

Alcoholism Under the Americans with Disabilities
Act of 1990 as Amended (ADA)
National LGBT Bar Association Conference
August 2015

Eduardo Juarez
Supervisory Trial Attorney
U.S. Equal Employment Opportunity Commission
San Antonio Field Office

Alcoholism Under the Americans with Disabilities Act of 1990 as Amended (ADA)

I. The Pertinent Provisions of the ADA as Amended

A. ADA's Protections and Definitions

The ADA makes it unlawful for an employer to discriminate against “a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.” 42 U.S.C. § 12112(a).

(i) Disability Defined

A “disability” is defined as: “(A) a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; (B) a record of such impairment; or (C) being regarded as having such an impairment....” 42 U.S.C. § 12102(1).

The ADA defines “major life activity” to include “the operation of a major bodily function, including but not limited to ... digestive, bowel, bladder, neurological, brain ... [and] endocrine ... functions.” 42 U.S.C. § 12102(2).

An individual is “regarded as” having a disability if she is subjected to an action prohibited by the ADA because of an actual or perceived physical or mental impairment, whether or not the impairment limits or is perceived to limit a major life activity. Thus, evidence (direct or circumstantial) that the individual was subjected to a prohibited employment action because of an impairment (other than a transitory and minor impairment) is sufficient to establish coverage under the “regarded as” definition. 42 U.S.C. § 12102(3).

(ii) Qualified

The individual with a “disability” or perceived impairment is protected only if she is “qualified.” An individual with a disability is “qualified” only if she possesses the “requisite skill, experience, and education requirements of the employment position” and “with or without reasonable accommodation is able to perform essential functions of such position.” 42 U.S.C.A. 1211(8).

(iii) Episodic Impairments and Mitigation Measures

Moreover, pursuant to 42 U.S.C. § 12102(4), the definition of “disability” is construed in accordance with (among others) the following statutory mandates:

- (D)** An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.
- (E)** **(i)** The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as ... **(iv)** learned behavioral... modifications.

B. Specific ADA Provisions Regarding the Use of Drugs and Alcohol

The ADA, 42 U.S.C. § 12114, also specifically addresses the use of drugs and alcohol:

- (a) Qualified individual with a disability.**

For purposes of this subchapter, 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.

(b) Rules of construction.

Nothing in subsection (a) of this section shall be construed to exclude as a qualified individual with a disability an individual 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; except that it shall not be a violation of this chapter for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (1)

or (2) is no longer engaging in the illegal use of drugs.

(c) Authority of covered entity.

A covered entity—

- (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 behave in conformance with the requirements established under the Drug Free Workplace Act of 1988 (41 U.S.C. 701 et seq.);
- (4)** may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee; and

(d) Drug testing.

(1) In general.

For purposes of this subchapter, a test to determine the illegal use of drugs shall not be considered a medical examination.

(2) Construction.

Nothing in this subchapter shall be construed to encourage, prohibit, or authorize the conducting of drug testing for the illegal use of drugs by job applicants or employees or making employment decisions based on such test results.

II. Alcoholism As a Disability Under the ADA

A. An employee who is an alcoholic may have a "disability" within the meaning of the ADA.

Most courts hold that an employee suffering from alcoholism has "a physical or mental impairment." *Bailey v. Georgia-Pacific Corp.*, 306 F.3d 1162, 167 (1st Cir. 2002)(citing cases and the ADA's legislative history to support the proposition that "there is no question that alcoholism is an impairment for purposes of the first prong of analysis under the ADA").

Courts do not always agree, however, that an employee's alcoholism substantially limits his or her major life activities. *See e.g., Id.* at 1168 (holding that the evidence was insufficient to prove plaintiff's alcoholism substantially limited major life activity of working); *Burch v. Coca Cola*, 119 F. 3d 305 (5th Cir. 1997)(evidence was insufficient to support a jury finding that employee's alcoholism substantially limited a major life activity and stating that alcoholism is not a *per se* disability); *Ames v. Home Depot*, 629 F.3d 665 (7th Cir. 2011) (no disability because alcoholism did not substantially limit major life activity or plaintiff's work performance). Thus, it is imperative that an

alcoholic plaintiff prove that his or her alcoholism substantially limits one or more major life activity. *Bailey v. Georgia-Pacific Corp.*, 306 F.3d 1162, 1167-1168 (1st Cir. 2002)(“An ADA plaintiff must offer evidence demonstrating that the limitation caused by the impairment is substantial in terms of his or her own experience...Alcoholism is no exception.”)(citations omitted).

A recovered alcoholic employee could face difficulty in showing that his or her alcoholism substantially limits a major life activity. *See e.g., Wallin v. Minn. Dep’t of Corr.*, 153 F.3d 681, n.4 (8th Cir. 1998) (dicta stating that the court doubted plaintiff could show his alcoholism impaired a major life activity because he was sober “for one year prior to the period of alleged discrimination ... for two years after ... and ... presented no evidence showing that his major life activities were impaired). *Cf. Williams v. Anheuser-Busch, Inc.*, 957 F.Supp. 1246 (M.D. Florida 1997) (evidence of black-outs and short term memory impairment sufficient evidence of substantial limitation in major life activity to withstand summary judgment).

Arguably, the ADA Amendments Act of 2008 has made it easier for a plaintiff to show that his or her alcoholism substantially limits a major life activity. The Diagnostic and Statistical Manual of Mental Disorders (Fifth Edition) states in regard to the diagnostic criteria of “Alcohol Use Disorder” as follows:

“Repeated intake of high doses of alcohol can affect nearly every organ system, especially the gastrointestinal tract, cardiovascular system, and the central and peripheral nervous systems.”

Thus, depending on a specific alcoholic’s medical diagnosis, including any features associated with the alcoholism, one could argue that the impairment of alcoholism substantially limits the digestive, neurological, brain, and/or cardiovascular major bodily functions. *See* 42 U.S.C. § 12102(2).¹

¹ Alcoholics could also argue that an employer regards them as disabled when the employer takes a prohibited employment action against them because of their alcoholic impairment. 42 U.S.C. § 12102(3). *Cf. Moorer v.*

Research as of the date of this paper however uncovered no reported cases holding under the ADA Amendments Act of 2008 that an employee's alcoholism substantially limited a major bodily function.

B. An employer may discipline an alcoholic employee for poor performance or workplace misconduct caused by or related to his drinking.

The ADA explicitly provides that an employer "may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee." Thus, employees who drink or are inebriated on the job or who fail to perform their duties because of drinking or who engage in drinking related misconduct may be subject to appropriate discipline, up to and including termination. *See Ames v. Home Depot*, 629 F.3d 665 (7th Cir. 2011) (no ADA violation where employer fired alcoholic employee for coming to work under the influence of alcohol); *Williams v. Widnall*, 79 F.3d 1003, 1007 (10th Cir. 1996) (holding that alcoholic employee who made threats to co-workers and supervisors while under the influence of alcohol was terminated because of "egregious, misconduct" and not because of alcoholism).

The employer however must treat alcoholic and non-alcoholic employees the same, and may not impose different penalties for the same offenses depending on whether or not the employee is an alcoholic. That is, the employer may not single out alcoholics for worse discipline than their non-alcoholic co-workers. The EEOC explains this point as follows:

The ADA specifically provides that employers may require an employee who is an alcoholic or who engages in the illegal use of drugs to meet the same standards of

Baptist Mem'l Health Care Sys., 398 F.3d 469 (6th Cir. 2005) (pre-ADA Amendments Act case finding that employer regarded plaintiff as an alcoholic who was substantially limited in working).

performance and behavior as other employees. This means that poor job performance or unsatisfactory behavior – such as absenteeism, tardiness, insubordination, or on-the-job accidents – related to an employee’s alcoholism or illegal use of drugs need not be tolerated if similar performance or conduct would not be acceptable for other employees.

See EEOC Guidance, *“The Americans with Disabilities Act: Applying Performance and Conduct Standards to Employees with Disabilities,”* (January 20, 2011).

C. An alcoholic employee must be qualified to perform the essential functions of the position.

Only "qualified" employees are protected by the ADA. 42 U.S.C. § 12112(a) (prohibiting discrimination "against a qualified individual on the basis of disability"). Many disability lawsuits based on alcoholism lose because the plaintiff cannot prove that he was qualified to perform the essential functions of the position. *See e.g., Budde v. Kane Cnty. Forest Preserve*, 597 F.3d 860, 862 (7th Cir. 2010) (a police chief fired after his driver’s license was suspended following a drunk driving accident was no longer qualified because he could not perform the essential function of driving). The essential functions of a position are the fundamental duties and responsibilities of the job. If an alcoholic employee cannot meet these requirements, he may not be deemed "qualified" for the position; hence, he may not be protected under the ADA.

D. An employer may be required to "reasonably accommodate" an alcoholic employee.

An employer is required under the ADA to reasonably accommodate an alcoholic employee depending on the circumstances. For example, even if an employee has the disability of alcoholism, the employer is not required to allow the employee to arrive late to work due to the effects of a hangover. On the other hand, the employer may be required to accommodate the employee's efforts to obtain

treatment for the alcoholism. *Rodgers v. Lehmann*, 869 F.2d 253 (4th Cir. 1989) (under Rehabilitation Act, employer was required as a reasonable accommodation to allow the employee an opportunity to participate in inpatient treatment before being discharged). *Fuller v. Frank*, 916 F.2d 558, 562 (9th Cir. 1990) (finding under Rehabilitation Act that Postal Service allowed plaintiff “an opportunity to obtain several different levels of treatment and, therefore, reasonably accommodated his alcoholism”). The EEOC explains as follows:

Example: An employer has warned an employee several times about her tardiness. The next time the employee is tardy, the employer issues her a written warning stating one more late arrival will result in termination. The employee tells the employer that she is an alcoholic, her late arrivals are due to drinking on the previous night, and she recognizes that she needs treatment. The employer does not have to rescind the written warning and does not have to grant an accommodation that supports the employee’s drinking, such as a modified work schedule that allows her to arrive late in the morning due to the effects of drinking on the previous night. However, absent undue hardship, the employer must grant the employee’s request to take leave for the next month to enter a rehabilitation program.

See EEOC Guidance, *“The Americans with Disabilities Act: Applying Performance and Conduct Standards to Employees with Disabilities,”* (January 20, 2011).

III. Conclusion

In sum, alcoholism can be a "disability" under the ADA, and employers may be required to reasonably accommodate (where there is no undue burden) an alcoholic employee's reasonable efforts at treatment and rehabilitation (for example, by providing leave or a flexible work schedule so the employee can attend in or out patient treatment). But this does not mean that an alcoholic employee is excused from meeting the employer's

required performance and conduct standards. Any violations of these standards, even if caused by or related to the employee's drinking (for example, an on-the-job accident caused by being drunk), may result in the employee being disciplined, up to and including termination.