Addiction and the Americans with Disabilities Act

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On July 26, 1990, the U.S. Congress enacted the Americans with Disabilities Act (ADA), which was intended as a broad, national, civil rights–oriented mandate "for the elimination of discrimination against individuals with disabilities," both physical and mental. ADA protection is extended, in limited form, to those with addiction disorders. However, many addicted individuals are denied ADA protection because of exclusionary criteria in the ADA itself and because of increasingly restrictive interpretations of the ADA in recent cases. The benefit to the addicted persons, and to the larger society, is lost when unfair discriminatory practices preclude employment of otherwise qualified, though stigmatized, individuals. The ADA currently falls short, in many respects, of preventing such discrimination against those with addictions.

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On July 26, 1990, the U.S. Congress enacted the Americans with Disabilities Act (ADA),[1] extending governmental protection against discrimination to those with physical or mental disabilities and building on two federal laws that preceded it (Table 1).[2,3] The framers of the ADA intended a broad, civil rights-oriented "national mandate for the elimination of discrimination against individuals with disabilities" that would "provide clear, strong, consistent, enforceable standards," "ensure a central role for the federal government in enforcing the act," and "use the regulation of commerce to protect persons with disabilities from discrimination" (Ref. 4, p 3).

Although addiction cases account for a minority of ADA litigation, cases related to addiction are increasingly common. Issues pertaining to these cases are often highly politicized and fraught with controversy. Denouncing prejudice against the mentally ill has become increasingly politically popular, as the development of the National Alliance for the Mentally Ill and the proposed Domenici/Wellstone Mental Health Parity Act of 1996 (Pub. L. 104-04, Title VII) attest. However, legislative failures to insure parity of health insurance benefits for addictive disorders suggest that political bias against addicted persons remains strong in this country. Our nation grapples with finding an acceptable definition of addiction that recognizes it as a physical and psychiatric illness without denying an element of personal responsibility with regard to substance use. Meanwhile, successive waves of addictive substances wash over the population, destroying physical and mental health, relationships, and economic productivity.

Employment, a primary bulwark in the rebuilding of lives affected by addiction, is often needlessly denied to the very addicted people who could return to productive work lives. The benefit to the addicted people themselves, and the larger society, is lost when unfair discriminatory practices preclude the employment of the otherwise qualified, though stigmatized, addicted person. The ADA has succeeded in providing some protection against employment discrimination for addicted individuals, but in many respects its provisions fall short in this area.

Rudiments of the ADA and Its Enforcement

The ADA specifically forbids seven types of discrimination (Table 2) against persons with physical or mental disabilities and regulates five arenas of potential dispute[1,4]: employment practices (Title I),

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Table 1 History of Legislation for Protection of Disabled Individuals, Including Those With Addictions

Legislation
Title V of the Rehabilitation Act of 1973 (Ref. 2)
Prohibits federal agencies or organizations that receive federal funds from discrimination against qualified people with disabilities
Protects alcoholic employees and, to a lesser extent, drug-addicted employees
Lays out the three-pronged definition of disability subsequently used in the ADA
Requires that disabled person be "otherwise qualified" for the position and not pose a direct threat to others and that employers make "reasonable accommodations"
No specific statute of limitations
Fair Housing Amendments Act of 1988 (Ref. 3)
Forbids discrimination on the basis of disability in the sale or rental of private property
Sellers or leasors must make "reasonable accommodations" to provide for equal opportunity for disabled persons
U.S. Attorney General, on behalf of group home operators, may take legal action against potential property sellers by alleging bias against mentally ill persons
The Americans with Disabilities Act of 1990 (Ref. 1)
Provides protection to those with a physical or mental disability, history of disability, or misclassification as having a disability
Protection extends to employment, government services, public accommodations and private services, and telecommunications
Persons with a diagnosis of alcohol dependence are protected, but those with drug dependence are protected only if they are in treatment or have completed a treatment program, and are not "currently" using illegal drugs
Disabled person must be otherwise qualified to complete the necessary tasks, with or without accommodations, and the accommodations must not cause "undue hardship" to the employer

state and local government services (Title II), public accommodations and private services (Title III), telecommunications (Title IV), and miscellaneous (Title V). Most ADA claims are made for unfair hiring practices and employment discrimination.

To warrant ADA protection, a person must have either a substantially limiting disability—not merely a diagnosis of illness—or a history of such an illness. The ADA also provides protection for those individuals who are misclassified as having a substantially limiting disability and those who are treated as if they have a disability, even if no such disability exists.[5]

Although the initial ADA statute referred only to employers with more than 25 employees, the ADA has covered employers with more than 15 employees

Table 2 Discrimination Prohibited Under the ADA for Otherwise Qualified Persons†

1. Limiting, segregating, or classifying applicants or employees in ways that adversely affect their opportunities or status
2. Participating in a contract, arrangement, or relationship that subjects an employee to prohibited discrimination
3. Using standards, criteria, or administrative methods that discriminate or perpetuate discrimination
4. Discriminating against a qualified individual because that individual associates with an individual with a known disability
5. Failing to make reasonable accommodations for the known limitations of an otherwise qualified individual, unless doing so would impose an undue hardship
6. Using selection criteria that screen out individual with disabilities, unless such criteria are job-related and consistent with business necessity
7. Failing to ensure that any employment tests used accurately reflect whatever factor the test is supposed to measure, not a person's disability

† See Refs. 1 and 4.

since July 6, 1994.[6] Ironically, the only employer not bound by the original ADA of 1990 was the very body that enacted the law, the U.S. Congress.[4] This lacuna of unfairness was rectified for the most part by the Congressional Accountability Act of 1995.[7]

Enforcement of the ADA is primarily directed by the Equal Employment Opportunity Commission (EEOC), which publishes compliance manuals[8] and updated guidelines for emerging applications of the law[9] and evaluates all claims of disability discrimination not already evaluated by a state agency designated for that purpose. (Some states have more comprehensive and strict antidiscrimination statutes than the ADA, and these state statutes supersede the ADA.) A charge of disability discrimination must be brought to the EEOC within 180 days of the alleged act, unless the state where the act was committed has an agency designated to monitor disability discrimination, in which case, the charge must first be presented to the local agency. When such a local agency exists, the time limit for presentation to the EEOC is 300 days, or 30 days after the state agency has made an official notification that it will not be pursuing a court action.[10] The EEOC may decide to pursue the matter in the complainant's behalf, issue a right-to-sue letter to the complainant, or find that no disability discrimination occurred. If the complainant exhausts the state's administrative remedies and the EEOC does not resolve the complaint but issues a right-to-sue letter, the complainant may sue in court in a private case. In private cases, attorneys' fees are awarded to the prevailing side, as in litigation under the federal Civil Rights Act.[4]

Potential judicial remedies for ADA violations consist of monetary damages and equitable relief in the form of job reinstatement or promotion. According to the Civil Rights Act of 1981,[11] punitive damages under the Civil Rights Act of 1964 (and, by extension, under the ADA) are allowed, with a cap on the aggregate monetary penalty to employers of $50,000 for employers of fewer than 100 employees, $100,000 for employers of 101 to 200 employees, $200,000 for employers of between 201 and 500 employees, and $300,000 for employers of more than 500 employees. State and local government employees, although covered under Title II of the ADA, may not collect punitive damages.

Congress, in passing the ADA, clearly conceived of a broad civil rights measure comparable with previous measures prohibiting discrimination based on race and gender. On the floor of the Senate, Senator Harkin intoned that:

> . . .today Congress opens the doors to all Americans with disabilities; that today we say no to fear, that we say no to ignorance, that we say no to prejudice. The ADA is, indeed, the 20th century Emancipation Proclamation for all persons with disabilities. Today, the U.S. Senate will say to all Americans that the days of segregation and inequality are over and. . .by your winning your full civil rights, you strengthen ours.[12]

ADA Coverage of Disabling Psychiatric Illness

Importantly, the ADA included not only those with physical disabilities, but disabling psychiatric illnesses as well. The ADA specifically forbids "sanism," the prejudice against the mentally ill originally described by Morton Birnbaum (Ref. 13, p 105) and later defined by Michael Perlin as "an irrational prejudice of the same quality and character of other irrational prejudices that cause (and are reflected in) prevailing social attitudes or racism, sexism, homophobia, and ethnic bigotry."[14]

However, there are some noteworthy qualifications of ADA coverage for mental disabilities. For a mental impairment to be protected under the ADA, the disability must substantially limit one or more major life activities, usually "learning, thinking, concentrating, interacting with others, caring for oneself, speaking, performing manual tasks, or working."[15] Criteria for judging whether a limitation is significant include the nature, severity, expected duration, and long-term effects of the individual's condition.[16] Disabled persons are put into the difficult position of having to show that they are disabled enough to be legally considered disabled, but are not so disabled that they cannot perform their job functions, with some accommodations. In addition, in an apparent attempt to deny ADA coverage for what it perceived as trivial or politically difficult conditions, Congress specifically excluded many psychiatric diagnoses, including "transvestitism, transsexualism, pedophilia, exhibitionism. . .[and] gender identity disorders not resulting from physical impairments."[17]

ADA Coverage of Addictions

Under the ADA, addiction coverage is divided according to use of alcohol or illegal drugs. Illegal drugs are defined as street-purchased or manufactured substances, and prescription medications used without the supervision of a health care professional.[18] Persons with a diagnosis of alcohol dependence are protected by the ADA, whereas those who have drug dependence are protected only if they are in treatment for the addiction or have completed a treatment program and are not currently using illegal drugs. The definition of "currently" has been left vague in the ADA and in subsequent guidance from the EEOC. Those addicted to drugs or alcohol are excluded from ADA protection if their condition poses a direct threat of harm to others or (arguably) themselves. As with all ADA claims, the addicted person must be otherwise qualified to complete the necessary tasks, with or without accommodations, and the accommodations must not cause "undue hardship" to the employer. The definitions of "current drug use," "direct threat," and "undue hardship" have been the subjects of vigorous litigation.

Although persons with alcohol dependence are more broadly covered under the ADA than are those with addictions to illegal drugs, the employee with an alcohol problem does not receive blanket protection under the ADA. In the case of *Marrari v. WCI Steel*,[19] William Marrari claimed that he was fired for having a urine sample that was positive for alcohol after he had entered into a "last-chance" agreement with his employer. The last-chance agreement had specified that the presence of any alcohol in his body when he reported to work would be considered a reason for immediate dismissal. The judge in the Sixth Circuit Court of Appeals conceded that Marrari had in fact been treated differently than had other (nonalcoholic) employees, but found that the last-chance agreement was a valid contract between Marrari and the employer and that Marrari was fired for breaking the agreement rather than because of any discriminatory intent. In framing last-chance agreements, employers should (1) ascertain that employees know what right they are giving up and what obligations they are undertaking; (2) give something of value to the employees in return for giving up those rights, most likely reinstatement in a lost job; and (3) carefully describe all the requirements and consequences of the agreement.[20]

When dealing with any employee with an addiction disorder, the ADA allows employers to comply with other federal regulations governing addiction in the workplace, such as the Drug Free Workplace Act (Pub. L. 100-690, Title V, Subtitle D (1988)), and statutes established by the Department of Transportation, Department of Defense, and the Nuclear Regulatory Commission. Generally speaking, these federal statutes are consistent with the ADA.[21]

"Reasonable Accommodations" for Persons With Addictions

Under the ADA, employers must make "reasonable accommodations" for employees or potential employees who are considered disabled under the ADA's provisions. Specifically, employers must make "modifications or adjustments"[22] in the hiring process to allow covered candidates to have a fair shot at being hired, enable the disabled employee to participate in the work environment, and allow the disabled employee to profit equally from the benefits and privileges of employment. Financial considerations account for most of the criteria for "reasonableness" of the accommodation. Factors considered in assessing the hardship of a particular accommodation to the employer include the accommodation's "nature and net cost," and "effect on expenses and resources." Also considered are the financial resources and size of the business, the nature of the workplace, and the "impact on the facility's ability to conduct business."[23]

Practical accommodations for the addicted person protected under the ADA can include leave time for inpatient treatment or altered schedules to attend outpatient treatment or Alcoholics Anonymous meetings. Some examples of accommodations include:

1. Modified work schedule to allow for daily methadone pickup
2. "Job restructuring to relieve an employee of particular marginal tasks that may compromise recovery"
3. "Temporary reassignment of an employee in a safety-related position to a vacant non–safety-sensitive position while he or she completes treatment." [Ref. 23, pp 3–4].

The defendant employer's failure to provide reasonable accommodation was an important factor in *Schmidt v. Safeway, Inc.*,[24] in which a truck driver was fired for his apparent alcohol problem, although he had not been found to be intoxicated while working. The appeals judge found for the plaintiff, writing that "a leave of absence to obtain medical treatment is a reasonable accommodation if it is likely that, following treatment, plaintiff would have been able to safely perform his duties as a truck driver" (Ref. 24, p 4). In this case, the company's own medical review officer (MRO) had recommended a medical leave during which the employee was to complete alcoholism treatment. The MRO, while employed by the defendant, Safeway, Inc., had stated that the plaintiff "should be an excellent employee after he finishes treatment [and at that time, could] certainly return to his regular job" (Ref. 24, p 9). Although concerned for public safety and the potential threat of an alcoholic truck driver, the judge was clearly swayed by the MRO. This judicial deference to professional opinion suggests a court generally well-intentioned toward the addicted, mentally ill, or otherwise disabled claimant under the ADA.

In *Rodgers v. Lehman*,[25] a civilian employee of the Navy complained that he had been wrongly discharged because of his disability of alcoholism, whereas the Navy contended he had been treated fairly and had been discharged because of his record of multiple absences from work. The original trial ended in summary judgment in favor of the Navy, but a relatively pro-employee Fourth Circuit appeals court reversed the decision. Although sympathetic to the Navy's attempts to deal with a clearly dysfunctional employee, appeals court Judge Motz wrote that "Rodgers [was] deprived, however, of an opportunity to participate in an inpatient treatment before being discharged" and that the record did not "disclose any sound reason for denial of this opportunity" (Ref. 25, p 102).

The ADA Excludes Many Addicted Individuals

Although some addicted people are covered under the ADA, many are denied protection, usually based on defined exclusions written into the ADA itself. For example, although the ADA covers persons who have completed a supervised drug rehabilitation program or otherwise have been successfully rehabilitated, the ADA denies coverage of "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."[26] In contrast, "otherwise qualified" persons addicted to alcohol are covered under the ADA unless they pose a direct threat to others or break specific workplace rules against the use of alcohol.

Persons with addiction disorders who have received benefits for their disability may be prevented by judicial estoppel from applying for ADA coverage. The very fact that an individual receives disability benefits is taken to mean that he or she is not otherwise qualified for any position. Although this dilemma has forced many disabled persons to choose between disability benefits and ADA protection, a recent Supreme Court decision[27] suggested that differing disability definitions or change in the person's condition over time might explain the apparent conundrum and allow the disabled person to receive disability benefits and still request ADA protection.

A direct threat to the safety of others precludes any claim to ADA protection. For example, a neurosurgeon named Donald Judice[28] had had serious problems with alcohol over the course of many years, and consumption of alcohol was suspected in his mismanagement of a patient who died. When confronted just prior to performing a surgical procedure, Dr. Judice was found to have a detectable serum alcohol level, and he was immediately suspended from hospital privileges. (The blood alcohol content was not quantified in the case. It was simply noted that "a blood test. . .indicated the presence of alcohol" (Ref. 28, p 979)). After inpatient addiction treatment and the imposition of practice guidelines by the hospital, the hospital's Physician's Health Committee demanded that Dr. Judice undergo a "fitness for duty" examination by an addiction expert, Dr. Douglas Talbott. Dr. Judice refused this evaluation, and sued the hospital for discrimination under the ADA.

The district court agreed with the hospital's demand for a second opinion about Dr. Judice's recovery and granted summary judgment to the hospital. The court agreed that the defendant hospital was concerned about the actual risk to other persons rather than any perceived stigma attached to alcoholism, stating:

> [T]he Court finds that Dr. Judice posed a sufficient risk to public safety to justify a second evaluation. The hospital's fears rested not on generalized fears about those suffering from alcoholism, but on Dr. Judice's specific and uncertain past history. . . . The final report. . .does not serve as suitable proof that the objectively reasonable risk that Dr. Judice posed—to himself and others—was insignificant [Ref. 28, p 984].

Although the original ADA provided for exclusions based only on threats to the well-being of others, subsequent EEOC interpretation provided for exclusion of ADA coverage based on "a significant risk of substantial harm to the health or safety of the individual or others. . . .[29] Although courts have generally ruled against the EEOC's apparent expansion of the ADA's meaning to include danger to self as an exclusionary criterion, in *Mendez v. Gearan*,[30] a 1997 federal court ruled that the ADA did not protect an individual who presented a significant danger to her own well-being. Given the high correlation of addiction with suicide and suicide-related behavior, the potential denial of ADA protection to persons potentially harmful to themselves remains a contentious issue for the addicted person.

Case Law in Addictions: Interpretations and Further Restrictions of the ADA

A number of recent cases have helped defined how the ADA is applied with regard to those with addictions and, in some cases, have further restricted the eligibility of addicted individuals for ADA protection from discrimination. Judicial interpretation of the ADA in relation to addiction has fluctuated according to judicial temperament, although a widespread aversion to extending ADA protection to addicted persons seems clear.

The Causality Argument

Addiction-related cases litigated under the ADA and the Rehabilitation Act of 1973[31] often focus on the presence or absence of a causal relationship between the plaintiff's employment difficulties and the alleged disability.[32] If the employee's behavior would have been acceptable but for the inevitable effects of an addictive process covered under the ADA or the Rehabilitation Act, the employee can legitimately argue that he or she is the victim of illegal discrimination. Courts have issued widely varying and sometimes contradictory opinions on this issue, although most have conceded that absenteeism or poor productivity, if clearly caused by an addictive disorder, cannot constitute rationales for job dismissal, absent attempts at reasonable accommodation.

In *Office of Senate Sergeant at Arms v. Office of Senate Fair Employment Practices*,[33] which focused on the perception that a causal relationship between addiction and absenteeism leads to job dismissal, a U.S. Capitol police dispatcher argued that his dismissal for failure to meet written guidelines for requesting leave time was illegal discrimination, because, he claimed, his failure was a consequence of his alcoholism. The Federal Employee Hearing Board found that although the employee's disability (alcoholism) was not known at the time of his dismissal, a "retroactive accommodation" of a "fresh start agreement" was necessary. The appeals court disagreed and reversed this part of the board's decision. However, the appeals court upheld the notion that:

> . . .a significant causal connection existed between [the plaintiff's] alcoholism and his job performance to qualify him as an individual with a disability. The plaintiff's alcoholism clearly interfered with his ability to report for work, thereby substantially limiting his performance of his job, which was one of his major life activities.[33]

In *Leary v. Dalton*,[34] a civilian employee of the Navy complained that he had been discriminated against because of his alcoholism. His supervisors had dismissed him for failing to report to work and subsequently for missing 2 weeks of work while incarcerated for his second driving-while-intoxicated (DWI) offense. Other criminal charges brought against Leary at the same time as the DWI charge included driving with a revoked license, transporting a controlled drug, resisting arrest, and assaulting a police officer. A Navy administrative law judge (ALJ) agreed that Leary was disabled by alcoholism and drug dependency but said that "the unauthorized absence for which he was removed was neither caused by, nor entirely a manifestation of, his disability" (Ref. 34, p 190). A later EEOC ruling concurred, saying that "Leary had failed to establish a significant nexus between his disability and his termination to make out a claim of discrimination based on disability" (Ref. 34, p 190). Concurring with the ALJ and the EEOC, and contrary to the findings in *Office of the Sergeant at Arms v. Office of Senate Fair Employment Services*, a U.S. Third Circuit Court of Appeals judge affirmed the decision upholding Leary's dismissal for absence from duty while incarcerated for an alcohol-related offense. Although the appeals judge attempted to attribute Leary's absence from work to an inability to make bail rather than to his alcoholism, the distinct criminality of Leary's behavior undoubtedly contributed to the judge's reluctance to provide him with protection under disability laws.

Job Performance Standards

Disabled persons seeking protection under the ADA are held to the same performance standards as nondisabled persons. In one case that hinged on this concept, the Raytheon Company fired an employee named Shawn Flynn for coming to work intoxicated.[35] Flynn later claimed ADA-protected status for his alcoholism and asserted that he received disparate treatment because nonalcoholic employees who used alcohol had been treated more leniently for the same behavior under the same circumstances. The district court found Raytheon's dismissal of Flynn lawful, saying that the ADA's injunction against employees' being under the influence of alcohol or drugs, "could hardly be more direct" (Ref. 35, p 387). However, the court found Flynn's claim of disparate treatment plausible enough to deny Raytheon's motion for summary dismissal of the case.

In *Ham v. State of Nevada*,[36] Ham, the Chief of Nevada's Bureau of Alcohol and Drug Abuse, was convicted of DWI and was then demoted from his professional position. He claimed that he had been unfairly discriminated against according to the Rehabilitation Act of 1973,[31] a forerunner of the ADA. There was no doubt that Ham was considered "disabled" under the act, and there had been no allegations that he was unable to complete his work appropriately. Although the appeals judge noted the State's understandable interest in having a director of the Bureau of Alcohol and Drug Abuse with no history of public problems with addiction, the judge weighed more heavily the plaintiff's good work record in denying summary judgment to the defendants. The judge ruled:

> [T]here is no evidence before the court that would indicate that Plaintiff's drinking interfered with his day-to-day work duties. Nor is there any evidence the Plaintiff was intoxicated on the job or exhibited a history of absence or tardiness. The record, as it stands, does not cut either way. Therefore the court must deny summary judgment on this issue. . . [Ref. 36, p 459].

In *Collings v. Longview Fiber Company*,[37] 18 employees were the subjects of an undercover investigation at their place of employment and were found to be buying, using, and selling marijuana during work hours and on company property. Five of the eight plaintiffs in the case admitted their misconduct, but all claimed protection under the ADA. An initial trial found the terminations appropriate, and an appeals judge agreed, ruling that the employees were terminated for their direct contravention of company rules against using or selling drugs on company property, despite the fact that the employees were otherwise protected under the ADA.

A nuclear energy worker, Michael W. McCoy,[38] alleged that his security clearance was revoked after he acknowledged his ADA-covered disability of alcoholism. This security clearance was necessary for him to work in the control room of the nuclear power plant, and therefore he was reassigned to the loading dock. As in *Collings v. Longview Fiber Company*,[37] the court acknowledged the employee's "disabled" status, but found that no reasonable accommodation could be made to restore his qualification for a security clearance. The transfer to the loading dock was itself, the court opined, a reasonable accommodation.

Obligation to Inform Employer

Further narrowing the category of ADA-protected disability, the necessity for declaring one's disability to an employer was emphasized in *Davis v. Safeway*.[39] Safeway grocery stores fired Brian S. Davis, a store manager, for his verbally and physically abusive behavior at a corporate social function. Clearly intoxicated with alcohol at the time, Davis subsequently claimed that he had been fired because of his covered condition of alcoholism. The original court found that Davis was fired for his misconduct rather than any discrimination against him as an alcoholic. Davis then amended his complaint to include a charge that he had been treated in a disparate manner from other employees who acted similarly but did not have alcoholism. Safeway stores argued that they had no knowledge of Davis's disability of alcoholism before he was fired and therefore had no duty to offer him reasonable accommodation or any other requirements of the ADA. Safeway acknowledged that managerial staff had been aware of and had confronted Davis's apparent drinking, but much was made of Davis's vehement denials of any problem with alcohol.

The court ultimately found that Davis had been dismissed appropriately, since he had made no request for accommodation. Moreover, in considering the public policy implications of their ruling, the court noted that if it had ruled that Safeway should have investigated the possibility of an alcohol problem, this would result in a "contrary interpretation of the ADA [since] requiring employers to accommodate employer-suspected, but employee-denied, disabilities would force employers to choose between risking a claim for failure to accommodate and risking a claim for discrimination" (Ref. 39, p 127). Rather than taking a commonsense approach to this paradox—any reasonable person would suspect an addiction problem in this case—the court chose the safer route of making official notification a necessary prerequisite to ADA protection. Thus, one of the common sequelae of addiction, denial of a problem by the clearly addicted individual, forecloses on the possibility of coverage by the ADA. In addition, even persons who are not in denial regarding their addictions may hesitate to inform their employers of their addictions due to fear of stigmatization and discrimination.

"Current" Drug Use

Those whose drug use is "current" are denied ADA protection, which lends tremendous importance to judicial definition of the word "current." A driver for ARKLA, Inc., Anthony Wormley, whose work evaluations had always been positive, had an ongoing cocaine addiction. After several attempts at treatment, a written agreement with his employer, and two years of negative urine test results for cocaine, Mr. Wormley again entered inpatient rehabilitation in April 1993. A counselor there informed ARKLA of Wormley's cocaine use, and despite the lack of any allegations of drug use during the previous month, his employment was terminated on May 14, 1993. Wormley sued, claiming protection under the ADA, because his drug use was not "current."[40] In searching for a definition of "current" drug use, the court cited the *ADA Technical Assistance Manual*, which states:

> "Current" drug use means that the illegal use of drugs occurred recently enough to justify an employer's reasonable belief that involvement with drugs is an ongoing problem. It is not limited to the day of use, or recent weeks or days, in terms of an employment action. It is determined on a case by case basis. . . .[41]

Finding that this definition was satisfied, the court disallowed Wormley's claim of ADA protection.

Another case in which the parameters of "currently" were explored involved Russel McDaniel,[42] a recovering addict and marketing representative for a hospital chemical dependency center. After a relapse to pills, the plaintiff asked one of his own program's counselors for help, entered inpatient treatment, and was terminated from his position immediately upon his return to work 28 days later. In response to his request for ADA protection, the appeals judge found that his drug use was "current" enough to warrant exclusion from ADA coverage. The judge remarked on the vagueness of the ADA's definition of "current," but decided that the intent of Congress was not to protect a person with a drug-free period as short as Mr. McDaniel's 28 days.

In another broad judicial definition of "current," an appeals court found that nurse-anesthetist Deborah Shaffer, after a 21-day inpatient treatment for fentanyl addiction, was not entitled to ADA protection because of her current drug use.[43] (The hospital had terminated her employment due to her acknowledged diversion of fentanyl, but did not accuse her of drug use during her rehabilitation treatment.) In displaying its reasoning, the court wrote that:

> Contrary to Shaffer's assertion, the ordinary or natural meaning of the phrase "currently using drugs" does not require that a drug user have a heroin syringe in his arm or a marijuana bong to his mouth at the exact moment contemplated. Instead, in this context, the plain meaning of "currently" is broader. . . [Ref. 43, p 29].

It is likely that the court was also influenced by the fact that records in evidence showed that Ms. Shaffer had relapsed to fentanyl use two weeks into her next job under a restricted license at a different hospital.

Trends in ADA Interpretation by the U.S. Supreme Court

Although the Supreme Court has heard no addiction-related ADA cases, other decisions by the 1999 Supreme Court show a general narrowing of ADA protection. In *Sutton v. United Airlines*,[44] *Murphy v. United Parcel Service*,[45] and *Albertsons, Inc. v. Kirkinburg*,[46] the Court denied ADA coverage to two pilots whose eyesight was corrected by eyeglasses, a mechanic whose hypertension was treated by medication, and a truck driver with monocular vision, respectively. These decisions were reflected in a subsequent EEOC publication,[47] which amended EEOC regulations to define disability as a substantial limitation in a major life activity when using a mitigating measure. That is, the fact that the physical limitation could be cured by some entity such as eyeglasses or antihypertensive medication means that the disability is no longer a substantial limitation in a major life activity, and therefore the individual does not qualify for ADA protection. These cases potentially set a precedent for denying ADA protection to those whose disability can be mitigated in treatment, thereby denying coverage to addicted people who participate in inpatient treatment, regardless of whether they remain drug-free.

The 2000 Supreme Court further constricted the ADA's power by ruling that individual states cannot be sued in federal court under the ADA,[48] despite Congress' clear intention for a federal mandate. Two Alabama state employees filed ADA suits, claiming that they had been discriminated against because of their physical disabilities. The employees won at the trial court level, but lost on the State's appeal. When they brought their case to the Supreme Court, a five-justice majority found that the states rights argument under the Eleventh Amendment prevailed over the Fourteenth Amendment's equal protection under the law requirement, and that Alabama could not be sued under the ADA in federal court. This further weakening of the ADA was opposed in *amicus* briefs by, among others, the original signer of the ADA, former President George Bush, the National Mental Health Association, the National Alliance for the Mentally Ill, and the American Psychiatric Nurses Association.[49]

Case law will determine the ultimate meaning of these Supreme Court cases for addiction issues, but the clear trend is toward an even stricter test for ADA coverage across the board.

Clinical Effects of ADA Legislation on Persons With Addictions

One school of thought within addiction psychiatry posits that the addicted person must "hit bottom" before he or she seeks help and that a potential drawback of ADA protection is a forestalling of such a collapse and subsequent prevention of the addict's entry into treatment. Although the ADA focuses on employment and discrimination matters, the reasonable-accommodation clause clearly advocates treatment, and even the most confrontational treatment approaches now promote intervention with the addict long before a collapse in the ability to work.[50] Moreover, the ADA's *de facto* encouragement of drug addiction treatment in the interpretation of "current" drug use also prods addicted individuals toward treatment in the service of keeping their jobs.

Conclusion

The past several years have seen a reduction of the ADA's protections against discrimination for addiction. If this trend continues, only a tiny portion of those recovering addicts who are employable and willing to work will be covered under the ADA. This situation is a loss for both recovering addicts and society as a whole, because it excludes from the workplace those individuals who are willing and able to make a significant contribution. To remedy this unfortunate state of affairs, recovering addicts and their communal organizations (e.g., Alcoholics Anonymous) must work together in encouraging legislative change at the national level. In addition, addicts in recovery should challenge in the courts the unfair and destructive neutralization of the ADA's original purpose. The focused political effort required will probably necessitate a loss of anonymity, which is foreign to most recovering addicts and their organizations. Moreover, to achieve the larger political goals of improved ADA protection for addiction, recovering addicts must make their cases more effectively than they have in the past.

References

1. Americans with Disabilities Act of 1990, §§ 2-514, U.S.C.A. §§ 12101–213
2. 29 U.S.C. §§ 791–4 (1990)
3. 42 U.S.C. § 3601 et. seq. (1990)
4. Parry JW: Mental Disabilities and the Americans with Disabilities Act (ed 2). American Bar Association Commission on Mental and Physical Disability Law: Washington, DC: American Bar Association, 1997
5. 29 C.F.R. § 1630.2(k), § 1630.3(a–c)
6. The Legal Action Center: The Americans with Disabilities Act: A Summary of Alcohol and Drug and AIDS Provisions. Actionwatch. October 1990
7. Pub. L. No. 104-1, T. II §§201, 210, 109 Stat. 8, 16(1995)
8. Equal Employment Opportunity Commission: Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities. Washington, DC: EEOC
9. Equal Employment Opportunity Commission: Addendum to the Compliance Manual on the Definition of the Term "Disability." Washington, DC: EEOC
10. Equal Employment Opportunity Commission: Filing a Charge. Washington, DC: EEOC, available at www.eeoc.gov/facts/howto
11. 42 U.S.C. § 1981a(b)(3)
12. 136 Cong. Rec. S9684-03
13. Birnbaum M: The right to treatment: some comments on its development, in Medical, Moral, and Legal Issues in Health Care. Edited by Ayd F. Baltimore: Williams & Wilkins, 1974, pp 97–141
14. Perlin M: The Hidden Prejudice, Mental Disability on Trial. Washington, DC: American Psychological Association, 2000, pp xviii–xix
15. Equal Employment Opportunity Commission: Psychiatric Guidance. Washington, DC: EEOC, March 25, 1997, p 4
16. 29 C.F.R §§ 1630.2(j)(1)(ii)
17. 42 U.S.C. § 12211
18. 42 U.S.C. § 12114; 9 C.F.R.
19. Mararri v. WCI Steel, Inc., 130 F.3d 1180 (6th Cir. 1997)
20. 6 No. 8 Okla. Employment L. Letter 1, 1998
21. Weber EM: Employing and Accommodating Individuals With Histories of Alcohol or Drug Abuse. Washington DC: Legal Action Center, 2000, 3–4
22. 29 C.F.R. § 1630.2(o)(1)(i)
23. 29 C.F.R. §§ 1630.2(p)(2)(i-v)
24. Schmidt v. Safeway, Inc., 864 F. Supp. 991 (D. Or. 1994)
25. Rodgers v. Lehman, 869 F.2d 253 (4th Cir. 1989)
26. 42 U.S.C. § 104–12114, p 510
27. Cleveland v. Policy Management System Corp. et. al., 526 U.S. 795 (1999)
28. Judice v. Hospital Serv. Dist., 919 F. Supp. 978 (E.D. La. 1996)
29. 29 C.F.R. § 1630.2(r)
30. Mendez v. Gearan, 956 F. Supp. 1520 (N.D. Cal. 1997)
31. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. 794
32. Sadler JP: The alcoholic and the Americans With Disabilities Act of 1990: the "booze made me do it" argument finds little recognition in employment discrimination actions. Texas Tech. L. Rev. 28:861–85, 1997
33. Office of Senate Sergeant at Arms v. Office of Senate Fair Employment Practices, 95 F.3d 1102 (Fed. Cir. 1996)
34. Leary v. Dalton, 58 F.3d 748 (1st Cir. 1995)
35. Flynn v. Raytheon Co., 868 F. Supp. 383 (D. Mass. 1994)
36. Ham v. State of Nevada, 788 F. Supp. 455 (D. Nev. 1992)
37. Collings v. Longview Fibre Co., 63 F.3d 828 (9th Cir. 1995)
38. McCoy v. Pennsylvania Power and Light Co., 933 F. Supp. 438 (M.D. PA. 1996)
39. Davis v. Safeway, Inc., 1996 WL 266128 (N.D. Cal. May 14, 1996)
40. Wormley v. ARKLA, Inc., 871 F. Supp. 1079 (E.D. Ark. 1994)
41. ADA Technical Assistance Manual § 8.3. Washington, DC: EEOC 1992, p 82
42. McDaniel v. Mississippi Baptist Medical Center, 877 F. Supp. 321 (S.D. Miss. 1994)
43. Shaffer v. Preston Memorial Hosp. Corp., 107 F.3d. 274 (4th Cir. 1996)
44. Sutton v. United Air Lines, 527 U.S. 471, 477 (1999)
45. Murphy v. United Parcel Service, Inc., 527 U.S. 516 (1999)
46. Albertson's v. Kirkingburg, 527 U.S. 555 (1999)
47. EEOC Guidance on the Americans With Disabilities Act and Psychiatric Disabilities, Addendum. http://www.eeoc.gov/docs/psych.html
48. Board of Trustees of University of Alabama v. Garrett, 531 U.S. 356 (2001)
49. Hausman K: State employees lose some ADA protections. Psychiatric News. November 3, 2000, pp 41–2
50. Johnson VE: Intervention: How to Help Someone Who Doesn't Want Help. Minneapolis, MN: Johnson Institute, 1986, p 61