Is Addiction a Disability Under the ADAAA?

By Robert J. O'Hara and Anastasia A. Regne, *Epstein Becker & Green, P.C.*
October 16, 2020

More Americans are taking drugs, both legal and illegal. First, the increase in the availability and use of opioid pain relievers has led to the United States' entrenchment in an opioid epidemic. In 2017, the United States Department of Health and Human Services declared the opioid epidemic a public health emergency.[1] The statistics[2] concerning the opioid crisis are astounding:

- A National Center for Health Statistics survey found that in 2018 and 2019, more than an estimated 130 Americans died of opioid-related drug overdoses each day;
- A 2019 National Survey on Drug Use and Health found that 10.3 million Americans misused prescription opioids in 2018;
- A November 2018 National Center for Health Statistics Data Brief found that 47,600 Americans died from overdosing in opioids; and
- In 2018, 2 million Americans had an opioid use disorder.

Second, there is growing acceptance and availability of marijuana throughout the United States. The 2017 National Survey on Drug Use and Health[3] found that 7.9% (16.8 million) of adults age 26 and older are current marijuana users – almost double the number reported in 2002.

---

[1] *See* U.S. Department of Health and Human Services, *What is the U.S. Opioid Epidemic* (Sept. 4, 2019), *https://www.hhs.gov/opioids/about-the-epidemic/index.html*.
[2] *Id*.
[3] *See* Substance Abuse and Mental Health Services Administration, *Key Substance Use and Mental Health Indicators in the United States: Results from the 2017 National Survey on Drug Use and Health* (Sept. 2018), https://www.samhsa.gov/data/sites/default/files/cbhsq-reports/NSDUHFFR2017/NSDUHFFR2017.pdf.

Support for the legalization of cannabis continues to grow, too. In a 2019 Pew Research Center Survey[4], 91% of U.S. respondents said that marijuana use should be legal in general[5], whereas only 31% supported legalization in 2000. State laws have responded to this trend: 33 states and Washington, D.C. have legalized medical marijuana[6]; nine states and Washington, D.C. allow both medical and recreational use of marijuana[7]; and some states permit (limited) use of products with low levels of tetrahydrocannabinol (THC), while others permit only products containing cannabidiol (CBD). Some states, including New York and Hawaii, have also decriminalized the possession of small amounts of marijuana. As a result, more Americans are using marijuana – whether for medical or recreational purposes.

In the wake of the opioid epidemic and the increase in use of marijuana, employers are facing more claims from employees who suffer from addiction and/or require accommodations for legal drug use. Under the Americans with Disabilities Act Amendments Act of 2008 ("ADAAA"), which broadened the Americans with Disabilities Act of 1990 ("ADA") definition of "disability," employers may be required to provide accommodations to employees with addictions or substance abuse disorders[8], or face the risk of disability discrimination litigation. This article will explore the

[4] *See* Andrew Miller, *Two-thirds of Americans support marijuana legalization*, Pew Research Center (Nov. 14, 2019) *https://www.pewresearch.org/fact-tank/2019/11/14/americans-support-marijuana-legalization/*.

[5] Note that 59% of respondents favored marijuana legalization for medical and recreational use, and 32% said that marijuana should be legal for medical use only. *See Id.*

[6] *See* National Conference of State Legislatures. (Oct. 12, 2020), *State Medical Marijuana Laws* [online] Available from *https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx*.

[7] *See* Jeremy Berk & Yeji Jesse Lee, *States where cannabis is legal*, Business Insider (Oct. 12, 2020, 12:43 PM), https://www.businessinsider.com/five-states-voting-on-marijuana-legalization-in-november-2020.

[8] No federal ADA protection exists for employees where employer acts based on an employee's current marijuana use, which remains illegal under the federal Controlled Substances Act. *James v. City of Costa Mesa*, 700 F.3d 394 (9th Cir. 2012), *cert. denied*, 569 U.S. 994 (2013) (in ADA Title II case, holding marijuana use not protected even though state legalized for medical treatment); *Steel v. Stallion Rockies Ltd.*, 106 F. Supp. 3d 1205 (D. Colo. 2015) (dismissing ADA claim by medical marijuana user terminated following his positive drug test). However, to preclude ADA liability, an employer must have acted on basis of current illegal drug use, not cite it as pretext for disability discrimination. See, *e.g.*, *EEOC v. Pines of Clarkston*, No. 13-CV-1407, 2015 WL 1951945 (E.D. Mich. Apr. 29, 2015) (reasonable jury could conclude employee was fired because of her epilepsy rather than her medical marijuana use).

evolving landscape of federal case law surrounding the issue of disability-related accommodations for those who use drugs. We will provide a brief summary of issues related to employee coverage, accommodations, impairment, safety and direct threat, and testing under the ADA, as amended. Finally, this article will provide practical guidance for employers with regard to drug testing and accommodations in the workplace.

Redefining "Disability": the ADA vs. the ADAAA

The ADAAA amended the ADA, and redefined "disability"[9] under that statute. With the clear intention of broadening the definition of "disability," and lowering the standard to meet that definition that had been applied by courts, the ADAAA provides a greater range of coverage to individuals with both mental and physical impairments that "substantially limit" a "major life activity." While both the ADA and ADAAA define "disability" as a physical or mental impairment that substantially limits one or more major life activity of an individual, with a record of such an impairment, or being regarded as such an impairment,[10] the purpose of the ADAAA was to "reinstat[e] a broad scope of protection to be available under the ADA."[11]

First, the ADAAA broadened the interpretation of the term "substantially limits." After the decisions in several Supreme Court cases had narrowly construed this definition, the ADAAA explicitly[12] sought to lower the standard for finding that an individual meets the definition of

---

Claims relating to marijuana use arise under state law protections. Unlike the ADA, some state laws provide explicit employment protections for medical or recreational marijuana use, or have been interpreted by courts to allow an implied right against employment discrimination. These state laws would still allow employers to terminate employees who use or are impaired in the workplace, but may bar discipline where that is not established. See, *e.g.*, *Whitmire v. Wal-Mart Stores, Inc.*, 359 F. Supp. 3d 761 (D. Ariz. 2019); *Barbuto v. Advantage Sales Marketing, LLC*, 477 Mass. 456, 78 N.E.3d 37 (2017); *Noffsinger v. SSC Niantic Operating Co.*, 273 F. Supp. 3d 326 (D. Conn. 2017); *Callaghan v. Darlington Fabrics Corp.*, 2017WL2321181 (R.I. Super. May 23, 2017).

[9] "The term 'disability' means, with respect to an individual – (A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment …" 42 U.S.C. § 12102(1)(A)-(C).

[10] *Id*.

[11] 42 U.S.C. § 12101(b)(1).

[12] Per the text of the ADAAA, the purposes of the ADAAA include to "to reject the requirement enunciated by the Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and its companion cases that whether an

"disability" under the ADA. The ADAAA rejects the Supreme Court's understanding of "substantially limits" by providing a rule of construction,[13] which requires that "disability" be construed in favor of broad coverage of individuals, to the maximum extent permitted by the terms of the ADA. Furthermore, the rule of construction states that the term "substantially limits" shall be interpreted consistently with the findings and purposes of the ADAAA. The ADAAA also directed the Equal Employment Opportunity Commission ("EEOC") to update the ADA regulations to revise the definition of "substantially limits."[14] Further, the ADAAA clarifies that an impairment that substantially limits a major life activity need not also limit other major life activities to be considered a disability. The ADAAA clarifies that impairments that are episodic or in remission are covered disabilities under the ADA if the condition would substantially limit a major life activity when it is in its active state.[15]

Second, with regard to "major life activities," the ADAAA provides a broad, non-exhaustive list of major life activities, including: caring for oneself, performing manual tasks, seeing, hearing,

---

impairment substantially limits a major life activity if to be determined with reference to the ameliorative effects of mitigating measures … to reject the Supreme Court's reasoning in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) with regard to coverage under the third prong of the definition of disability and to reinstate the reasoning of the Supreme Court in *School Board of Nassau County v. Arline***,** 480 U.S. 273 (1987) which set forth a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973 … to reject the standards enunciated by the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), that the terms 'substantially' and 'major' in the definition of disability under the ADA 'need to be interpreted strictly to create a demanding standard to quality as disabled,' and that to be substantially limited in performing a major life activity under the ADA 'an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives' … to convey congressional intent that the standard created by the Supreme Court case of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) for 'substantially limits', [sic] and applied by lower courts in numerous decisions, has created an inappropriately high level of limitation necessary to obtain coverage under the ADA, to convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis …" 42 U.S.C. § 12101(b)(2)-(5).

[13] 42 U.S.C. § 12102(4).

[14] *See* 42 U.S.C. § 12101(b)(6); *see also* EEOC, "Notice Concerning the Americans With Disabilities Act (ADA) Amendments Act of 2008" (Mar. 25, 2011), available at https://www.*eeoc*.gov/statutes/notice-concerning-americans-disabilities-act-ada-amendments-act-2008.

[15] *See* EEOC, "Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008" (March 25, 2011), available at https://www.eeoc.gov/laws/guidance/questions-and-answers-final-rule-implementing-ada-amendments-act-2008.

eating, sleeping, walking, standing, sitting, reaching, lifting, bending, breathing, learning, reading, concentrating, communicating, interacting with others, speaking, thinking, and working.[16] Further, the ADAAA definition of major life activities was also revised to include major bodily functions, including: functions of the immune system, special sense organs and skin, normal cell growth, and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions, as well as the operation of an individual organ within the body.[17] Additionally, the term "major" should now be broadly construed, and whether an activity is a "major life activity" may not be determined based upon the importance of that activity to daily life.[18] The ADAAA provides that the "ameliorative" effects of mitigating measures are disregarded in determining substantial limitation; the negative side effects can be considered.[19]

Third and finally, the ADAAA clarified the meaning of being "regarded as" having a disability. Under the ADAAA, an individual is regarded as having a disability when a covered entity takes an adverse action that is prohibited by the ADA because of an actual or perceived impairment that is not both transitory (lasting or expected to last six months or less) and minor.[20] Covered entities are not, however, required to provide a reasonable accommodation or modification to individuals who *only* meet the "regarded as" prong of the ADA definition of disability. An individual may also be disabled if they have a record of such an impairment.[21]

---

[16] 42 U.S.C. § 12102(2)(A); 29 C.F.R. § 1630.2(i)(1).
[17] 29 C.F.R. § 1630.2(h)(1).
[18] 42 U.S.C. § 12102(2)(B); 29 C.F.R. § 1630.2(i)(1)(ii).
[19] *See* EEOC, *supra* note 15.
[20] Intended "to reinstate the reasoning of the Supreme Court in *School Board of Nassau County v. Arline***,** 480 U.S. 273 (1987) which set forth a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973." 42 U.S.C. § 12101(b)(3); *see* 29 C.F.R. § 1630.2(g)(iii).
[21] *See Raytheon Co v. Hernandez*, 540 U.S. 44 (2003) (on remand from the Supreme Court, the Ninth Circuit considered whether there was sufficient evidence from which a jury could conclude that the defendant employer's articulated reason for not rehiring the plaintiff employee was pretextual. The court concluded that a reasonable jury could determine that the employer refused to rehire the plaintiff because of his past record of addiction and not because

Given this broader construction of the definition of the term "disability," the ADAAA left open the door to a greater range of individuals that may be covered under the ADAAA, including those with addictions. Whether and to what extent an individual with an addiction is covered, entitled to accommodations, and what accommodations are appropriate, are largely fact-specific analyses.

Coverage

Under the ADA, an individual with a substance abuse disorder may be a covered individual.[22] In the instance that an individual uses illegal drugs, the individual must have completed a supervised drug rehabilitation program, and no longer be using illegal drugs.[23] The individual's substance abuse disorder must substantially limit at least one major life activity. An individual may also be covered by the ADA if they are regarded as engaging in illegal substance abuse while they are not in fact engaged in that use.[24] Current illegal use of drugs is *not* protected under the ADA.[25] By contrast, current alcoholism can be a disability under the ADA. Federal case law may be helpful in illustrating where an employee with alcohol dependency and/or drug addiction is or is not a covered individual, and is or is not entitled to accommodations under the ADA.

---

of a company rule barring the rehire of previously terminated employees); *see also Rocha v. Coastal Carolina Neuropsychiatric Crisis Servs., P.A.*, 979 F. Supp. 2d 670 (E.D.N.C. 2013) (holding that in a case where the plaintiff, an employee of an outpatient mental health treatment facility, was terminated for failure to reveal his three prior felony drug convictions, termination for this reason did not demonstrate that the employer "regarded" him as an individual with a disability, *i.e.*, terminated him because of an actual or perceived impairment of drug addiction).

[22] *See* DOJ, Civil Rights Div., Disability Rights Section, "Questions and Answers: The Americans with Disabilities Act and Hiring Police Officers" (updated Feb. 25, 2020), https://www.ada.gov/copsq7a.htm.

[23] *See* 42 U.S.C. § 12114(a)(1).

[24] *See* 42 U.S.C. § 12114(a)(3).

[25] *See* 42 U.S.C. § 12114(c)(2). While there is no obligation under federal or state law to accommodate use of illegal drugs, some states require, either explicitly or through case law, that employers accommodate the use of medical marijuana, despite marijuana's status under federal law as a Schedule I substance. *See* Nathaniel M. Glasser & Anastasia A. Regne, *Off-Duty Use of Medical Marijuana: To What Extent Can Employers Say Something About It?*, Cannabis Business Executive (Sept. 13, 2019), https://www.cannabisbusinessexecutive.com/2019/09/off-duty-use-of-medical-marijuana-to-what-extent-can-employers-say-something-about-it/.

Recent Case Law

In *Harris v. Reston Hosp. Ctr.*,[26] a registered nurse brought claims against a hospital pursuant to the ADA for allegedly terminating the plaintiff based on perceived alcoholism and/or drug addiction. The plaintiff had previously attempted suicide twice, using medications she had diverted from the defendant hospital. Pursuant to a state program that provides alternatives to discipline for healthcare workers, the plaintiff signed an agreement with the hospital that she would not use drugs or alcohol, including Ambien. Despite the plaintiff's use of a prescription in the Ambien family, the employer did not discipline the plaintiff. The plaintiff also entered into an in-patient program pursuant to the alternative to discipline program, for which the employer granted six months of leave. Later, the plaintiff made errors in administering medications to patients. The plaintiff was then suspended for an unexcused absence for a hospital visit for a fall which resulted in a concussion. During that hospital visit, the plaintiff tested positive for benzodiazepines. After returning from her suspension, co-workers observed that the plaintiff appeared to be working while impaired. The plaintiff's supervisor said "you're drunk," and the plaintiff was taken to human resources, and a drug test was performed. The drug test was positive for several prescription drugs including Ambien and Klonopin. The plaintiff signed a consent form acknowledging that she had these drugs in her system. The plaintiff was later terminated based on the concern that she could not perform the essential functions of her job, including safely administering medications to patients.

In granting summary judgment to the employer on the plaintiff's claim that she was terminated based on perceived alcoholism or drug addiction, the court held that the plaintiff had not established "regarded as" coverage. The court explained that in order to qualify as "being

[26] 2012 WL 1080990 (E.D. Va. Mar. 26, 2012), *aff'd* 523 F. App'x 938 (4th Cir. 2013).

regarded as having an impairment," an individual must establish that an adverse employment action was taken because of an actual or perceived impairment. The employer's mere awareness of the employee's impairment without more, however, is insufficient to demonstrate that the employer has regarded the employee as having a disability or a that perception that the employee had a disability was the basis for the adverse employment action. The district court held that the "you're drunk," statement made by the plaintiff's supervisor observations of the plaintiff's being impaired at work, and knowledge that the plaintiff had previously gone to a rehabilitation facility to be treated for depression and a suicide attempt were insufficient to show that management perceived the plaintiff as having an impairment.

In *Shirley v. Precision Carparts Corp.*,[27] after overdosing on Vicodin, the plaintiff employee entered an in-patient treatment program that required him to abstain from opioid use before returning to his extrusion press operator position. After the plaintiff prematurely checked out of the program, the defendant employer notified him that his failure to complete it was grounds for dismissal. The plaintiff argued he was exempt from § 12114(a) of the ADA, the "current illegal use of drugs" exclusion under section § 12114(b)(2) of the ADA, because he was "participating in a supervised rehabilitation program," and had not engaged in illegal drug use for eleven days at the time of his termination. The Fifth Circuit rejected this argument because use of the §12114(b)(2) safe harbor requires a "significant period of recovery" and sufficient additional facts to justify a reasonable belief that drug use is no longer a problem for the individual in question, rather than "mere entry" into a rehabilitation program.

In *Jarvela v. Crete Carrier Corp.*,[28] a commercial truck driver brought claims under the ADA and Family Medical Leave Act ("FMLA") against his employer, a motor carrier regulated

[27] 726 F.3d 675 (5th Cir. 2013).
[28] 776 F.3d 822 (11th Cir. 2015).

by the Department of Transportation ("DOT"). The week before his termination, the plaintiff had been discharged, without restrictions, from a substance abuse treatment center, and had received an alcohol dependence diagnosis. Per the plaintiff's job description, which required him to meet all DOT medical requirements, the plaintiff had met with a DOT examiner. The DOT examiner determined that the plaintiff satisfied the medical requirements, including that he did not have a "current clinical diagnosis of alcoholism."[29] This determination was based on plaintiff's discharge papers, which listed his condition as "alcohol dependence," and also listed its probable duration as "chronic." The plaintiff alleged, in relevant part, that his employer's decision to terminate him pursuant to the workplace policy prohibiting employment of anyone who had an alcoholism diagnosis within the past five years, violated the ADA. The district court granted the employer's motion for summary judgment, and held that because the plaintiff had "a current clinical diagnosis of alcoholism" as defined under the DOT regulations,[30] the plaintiff was not a "qualified individual," and thus could not make out a *prima facie* claim for discriminatory termination under the ADA.[31]

In affirming the district court's decision, the Eleventh Circuit held that the plaintiff failed to meet "an essential function" of the commercial truck driver job, because the job description required that the employee not have a current clinical diagnosis of alcoholism under DOT regulations. The written job description stated that the driver must meet the DOT regulations, which included not having a current clinical diagnosis of alcoholism. Furthermore, the court held that EEOC regulations[32] specifically permit employers to comply with the DOT regulations, and

[29] *See* 49 C.F.R. § 391.41(b)(13).
[30] *See Id.*
[31] "In order to state a prima facie discriminatory termination claim under the ADA, a plaintiff must show three things: (1) he is disabled; (2) he is a qualified individual; and (3) he suffered unlawful discrimination because of his disability." *Jarvela*, 776 F.3d at 828 (internal citations omitted).
[32] *See* C.F.R. § 1630.16(b)(5).

indemnify employers from liability for violations of the ADA when they act pursuant to compliance with the DOT regulations. The plaintiff had taken FMLA leave to pursue a 30-day intensive out-patient treatment for his alcohol addiction. The court explained that although both the treatment program and the DOT examiner had released the plaintiff to return to work, both noted that his alcohol addiction was "chronic" in occurrence, and that there would be a need for ongoing treatment. While the court declined to address how much time would need to elapse in order for an alcohol dependency diagnosis to no longer be considered "chronic," the court held that a diagnosis of alcoholism received just seven days prior to the employee's termination constituted a "current" condition under the DOT regulations. Given this, the court held, the plaintiff did not qualify for his position as a commercial truck driver, and thus was not covered by the ADA.

Accommodations

Where an employee has an addiction, they may be entitled to workplace accommodations under the ADA. On August 5, 2020, the EEOC released new technical assistance publications addressing the rights of opioid users in the workplace under the ADA.[33] The two question-and-answer documents clarify that while current illegal drug use is not protected, employees who "are using opioids are addicted to opioids, or were addicted to opioids in the past, but are not currently using drugs illegally" may be entitled to reasonable accommodations under the ADA. Although the EEOC's documents are intended to explain an opioid user's workplace rights to the employee and their healthcare professional, the documents also provide helpful information to employers.

[33] The EEOC defines "opioids" as including "prescription drugs such as codeine, morphine, oxycodone (OxyContin®, Percodan®, Percocet®), hydrocodone (Vicodin®, Lortab®, Lorcet®), and meperidine (Demerol®), as well as illegal drugs like heroin. They also include buprenorphine (Suboxone® or Subutex®) and methadone, which can be prescribed to treat opioid addiction in a Medication Assisted Treatment ('MAT') program."

EEOC Accommodation Guidance for Employees (and Employers!)

In the first document, "Use of Codeine, Oxycodone, and Other Opioids: Information for Employees,"[34] the EEOC clarifies that employers can take adverse employment actions against workers who illegally use opioids, even if the individual has had no performance or safety issues. Unless required by another federal law (*e.g.*, DOT requirements), however, the ADA does not permit disqualifying or terminating an individual who legally uses opioids, including as directed in a Medication Assisted Treatment program ("MAT program"), without the employer first considering if there is a way for the employee to do the job "safely and effectively."

The EEOC explains that a reasonable accommodation may consist of a different break or work schedule to permit treatment or therapy, a new shift assignment, or a temporary transfer to another position. These and other reasonable accommodations may even be available for those with an opioid addiction (also called "opioid use disorders") or a medical condition related to opioid addiction (*e.g.*, post-traumatic stress disorder and major depression). Additionally, an employee who leaves work to seek treatment for opioid addiction may be entitled to take sick and other accrued leave, unpaid but job-protected federal FMLA leave, or other unpaid leave as a reasonable accommodation.

Importantly, the guidance stresses that the duty to reasonably accommodate does *not* mean that employers must lower performance standards, eliminate essential job functions, or excuse bad behavior. Nor are employers prohibited from reducing pay if the accommodation results in less work being performed. Although the employee need not have a specific accommodation in mind, it is the employee's responsibility to request a reasonable accommodation for his or her legal opioid use. The EEOC notes that employers are allowed to ask for documentation from the

[34] EEOC, "Use of Codeine, Oxycodone, and Other Opioids: Information for Employees" (Aug. 5, 2020), available at https://www.eeoc.gov/laws/guidance/use-codeine-oxycodone-and-other-opioids-information-employees.

employee's health care provider that confirms the legal opioid use or related disability and explains why a reasonable accommodation is necessary.

For those employers with drug testing programs, the EEOC recommends offering employees the opportunity to explain positive test results.[35]

Guidance for Healthcare Providers (and Employers!)

The second document, "How Health Care Providers Can Help Current and Former Patients Who Have Used Opioids Stay Employed,"[36] is intended to guide medical providers regarding documentation of covered disabilities under the ADA. In order to help their patients seek a reasonable accommodation, the EEOC recommends medical documentation be written using plain language explaining:

- The provider's professional qualifications and details regarding the nature and length of their relationship with the employee;
- The nature of the employee's medical condition;
- The extent to which the employee's opioid use would limit a "major life activity" (*e.g.*, walking, lifting, sleeping, and/or concentrating) without treatment;
- The need for a reasonable accommodation; and
- Suggested accommodations, without overstating the need for any one particular accommodation in case an alternative is necessary.

[35] Note that some states *require* that employees and/or applicants be given the opportunity to explain a positive drug test result. *See, e.g.*, N.J.S.A. 24:6I-6.1 (providing that if a drug test comes back positive for cannabis, the employer must "present the employee with written notice of the right to present a legitimate medical explanation … Give the employee or applicant three working days to: present a legitimate explanation for the positive test result including either or both an authorization for medical cannabis issued by a healthcare practitioner or proof of registration with the Cannabis Regulatory Commission; or request a confirmatory retest of the original sample at the employee or applicant's own expense.").

[36] EEOC, "How Health Care Providers Can Help Current and Former Patients Who have Used Opioids Stay Employed" (Aug. 5, 2020), available at https://www.eeoc.gov/laws/guidance/how-health-care-providers-can-help-current-and-former-patients-who-have-used-opioids.

The EEOC notes that providing employers with flat restrictions such as "no operating heavy machinery" is insufficient to determine if a particular duty can be performed safely for example. Instead, medical professionals should help employers determine if the employee poses a "direct threat" by providing relevant medical events or behaviors that could occur on the job (*e.g.*, loss of consciousness), and the probability that such events may occur. The documentation should also describe "any safety precautions that would reduce the chances the medical event or behavior will occur."

As detailed in the cases below, under the ADA, employees with addiction disorders (or a representative) must notify the employer of the need for accommodation *due to a medical condition* (*e.g.*, addiction)[37]. The question of whether accommodations were requested, and whether the employer failed to provide such accommodations in violation of the ADA, is a fact-specific analysis.

Recent Case Law

In *Davis v. George Washington University*,[38] a former employee who had worked as a service worker/housekeeper brought claims against his former employer, a university, and a contractor for alleged violations of the ADA, FMLA, and District of Columbia Family and Medical Leave Act ("DCFMLA"), as well as other state law claims. The plaintiff claimed that the defendants had failed to provide reasonable accommodations under the ADA. The plaintiff was diagnosed with depression, bipolar disorder, and substance abuse. The plaintiff told the defendant university that he had a medical condition, which he characterized as "depression." The plaintiff was terminated for multiple instances of absences from work without a timely request for leave,

[37] EEOC, "Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the ADA" available at https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#requesting.

[38] 26 F. Supp. 3d 103 (D.D.C. 2014).

and for failure to provide medical documentation to explain the absences. Following his termination, the plaintiff and the defendant university entered into a "Last Chance Agreement," which provided that if the plaintiff was absent from work again without permission, he would be discharged from employment. Following his reinstatement, the plaintiff had several excused absences, including hospital visits to treat his cocaine and alcohol abuse, and for his bipolar disorder. The plaintiff was also absent several more times for unexplained reasons, and provided no medical documentation, explaining only that he had been absent from work for "personal reasons" or because he could not work because of his illnesses. After these additional repeated episodes of unexcused absences, the plaintiff asked for more time off, but did not wait for a response from the employer, left work, and did not return.

In granting the defendants' motion for summary judgment, the district court held that the plaintiff had failed to request disability accommodation[39] from the defendant university. The court explained that under the ADA, to succeed on a failure to accommodate claim, the employee must show that they informed the employer of their disability, and requested an accommodation pursuant to any accommodation request procedures that the employer had in place. The district court found, however, that while the plaintiff had notified the defendant university of his disabilities, he had not properly requested a reasonable accommodation. First, the plaintiff's request for time off as needed without notice resembled a "work whenever you want," accommodation which was unreasonable. Further, providing the accommodation of frequent unplanned absences posed an undue hardship, because regular attendance and meeting cleaning

[39] "To establish a failure to accommodate claim under the ADA, a plaintiff must proffer evidence from which a reasonable fact-finder could find that (1) he had a qualifying disability within the meaning of the statute, (2) his employer had notice of the disability, (3) with reasonable accommodation, he could perform the essential functions of the position, and (4) he requested an accommodation but the employer denied his request." *Davis*, 26 F.Supp.3d at 113 (internal citations omitted).

schedules was an essential part of the plaintiff's job duties. Additionally, the court found that despite being aware of the accommodation request procedures, the plaintiff had not properly requested time off pursuant to the workplace procedures, and, moreover, the plaintiff had left the section labeled "requested accommodation" blank. Finally, when the defendant university communicated with the plaintiff to help him set up his health insurance and schedule a doctor's appointment, the defendant university again contacted the plaintiff employee to see how he was doing and asked how it could assist, and the plaintiff employee never specified an accommodation. Thus, because the plaintiff had not requested an accommodation pursuant to workplace procedures, and the inferred accommodation of regular unexcused absences was unreasonable and an undue hardship, the district court found that the defendants had not failed to provide reasonable accommodation for the plaintiff's addictions and illnesses.

In *Adkins v. Excel Mining, LLC,*[40] a former safety department employee brought claims against a mining company pursuant to the ADA and the Kentucky Civil Rights Act ("KCRA"). The company maintained a zero-tolerance drug policy that provided that no employee may engage in mining work while under the influence of alcohol or illegal drugs, including recreational drugs or unprescribed prescription medications. During a routine drug test, the plaintiff's test was positive for prescribed benzodiazepine and alcohol, which should not be mixed. The plaintiff was granted time to go home and allow the substances to leave his system. He was later granted time to enter an in-patient alcohol treatment program. Upon returning to work, the plaintiff disclosed to company healthcare professionals that he had been taking several prescribed medications while at the in-patient facility. Then, when the plaintiff tested positive for a medication that he had failed to disclose that he had taken, his employment was terminated. While the company medical

[40] 214 F. Supp. 3d 617 (E.D. Ky. 2016).

professionals determined that the plaintiff had been prescribed the undisclosed medication, given the time between when he left the in-patient facility and the time of the drug test, they concluded that the plaintiff had continued to take the medication after his treatment period. Since taking unprescribed medications while at work was a violation of company policy, the plaintiff was not reinstated.

In granting summary judgment for the employer, the court explained that the plaintiff had not actually requested an accommodation in the form of treatment for his alcoholism. Rather, the employer had made the arrangements for the in-patient treatment. Upon returning to work, the plaintiff then failed the drug test and was terminated from employment. Thus, the plaintiff had never actually requested an accommodation, as required to make out a *prima facie* case of failure to accommodation in violation of the ADA. Given that the plaintiff employee had never affirmatively asked for an accommodation, the employer had not failed to engage in the interactive process or provide him with an accommodation.

Impairment

Under the ADA, there is no employer obligation to tolerate impairment while at work.[41] Further, the ADA provides that employers may hold an employee who uses illegal drugs or is an alcoholic to the same standards as it holds other employees, even if any unsatisfactory conduct is due to the use of drugs or alcohol.[42] The ADA explicitly provides that employers may take adverse action against an employee who is impaired on the job.

[41] *See* 42 U.S.C. § 12114(c)(2).
[42] *See* 42 U.S.C. § 12114(c)(4).

Recent Case Law

In *Kitchen v. BASF*,[43] a former employee brought claims against his former employer, a chemical company, for alleged violations of the ADA and the Age Discrimination in Employment Act ("ADEA"). Specifically, the plaintiff alleged that the defendant had discriminated against the plaintiff because of his alcohol dependence. The plaintiff had twice been convicted of driving while intoxicated ("DWI"). He also consumed alcohol during work hours, despite knowing that such conduct violated company policy. The plaintiff employee had entered into both in-patient and out-patient treatment programs, and the employer had granted leave each time. Following another DWI conviction, the plaintiff received a final written warning, and the employer required that the plaintiff agree to take breath alcohol tests ("BAC"). Following a morning BAC test that showed alcohol levels that led the plaintiff's supervisor to conclude that the plaintiff was intoxicated at work, in violation of the final written warning, the plaintiff was terminated.

In affirming summary judgment for the employer, the Fifth Circuit held that an employee's termination for violating company policy by being under the influence of alcohol in the workplace did not violate the ADA. The court explained that firing the plaintiff because he arrived at work under the influence of alcohol was not equivalent to firing the plaintiff because he is an alcoholic. In coming to work under the influence of alcohol, the plaintiff had violated both company policy and the terms of his final written warning. The court held that the ADA permits employers to hold an employee who is an alcoholic to the same performance and conduct standards as other employees, even if an employee's problems stem from their disability. Additionally, the court held that the plaintiff had failed to show that the company's reasons for firing him were pretextual. The Fifth Circuit explained that the focus of a pretextual inquiry is not the accuracy of

[43] 952 F.3d 247 (5th Cir. 2020).

the BAC test or the credentials of the administering technician, but only whether the employer reasonably believed its nondiscriminatory reason for discharging him and acted on that basis.

Safety and Direct Threat

In instances where an employee poses a direct threat to safety because of their addiction, the employer may not be required to provide accommodations. Some regulatory agencies, such as the Nuclear Regulatory Commission ("NRC") require that employees meet fitness for duty standards to be eligible to work.[44] In other instances, the safety-based fitness for duty is governed by policies specific to an employer. In either instance, where an employee poses a safety risk because of their substance use and/or addiction, the employee may found not to be a "qualified employee," and thus have no claim for disability discrimination under the ADA. Further, employers may assert a "direct threat" defense, under which an employer may argue that an otherwise qualified individual under the ADA[45] becomes unqualified because they are unable to safely perform the functions of their job. Thus, under the "direct threat" affirmative defense, employers may avoid liability for disability discrimination under the ADA in instances where an otherwise qualified employee has an addiction that renders them unsafe, and unqualified, to do their job.

Recent Case Law

In *McNeils v. Pennsylvania Power & Light Co.*,[46] an armed security guard brought claims against his former employer, a nuclear power plant. Per the NRC's regulations,[47] the employer maintained a "fitness for duty program," to ensure that covered individuals met the fitness

[44] *See* 10 C.F.R. § 26.23(b); 10 C.F.R. § 26.77(b).
[45] The ADA provides that "'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." 42 U.S.C. § 12113(b); *see also* 29 C.F.R. § 1630.2(r).
[46] 867 F.3d 411 (3d Cir. 2017).
[47] *See* 10 C.F.R. § 26.23(b); 10 C.F.R. § 26.77(b).

standards required to work at a nuclear facility. Specifically, the regulations required that "individuals are not under the influence of any substance, legal or illegal, or mentally or physically impaired from any cause, which in any way adversely affects their ability to safely and competently perform their duties," and require that if an employee's fitness for duty is "questionable," the employer "shall take immediate action to prevent the individual from continuing to perform his duties." The regulations further require that, if the employer receives a report that a covered individual is engaging in suspicious activities, it must assess "the possible adverse impact of any noted psychological characteristics on the individual's trustworthiness and reliability"[48] and, if the individual's trustworthiness or reliability is found "questionable,"[49] revoke their unrestricted access authorization. As part of his security guard job duties, the plaintiff, a covered individual under the NRS regulations, had unrestricted access. The plaintiff experienced paranoid delusions and had alcohol abuse problems. According to co-workers, the plaintiff was "obsessed with" and previously used bath salts, a synthetic drug that affects the central nervous system. After a domestic incident, the treating physician at a psychiatric facility observed that the plaintiff had been experiencing paranoid delusions, sleeplessness, and auditory hallucinations. After a friend and co-worker reported concerns about the plaintiff's behavior to the employer, the plaintiff was evaluated by a psychologist who performed fitness for duty examinations for nuclear facilities. The plaintiff was deemed unfit for duty pending a review of the reports that the healthcare facility that had initially evaluated the plaintiff's psychological state and alcohol abuse, and his unrestricted access was revoked. The plaintiff was then terminated. The plaintiff then commenced the case against his employer for erroneously perceiving the plaintiff as having a disability, and basing an adverse employment action upon the perception, in violation of the ADA.

[48] *See* 10 C.F.R. § 73.56(e).
[49] *See* 10 C.F.R. § 73.56(f)(3).

In affirming the district court's grant of summary judgment for the defendant employer, the Third Circuit held that the plaintiff was not qualified for the position as a matter of law because he could not perform the "essential functions" of his job, namely, maintaining unrestricted security clearance as required by the NRC regulations. The court noted that there is a general consensus among courts that the "interplay" between the ADA and the NRC regulations provide that nuclear facility employees who have lost security clearance or are deemed unfit for duty are not qualified employees under the ADA. Citing *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999), the Third Circuit underscored that the defendant employer "was not insisting upon a job qualification merely of its own devising," but was complying with a regulation that was concededly valid and "ha[d] the force of law."

In *Breaux v. Bollinger Shipyards, LLC*,[50] a welder brought claims against his former employer, a shipyard, for alleged violations of the FMLA, and under the ADA for failure to provide disability accommodations. Prior to his employment with the defendants, the plaintiff had suffered a serious injury for which he was prescribed opioid pain killers. The plaintiff subsequently had difficulty withdrawing from the opioid pain killers, and began taking Suboxone, a medication used to treat opioid addiction. The plaintiff maintained that he was able to perform his job duties as a welder while taking Suboxone. When he was re-hired (he had previously been terminated by the employer for violation of company policy, and was later rehired), the plaintiff submitted a medical form and participated in a medical orientation. The company required that any employee working in a safety-sensitive position may not take safety sensitive medication while working, unless the medication was taken eight hours prior to beginning their shift. The plaintiff did not disclose his use of Suboxone. The plaintiff injured his hand while at work and took leave. As part of the

[50] 2018 WL 3329059 (E.D. La. July 5, 2018).

company's return to work procedures, the plaintiff submitted medical records related to the treatment of his hand injury. The medical records indicated that the plaintiff was in remission from opioid dependency, but that he had not disclosed the use of Suboxone. The plaintiff initially returned to work without restrictions, but later disclosed that he was taking Suboxone, and requested ADA accommodations that would allow him to return to work while taking the medication. At a meeting, the company provided that the plaintiff could take up to six months of job protected leave to get off the medication, but that if he did not return by a certain date, he would be terminated. The plaintiff filed for unemployment insurance benefits. Around that time, the defendant employer informed the plaintiff that he could have an additional month of job protected leave, and if he needed to return later, then he could reapply for available positions with the company.

The defendant employer argued that the plaintiff was rendered an unqualified individual under the ADA when he could not safely perform the essential functions of his job as a welder while taking Suboxone. The plaintiff argued that the defendant employer failed to do an individualized assessment of the plaintiff's circumstances. The plaintiff further argued that there was a material issue of fact as to whether the plaintiff could safely perform the essential functions of the job and the employer's "direct threat" defense. In denying the defendant employer's motion for summary judgment as to the ADA claims, the court found that the analysis regarding the extent of the risk of harm, and thus whether the plaintiff was a qualified individual, able to safely perform the essential functions of the job, was a question that requires a fact analysis most appropriate for a jury.

Testing

There is no comprehensive federal law that regulates drug testing in the private sector.[51] There are, however, state and local testing requirements (*e.g.*, written policy requirements,[52] requirements to provide employees an opportunity to explain a positive drug test,[53] and prohibitions on pre-employment drug testing[54]). With regard to public employers, the DOT has comprehensive regulations covering transportation employers, safety-sensitive transportation employees, and service agents. Employers covered by the DOT regulations may take adverse action against employees who test positive for drugs or alcohol, even if for the positive result is for cannabis, and those employees live and work in states in which cannabis is legal.[55] Additionally, government contractors are covered by the federal Drug-Free Workplace Act of 1988, which requires contractors to agree to provide drug-free workplaces as a precondition of receiving a contract or grant from a federal agency, but which does not actually require the drug testing of applicants or employees.[56]

Recent Case Law

In *Jones v. City of Boston*,[57] police officers, a cadet, and an applicant brought claims against a police department after they were terminated or denied employment after testing positive for cocaine. In relevant part, the plaintiffs alleged that the adverse employment actions were based on

[51] *See* Nathaniel M. Glasser and Anastasia A. Regne, *An Overview of Current Workplace Drug Policies Across the United States*, Cannabis Business Executive (Sept. 3, 2019), https://www.cannabisbusinessexecutive.com/2019/09/an-overview-of-current-workplace-drug-policies-across-the-united-states/.
[52] *See* Utah Code § 34-38-7(1).
[53] *See supra* n. 35.
[54] *See* Int. No. 1445-A, amending N.Y.C. Admin. Code. § 8-107 (providing that "[e]xcept as otherwise provided by law, it shall be an unlawful discriminatory practice for an employer, labor organization, employment agency, or agent thereof to require a prospective employee to submit to testing for the presence of any tetrahydrocannabinols or marijuana in such prospective employee's system as a condition of employment").
[55] *See* 49 C.F.R. § 40.23.
[56] *See* 42 U.S.C. § 701.
[57] 752 F.3d 38 (1st Cir. 2014).

a perceived disability of drug addiction, in violation of the ADA. In affirming the district court's grant of the defendants' motion for summary judgment as to the plaintiff's ADA claim, the First Circuit explained that the ADA protects those who are recovering from drug addiction and may be disabled as a result, as well as those who are erroneously perceived as having a drug addiction. When, however, an employer takes an adverse action on the basis that an individual is a current drug user, the ADA explicitly excludes from coverage those individuals who are current drug users, whether or not they have an addiction. The First Circuit held that the plaintiffs had failed to offer evidence that the adverse employment actions were "actually motivated by" the perception that they were addicted to drugs, as opposed to the belief that they were currently using illegal drugs. Thus, the employer's adverse actions against the employees were explicitly permitted under the ADA.

In *Williams v. FedEx Corp. Servs.*,[58] a sales person brought claims against a logistics company for, in relevant part, violations of the ADA for discrimination on the basis of a perceived disability. The plaintiff applied for short term disability benefits due to his anxiety and adjustment disorders. During the application process, the plaintiff mentioned to the insurance representative that he was also experiencing symptoms of withdrawal from Suboxone. The plaintiff had been prescribed Suboxone to replace OxyContin after he was diagnosed with opioid dependency. The insurance company then notified the defendant employer that the plaintiff had "filed a disability claim for alcohol use or substance abuse." The defendant employer informed the plaintiff that his application for disability benefits had triggered a mandatory employee assistance program, and that a refusal to comply would result in the plaintiff's termination from employment. An initial evaluation determined that the plaintiff had "no current substance abuse/dependency diagnosis,"

[58] 849 F.3d 889 (10th Cir. 2017).

and the plaintiff also provided the defendant employer with letters from his attorney and healthcare providers stating that the plaintiff did not have a substance abuse problem. Regardless, the defendant employer required the plaintiff to participate in the program, which included regular drug testing, and reporting of all prescription drug use for a period of five years.

On appeal, the plaintiff argued that the district court erred in not addressing his claim that the defendant employer violated the ADA by requiring him to submit to monthly drug tests and disclose his use of legally prescribed medications. The plaintiff alleged that the five-year testing and reporting requirement constituted disparate treatment on the basis of a perceived drug abuse disability. The Tenth Circuit agreed that an individual may be "regarded as" having a disability if they are erroneously regarded as having engaged in illegal use of drugs. Without addressing whether the five year testing requirement constituted an adverse action, the Tenth Circuit affirmed summary judgment in favor of the defendant on the plaintiff's disparate treatment claim because the employer's good-faith belief that the plaintiff sought treatment for drug abuse constituted a legitimate, nondiscriminatory reason for the employer's actions. The Tenth Circuit also held that while a test for the illegal use of drugs is not considered a medical examination under the ADA, the defendant employer appeared to have done more than merely subject the plaintiff to mandatory drug testing. The Tenth Circuit remanded the issue of whether the defendant employer violated the ADA's limitations on disability-related inquiries by improperly requiring the plaintiff to disclose his use of legally prescribed medications.

Finally, in *Voss v. Housing Authority of the City of Magnolia*,[59] an employer did not violate the ADA when it placed an employee on paid suspension following a positive drug test for opiates/morphine in order to obtain a letter from his treating physician. The employer was

[59] 917 F.3d 618 (8th Cir. 2019).

trying to determine if he did or did not pose a direct threat to safety due to his prescribed hydrocodone.

Practical Guidance

Given the patchwork of state and local drug testing laws, with the overlay of the federal prohibition against even marijuana use and the DOT regulations, employers should carefully consider whether to implement jurisdiction-specific drug testing and other policies for each location in which they operate, or create a "one-size-fits-all" policy that complies with the most liberal drug testing laws. On the other hand, employers may choose not to drug test applicants and/or employees to avoid making these factually complex decisions altogether. These employers could restrict drug testing exclusively to determining impairment in the workplace.

Once the design strategy has been decided, employers should consider the following best practices[60]:

- Drug testing practices should be applied consistently, especially if applicable law prohibits discrimination against certified medical marijuana users or requires accommodation.
- If there is a duty under state and/or local law to reasonably accommodate medical marijuana use, the employer first should engage in a fact-based inquiry to determine whether the individual is a permitted medical user. If the individual is a permitted user, the employer next should engage in the interactive process to determine whether medical marijuana use can be reasonably accommodated in the workplace. Note that

[60] *See* Glasser, *supra* note 25; *see also* Nathaniel M. Glasser, Garen E. Dodge, Anastasia A. Regne & Eric Emanuelson, *Employers Must Accommodate Some Workers' Opioid Use and Treatment*, Epstein Becker & Green (Aug. 10, 2020), https://www.workforcebulletin.com/2020/08/10/employers-must-accommodate-some-workers-opioid-use-and-treatment/.

some jurisdictions have stricter requirements than the interactive process; in New York City, for example, employers must engage in a "cooperative dialogue."

- Generally, absent current illegal use, addiction can be a disability for which an employee may be entitled to reasonable accommodation, including: employer-provided leave, modified job schedule to attend self-help meetings, and changes to job duties.
- Employers are not required to tolerate an employee's alcohol or substance use at work or misconduct.
- Employers should provide notice and obtain consent from an applicant or employee prior to testing.
- Employers must treat any documents related to an employee's substance abuse as confidential, the same level of treatment as all other employee medical information.
- To ensure maximum compliance, drug testing should be conducted *after* the company provides a conditional job offer. Additionally, the screening should occur prior to the start date, so that any positive test can be addressed before the individual begins work.
- If an employee drug test comes back positive, consider possible obligations under disability discrimination and medical marijuana laws.

Remember, no matter the law or policy, employers never need to accommodate the use of illegal drugs, nor do they have to accommodate *all* marijuana use in jurisdictions where medical and/or recreational use is lawful (and remember marijuana is still illegal under the federal Controlled Substances Act). First and foremost, employees cannot be impaired while on the job; thus, any drug or marijuana use that causes an individual to be under the influence while at work

does not need to be tolerated. Additionally, most states still do not require accommodation for recreational users.[61]

Detecting impairment is much more challenging than detecting marijuana or other drugs through a drug test, because the level of the substance in the body may not reflect impairment or behavioral effects. Where off-duty use of medical marijuana is protected, and accommodation required, the employer's ability to regulate off-duty use often comes down to the frequency and time of day of use. For example, an employer typically will have little say in an employee's use of medical marijuana or prescription drugs if the use occurs after work – such as, every day at 6:00 p.m. after working a 9-to-5 job. If, however, that same employee uses at 8:00 a.m. before work, almost ensuring on-site impairment, then it would not be a reasonable accommodation to require the employer to allow for such conduct.

When considering reasonable accommodations, employers should ask questions that are more likely to identify the circumstances that may cause an employee to be impaired at work – such as asking about frequency and timing of use of marijuana and other legal substances. Employers also should train supervisors and management to detect impairment, and ensure that all anti-impairment policies are enforced uniformly throughout the workforce.[62]

Opioid Users

With regard to employees who use or are addicted to opioids, in light of the EEOC's August 5, 2020 guidance,[63] employers should review their substance abuse and drug testing policies and make sure such policies distinguish between legal and illegal opioid use. Additionally, employers

[61] *See* Glasser, *supra* note 51.
[62] *See* Glasser, *supra* note 25.
[63] *See* EEOC, "Use of Codeine, Oxycodone, and Other Opioids: Information for Employees" *supra* note 34; *see also* EEOC, "How Health Care Providers Can Help Current and Former Patients Who Have Used Opioids Stay Employed" *supra* note 34; Glasser, *supra* note 59.

who drug test their employees should consider allowing their workers to explain a positive result, if such an opportunity is not otherwise required under state law. Employers should also be sure they permit employees receiving treatment for opioid addiction to use available sick and accrued leave, or FMLA leave where applicable.

Summary

The use of opioids (and high-THC content marijuana) in the general population is growing at significant rates. The key to analyzing what should be done when presented with an employee who has an underlying addiction is to determine the type of addiction (past or current), the type of drug being used (illegal or legally prescribed and perhaps abused), and what accommodations should be offered, if any, under the expanded definition of disability under the ADA. These are not always easy questions, nor are formulaic responses generally helpful.

The purpose behind the ADAAA revisions was to expand the number and type of qualified disabilities to effect the purposes of the ADA's original intent. As noted earlier, courts had stripped away many of the ADA's protections over time, which led to near nullification of the statutory protections except in egregious cases. The ADAAA intended to expand the scope and restore the statutory protections to the ADA as originally designed. It was a model exercise in stakeholder negotiations (disability rights organizations and employer groups) authorized, but not directed by, Congress to reach a compromise. The groups were given a six-month negotiating mandate to reach consensus on the redefinitions noted above. It was an arduous process, but one that yielded positive, sustainable rights for all who deserved the protection the ADA had promised.[64]

[64] On a personal note, Robert O'Hara was honored to participate in the negotiations as a member representing the employer community. Mr. O'Hara remembers the dozens of long negotiations and lengthy conversations that were necessary to achieve the final compromise. It remains one of his most gratifying achievements as an employment lawyer.