitation on his ability to work safely?
  - ❖ Employer must balance its responsibilities to reasonably accommodate employees with its duty to maintain a safe work environment.
  - ❖ There were also issues of "regarded as" and "record of" having a disability.

## Direct Threat Case: Failure to Take Medication



### *Darnell v. Thermafiber, Inc.*, 417 F.3d 657 (7<sup>th</sup> Cir. 2005)

- Summary judgment affirmed for employer who did not rehire employee with insulin-dependent, Type 1 diabetes.
- Pre-employment physical showed plaintiff's diabetes was not under control and Plaintiff admitted not being compliant with medication and treatment.
- Court held that an employee is not qualified for a position if his disability poses a direct threat to his safety or the safety of others.
- Court found uncontrolled diabetes in a manufacturing plant with dangerous machinery could cause serious injury.
- *But See*, *Rodriguez v. ConAgra Grocery Product Co.*, 436 F.3d 468 (5<sup>th</sup> Cir. 2006), (Employer must conduct an independent, individualized assessment, not base decisions on generalizations and false beliefs).

## Practice Tips



## Practical Tips for Employers



- Offer periodic ADA training, including new hires.
- Accept medical information showing drugs are used legally.
- Use objective evidence to support direct threat defenses
- Be consistent in enforcing conduct rules.
- Engage in interactive process when accommodations are requested.
  - ❖ Request limited additional information if the disability or need for accommodation is not known or apparent. (Use Medical Releases)
- **Formulate and enforce policies on:** reasonable accommodations, confidentiality, harassment, retaliation.
- **Document:** Medical disclosures, job duties, discipline, performance improvement plans, and reasonable accommodation efforts.

## Practical Tips for Employees



- Medical conditions do not have to be disclosed unless a reasonable accommodation is needed.
  - ❖ Balance confidentiality concerns with the need for an accommodation.
  - ❖ If performance is at issue, requesting an accommodation may help an employee meet qualification standards.
- Requests for reasonable accommodations should identify the impairment, limitations, & accommodation preference, if known
- **Document:** Reasonable accommodation requests, medical disclosures, harassment, retaliation, disparate treatment,...
- Know and follow procedures, policies, and workplace conduct rules.
- Provide medical information when appropriate.
- It's best if the employee, (not the employer), obtains info from the Dr.
- **Personnel Files:** Feel free to add information or request a copy.

## Questions?

- **You May Type and Submit questions in the Chat Area Text Box or press Control-M and enter text in the Chat Area**

## General ADA Resources



- **National Network of ADA Centers:** [www.adata.org](http://www.adata.org); 800/949-4232 (V/TTY)
- **Equal Employment Opportunity Commission (EEOC):** [www.eeoc.gov](http://www.eeoc.gov)
- **Equip For Equality:** [www.equipforequality.org](http://www.equipforequality.org); 800/537-2632 (Voice); 800/610-2779 (TTY)
- **Job Accommodation Network:** <http://askjan.org>

## Continuing Legal Education Credit for Illinois Attorneys



- **This session is eligible for 1.5 hours of continuing legal education credit for Illinois attorneys.**
- **Illinois attorneys interested in obtaining continuing legal education credit should contact Barry Taylor at:**  
[barryt@equipforequality.org](mailto:barryt@equipforequality.org)

## Thank You

- Thank you for Participating in Today's Session.
- Please Join us for the next session in this series:
- September 21, 2011
- **The Litigation Landscape Three Years After the Passage of the ADA Amendments Act**

## Session Evaluation

- Your Feedback is Important to Us!
- Please Fill Out The On-Line Evaluation Form at: <http://ada-conferences.July202011.sgizmo.com>



# The End

## **Drugs, Alcohol and Conduct Rules Under the ADA**

**July 20, 2011**

**Presented by Barry Taylor, Legal Advocacy Director and  
Alan Goldstein, Senior Attorney, Equip for Equality**

Equip for Equality is providing this information under a subcontract with the DBTAC - Great Lakes ADA Center, University of Illinois at Chicago, U.S. Department of Education, National Institute on Disability of Rehabilitation and Research Award No. H133A060097.



(877) 232 - 1990 (V/TTY)  
<http://www.ada-audio.org>

65