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DON'T FALL OFF THE WAGON!
PUBLIC SAFETY DISCIPLINE CHALLENGES UNDER THE ADA & FMLA

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Don't Fall Off the Wagon! Public Safety Discipline Challenges under Title I of the ADA & the FMLA

Numerous individuals suffer from alcohol dependency and drug addiction. It has been estimated that nearly one (1) in every thirteen (13) adults are alcoholics. Approximately seventy-five (75%) percent of people who use illicit drugs are employed. Employers are therefore challenged to manage employees who have substance abuse issues in a way that is fair and does not violate the law. While an employer can discipline or take corrective action to address an employee's absenteeism or performance issues, once the employer has noticed the conduct stems from addiction, the situation becomes more complicated.

A. Application of the ADA and FMLA to Drug and Alcohol Use in the Workplace

Alcoholism and drug use may be protected by the American's with Disability Act (the "ADA") and the Family Medical Leave Act (the "FMLA"). In some situations, alcoholism is viewed as a disability under the ADA[1] and it is often considered a serious health condition under the FMLA.[2] Therefore, to address inappropriate employee conduct and discipline, which often stems from substance abuse, an employer may be required to follow the guidelines of each law.

1. THE AMERICAN'S WITH DISABILITY ACT

The ADA was signed into law on July 26, 1990.[3] Its overall purpose is designed to make American Society more accessible to disabled persons. In 2008, the ADA Amendments Act (the "ADAAA") was passed.[4] The law was enacted to broaden the definition of the term "disability," which had been narrowed by U.S. Supreme Court decisions.[5] The ADA's protection only applies to individuals who meet the ADA's definition of "disability." An individual has a disability under the ADA if they: (1) have a physical or mental impairment that substantially limits one or more major life activities; (2) have a history or record of such impairment; or (3) are perceived by others as having such impairment[6].

Under the ADA, to state a prima facie case for disability discrimination, a plaintiff must prove the following: (1) he suffers from a disability; (2) he is a qualified individual; and (3) he was subject to an adverse employment action

[1] 29 C.F.R. § 1630.16(b) (2011).
[2] 29 C.F.R. § 825.119 (2013).
[3] 29 C.F.R. § 1630.1 (2011).
[4] 29 C.F.R. § 1630.2 (2011).
[5] *Sutton v. United Airlines Inc*., 527 U.S. 471 (1999); *Toyota Motor Mfg. Ky. Inc. v. Williams,* 534 U.S. 184 (2002).
[6] 42 U.S.C.A. § 12102 (2009).

because of his disability.[7] A "qualified individual" is defined as an employee or job applicant who meets legitimate skill, experience, education or other requirements of the employment position.[8] The person must be able to perform the essential functions of the position either with or without reasonable accommodation.[9] Once a prima facie case is established by an employee, an employer may overcome the inference of unlawful discrimination by articulating a legitimate, non-discriminatory reason for the challenged employment action.[10]

A. "Currently Engaging" Exception to ADA protection

When the ADA broadened the definitions of "disability" and "qualified individual," it created exceptions. One exception provided these terms do not include a person currently engaged in the use of illegal drugs.[11] 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.[12]

Interpretive guidance on Title I of the ADA clarifies the term "currently engaging," but does not create a bright line rule. The term is not intended to be limited to the use of drugs on the day of, or within a matter of weeks before, the adverse employment action.[13] Rather, the provision is intended to apply to the illegal use of drugs that has occurred recently enough to indicate the individual is actively engaged in such conduct.[14] Courts have also declined to adopt a bright line rule. As a result, whether an individual is "currently engaging" in illegal drug use is decided on a case by case basis.

1. Employee Not "Currently Engaging" in Illegal Drug Use

Montegue v. City of New Orleans, 22 A.D.D. 1150 (E.D. La. 1996).

Firefighter was terminated after he tested positive for cocaine and marijuana metabolites. After his termination, the employee successfully completed a drug rehabilitation treatment program. Pursuant to a civil service

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[7] *Chandler v. City of Dallas*, 2 F.3d 1385,1390 (5th Cir. 1993); *Holbrook v. City of Alpharetta*, 112 F.3d 1552 (11th Cir. 1997).
[8] 42 U.S.C.A. § 1211(8) (2009).
[9] 42 U.S.C.A. § 1211(8)-(9) (2009).
[10] *Bielich v. Johnson & Johnson, Inc.,* 2:11-CV-01635 (W.D. Pa. 2014).
[11] The ADA defines "drug" to mean any controlled substance defined in schedules I through IV of § 202 of the Controlled Substance Act (21 U.S.C § 812). The ADA further defines "illegal use of drugs" to mean the use of drugs in which the possession or distribution of is unlawful under the Controlled Substance Act as updated by the Food and Drug Administration. The term does not include the use of a drug taken under the supervision of a licensed heath care professional, or other uses authorized by the Controlled Substance Act or other provisions of Federal Law; 29 C.F.R. § 1630.3(a) (2011).; The EEOC has stated that "current" in the context of a drug user means "recently enough" to justify the employer's reasonable belief that drug use is an ongoing problem.
[12] 29 C.F.R § 1630.16-Appendix to part 1630.3 (2011).
[13] 29 CFR § 1630.3 (a)-(c) (2011).
[14] 29 CFR § 1630.3 (a)-(c)(2011).

rule, the employee requested reemployment with the New Orleans Fire Department. The employee's request for reinstatement was denied without explanation. He alleged his denial of reemployment with the City violated the ADA on the basis of discrimination for his former drug addiction. In response, the Fire Department stated two legitimate, nondiscriminatory reasons for refusing to rehire him: (1) he committed two crimes when he tested positive for two different illegal drugs; and (2) he was not rehired due to the sensitive nature of the firefighter's job.

The City argued the refusal to rehire a former drug addict is permissible on the grounds it is job-related and consistent with business necessity.[15] The EEOC Technical assistance manual specifically provides an employer can terminate a person with a past history of illegal drug use in specific occupations such as law enforcement.[16] The City argued this justification should also apply to firefighters. However, the Court held the City failed to provide a legitimate, non-discriminatory reason to refuse to rehire the employee and the provision did not apply to firefighters.

D'Amico v. City of New York, 132 F.3d 145 (2d Cir. 1998).

At the time of his termination, issue of fact existed as to whether firefighter with a cocaine addiction was a current substance abuser within the meaning of the ADA. The employee testified he had not used cocaine for several months at the time of his termination and the Fire Department provided no evidence of his drug use other than his uncorroborated alleged admissions. Thus, an issue of fact existed as to whether his substance abuse problem was severe and recent enough that his employer was justified in believing he could not perform the essential duties of his job.

Teahan v. Metro-North Commuter R.R., 951 F.2d 511 (2d Cir. 1991).

An individual with alcohol addiction filed a claim against his employer alleging he was dismissed solely by reason of his disability. The Second Circuit held the relevant time to assess the "current use" status was the time of termination. The question of whether the employee was a "current" user was remanded to the district court. On remand, the district court held the employee was not a current drug user as he had not consumed illegal drugs or alcohol for over three months prior to his discharge and had successfully completed a rehabilitation program.[17]

2. Employee "Currently Engaging" in Illegal Drug Use

[15] 29 CFR § 1630.15 (2011).
[16] EEOC Technical Assistance Manual: ADA §8.7 (2002).
[17] *Teahan v. Metro-North Commuter R.R.*, 1994 WL 719720 (S.D.N.Y. 1994).

Baustian v. State of La., 910 F. Supp. 274 (E.D. La. 1996).

Prison employee was terminated seven weeks after he possessed an illegal drug while driving a state assigned vehicle. Despite enrollment in a drug treatment program, the court reasoned a seven week period between possession of drugs and termination was not a sufficient time to avoid being classified as a current drug user. Therefore, the court found the employee was not a qualified individual with a disability and was not entitled to the protections of the ADA.

Daniels v. City of Tampa, 2010 W.L. 1837796 (M.D. Fla. 2010).

Employee tested positive for drugs and alcohol during a random drug test at his place of employment. He subsequently enrolled in a Substance Abuse Program. Six years later, the employee was involved in a vehicle accident and was required to take a post-accident drug/alcohol test. The test was positive for cocaine. The court found the employee was currently engaged in the illegal use of drugs and therefore not protected under the provisions of the ADA.

B. "Safe Harbor Provision" of the ADA and Substance Abuse

An employer may discharge a person who is currently engaged in the use of illegal drugs without violating the ADA. However, the terms "disability" and "qualified individual with a disability" include an individual who: (1) has successfully been rehabilitated and is not engaged in the illegal use of drugs; (2) participates in a supervised rehabilitation program and is no longer engaging in the use of illegal drugs; or (3) is erroneously regarded as engaged in the use of illegal drugs, but is not engaged in such use.[18] The statute expressly permits employers to adopt and administer reasonable polices or procedures, including drug testing, to ensure employees who have completed or are participating in a rehabilitation program are no longer engaged in the illegal use of drugs.[19]

In order to be protected under the ADA, drug addicts are required to establish they satisfy the requirements of these definitions.[20] For example, an individual erroneously regarded as a drug user would have to show he was regarded as a drug addict in order to meet the definition of "disability." Further, drug users are only protected under the ADA if they can show that their disability substantially limits one or more major life activities.[21]

1. Employee Entitled to ADA Protection

Christian v. Se. Pa. Transit Auth., 1997 WL 736867 (E.D. Pa. 1997).

[18] 29 C.F.R. § 1630.3(b)(2011).; 42 U.S.C.A. § 12114(b)-(c) (2009).; 29 C.F.R. 1630.16 (2011).
[19] 29 C.F.R. § 1630.3(c) (2011).
[20] EEOC Technical Assistance Manual: ADA § 8.6 (2002).
[21] Id.

A Southeastern Pennsylvania Transit Authority ("SPTA") employee was granted a two year emergency leave of absence to seek treatment for his drug addiction. The employee traveled to an inpatient rehabilitation center in Colorado, but was terminated two months later. The court held the employee was not a current drug user and was not excluded from the protections under the ADA.

Jones v. Corr. Corp. of America, 993 F.Supp.1384 (D. Kan. 1998).

Former corrections officer was terminated for testing positive for marijuana and refusing treatment. The court held the officer established a prima facie case of ADA discrimination as he established he was erroneously regarded as a drug addict. The officer established he was "disabled" because his employer demanded he enter drug treatment as a condition of continued employment after he tested positive for marijuana. The employee demonstrated the urine sample was mishandled and he subsequently produced a clean urine sample through his own physician.

Brock v. Lucky Stores, Inc., 2000 WL 288395 (N.D. Cal. 2000).

Brock was employed as a truck driver and was terminated after an employer sponsored random drug test was positive for cocaine. Brock claimed he was an individual with a disability under the ADA because his addiction to cocaine substantially limited him in the major life activity of working. The court agreed, finding that his long record of excessive absenteeism was sufficient evidence of a substantial limitation.

2. Employee Not Entitled to ADA Protection

Johnson v. City of Columbus, 2011 WL 605040 (S.D. Ohio 2011).

A city worker admitted his addiction to marijuana. He was involved in a traffic accident while on duty, which triggered a drug test pursuant to City policy. The test was positive for marijuana. The employee was placed on leave and was referred to an outpatient drug rehabilitation program. He returned to work, but was subject to random drug testing for a period of twelve months.

The employee subsequently tested positive for marijuana a second time and was terminated for violating City policy. He filed suit on the basis he was terminated because of his disability, and asserted he was a protected person under the "Safe Harbor" provision of the ADA. The court held he was a current drug user when he was terminated and failed to establish a prima facie case of disability discrimination.

Muhammed v. City of Philadelphia, 186 Fed. Appx 277 (3d Cir. 2006).

City employee informed his employer he was not willing to see a city doctor because "I'm going to come up positive for cocaine or heroin or something." The court held employee could not be erroneously regarded as engaging in illegal drug use because he admitted he would test positive for drugs. Therefore, as employee was a current drug user, he was not considered disabled under the protective umbrella of the ADA.

3. Drug Testing

Police and fire departments may conduct testing on current employees and may require job applicants undergo drug testing at any time during the application process.[22] If the applicant tests positive for illegal drug use, an employer may ask whether any prescription medications would have caused the positive result. Inquiries into the use of prescription medications are permitted in response to a positive drug test even though the answers may disclose information about a disability.[23]

Skinner v. City of Amsterdam, 824 F.Supp.2d 317 (N.D.N.Y. 2010).

Employee suffered from drug addiction. Employer asked employee to submit to a drug test but he was refused and was subsequently terminated. The court held even though he was disabled under the ADA, his termination was caused by his refusal to take a drug test, not his disability, and the action therefore did not violate the ADA.

Jones v. City of Boston, 752 F.3d 38 (1st Cir. 2014).

The Boston Police Department required officers and cadets to be annually drug tested using samples of hair. The hair samples were tested for the presence of chemicals indicating exposure to cocaine, marijuana, opiates, PCP, and amphetamines. If an employee tested positive and was not exonerated by a safety-net test, the department terminated the employee unless the officer agreed to seek rehabilitation for drug abuse and accept an unpaid suspension while undergoing treatment. Officers who were terminated under this policy claimed the department fired them on account of an erroneous perception that they were drug addicts. The court held the police department's decision to terminate the officers was not motivated by a perception that the officers were addicted to drugs. The department's drug test policy trained its efforts at directly identifying users, whether addicts or not, and did not accept any defense that the officer used illegal drugs only once.

[22] 29 C.F.R§ 1630.3(b) (2011).

[23] EEOC Technical Assistance Manual: ADA §8.9: Drug Testing (2002); 42 U.S.C.A. § 12114 (2009).

C. Alcoholism under the ADA

In contrast to the exclusion of individuals who currently engage in the illegal use of drugs, current alcohol users are not automatically denied protection. Alcohol is not a controlled substance, so the use of it is not specifically addressed.[24] Courts generally have declined to consider alcoholism as a "per se" disability. However, EEOC regulations state individuals disabled by alcoholism are entitled to the same protections afforded other individuals with disabilities.[25] When alcoholism substantially limits one or more major life activities, alcohol has been considered a protected disability under the ADA.[26]

Under the ADA, employers are allowed to restrict the use of alcohol in the workplace. The text of the ADA provides an employer may adopt rules for the use of alcohol. An employer may: (1) prohibit the illegal use of alcohol at the workplace by all employees; (2) require that employees shall not be under the influence of alcohol at the workplace; (3) require that employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988[27]; and (4) hold an employee who is an alcoholic to the same qualification standards for employment or job performance and behavior as other employees, even if the unsatisfactory performance or behavior is related to the alcoholism of such employee.[28]

1. "Qualified Individual"

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

An alcoholic dispatcher employed by the United States Capitol Police alleged he was protected under the ADA. The Federal Circuit agreed. The employee's alcoholism clearly interfered with his ability to report for work and it substantially limited his performance in his job. The Court held his job was a major life activity and the employee was a qualified individual under the ADA.

2. Alcoholics Not Protected under ADA

Mandujano v. Geithner, 2011 WL 2550621 (N.D. Cal. 2011).

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[24] 29 C.F.R. § 1630.3 (2011).
[25] 29 C.F.R. § 1630.16(b) (2011).; Appendix to Part 1630-Interpretive Guidance on Title I of the ADA (2002).
[26] *Schmidt v. Safeway Inc*., 864 F. Supp. 991, 996 (D. Or. 1994).; *Mackey v. Cleveland State Univ.*, 837 F. Supp. 1396, 1411-12 (N.D. Ohio 1993).; 29 C.F.R. Pt. 1630 App. (interpretive regulations, §1640.16(b) (2011)).; EEOC Technical Assistance Manual § 8.4 (2002).
[27] 41 U.S.C.A. §§ 701, *et seq*.
[28] 42 U.S.C.A. § 12114(c) (2009); *Carrol v. Ill. Dept. of Mental Health and Developmental Disabilities*, 979 F. Supp. 767 (C.D. Ill. 1997); *Rollison v. Gwinnett County*, 865 F. Supp. 1564 (N.D. Ga. 1994); *Burch v. Coca-Cola Co.*, 119 F.3d 305 (5th Cir. 1997).; *Miners v. Cargill Commc'n, Inc*. 113 F.3d 280 (8th Cir. 1997).

A U.S. Mint police officer was terminated for failing to maintain a driver's license and sustaining a conviction for driving under the influence of alcohol. The officer argued he never missed work as a result of drinking, did not report to work intoxicated, and never missed any important events for his children because of his drinking. The court granted summary judgment to the employer, and held the officer did not submit any evidence to establish his alcohol addiction substantially limited one or more major life activity. The court followed the Tenth and Eleventh Circuits and held that driving, by itself, does not constitute a major life activity.[29]

2. THE FAMILY MEDICAL LEAVE ACT

The Family Medical Leave Act (the "FMLA") became effective for most covered employers on August 5, 1993.[30] An employee may take job-protected, unpaid leave, for up to a total of twelve (12) work weeks in a twelve (12) month period for the following reasons: (1) the birth of the employee's child and to care for the newborn child; (2) the placement of a child with the employee for adoption or foster care; (3) to care for the employee's spouse, parent, son, or daughter with a serious health condition; or (4) when the employee is incapacitated due to a serious health condition.[31] The FMLA was amended in 2008, 2009, and 2013 to expand coverage for military members and their families as well as airline flight crew members and flight attendants.

A. Covered Employers

The FMLA only applies to employers that meet certain criteria. A public agency, including a local, state, or Federal governmental agency, is a covered employer under the statute.[32] As such, police and fire departments must follow the rules of the FMLA.

B. Covered Employees

Only eligible employees are entitled to take FMLA leave. An eligible employee is one who: (1) works for a covered employer; (2) has worked for the employer for at least twelve (12) months[33]; (3) has at least one thousand, two hundred and fifty (1,250) hours of service during the twelve (12) month period

[29] *Mandujano v. Geithner*, 2011 WL 255061, 5, citing *Kellogg v. Energy Safety Servs. Inc.*, 544 F.3d 1121, 1126 (10th Cir. 2008); *Chenoweth v. Hillsborough County*, 250 F. 3d 1328, 1329 (11th Cir. 2001).
[30] 29 C.F.R. § 825.100 (2013).
[31] 29 C.F.R. § 825.112 (2013).
[32] 29 C.F.R. § 825.104 (2013).
[33] The twelve (12) month period of employment does not have to be consecutive. Any time previously worked for the same employer can be used to meet the 12-month requirement.

immediately preceding the leave; and (4) works at a location where the employer has at least fifty (50) employees within seventy-five (75) miles.[34]

C. Notice

Employees must comply with their employer's usual and customary requirements for requesting leave and provide enough information for their employer to reasonably determine whether the FMLA applies to the leave request.[35] Employees must generally request leave thirty (30) days in advance when the leave is foreseeable.[36] If the leave is unforeseeable, employees must provide notice as soon as possible and practicable under the circumstances.[37]

D. Certification

An employer may require that a request for leave be supported by certification issued by the employee's heath care provider, which must state the following: (1) the date on which the serious health condition commenced; (2) the probable duration of the condition; (3) the appropriate medical facts within the knowledge of the health care provider regarding the condition; and (4) a statement that the employee is unable to perform the functions of the position of the employee.[38] If the employee fails to provide its employer with the required notice, the employer can deny leave even if the employee has a serious health condition.[39]

E. Enforcement

The FMLA provides it shall be unlawful for any employer to interfere with, restrain, deny the exercise of, or the attempt to exercise, any right provided under the FMLA. In order for an employee to establish an FMLA interference claim, an employee must show: (1) they are an FMLA eligible employee; (2) the employer is considered to be subject to the provisions of the FMLA; (3) the employee was entitled to take FMLA leave; (4) the employee gave notice of his intention to take leave; and (5) the employer denied the employee FMLA entitled benefits.[40]

F. Substance Abuse

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[34] 29 C.F.R. § 825.110(2)(2013).
[35] 29 C.F.R. § 825.301(b) (2013).
[36] 29 C.F.R. § 825.302 (2013).
[37] 29 C.F.R. § 825.303 (2013).
[38] 29 C.F.R. § 825.306 (2013). (Employers can use DOL form WH-380 for FMLA certification purposes.)
[39] *Phillips v. Quebecor World RAI, Inc*., 450 F.3d 308, 311 (7th Cir. 2006); 29 C.F.R. § 825.208(a)(1) (2013).
[40] *Basso v. Potter*, 596 F. Supp. 2d 324, 337 (D. Conn. 2009).

FMLA leave applies only to a serious health condition or a chronic serious health condition.[41] A serious health condition is defined as an illness, impairment or physical or mental condition that involves inpatient care or continuing treatment by a health care provider. An employee's mere reference to being sick does not suggest to the employer the medical condition might be serious or the FMLA would otherwise apply.[42]

Substance abuse, however, may be considered a serious health condition.[43] But, FMLA leave may only be taken for treatment of substance abuse by a health care provider. As such, an employee's absence stemming from the use of drugs or alcohol does not qualify for FMLA leave.[44]

Further, an employee's engagement of treatment for substance abuse does not prevent an employer from taking employment action against an employee.[45] If an employee exercises FMLA rights, it does not insulate them from adverse employment action pursuant to policy that provides for termination for substance abuse.[46]

B. Substance Abuse Related Performance and Conduct Issues

As police officers, firefighters, and civilian employees become more knowledgeable about their ADA rights, more employees will ask for reasonable accommodations. Public employers must provide reasonable accommodations to the known physical and mental limitations of current employees with disabilities. While an employer may be required to provide an accommodation to an alcoholic or recovered drug addict, an employer may discipline and terminate employment when alcohol and drug use adversely affect job performance or conduct.[47] The ADA provides employers may require an addict to meet the same standards of performance and behavior as other employees, and employers do not have to tolerate poor job performance or unsatisfactory behavior related to an employee's alcoholism or illegal use of drugs.[48]

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[41] 29 C.F.R. § 825.113 (2013).

[42] *Brown v. Pension Bds*, 488 F.Supp.2d, 409 (S.D.N.Y. 2006) ("Merely calling in sick is insufficient to put a company on notice that an employee is requesting leave that may be eligible under the FMLA."). Accordingly, the FMLA does not require employers to play Sherlock Holmes, scanning an employee's work history for clues as to the undisclosed, true reason for an employee's absence. See also: *De la Rama v. Ill. Dep't of Human Servs*., 541 F.3d 681, 687 (7th Cir. 2008); *Golden v. New York City Dep't of Envtl. Prot*., No. 06 Civ. 1587, 2007 WL 4258241, at 2 (S.D.N.Y. 2007) (holding an employer's knowledge its employee suffered from a chronic medical condition did not relieve the employee of duty to notify its employer as soon as practicable that an individual absence was due to this condition.).

[43] 29 C.F.R. § 825.119(a) (2013).; 29 C.F.R. § § 825.113 through 825.115 (2013).

[44] Id.

[45] Id.

[46] 29 C.F.R. § 825.119(b). (2013).

[47] EEOC Technical Assistance Manual: ADA § 8.7 (2002).

[48] 29 C.F.R. § 1630.16(b)(4)(2011).; *Ibarra v. Sunset Scavenger Co*., 2003 WL 21244096 (N.D. Cal. 2003).

1. ADA Reasonable Accommodations for Substance Abuse Issues

Employers have the right to evaluate employees based on consistently applied standards of performance and conduct.[49] Public safety employers must meet qualification standards that are job-related and consistent with business necessity.[50] Police officers and firefighters must be able to perform the essential functions of the job, with or without accommodation.[51] An employee's disability usually has no bearing on performance or conduct. However, when a disability contributes to performance and conduct problems, an employer may be required to provide the accommodation unless the employer can show the accommodation would impose undue hardship on its operations.[52]

a. The Interactive Process

An employer is not required to speculate whether an employee's physical or mental impairment would require accommodation.[53] The employee bears the burden of identifying a reasonable accommodation and the request must be clear and communicated to the employer.[54] In making such request, the employee should describe the disability necessitating the change. The ADA does not obligate an employer to provide the accommodation requested.[55] It only requires the employer to provide some reasonable accommodation.[56]

When an employee requests an accommodation in response to a performance evaluation, the evaluation should continue. The employer must have an interactive discussion with the employee to determine what accommodation might improve performance.[57] As with other types of disabilities, an alcoholic employee must demonstrate the employer was aware of the disability to successfully prevail on a reasonable accommodation claim.[58]

District courts are in disagreement as to whether individuals with drug or alcohol addiction are entitled to reasonable workplace accommodations. A small

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[49] 29 C.F.R. § 1630.2(q) (2011).
[50] Id.
[51] 29 C.F.R. § 1630.2(n)-(o) (2011).
[52] 29 C.F.R. § 1630.2(p) (2011); 29 C.F.R. § 1630.2(o)(4) (2011); 29 C.F.R. § 1630.9(a) (2011).
[53] 29 C.F.R. § 1630.9 (2011).
[54] *Borkowski v. Valley Cent. School Dist*., F.3d 131, 138 (2d Cir. 1995).; *Singer v. Office of the Senate Sergeant at Arms*, 173 F.3d 837 (Fed. Cir. 1999); *Huppenbauer v. May Department Stores Co.*, 99 F.3d 1130 (4th Cir. 1996)(unpub.).
[55] *Hennenfent v. Mid Dakota Clinic, P.C.*, 164 F.3d 419 (8th Cir. 1998).
[56] *Id.*
[57] 29 C.F.R. § 1630.9 (2010); The ADA Amendments Act of 2008 explicitly states individuals who are covered only under the "regarded as" definition of "disability" would not be entitled to reasonable accommodation; *Curry v. Goodman, Inc*., 286 Conn. 390, 416 (Conn. 2008), citing 29 C.F.R Section 1630.3(o)(3) (2007), holding that once an employee has suggested to his employer a reasonable accommodation, the employer must engage in an "informal, interactive process" with the disabled individual in order to identify the precise limitations which result from the disability and potential reasonable accommodations that could overcome those limitations.
[58] *Rock v. McHugh*, 2011 WL 2119035 (D. Md. 2011).

number of courts have prohibited reasonable accommodation to alcoholics.[59] However, a common mandate amongst most courts allows employee's leave for drug and alcohol treatment. Moreover, the EEOC's interpretive guidance suggests additional unpaid leave, if necessary for substance abuse treatment, is a reasonable accommodation.[60] However, no court has yet decided the issue.

b. Unreasonable Requests for Accommodation

Nanos v. City of Stamford, 609 F.Supp. 2d 260 (D. Conn. 2009).

Police records clerk suffered from alcoholism, was habitually absent from work and was eventually terminated. The employee argued the nature and symptoms of alcoholism substantially limited her major life activity of maintaining regular attendance in the performance of her job. The court recognized the ADA expressly precludes alcoholics from recovery in circumstances where their alcoholism prevented them from performing their job duties to the same standards as non-alcoholics.

c. Reasonable Requests for Accommodation

McMillian v. City of New York, 711 F.3d 120 (2nd Cir. 2013).

City employee successfully claimed discrimination under the ADA. The court held it was not evident a timely arrival at work was an essential function of the job. The employee was able to complete the essential functions of his job by offsetting the time he missed due to tardiness with additional work hours.

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

The Court held an employer must provide a leave of absence for 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.

2. Last Chance Agreements

A last chance agreement is a settlement agreement and a settlement agreement is a contract.[61] It is a tool that an employer can use when an employee has admitted a substance abuse problem, the substance abuse is the cause of the performance problems, and the employer is prepared to terminate the employee when the terms are violated. If the employee is not willing to acknowledge the

[59] *Nanos v. City of Stamford*, 609 F. Supp. 2d 260, 265 (D. Conn. 2009).
[60] 29 C.F.R. Pt. 1630, app. (2011).
[61] *Link v. Dept of Treasury*, 51 F.3d 1577, 1582 (Fed. Cir. 1995).

substance abuse problem, the employer may not be able to force the employee to seek treatment.

However, an employee cannot use the FMLA as a shield from discipline. An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period.[62] In order to deny restoration of employment, an employer must be able to show an employee would not have otherwise been employed at the time reinstatement was requested.[63]

Longen v. Waterous Co., 2002 WL 1906027 (D. Minn. 2002).

Employee entered into a last chance agreement with his employer which provided the employer would terminate employee in event he ingested mood altering chemicals. The employee subsequently violated the last chance agreement by testing positive for cocaine. The court held a violation of the last chance agreement constituted a legitimate non-discriminatory reason for termination under the ADA.

Allen v. City of Sturgis, 559 F. Supp.2d 837 (W.D. Mich. 2008).

Alcoholic police officer's consumption of alcohol during his employment caused him to be involved in incidents outside of work. As a term of discipline, the employee entered into a last chance agreement which specifically stated any off duty consumption of alcohol which brought discredit to the police department would result in his termination. Two years after signing the last chance agreement, an off duty incident occurred which involved alcohol. The Court held even if the employee could satisfy the elements of a prima facie case for retaliation and interference under the FMLA, the City properly terminated him based on the terms of his last chance agreement.

Basso v. Potter, 596 F. Supp. 2d 324 (D. Conn. 2009).

Employee was terminated after he experienced disciplinary problems which included failures in timeliness, attendance and compliance with instructions. Prior to termination, the employee entered into a last chance agreement. He agreed to participate in a structured alcohol rehabilitation program and to refrain from further substance abuse related misconduct. The terms of the agreement were subsequently violated. The court held a genuine issue of material fact existed as to whether the employee was incapacitated for work because of alcohol treatment or alcohol use. However, the court ruled the employee was properly terminated under the express terms of his last chance agreement.

[62] *Arban v. West. Pub. Corp.*, 345 F.3d 390, 401 (6th Cir. 2003).
[63] 29 C.F.R. Section 825.216(a)(2013).; *Hollins v. Ohio Bell Tel. Co*., 496 F. Supp.2d 864 (S.D. Ohio 2007).

Allen v. Butler County Comm'rs, 2009 U.S. App. Lexis 18773 (6th Cir. 2009).

County employee was a member of the AFL-CIO by virtue of employment. The AFL-CIO had a collective bargaining agreement with the County, which had a separate and specific paid sick leave policy. After the employee's work performance deteriorated and numerous discipline issues occurred, the employee and Union entered into a last chance agreement with the County. Under this agreement, if the employee failed to comply with the County's sick leave policy or had any additional discipline problems, the employee would be immediately terminated. Subsequent to signing the last chance agreement, the employee violated the terms. The Sixth Circuit Court of Appeals held an employee on FMLA leave could be terminated for violating more stringent requirements of the employer's concurrent paid sick leave policy.

Cooper v. Dep't of Veterans Affairs, 2012-3112 (Fed. Cir. 2013).

Employee was involved in an altercation with another co-worker while on duty. The supervisor attributed the incident to the employee's apparent intoxication. As a result of the incident, the Department of Veterans Affairs (the "DVA") terminated the employee. While the appeal was pending, the parties entered into a last chance agreement. Among other terms, the employee would be subject to random drug tests for alcohol. The employee was reinstated, but shortly thereafter, tested positive for alcohol. The DVA sought termination based on a violation of the last chance agreement.

The employee argued the last chance agreement denied him the opportunity to take FLMA protected leave for substance abuse treatment. The court held the employee was bound by the terms of the last chance agreement and upheld the provision subjecting an alcoholic to random alcohol screens.

3. Off Duty Conduct and the Direct Threat Defense

Title I of the ADA provides the term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.[64] Courts generally have held that the existence of a direct threat is a defense to be proved by the employer and the direct threat may extend to cases where the threat stems from off-duty conduct.[65]

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

An employee was arrested for disorderly conduct and possession of cocaine while off-duty. While the employee was never convicted on these charges, he voluntarily sought treatment for his self-acknowledged drug addiction. He was terminated for various violations of City rules which stemmed

[64] 42 U.S.C. § 12113 (2009).

[65] EEOC Technical Assistance Manual § 8.7 (2002).

from his arrest. The Seventh Circuit found in favor of the City and held termination for possession of illegal drugs did not violate the ADA. The court distinguished this action from termination based on the employee's drug addiction. The employee's addiction did not compel the illegal conduct and thus, the employer did not violate the ADA.

Maull v. Division of State Police, 141 F. Supp 2d 463 (D. Del 2001).

A state trooper was involved in an off-duty automobile accident and was found to have a blood alcohol content of .07%. In a subsequent incident, the state trooper was reprimanded for reporting to work with a blood alcohol content of 07%. After the second alcohol related incident, he entered a residential treatment program. The court held the state trooper's alcoholism posed a considerable threat to the health and safety of the public and his fellow troopers. Because ensuring public health and safety is the *sine qua non*e of a police officer's job, the state trooper was not qualified for his employment position.

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

An alcoholic police chief was involved in an off-duty personal injury accident where he was found to have a blood alcohol level of .23%, nearly three times the legal limit in Illinois. The chief was initially placed on paid administrative leave but subsequently terminated. At the time of his termination, he had not been convicted of any crime but his license had been suspended. The court held the officer could not recover under the ADA because he was terminated for his off-duty misconduct, not his disability. The court also noted the ADA neither prevents employers from holding persons suffering from alcoholism to reasonable rules of conduct, nor protects alcoholics from the consequences of their own misconduct.

4. Fitness for Duty Exams under the FMLA and the ADA

A. FMLA

An employer may require a "Fitness for Duty" certification as a condition of reinstatement under the FMLA.[66] However, under FMLA regulations, no second or third opinions on a fitness-for-duty certification may be required.[67] The FMLA specifically states that requirements under the ADA apply.[68] After an employee returns from FMLA leave, the ADA requires any medical examination by the employer's health care provider be job-related and consistent with business necessity.[69] If an employee's serious health condition may also be a disability

[66] 29 C.F.R. § 825.312(a) (2013).
[67] 29 C.F.R. § 825.312(b) (2013).
[68] 29 C.F.R. § 825.312(h) (2013).
[69] Id.

within the meaning of the ADA, the FMLA does not prevent the employer from following the procedures for requesting medical information under the ADA.[70]

B. ADA

Generally, the ADA prohibits employers from using medical exams as a pretext to harass employees for non-work related medical issues.[71] However, not all types of medical exams are forbidden.[72] When health problems have had a substantial and injurious impact on an employee's job performance, the employer can require the employee to undergo a physical examination designed to determine the employee's ability to work.[73] Courts have specifically recognized a business necessity exception in the context of police departments because armed officers are placed in positions where they can do tremendous harm if they act irrationally.[74] In fact, a police department is permitted to require a medical examination when it can identify legitimate, nondiscriminatory reasons to doubt the officer's capacity to perform their duties.[75]

C. Relevant case law:

Watson v. City of Miami Beach. 177 F. 3d 932 (11th Cir. 1999).

The Eleventh Circuit upheld an employer's decision to require a police officer, whose job performance was otherwise satisfactory, undergo a fitness for duty examination after he displayed unusually defensive and antagonistic behavior towards his co-workers and supervisors. The court also enunciated a blanket rule that a fitness for duty examination is job related and consistent with business necessity where a police department reasonably perceived an officer to be even mildly paranoid, hostile, or oppositional.

Brownfield v. City of Yakima, 612 F.3d 1140, (9th Cir. 2010).

The Ninth Circuit upheld the City action of requiring a police officer to submit to a fitness for duty exam after his primary care physician cleared him for duty. The primary care physician made mention that the injured officer could perform the physical activities described in the job analysis, but failed to mention any of his psychological issues. Although the officer's job performance was otherwise satisfactory, an in-house fitness for duty certification was justified by the business necessity exception to determine the employee's ability to return to work based on his psychological prognosis.

Franklin v. City of Slidell, 936 F. Supp.2d 691 (E.D. La. 2013).

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[70] Id.
[71] *Brownfield v. City of Yakima*, 612 F.3d 1140, 1140 (9th Cir. 2010).
[72] *Conroy v. N.Y. Dept. of Corr. Servs*, 333 F.3d 88, 95 (2nd Cir. 2003).
[73] *Yin v. State of Cal.*, 95 F.3d. 864 (9th Cir. 1996).
[74] *Watson v. City of Miami Beach*, 177 F. 3d 932, 935 (11th Cir. 1999).
[75] 42 U.S.C.A § 12112(d)(4)(A) (2009).

The court held the mere fact an employee was a police officer returning to work from sick leave did not alone constitute a legitimate reason to require a fitness for duty examination. A fitness for duty examination will not be justified by the business necessity exception without evidence that an officer's health problems have a substantial and injurious impact on job performance.

White v. County of Los Angeles, 170 Cal. Rptr. 3d 472 (Cal. App. 2014).

Employee was a senior district attorney investigator with the Los Angeles County District Attorney's Office. She began experiencing emotional difficulties and was observed acting irrationally. The employee eventually took FMLA to undergo treatment for psychological difficulties. Her doctor released her back to work. The County placed her on paid administrative leave, and insisted she participate in a fitness for duty evaluation prior to a full return to work.

The court held under the FMLA, once an employee returns to work with a medical certification, they are fit for duty and the employer has no right to a second opinion. The employer must accept the employee's certification and return the employee to paid status. The court concluded the ADA, not the FMLA controlled the case. Under the ADA, the standard is whether the fitness for duty exam is job related and consistent with business necessity. The court held the County properly relied on the employee's pre-FMLA behavior to require a fitness for duty exam prior to returning to work.

CONCLUSION

Unless an employee is currently engaged in the illegal use of drugs, substance abuse is generally considered a disability under the ADA. Thus, an alcoholic and recovered drug addict may be entitled to a reasonable accommodation which may include leave or schedule modifications to receive substance abuse treatment. Employees are entitled to take leave under the FMLA for substance abuse treatment, but not for absences resulting from substance abuse itself. When confronted with an employee who has a substance abuse issue, the employer must carefully analyze the facts of each individual case and must carefully consider both the FMLA and ADA. If not, the employer will fall off the wagon into the depths of the intricate nuances of both the ADA and FMLA.