Minnesota Journal of Law & Inequality

Volume 15 | Issue 1 Article 7

June 1997

# Protecting Addicts in the Employment Arena: Charting a Course toward Tolerance

Amy L. Hennen

# Protecting Addicts in the Employment Arena: Charting a Course Toward Tolerance

Amy L. Hennen*

## Introduction

In July of 1984, Dorothy Wallace responded to a newspaper advertisement for a nursing position in the Intensive Care Unit (ICU) at the Veteran's Administration (VA) Hospital in Wichita, Kansas.[1] Ms. Wallace, a trained and licensed registered nurse, had extensive work experience in intensive care units.[2] Despite her impressive qualifications, the VA Hospital refused to hire Ms. Wallace because she was a recovering drug addict.[3] Although she had been free of drug use for nine months, successfully completed a drug rehabilitation program and possessed a letter of recommendation from her treating physician, the VA Hospital discrimi-

---

* J.D. expected 1997, University of Minnesota Law School; B.A. 1994, University of Minnesota, Morris. I would like to thank *Law & Inequality* staff members Keiko Sugisaka and Randi Levine for their constructive criticism, and Professor Jim Chen for his comments on an earlier draft of this Note. I would also like to thank Lori Marco for being my sounding board for the technical analysis in this Note. Her thoughts and comments were invaluable. I am especially thankful to my parents, Ron and Linda Hennen, and my sister, Jenny Holm, for their love, guidance and the unconditional support they have given me for 23 years. Finally, I am deeply indebted to my partner in love and life, my husband Scott Nielsen. His unwavering conviction to always bring out the best in me has made all of this possible. This Note is dedicated in loving memory to my cousin and soul mate, the angel who watches over me, Kari Jane Kopel.

1. Wallace v. Veterans Admin., 683 F. Supp. 758, 759 (D. Kan. 1988).

2. *Id.* at 759. Ms. Wallace had been employed in several nursing positions, and the court had "no doubt that [she] was well qualified for a position in the ICU of the V.A. Hospital." *Id.*

3. *Id.* at 759-60. The VA Hospital asserted that as a recovering addict, Ms. Wallace could not administer narcotics and thus was unable to perform the duties of a nurse working in the ICU. *Id.* at 765. The court disagreed with the VA Hospital, finding that Ms. Wallace had proved a prima facie case of "handicap discrimination" under the Rehabilitation Act, shifting the burden to the government employer to prove that the requirement was an "essential function of the job." *Id.* Since narcotics administration constituted less than 2% of a registered nurse's (R.N.) time on the job, the court found that the inability to administer narcotics "does not prevent an otherwise qualified nurse from being able to perform the essentials of the position if reasonable accommodation is made." *Id.*

nated against Ms. Wallace by refusing to hire her because of her past drug addiction.[4] Consequently, she filed suit for employment discrimination under the Rehabilitation Act of 1973.[5]

To date, federal court decisions regarding drug and alcohol addicts under the Americans with Disabilities Act of 1990 (ADA)[6] and the Rehabilitation Act of 1973[7] have established a spectrum of holdings, standards and rulings which provide employers little guidance and employees little security.[8] This lack of guidance has left the judiciary without an authoritative interpretation of who qualifies as an addict under the ADA or the Rehabilitation Act. Further, courts are split over the degree of protection to be afforded an addict. Without clear guidance, courts have drifted farther and farther away from the purpose of both the ADA and the Rehabilitation Act:[9] to protect those with disabilities, including drug addiction and alcoholism, from employment discrimination on the basis of that disability.[10] Federal courts have failed to give

4. *Id.* at 759-60. The VA Hospital argued that it was unable to accommodate Ms. Wallace because it would have to hire additional staff, staff morale would be harmed, and the restriction on her narcotic administration duties would compromise patient care. *Id.* at 766. The court rejected these arguments as speculative, however, because the record showed no attempt on the part of the VA Hospital to try to accommodate Ms. Wallace, and because the VA Hospital failed to present any factual foundation for its assertion that the restriction on Ms. Wallace's duties would preclude safe employment. *Id.* (citing Mantolete v. Bolger, 767 F.2d 1416, 1423 (9th Cir. 1985)). An employer can only make a decision as to the reasonableness of accommodation by first gathering facts as to whether the accommodation would preclude safe employment. *Id.*

5. Ms. Wallace alleged that the VA Hospital violated §§ 501, 504 and 505 of the Rehabilitation Act of 1973, 29 U.S.C. §§ 791, 794, 794(a)(1), which prohibit discrimination against handicapped individuals. *See Wallace,* 683 F. Supp. at 759.

6. 42 U.S.C. §§ 12101-12213 (1994).

7. 29 U.S.C. §§ 701-796 (1994). Although the Rehabilitation Act consists of seven titles, this article focuses on § 504 of Title V, which contains the substantive employment discrimination provisions. Section 504 prohibits discrimination against individuals with disabilities by executive agencies or federally assisted programs and activities. 29 U.S.C. § 794.

8. *See infra* Part II.B.3.

9. For example, in *Maddox v. University of Tennessee,* 62 F.3d 843 (6th Cir. 1995), the Sixth Circuit rejected the Second Circuit's decision in *Teahan v. Metro-North Commuter R.R.*, 951 F.2d 511 (2d Cir. 1991), which protected alcoholic conduct caused solely by reason of that disability against discrimination under the Rehabilitation Act. *See infra* notes 92-93 (discussing *Teahan* and its subsequent history). The *Maddox* court did so even though it assumed that alcoholics may be "individual[s] with a disability" for purposes of the Rehabilitation Act, 29 U.S.C.§ 706(8)(A). 62 F.3d at 846. The *Maddox* court held that a distinction existed between an employee's disability and any misconduct related to that disability, and upheld a university's termination of a disabled (alcoholic) assistant coach for public drunkenness resulting from his alcoholism. *Id.* at 847.

10. The stated purpose of the ADA is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with

importance to medical definitions of addiction which describe it as a disabling disease.[11] Consequently, courts have failed to protect individuals with medical conditions qualifying as addictions, thereby falling short in their protection of persons with disabilities.

Dorothy Wallace was fortunate and won her fight against her discriminatory employer.[12] The Kansas Federal District Court held that she met all of the necessary and legitimate requirements of the VA Hospital's ICU nursing position.[13] Unfortunately, most addicts are not as successful as Ms. Wallace. Terminated because of their addiction, most employees are left without remedy when the judicial system fails them.[14] The federal judiciary, in its interpretation of employment discrimination laws, should focus on medical realities rather than social prejudices[15] and protect an ad-

---

disabilities." 42 U.S.C. § 12101(b)(1). *See also* H.R. REP. NO. 101-485(II), at 51 (1990), *reprinted in* 1990 U.S.C.C.A.N. 276, 332 (providing legislative history using identical language to summarize the policy behind enactment of the Act). "[T]here is a compelling need to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities and for the integration of persons with disabilities into the economic and social mainstream of American life." *Id.* For the statutory language proclaiming the purposes of the ADA and the Rehabilitation Act, see *infra* note 20.

11. For a medical discussion of addiction as a disabling physical and psychological condition, see *infra* note 48.

12. Wallace v. Veterans Admin., 683 F. Supp. 758, 767 (D. Kan. 1988)

13. *See id.* at 762, 767. In the face of the nurse's evidence that recovering R.N.s with restrictions do not compromise patient care or affect staff morale, the court reasoned that the VA Hospital's "conjecture about the risk to patients and morale" was insufficient. *Id.* The court found that "[i]n truth, the VA rejected Dorothy Wallace because it was unenlightened and uneducated about recovering nurses." *Id.* at 767. The court held that the VA Hospital had failed to sustain its burden of showing that Ms. Wallace could not have been reasonably accommodated, as it is obligated to do under the Rehabilitation Act of 1973. *Id.*

14. *See, e.g.*, Despears v. Milwaukee County, 63 F.3d 635 (7th Cir. 1995) (upholding termination of alcoholic maintenance worker for off-duty misconduct); Little v. FBI, 1 F.3d 255 (4th Cir. 1993) (upholding termination of an FBI worker who relapsed during participation in a rehabilitation program).

15. Many addicts seek treatment and are capable of handling their medical situation before, during and after treatment. *See* Criteria Comm. Nat'l. Council on Alcoholism, *Criteria for the Diagnosis of Alcoholism*, 77 ANNALS OF INTERNAL MED. 249, 255 (1972) (hereinafter Criteria Committee). The Committee found:

> Intermittent or recurrent drinking may represent a phase in the course of alcoholism . . . . In many individuals daily drinking increases until the individual himself slowly becomes aware that physiological and psychological dependence exist. At this point periods of "going on the wagon" may occur, with resulting intermittent or recurrent patterns of drinking. For most drinkers, there are lesser or greater periods of time when, because of circumstances or the acute effects of alcohol, drinking is not possible. This pattern is not inconsistent with other drug dependency situations, in which interruptions of use are commonplace . . . .

*Id.* In addition, the Committee commented:

> [T]here are many patients who, after a time of complete sobriety, have re-

dict in the workplace, just as any other disabled individual is protected.[16]

Part I of this article summarizes statutory employment discrimination law under the Americans with Disabilities Act (ADA) and the Rehabilitation Act, offering a current definition of an addict and describing the treatment of drug and alcohol addicts under the Acts. Courts have created chaos in interpreting the Acts by focusing on particular facts of cases rather than a clear standard or rule.[17] Part II of this article addresses this chaos, laying out a line of decisions extending in two directions: one toward the protection of disabled addicts, the other toward a complete preclusion of protection for addicts.[18] This chaos demands that a new standard be established within the spectrum of holdings articulated to date. Part III of this article argues that judicial interpretations of the Acts should be guided by a standard which considers conduct caused by the addiction a part of the disability itself, thus clarifying the confusion as to what is covered by the Acts. In addition, statutory reform and clarification are necessary. The present exemption precluding currently-using addicts from ADA and Rehabilitation Act coverage must be narrowed to exclude an employee only when he or she is currently using on the job. The present blanket denial of protection to addicts contravenes and defeats the purpose of the ADA with respect to addicts.[19] These new judicial and statutory standards would reverse the current trend toward intolerance and reiterate the stated legislative intent of both the ADA and the Rehabilitation Act: to protect individuals with disabilities from discrimination.[20]

---

> ordered their lives in a rehabilitative way and are completely able to perform complex and responsible tasks. There are also a few patients who have returned to "social" drinking or who have infrequent "slips" but who still function as rehabilitated persons.

*Id.*

16. *See infra* note 126 (emphasizing how the judiciary's interpretation of the Rehabilitation Act reflects societal notions that are incongruous with the protective goals of the Act).

17. *See* Eric Harbrook Cottrell, *There's Too Much Confusion Here, And I Can't Get No Relief: Alcoholic Employees and the Federal Rehabilitation Act in* Little v. FBI, 72 N.C. L. REV. 1753, 1753 (1994) ("Interpretation of the provisions of the [Rehabilitation Act] . . . has been clouded by imprecise congressional drafting and inconsistent treatment by the federal judiciary.").

18. Illustrative of the disagreement among courts is a circuit split on the issue of whether the ADA and the Rehabilitation Act protect addicts for conduct caused "solely by" their addiction. *See infra* notes 92-116 and accompanying text.

19. *See* 42 U.S.C. § 12101(b) (1994) (stating the purpose of the ADA); *see also infra* note 20.

20. *See supra* note 10. The ADA's and the Rehabilitation Act's stated purposes reflect the congressional intent to protect disabled individuals. The ADA states:

## I. The Rehabilitation Act and the Americans with Disabilities Act

Federal adjudication of employment discrimination has focused on two key pieces of legislation, the ADA and theRehabilitation Act.[21] These Acts incorporate similar definitions and standards.[22] As a result, courts have analyzed ADA and Rehabilitation Act discrimination cases under equivalent standards and frameworks.[23] To understand the need for changes in the judicial

---

It is the purpose of this chapter—

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities; (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

42 U.S.C. § 12101(b). The Rehabilitation Act's purposes focus on individual self-empowerment as well:

The purposes of this chapter are—

(1) to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society through

(A) comprehensive and coordinated state-of-the-art programs of vocational rehabilitation; . . .

. . .

(F) the guarantee of equal opportunity; and

(2) to ensure that the Federal Government plays a leadership role in promoting the employment of individuals with disabilities, especially individuals with severe disabilities, and in assisting States and providers of services in fulfilling the aspirations of such individuals with disabilities for meaningful and gainful employment and independent living.

29 U.S.C. § 701(b) (1994).

21. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (1994) . Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796 (1994).

22. *See* Joseph S. Kass, *Disability Discrimination Litigation: A Legal and Strategic Update, in* EMPLOYMENT DISCRIMINATION CASES 1, 2 n.2 (1995). "Although the ADA is more extensive in its coverage than the Rehabilitation Act, the ADA contains much of the same statutory and regulatory language . . . [as the] Rehabilitation Act." *Id.* Because courts have already interpreted those sections of the Rehabilitation Act, looking to Rehabilitation Act cases interpreting such language gives guidance to understanding ADA interpretation by courts. *Id.*

23. The preference of federal courts to adjudicate Rehabilitation Act and ADA claims under similar frameworks and standards is evidenced by case law, statutory language and scholarly observation. *E.g.*, Ennis v. National Ass'n of Bus. and Educ. Radio, 53 F.3d 55, 57 (4th Cir. 1995) (discussing the Fourth Circuit's preference for "adjudic[ating] ADA claims in a manner consistent with decisions interpreting the Rehabilitation Act"). The Rehabilitation Act, as revised and approved on July 7, 1995, contains a description of the standards used in determining a violation of its section on non-discrimination under federal grants and programs. 29 U.S.C. § 794.

treatment of addicts in employment discrimination cases, one must first be familiar with the substance of the Acts, the subtle differences between them in their treatment of addicts and the federal judiciary's inattention to these differences.

### *A. Purposes and Provisions of the Rehabilitation Act*

The stated purpose of the Rehabilitation Act in 1973 was "to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society."[24] Congress sought to protect disabled workers and eliminate discrimination against them by employers, including public sector employers such as government contractors and recipients of federal financial assistance.[25] The Rehabilitation

---

According to its own statutory language, the standards to be used in determining whether section 794 has been violated in a complaint alleging employment discrimination under section 794 of the Rehabilitation Act "shall be the standards applied under title I of the Americans with Disabilities Act of 1990" as those sections of the ADA relate to employment. *Id.* § 794(d). Also, the Equal Employment Opportunity Commission (EEOC) developed its regulations for implementing the ADA by using the regulations and case law interpreting the Rehabilitation Act. Equal Employment Opportunity for Individuals with Disabilities, 56 Fed. Reg. 35, 726 (1991) (codified at 29 C.F.R. § 1630 (1995)).

As one scholar stated, "courts can rely on precedent forged under the Rehabilitation Act in deciding [ADA] issues." John L. Flynn, *Mixed-Motive Causation Under the ADA: Linked Statutes, Fuzzy Thinking, and Clear Statements*, 83 GEO. L.J. 2009, 2009 (1995); *see also* Cottrell, *supra* note 17, at 1753. The ADA and the Rehabilitation Act "incorporate many of the same ideas and were designed to work together." *Id. But cf.* Kathy A. Wolverton, *Protecting Alcoholics Under the Americans with Disabilities Act and New York Law: A Statutory Tug of War*, 57 ALB. L. REV. 527, 541 (1993) (questioning the value of applying Rehabilitation Act cases to ADA cases because the Rehabilitation Act only applies to the federal government and those employers receiving a measurable amount of federal funding, whereas the ADA applies to both the private and public sector).

24. 29 U.S.C. § 701(b)(1). *See* full text *supra* note 20. "Congress enacted the Rehabilitation Act of 1973 . . . in an effort to maximize handicapped persons' employability, independence, and integration into the workplace and community." L.D. Clark, Shields v. City of Shreveport: *Federal Grantees Under the Rehabilitation Act Escape Duty of Reasonable Accommodation Toward Alcoholics*, 66 TUL. L. REV. 603, 605 (1991). The legislative history of the Act indicates it was enacted to "promote and expand employment opportunities in the public and private sectors for handicapped individuals." Jennifer L. Adams, *At Work While "Under the Influence": The Employer's Response to a Hazardous Condition*, 70 MARQ. L. REV. 88, 109 (1986) (citing S. REP. NO. 93-318, at 49 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2076).

25. The text of the Rehabilitation Act's nondiscrimination provision reads as follows:

> No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by an Executive agency or by the United States Postal Service.

Act explicitly excludes currently abusing drug addicts from protection in the employment context.[26]

### B. *Purposes and Provisions of the Americans with Disabilities Act.*

To enlarge the scope of protection for individuals with disabilities, Congress enacted the Americans with Disabilities Act in 1990.[27] The ADA extended the remedies already provided under the Rehabilitation Act[28] against federally-funded programs and activities.[29] The ADA prohibits discrimination against individuals with disabilities[30] and individuals associated with disabled people,[31] and allows actions to be brought against private employers who discriminate.[32]

---

29 U.S.C. § 794(a). *See also* Clark, *supra* note 24, at 605 (noting that a handicapped individual has a private right of action and is not required to exhaust any administrative remedies prior to bringing an action).

26. *See* 29 U.S.C. § 706(8)(C)(i) (1994)The text of the statute reads: "[T]he term 'individual with a disability' does not include an individual who is currently engaging in the illegal use of drugs, when a covered entity acts on the basis of such use." *Id.* Congress's concern with requiring governmental employers to hold substance-abusing employees to the same standards as non-using employees prompted the addition of this exclusion in the 1978 amendments. *See* Clark, *supra* note 24, at 606-07.

27. The ADA has been heralded as the most sweeping anti-discrimination measure in the last twenty years. Wolverton, *supra* note 23, at 540. This recognition is in part because the ADA is "non-exclusive" and "non-preemptive," allowing more protective state anti-discrimination laws to remain in effect. Alan M. Koral, *Major Provisions of the Statute, in* EMPLOYER COMPLIANCE WITH THE AMERICANS WITH DISABILITIES ACT 7, 11 (PLI Corp. L. & Prac. Course Handbook Series No. 714, 1990). *See also* Ellenwood v. Exxon Shipping Co., 984 F.2d 1270, 1277 (1st Cir. 1993) (holding that the ADA and the Rehabilitation Act do not preclude the availability of additional state or federal remedies).

The ADA was intended to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities. Flynn, *supra* note 23, at 2012-13. The ADA also specifically abolishes the immunity provided to states under the Eleventh Amendment to the United States Constitution, allowing individuals to bring actions for damages against state governments. John Albrecht, *A Guide to Employment Discrimination Cases Under the Americans with Disabilities Act*, NEV. LAW., Feb. 1993, at 20 (citing 42 U.S.C. § 12202). For an extensive description of the ADA, see Robert L. Burgdorf Jr., *The Americans With Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413 (1991).

28. *See supra* note 25 and accompanying text (describing the scope of the Rehabilitation Act).

29. *See Ellenwood*, 984 F.2d at 1277 (noting that the ADA amended the Rehabilitation Act, extending remedies for employment disability discrimination suits against many more private employers).

30. A disability is defined in the ADA as "(A) a physical or mental impairment that substantially limits one or more of the 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(2) (1994). Author John Albrecht provides a useful example:

According to its stated findings, the ADA was prompted in part by the discrimination and prejudice that denies disabled Americans equal opportunities and costs the United States billions of dollars due to the dependency and nonproductivity of unemployed disabled Americans.[33] Title I of the ADA prohibits private sector employers[34] with fifteen or more employees from discriminating against "qualified individuals with disabilities" who are capable of performing the "essential functions" of the job in question with or without the "reasonable accommodation" of the employer.[35] Title II requires all state and local agencies to adhere to Title I re-

---

> A person who has had a leg amputated but wears a prosthetic device has a disability. First, the disability is determined without considering the prosthesis. Second, the loss of the leg is an anatomical loss. Third, it affects the musculoskeletal system. It is a physical impairment within the meaning of the regulations and ADA. Further, this impairment substantially limits a major life activity. This person is unable to walk without the prosthesis. This person has a disability within the meaning of the ADA.

Albrecht, *supra* note 27, at 21.

31. 42 U.S.C. § 12112. The ADA prohibits discrimination against either an applicant or an existing employee who does not have a disability but who associates with a person who does have a disability. *Id.* For example, an employee whose spouse has AIDS would be protected under this provision of the ADA. Kass, *supra* note 22, at 2 n.3. This association can be through any relationship such as caregiver, relative, friend or business associate. *Id.*

32. *See Ellenwood*, 984 F.2d at 1277. The First Circuit described the ADA as an example of Congress's "historical practice of allowing overlapping remedies for employment discrimination," pointing to the ADA provision that the legislation shall not "limit the remedies, rights, and procedures of any . . . law of any State . . . ." *Id.* (quoting 42 U.S.C. § 12201(b)). The court held that remedies under state discrimination statutes prohibiting discrimination by private employers and remedies available under state contract and estoppel claims were not preempted by the Rehabilitation Act. *Ellenwood*, 984 F.2d at 1277. As proof, the court pointed to the ADA, "which amended the Rehabilitation Act and extended remedies for handicap discrimination against many more private employers," and its provisions allowing overlapping remedies. *Id.*

33. 42 U.S.C. § 12101(a). The legislation was prompted by the continuing existence of unfair and unnecessary discrimination and prejudice [which] denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity. *Id.* § 12101 (a)(9).

34. An "employer" is defined as "a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of [the employer]." 42 U.S.C. § 12111(5)(A).

35. Wolverton, *supra* note 23, at 541. *See also* 42 U.S.C. § 12112 (forbidding such discrimination). *See also* H.R. REP. NO. 101-485(II), at 51 (1990), *reprinted in* 1990 U.S.C.C.A.N. 276, 336. The legislative history describes the scope of the Act's coverage as "employers (including governments, governmental agencies, and political subdivisions) who are engaged in an industry affecting commerce and who have 15 or more employees for each working day . . . ." *Id.*

gardless of the number of employees.[36] The ADA covers many types of employer activities including: 1) recruitment, advertising and job application procedures; 2) hiring, upgrading, promotion and termination; 3) pay rates and 4) fringe benefits, or any other term or condition of employment.[37] The ADA expands on existing remedies available to disabled employees and applicants who are discriminated against.[38]

Like the Rehabilitation Act, the ADA allows employers to prohibit the use of alcohol and the illegal use of drugs during working hours.[39] It also permits employers to hold disabled addicts to the same performance and behavior standards as non-disabled employees, even if the unsatisfactory performance or behavior is related to the employee's drug addiction or alcoholism.[40]

### C. *Bringing an Employment Discrimination Case Under the Acts*

When a disabled employee believes she has been discriminated against and wants to seek remedies under the ADA, the Rehabilitation Act or both, certain elements must be met.[41] For an

---

36. Kass, *supra* note 22, at 2-3.

37. *See* 29 C.F.R. § 1630.4 (1995). Regulations implementing the ADA list eight employer actions as unlawful discrimination. This list is not exclusive and includes: classifying a job applicant in a way that adversely affects the disabled employee because of the disability, participating in contractual arrangements that discriminate against an applicant or employee with a disability, using standards that have the effect of discriminating, denying equal job benefits, not making reasonable accommodations to the known limitations of the employee (unless doing so imposes an undue hardship on the operation of the employer's business), denying employment opportunities based on the employer's need to make such reasonable accommodations, using selection criteria that tend to screen out individuals with disabilities and failing to administer employment tests in the most effective manner. *See id.* §§ 1630.5-1630.11.

38. The ADA neither invalidates nor limits the remedies, rights or procedures available under any law that provides a greater or equal degree of protection for individuals with disabilities. 42 U.S.C. § 12201(b) (1994) . The ADA provides disabled people with, and limits them to, the powers, remedies and procedures available to those bringing discrimination claims under Title VII of the Civil Rights Act of 1964 based on race, color, religion, sex or national origin. Kass, *supra* note 22, at 5. Remedies under Title VII are no longer limited to lost back pay, reinstatement, injunctive relief and attorney's fees due to the passage of the Civil Rights Act of 1991. *Id.* They can now include compensatory damages for emotional distress and limited punitive damages, as well as jury trials for ADA employment discrimination claims. *Id.*

39. *See* 42 U.S.C. § 12114(c)(1).

40. *Id.* § 12114(c)(2)-(4).

41. *See* McDonnell Douglas v. Green, 411 U.S. 792, 802 (1973) (setting out the prima facie discrimination standard for Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17, used by other courts in discrimination cases, including employment discrimination cases under the Rehabilitation Act and the ADA).

individual wrongfully terminated or refused employment because of her status as a drug or alcohol addict, bringing a discrimination action under the Acts requires tailoring the elements of the claim to fit the case of a disabled addict.[42]

The first step in bringing a lawsuit against an employer for disability discrimination under the ADA or the Rehabilitation Act is establishing that the employee is an individual with a disability.[43] Congress,[44] executive agencies,[45] federal courts,[46] the Attor-

---

In *McDonnell Douglas*, the Supreme Court stated:

> The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

*Id.* at 802. The Court also noted that these requirements were fact-specific and would vary from case to case. *Id.* at 802 n.13.

The Sixth Circuit applied the *McDonnell Douglas* standard to Rehabilitation Act cases and found that to establish a violation of the Act, a plaintiff must show:

> (1) The plaintiff is a "handicapped person" under the Act; (2) The plaintiff is "otherwise qualified" for participation in the program; (3) The plaintiff is being excluded from participation in, being denied the benefits of, or being subjected to discrimination under the program solely by reason of his handicap; and (4) The relevant program or activity is receiving Federal financial assistance.

Maddox v. University of Tenn., 62 F.3d 843, 846 (6th Cir. 1995) (citing Doherty v. Southern College of Optometry, 862 F.2d 570, 573 (6th Cir. 1988)).

The Fourth Circuit found the *McDonnell Douglas* analysis applicable to the ADA as well. *See* Ennis v. National Ass'n of Bus. and Educ. Radio, 53 F.3d 55, 58 (4th Cir. 1995). In *Ennis*, the court compared the analysis of an ADA case to the *McDonnell Douglas* standards and found that in a typical discharge case brought under the ADA, the prima facie test was met if the plaintiff could show, by a preponderance of the evidence, that "(1) she was in the protected class; (2) she was discharged; (3) at the time of the discharge, she was performing her job at a level that met her employer's legitimate expectations; and (4) her discharge occurred under circumstances that raise a reasonable inference of unlawful discrimination." *Id.* (citing Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981)). *See also infra* note 60 (discussing the standards for a prima facie employment discrimination case).

42. The Supreme Court noted in *McDonnell Douglas* that the elements would vary depending on the claim brought. 411 U.S. at 802 n.13.

43. *See* 42 U.S.C. § 12102(2)(A) (1994). *See also* statutory text *supra* note 30. Because the ADA defines a disability as a physical or mental impairment, addiction is biologically within this definition. Dr. Miller of the University of Illinois at Chicago, Department of Psychiatry, has said that addiction is within the clinical definition of "disease." *See* NORMAN S. MILLER, M.D., ADDICTION PSYCHIATRY: CURRENT DIAGNOSIS AND TREATMENT 81 (1995) ("Alcoholism and drug addiction fit exactly into this definition because an addiction to alcohol and drugs is a definite morbid process that produces characteristic and identifiable signs and symptoms affecting many organ systems in the body."). David Malikin, Professor of Rehabilitation Education at New York University, also considers alcoholism a disease and labels it a "psychological disablement." DAVID MALIKIN, SOCIAL DISABILITY:

ALCOHOLISM, DRUG ADDICTION, CRIME AND SOCIAL DISADVANTAGE 57 (1973).

44. Congress expressed its intention to include addiction as a disease covered by the ADA and the Rehabilitation Act both through specific statutory provisions and legislative history. The ADA defines a disability as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102(2)(A). It specifically excludes individuals currently engaging in the illegal use of drugs, *id.* § 12114(a), but covers those who have completed rehabilitation programs, *id.* § 12114(b). The Rehabilitation Act uses the same language to define an individual with a disability as the ADA, 29 U.S.C. § 706(8)(B) (1994). It also creates the same exception for currently using addicts, *id.* § 706(8)(c)(i), and the same "exception to the exception" for rehabilitated addicts, *id.* § 706(8)(c)(ii).

Congress also expressed its intention to protect addicts under the ADA in its debates and discussions prior to enactment. In discussing the term "disability," both the Senate Report and House Report included drug and alcohol addiction. *See* S. REP. NO. 101-116, at 22 (1989); H.R. REP. NO. 101-485(II), at 51 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 333. The House Report noted that "[t]he term [disability] includes . . . such conditions, diseases and infections as: orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, infection with the Human Immunodeficiency Virus, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, *drug addiction, and alcoholism.*" *Id.* (emphasis added).

45. Regulations implementing the ADA and the Rehabilitation Act also recognize and define addiction as a disabling disease covered by the Acts. Department of Justice regulations implementing the ADA define "physical or mental impairment" to include "drug addiction" and "alcoholism," although they specifically exclude certain disorders resulting from the "current illegal use of drugs." 28 C.F.R. § 35.104(1)(ii), (5)(iii) (1995). EEOC regulations implementing the equal employment provisions of the ADA state that the terms "disability" and "qualified individual with a disability" include an individual who has successfully completed or is participating in a rehabilitation program and is no longer engaging in illegal use. 29 C.F.R. § 1630.3(b) (1995). In addition, the EEOC's Americans With Disabilities Technical Assistance Manual provides that "[p]ersons addicted to drugs, but who are no longer using drugs illegally and are receiving treatment for drug addiction or who have been rehabilitated successfully, are protected by the ADA from discrimination on the basis of past drug addiction." Americans with Disabilities Act of 1990: EEOC Technical Assistance Manual, Lab. L. Rep. (CCH) Rep. 437, ¶ 8.5 (Feb. 14, 1992).

46. Federal case law has interpreted both addiction and alcoholism to be diseases within the protective purview of the Rehabilitation Act and the ADA. The Supreme Court first recognized addiction as a disease in 1925. *See* Linder v. United States, 268 U.S. 5, 18 (1925) (stating that addicts are "diseased" and proper subjects for treatment). The *Linder* Court refused to conclude that a doctor acted improperly, or for purposes other than medical, when he dispensed "morphine or cocaine for relief of conditions incident to addiction." *Id.* Thirty-five years later in *Robinson v. California*, 370 U.S. 660 (1962), the Supreme Court held that a state criminal law punishing the "status" of being a narcotic addict inflicted a cruel and unusual punishment in violation of the Fourteenth Amendment, in part because narcotic addiction was an illness and was, indeed, "apparently an illness which may be contracted innocently or involuntarily." *Id.* at 666-67.

Federal circuit and district courts have recognized addiction as a disease as well in the years following *Linder*. The United States District Court of Kansas recognized alcoholism and drug addiction as included in the Rehabilitation Act's definition of disabled in *Wallace v. Veterans Administration*, 683 F. Supp. 758, 761 (D. Kan. 1988) (citing Tinch v. Walters, 765 F.2d 599 (6th Cir. 1985)). *See also* Whitlock v. Donovan, 598 F. Supp. 126 (D.D.C. 1984), *aff'd*, 790 F.2d 964 (1986); Davis v. Bucher, 451 F. Supp. 791 (E.D. Pa. 1978). The Second Circuit reflected

ney General[47] and the medical community[48] have all recognized addiction as a disabling disease covered by both Acts. By classifying addiction as a disease that qualifies for disability protection under the ADA and the Rehabilitation Act, it becomes clear that addicts need the same protection in the employment arena as other individuals with disabilities. The ADA requires that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual."[49] The ADA defines a "qualified individual with a disability" as a person who can perform the essential function of the job with or without accommodation from the employer.[50]

---

the common rule in case law today, finding "it is clear that substance abuse is a 'handicap' for purposes of the Rehabilitation Act." Teahan v. Metro-North Commuter R.R., 951 F.2d 511, 517 (2d Cir. 1991).

47. A 1977 U.S. Attorney General's Opinion concluded that both alcoholics and drug addicts are "handicapped individuals" for purposes of Title V of the Rehabilitation Act (which used "handicapped" throughout to describe individuals with disabilities). 43 Op. Att'y Gen. 12 (1977).

48. One medical dictionary defines addiction as "the state of physical dependence induced by such drugs as morphine, heroin and alcohol, but it is also used for the state of psychological dependence, produced by drugs such as barbiturates." THE BANTAM MEDICAL DICTIONARY 6 (rev. ed. 1990). Furthermore, many medical experts define alcoholism as a disease, much like AIDS or cancer. *See, e.g.*, Maurice Victor & Raymond D. Adams, *Alcohol, in* HARRISON'S PRINCIPLES OF INTERNAL MEDICINE 1285, 1285 (Robert G. Petersdorf et al. eds., 10th ed. 1983); Charles L. Whitfield et al., *Alcoholism, in* PRINCIPLES OF AMBULATORY MEDICINE 245, 248 (L. Randol Barker et al. eds., 2d ed. 1986). *But see* Ellison v. Software Spectrum, Inc., 85 F.3d 187 (5th Cir. 1996) (holding that breast cancer was not a disability based on specific facts of that case).

Medical authority has repeatedly agreed that drug addiction and alcoholism are disabling diseases of both the body and mind. The National Committee on Alcoholism found that "[a]lcoholism fits the definition of disease given in Dorland's Illustrated Medical Dictionary, 24th edition: 'A definite morbid process having a characteristic train of symptoms; it may affect the whole body or any of its parts, and its etiology, pathology, and prognosis may be known or unknown.'" Criteria Committee, *supra* note 15, at 250. The Committee also noted that the description of alcoholism as a disease is agreed upon by the American College of Physicians, the American Medical Association, the American Psychiatric Association and other medical organizations. *Id.* In addition, Dr. A. Thomas McClellan, Director of Clinical Research at the Drug Dependence Service at the Philadelphia VA Medical Center, noted the biological and social characteristics of addiction when he and other doctors observed that "addiction may be more realistically considered as a complex of potential treatment problems manifested by symptoms in the area of medical, psychological, legal, economic, and social function, as well as chemical dependence." EDWARD GOTTHEIL ET AL., SUBSTANCE ABUSE AND PSYCHIATRIC ILLNESS 152 (1972).

49. 42 U.S.C. § 12112(a) (1994). Covered entities include both public and private employers, employment agencies, labor organizations or joint labor-management committees. *Id.* § 12111(2).

50. *See id.* § 12111(8).

Once an addict employee establishes that she is a qualified individual with a disability,[51] the second step in bringing an employment discrimination claim under the ADA or the Rehabilitation Act is showing she is "otherwise qualified," with or without the disability.[52] In assessing whether an employee is "otherwise qualified," the ADA requires an employer to make "reasonable accommodations" for the employee's disability.[53] If after this accommodation the employee can perform the essential functions of the job, the employee may not be legally terminated or denied employment because of her disability.[54] Thus, the "reasonable accommodation" is linked to whether the employee is "otherwise qualified." When an employee with a disability is unable to perform the essential functions of the position, the court must consider whether any reasonable accommodation would enable the employee to perform those functions.[55]

As an affirmative defense, the employer may demonstrate that "reasonable accommodation"[56] of the disabled employee would

---

51. *See supra* notes 43-50 and accompanying text (establishing addiction as a disabling disease under both the ADA and the Rehabilitation Act).

52. 42 U.S.C. § 12111(8). *See also* Leary v. Dalton, 58 F.3d 748, 753 (1st Cir. 1995) (requiring a plaintiff bringing Rehabilitation Act claim to show he is a qualified individual with respect to his employment, with or without reasonable accommodation, and can perform the essential function of his job: in this case arriving on time).

53. The statutory text of this section provides:

> the term "discriminate" includes . . . not making *reasonable accommodations* to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity. . . .

42 U.S.C. § 12112(b)(5)(A) (emphasis added). "Reasonable accommodation" may include, but is not limited to, making existing facilities accessible and job restructuring including part-time schedules or reassignments. *Id.* § 12111(9); 29 C.F.R. § 1630.2(o)(2) (1995).

54. 42 U.S.C. §§ 12112(a), (b)(5)(A).

55. Clark, *supra* note 24, at 608.

56. 42 U.S.C. § 12112(b)(5)(A) (1994) . *See* statutory text *supra* note 53. "The ADA imposes an affirmative financial obligation on employers to reasonably accommodate the known physical or mental limitations of an otherwise qualified applicant or employee with a disability." Kass, *supra* note 22, at 13. In general, an accommodation is any change in work environment that enables individuals with disabilities to have the same employment opportunities as non-disabled individuals. *Id.* The EEOC defines "reasonable accommodation" as:

> I) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or
>
> II) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to per-

impose an "undue hardship."[57] Absent a showing of undue hardship, however, the ADA forbids denying employment to an otherwise qualified individual with a disability if the denial is based on the need to make reasonable accommodations.[58]

These concepts and requirements of the ADA find their origin in the Rehabilitation Act. Section 794 of the Rehabilitation Act prohibits discrimination against "otherwise qualified" individuals with disabilities by federally-funded programs or activities.[59] Both the Rehabilitation Act and the ADA serve largely to shift burdens of proof in adjudication. Generally, once the plaintiff establishes a prima facie case of discrimination,[60] the burden shifts to the em-

---

form the essential functions of that position; or

III) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

29 C.F.R. § 1630.2(o)(1).

For clarification of the "reasonable accommodation" requirement, see the Appendix to Title 29's implementing regulations. It notes, "[w]hile the ADA focuses on eradicating barriers, the ADA does not relieve a disabled employee or applicant from the obligation to perform the essential functions of the job." 29 C.F.R. app. § 1630. The background comment continues, "[t]o the contrary, the ADA is intended to enable disabled persons to compete in the workplace based on the same performance standards and requirements that employers expect of persons who are not disabled." *Id.* An accommodation need not be the "best" one possible as long as it permits the employee to perform the essential job functions. *See* Kass, *supra* note 22, at 13.

57. An accommodation of the disability is not required when it will impose an "undue hardship" on the employer. 42 U.S.C. § 12112(b)(5)(A). *See also* Clark, *supra* note 24, at 608 (stating that employers must accommodate the known limitations unless the accommodation would impose an undue hardship).

"Undue hardship" is defined as an action requiring significant difficulty and expense. 42 U.S.C. § 12111(10)(A); 29 C.F.R. § 1630.2(p)(1). Factors to be considered when determining whether an accommodation is an undue hardship include: nature and net cost of the accommodation, overall financial resources of the entity providing the accommodation and the type of operations of the covered entity. 29 C.F.R. § 1630.2(p)(2). *See also* Evan J. Kemp, Jr. & Christopher G. Bell, *A Labor Lawyer's Guide to the Americans with Disabilities Act of 1990,* 15 NOVA L. REV. 31, 59-62 (1991) (discussing legislative history behind "undue hardship" provision).

In addition to the "undue hardship" defense, the ADA incorporates other defenses such as business necessity, direct threat to the health and safety of others, religious beliefs and infectious and communicable disease transmission when dealing with a food handling job. Albrecht, *supra note* 27, at 24.

58. The statutory text provides: "the term 'discriminate' includes . . . denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant." 42 U.S.C. § 12112(b)(5)(B).

59. 29 U.S.C. § 794(a) (1994). In the employment context, a disabled individual is "otherwise qualified" under the Rehabilitation Act if he or she can perform the essential functions of a position with or without reasonable accommodation on the part of the employer. School Bd. of Nassau County v. Arline, 480 U.S. 273, 287 n.17 (1987) (citation omitted).

60. A prima facie case is established under the ADA guidelines by proving the

ployer to show: (1) it reasonably accommodated the employee, (2) the reasonable accommodation imposed an "undue hardship"[61] on the employer or (3) the employee was not otherwise qualified for the job.[62]

As applied to the context of an addict seeking employment, the ADA and the Rehabilitation Act consider persons who complete drug rehabilitation programs and who do not currently use illegal drugs to be individuals with disabilities.[63] Thus, if a former drug addict has been released from a rehabilitation program and is otherwise qualified to perform all the essential functions of the job with or without reasonable accommodation by the employer, the employer may not discriminate against that individual.[64]

---

employee: 1) has a disability, 2) is qualified or would be qualified with reasonable accommodation by the employer and 3) was discriminated against by her employer because of the disability. Flynn, *supra* note 23, at 2013. *See also supra* note 41 (describing how a prima facie case of discrimination is established according to the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)). The employer can also plead a few limited defenses such as direct threats to safety and health and religious exemptions. *Id. See also supra* notes 56-58 and accompanying text (discussing the additional defenses of undue hardship).

61. For a discussion of the employer's duty to reasonably accommodate unless the accommodation imposes an undue hardship on the employer, see *supra* note 57. *See also* 45 C.F.R. § 84.12(a) (1995); 29 C.F.R. § 1613.704(a) (1995). Factors to be considered in determination of whether imposing undue hardship by imposing duty of reasonable accommodations include: (1) the size and type of program involved, (2) the nature of the accommodation and (3) the cost of the accommodation. 45 C.F.R. § 84.12(c); 29 C.F.R. § 1613.704(c). For a critical view of the administrative difficulties resulting from this duty of reasonable accommodation unless an undue hardship can be shown, particularly with respect to small business persons, see Jack Anderson and Michael Binstein, *ADA Compliance: A Hammer Over Small Businesses*, PORTLAND OREGONIAN, Feb. 16, 1994, at C11.

62. *See* Wallace v. Veterans Admin., 683 F. Supp. 758, 765 (D. Kan. 1988) (explaining that once nurse plaintiff establishes a prima facie case of handicap discrimination, the burden shifts to the governmental employer to prove that administering narcotics is an "essential" function of an ICU nurse).

63. Thomas P. Murphy, *Disabilities Discrimination Under the Americans with Disabilities Act*, 36 CATH. LAW. 13, 22 (1995). *See also* 42 U.S.C. § 12114(b) (including as qualified persons with disabilities individuals who have successfully completed a drug rehabilitation program). The statutory text provides:

> Nothing in subsection (a) of this section shall be construed to exclude as a qualified individual with a disability an individual who—
>
> (1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;
>
> (2) is participating in a supervised rehabilitation program and is no longer engaging in such use.

*Id.* For similar language in the Rehabilitation Act, see 29 U.S.C. § 706(8)(C)(ii).

64. Murphy, *supra* note 63, at 22. Murphy also provides an example: If a reformed drug addict applied for a teaching position at a parochial school, and the applicant is otherwise qualified to perform all essential functions of the position, the diocese or school board may, as a reasonable accommodation, have to allow the individual to leave every day at noon to go to a methadone clinic, to come in a little

### *D. Judicial Failure to Recognize Subtle Differences in "Current Use" Provisions of the Rehabilitation Act and the ADA*

Turning from disability discrimination in the employment arena generally to disability discrimination against addicts specifically, the Rehabilitation Act and the ADA treat the use of illegal drugs differently from the use of alcohol.[65] For example, the ADA defines a "drug" as a "controlled substance" as defined by schedules I through V of section 202 of the Controlled Substances Act, without mentioning alcohol.[66] The ADA prohibits "controlled substances" from "current" use,[67] but does not forbid the consumption

---

later than the other teachers or maybe leave a little early because he tires easily in the first six months of rehabilitation. *Id.* "Only by demonstrating that this type of accommodation is 'unreasonable' and would [be] an undue hardship on the school can the school defend not providing the accommodation." *Id.* at 22-23.

65. *See id.* at 23 ("Alcoholism is treated differently from drug use under the ADA."). Unlike the current use of illegal drugs, the current use of alcohol is not prohibited by the ADA. *Id.* Thus, if an employee's "alcoholism does not interfere with job performance, as an alcoholic, the individual may be protected against discrimination under the ADA." *Id. See also* Wolverton, *supra* note 23, at 541-42. The ADA, however, is inconsistent: "although section 12114 is entitled 'Illegal Use of Drugs and Alcohol,' the terms 'alcohol' and 'alcoholic' are missing from the section's key portions." *Id.* at 541. Further, subsection (a), which defines an individual with a disability, excludes persons currently illegally using drugs, but not alcohol. *Id.* "It is only in the subsections pertaining to the authority of the employer and to transportation employees that the term 'alcohol' is used." *Id.*

Similarly, current drug users are excluded from protection under the Rehabilitation Act, which states that only alcoholics whose current use of alcohol prevents them from performing the duties of the job lose Rehabilitation Act protection. 29 U.S.C. § 708(8)(C)(v); *see also supra* note 26 and accompanying text. Under the Rehabilitation Act, Congress intended to require federal employers "to exert substantial affirmative efforts to assist alcoholic employees toward overcoming their handicap before firing them for *performance deficiencies related to drinking*." Adams, *supra* note 24, at 110 (citing Whitlock v. Donovon, 598 F. Supp. 126 (D.D.C. 1984), *aff'd* 790 F.2d 964 (1986) (stating that reasonable accommodation means an employer must offer an alcoholic employee the "firm choice" between treatment and discipline before any disciplinary action may be taken)). Thus it appears that those persons who currently use alcohol, but who can still perform their jobs, are protected by law, whereas *all* current drug users lose such protection even if they can still perform their jobs.

While the illegality of controlled substances makes their use different in many ways from the use of alcohol, the ADA's and the Rehabilitation Act's treatment of these mood-altering substances should not reflect these social and legal differences. Drug and alcohol use both create addiction. That is the only factor relevant to the discussion of such use in these Acts because they are meant to protect individuals with disabilities, not to set social and legal standards of acceptable conduct.

66. 42 U.S.C. § 12111(6)(B).

67. *See id.* § 12114(a). The statute provides: "For purposes of this subchapter, the term 'qualified individual with a disability' shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use." *Id.* Thus, the ADA clearly states that an in-

of alcohol in this manner.[68] Although drug use and alcohol use are treated differently by the ADA and the Rehabilitation Act, courts interpreting these statutes have blurred the distinction by failing to recognize or even acknowledge the differences. Instead, courts have excluded the current use of both illegal drugs and alcohol from protection as a disability under both the Rehabilitation Act and the ADA.[69] Thus, although the ADA and the Rehabilitation Act do not explicitly forbid current alcohol consumption as they do for current illegal drug use,[70] courts interpret the Acts as if they forbid the current consumption of alcohol as well.[71]

Failure to recognize the statutory distinction between the current use of drugs and the current use of alcohol becomes particularly relevant in the context of addiction. Actions resulting from an addiction to alcohol are protected in a manner that actions resulting from a drug addiction are not. For example, suppose an alcoholic employee is arrested at night for public drunkenness due to the "current" use of alcohol, and is not a threat to the safety of his or her office at the time.[72] Arguably, the ADA and the Rehabilitation Act should protect the employee against termination resulting from the incident. First, the employee's drunken status

---

dividual who is currently using illegal drugs is not a "qualified individual with a disability," and is not entitled to protection under the ADA. Murphy, *supra* note 63, at 22. Moreover,

> the term 'currently' does not require the employer to prove the individual illegally used drugs at the time of the action. The act is intended to deny protection to an individual whose illegal use of drugs 'occurred recently enough to justify a reasonable belief' that the person's drug use is current.

*Id.* (citing 29 C.F.R. § 1630.3 (1994)).

68. Murphy, *supra* note 63, at 23; *see also* Samuel Estreicher, *The Americans With Disabilities Act: A Guide for Practitioners*, 208 N.Y.L.J. 1, 7 (1992) ("By contrast [to users of illegal drugs], the ADA does not expressly exclude current alcoholics from coverage.").

69. *See* Collings v. Longview Fibre Co., 63 F.3d 828 (9th Cir. 1995) (upholding termination due to current drug use in claim brought under the ADA). *Cf.* Maddox v. University of Tenn., 62 F.3d 843 (6th Cir. 1995) (explaining the court's view that the Rehabilitation Act and the ADA provide no protection for alcoholics' current use of alcohol).

70. *See supra* note 67 and accompanying text.

71. Although courts have not directly spoken to protection of current use of alcohol, current users of alcohol are nonetheless, in effect, unprotected because courts use "conduct" and "not otherwise qualified" to deprive alcoholics of protection under the Acts. *See Maddox*, 62 F.3d at 843 (upholding a termination for current alcohol use in a claim brought under both the Rehabilitation Act and the ADA); Altman v. New York City Health and Hosp. Corp., 904 F. Supp. 503 (S.D.N.Y. 1995) (upholding a hospital's refusal to reinstate its chief of internal medicine due to current alcohol use).

72. *See* 29 U.S.C. § 706(8)(C)(v) (1994). This provision of the Rehabilitation Act exempts from protection any employee who "is an alcoholic whose . . . employment, by reason of such current alcohol abuse, would constitute a direct threat to property or the safety of others." *Id.*

was caused by alcoholism, a protected disability. Second, the ADA and the Rehabilitation Act do not explicitly remove the "current use" of alcohol by employees from protection. However, the "current" use of an illegal drug clearly does remove an addict employee from protection.[73] Thus, an addicted employee currently using alcohol has greater protection under the Acts than a similarly-situated addicted employee currently using illegal drugs.[74] This statutory distinction in the treatment of addicts has not been noted by many federal courts, which have treated all current use by an addict as unprotected.[75]

Because these statutes treat alcoholics differently than drug addicts, federal courts' uniform treatment of disabled employees with addictions has been irrational and contrary to congressional intent. The uniform treatment of drug and alcohol addicts who are also current users becomes significant when arguing for statutory reform. Because the ADA and the Rehabilitation Act were meant to protect individuals with disabilities, it seems inconsistent that the Acts should uniformly deny protection to drug addicts, rather than uniformly protect both drug and alcohol addicts.[76]

## II. The Federal Case Law

With an overview of the statutory provisions of the ADA and the Rehabilitation Act as background, this analysis turns to the federal judiciary's treatment of the two Acts and their protection of addicts. Federal district and circuit courts have treated ADA and Rehabilitation Act cases identically in analyzing whether a prima facie case has been established and whether the addict should be afforded protection.[77] This parallel treatment, however, has led to a line of holdings and standards that give employers and lower courts little guidance and addicted employees little security.

---

73. *Id.* § 706(8)(C)(i).

74. Murphy, *supra* note 63, at 23.

75. *See* Maddox v. University of Tenn., 62 F.3d 843 (6th Cir. 1995) (upholding termination of alcoholic football coach for public intoxication and driving under the influence of alcohol after hours).

76. *See* Kass, *supra* note 22, at 2 n.2 (commenting on the expansive protection of the ADA).

77. For a discussion of the preference of federal courts to adjudicate Rehabilitation Act and ADA claims under similar frameworks and standards, see *supra* note 23.

### *A. Employer Reliance and Prima Facie Discrimination*

Federal courts adjudicate Rehabilitation Act and ADA claims under the same framework and apply similar standards to cases involving claims arising under the Acts.[78] In deciding Rehabilitation Act and ADA claims under these standards, federal courts have identified two types of cases: (1) cases where the employer disclaims any reliance on the employee's disability in its employment discretion and decision-making and (2) cases where the employer acknowledges reliance on the disability.[79] By classifying a case as one or the other, federal courts determine the appropriate burden of proof to apply in disability discrimination suits.

In cases where the employer disclaims reliance on the disability when taking action against an employee, federal courts employ the same analysis used in actions brought under Title VII of the Civil Rights Act of 1964.[80] Applying this analysis to the employment disability discrimination context, an employee has the final burden of proving the employer's reason for the action was actually a pretext for discrimination and that the action had a disparate impact on that disabled employer.[81]

A different analysis applies in the case where an employer acknowledges reliance on the disability in taking adverse action against an employee. A disability may be a permissible factor to consider with respect to the employee's qualifications. An employer may consider an employee's disability when the limitations make the employee unqualified to perform all of the essential

---

78. For a discussion of this preference for treating ADA and Rehabilitation cases under similar standards and frameworks, see *supra* note 23 .

79. For an example of this analysis with respect to a claim brought under the Rehabilitation Act, see *Teahan v. Metro-North Commuter R.R.*, 951 F.2d 511, 511 (2d Cir. 1991) (holding employer terminated employee "solely by reason of" his disability, even though the employer disclaimed any reliance on the employee's disability, when behavior relied on is causally related to that disability). For an example of this analysis applied to a case brought under the ADA, see *Ennis v. National Ass'n of Business and Education Radio*, 53 F.3d 55 (4th Cir. 1995) (applying framework used in Rehabilitation Act cases and other discrimination claims to ADA claims as well). *See also Teahan*, 951 F.2d at 511 and Ham v. Nevada, 788 F. Supp. 455 (D. Nev. 1992) (describing generally the two branches of analysis used in labor discrimination claims under the Rehabilitation Act and the ADA).

80. *Teahan*, 951 F.2d at 514 (finding *McDonnell Douglas* Title VII analysis appropriate when employer disclaimed reliance on the disability in the context of Rehabilitation Act claims). For the *McDonnell Douglas* standard for finding a prima facie case of racial discrimination under Title VII of the Civil Rights Act of 1964, see *supra* note 41.

81. For application of the *McDonnell Douglas* analysis to claims brought under the Rehabilitation Act and the ADA, see *supra* note 41.

functions of the job.[82] Although an employer may permissibly take into account a disability, once a prima facie case of discrimination is shown, the employer is required to rebut the inference that the disability was improperly considered. Rebuttal is accomplished by demonstrating that the reliance on the disability was relevant to the job qualifications.[83] The disabled plaintiff, however, "still bears the ultimate burden of proving that despite his disability, he is qualified."[84]

As a threshold question, classifying a case as one type or the other is important. Typically, an employer acknowledges reliance on the employee's disability as a permissible and appropriate factor to consider with respect to employee qualifications when taking adverse action such as termination.[85] The difficult cases are those of the first type, where an employer disclaims reliance on the disability but the employee contends that the conduct resulting in termination was caused by his disability. In these cases the employee contends the employer did indeed rely impermissibly on the disability in terminating the employee.[86] Once an employee establishes a prima facie case of discrimination, the burden is placed on the employer to justify the dismissal. This shifting burden is meant to prevent employers from justifying dismissal by citing misconduct related to a type of disability, thereby "avoiding the

82. In *Teahan*, 951 F.2d at 514-15, the court held that section 504 of the Rehabilitation Act allows employers to make decisions based upon the job-related attributes of a person's disability, and that Title VII disparate treatment analysis is applicable where the employee's disability is an appropriate factor to consider with respect to his qualifications. *Id.* Nonetheless, the qualifications being judged cannot be directly related to a disability unless the employer proves that the disability in essence renders the employee unqualified to fill the job. *See also* Alicia H. Apfel, *Cast Adrift: Homeless Mentally Ill, Alcoholic and Drug Addicted*, 44 CATH. U. L. REV. 551, 564 (1995) (noting that "[t]reatment of intentional discrimination against disabled persons differs from other types of discrimination, such as race discrimination, in that an individual's disability may be taken into account when determining an individual's eligibility"). *Id.* (footnote omitted). The employer may have to demonstrate that the disability factors were relevant to the essential eligibility requirements for the position. *Id.*

83. *See Ham*, 788 F. Supp. at 457-58. The *Ham* court found that the defendant, the State of Nevada, relied on the employee's alcoholism when terminating him from his position as Chief of Nevada Bureau of Alcohol and Drug Abuse for driving while intoxicated. *Id.* Thus, the state had the burden of showing the employee was "not qualified to hold his position." *Id.* at 458.

84. *See id.* at 457 (quoting Teahan v. Metro-North Commuter R.R, 951 F.2d 511, 514-15 (2d Cir. 1991)).

85. *See id.* at 457 (citing *Teahan*, 951 F.2d at 514-15).

86. *See, e.g., Teahan*, 951 F.2d at 514.

burden of proving that the handicap is relevant" to the job requirements.[87]

### B. *The Effect of Addiction on Conduct and Its Statutory Protection*

In adjudicating Rehabilitation Act and ADA discrimination claims brought by drug addicts and alcoholics, a key distinction has surfaced in the way courts characterize conduct associated with addiction. The issue of whether to recognize or reject a distinction between the disability of addiction, and conduct related to that addiction, has created a split between the Second and Sixth Circuits.[88] In addition, federal circuit jurisdictions other than the Second and the Sixth favor either recognition or rejection as well, making the split even more important.[89] The federal district and circuit courts treatment of employment discrimination cases brought by addicts, while favoring either recognition or rejection of the disability/conduct distinction generally, has established a spectrum of holdings and standards.[90] While these scattered holdings incorporate (in part or in whole) this disability/conduct dichotomy, the cases are often decided on their specific facts or for underlying policy reasons, leaving the holdings hollow as precedents to be applied in later cases.[91]

#### 1. Rejecting the Addiction/Conduct Distinction

In 1991, the Second Circuit Court of Appeals, in *Teahan v. Metro-North Commuter Railroad*,[92] held that a Rehabilitation Act plaintiff can show that he was fired "solely by reason of" his disability, or at least create a genuine issue of material fact, if he can show the termination was causally related to his disability.[93] In

87. *Id.* at 517.

88. On August 21, 1995, the Sixth Circuit explicitly declined to follow the reasoning of the Second Circuit in *Teahan*, 951 F.2d at 511. Maddox v. University of Tenn., 62 F.3d 843, 847 (6th Cir. 1995).

89. For treatment by other federal circuit courts, see *infra* Parts II.B.1-2.

90. *See infra* Part II.B.3.

91. For a discussion of the fact-bound holdings of appellate courts, see *infra* Parts II.B.1-2. *See also infra* Part III.A (discussing the substantive importance of the burden shifting characteristic of the disability/conduct distinction).

92. 951 F.2d 511 (2d Cir. 1991).

93. *Id.* at 517. "The 'solely by reason of' inquiry is intended to ascertain which employer decisions are based on conduct or circumstance that are causally unrelated to the handicap, and thus, outside the protective sweep of section 504 of the Rehabilitation Act." *Id.* at 516.

While *Teahan*, 951 F.2d 511, was later remanded, dismissed and the dismissal affirmed, the substance of the Second Circuit's original decision regarding termi-

*Teahan*, the defendant was fired for excessive absenteeism caused by his alcoholism.[94] The Second Circuit held for the employee, rejecting the district court's distinction between misconduct (absenteeism) and the disabling condition of alcoholism.[95] The court presumed that Teahan's absenteeism may have resulted from his alcoholism.[96] The court held that termination by an employer justified as due to conduct "shown to be caused by substance abuse is termination 'solely by reason of ' that substance abuse for purposes of § 504."[97] Thus, one's disability should not be distinguished from its effects in determining whether one was fired "solely by reason of" the disability.

In *Despears v. Milwaukee County*,[98] the Seventh Circuit Court of Appeals supported the *Teahan* holding by rejecting the distinction between addiction and conduct.[99] In *Despears*, the plaintiff filed suit under the ADA and the Rehabilitation Act for being demoted to a lower-paying job after he lost his driver's license because of repeated convictions for driving under the influence of alcohol.[100] While affirming summary judgment in favor of the defendants, the court noted that the increased likelihood of an alcoholic losing his driver's license as compared to a non-alcoholic was enough to show a causal relation between Despears' alcohol-

---

nations of addicts and their rejection of the distinction between misconduct and the disability of addiction remains unchanged. *See* Teahan v. Metro-North Commuter R.R., 80 F.3d 50, 51 (2d Cir. 1996). Thus, the subsequent history of Mr. Teahan's claim (complaint dismissed for failure to show he was "otherwise qualified") is treated here only summarily. *See id.* The Second Circuit noted that on remand the district court found Teahan's termination to be "solely by reason of" his disability of alcoholism even though the employer disclaimed any reliance on the disability and that it relied on the conduct itself (excessive absenteeism) as caused by, or as a job-related manifestation of, the disability. *Id.* at 52. The court also noted that on remand the district court was guided directly by the first *Teahan* case (case analyzed in this Note) because it specifically addressed the "solely by reason of" issue. *Id.* Thus, the Seventh Circuit re-affirmed its position rejecting the conduct/disability distinction. *Id.*

94. *Teahan*, 951 F.2d at 513.

95. *Id.* at 516-17.

96. *Id.* at 515. The defendant's summary judgment motion caused the court to examine the facts in the light most favorable to Teahan, and thus assume the existence of a causal relationship between his alcoholism and the absenteeism. *Id.*

97. *Id.* at 517. The court also noted, however, that "if the consequences of the handicap are such that the employee is not qualified for the position, then a firing because of the handicap is not discriminatory, even though the firing *is* 'solely by reason of the handicap." *Id.* at 516.

98. 63 F.3d 635 (7th Cir. 1995).

99. *Id.* at 637.

100. *Id.* at 635. Despears worked initially as a maintenance worker, a job which involved occasional driving. *Id.* Upon his fourth conviction for driving under the influence of alcohol, Despears was demoted to the lower-paying position of custodian, a job which involved no driving. *Id.*

ism and his demotion.[101] The court held that although alcoholism could be an impermissible cause for his demotion under the ADA and the Rehabilitation Act, in this case alcoholism was not the "compulsion" or "sole cause" for the demotion.[102] The court noted that the alcoholism must be such a compulsion or sole cause "to form the bridge that Despears seeks to construct between his alcoholism and his demotion."[103] Therefore, while the plaintiff established no "sole cause" connection, the court rejected the distinction between addiction and conduct caused solely by that disability by implying that if alcoholism were the "sole cause" of his misconduct, it would be a discriminatory violation of the ADA and the Rehabilitation Act to fire him as a result of that conduct.[104]

2. Recognizing the Addiction/Conduct Distinction

In 1995, in *Maddox v. University of Tennessee*,[105] the Sixth Circuit Court of Appeals declined to follow the Second Circuit's reasoning in *Teahan*.[106] In *Maddox*, the University of Tennessee's assistant football coach was fired as a result of being arrested for public disorderly conduct due to his drunkenness.[107] The coach was an alcoholic, and he relied on *Teahan* to argue that his misconduct was "solely by reason of" his disabling condition.[108] The *Maddox* court held that the correct analysis centered on the distinction between discharging someone for unacceptable misconduct and discharging someone because of his addiction disability.[109]

To support its disability/misconduct distinction, the *Maddox* court relied on *Taub v. Frank*,[110] a First Circuit case. The *Taub* decision held the connection between drug addiction and addiction-related drug possession for distribution was too attenuated to afford protection to the addict.[111] While the court acknowledged a

101. *Id.* at 636.

102. *Id.* The court stated that another cause of his being convicted of drunk driving was his decision to drive while drunk. *Id.*

103. *Id.*

104. *Id.*

105. 62 F.3d 843 (6th Cir. 1995).

106. *Id.* at 847.

107. *Id.* at 845.

108. *Id.* at 847.

109. *Id.*

110. 957 F.2d 8 (1st Cir. 1992).

111. *Id.* at 11. The facts in *Taub*, however, made that case much easier to rule on than *Teahan* or *Maddox*. In *Taub*, a Postal Service employee was convicted of possessing and distributing heroin, a portion of which he distributed to other Postal Service employees. *Id.* at 9. The First Circuit held that "[w]hatever force

disability/misconduct distinction *on the facts of that case*, the court did not wholly recognize the distinction as later asserted by the court in *Maddox*.[112] The First Circuit focused on the drug distribution actions of the defendant, not the addiction or the possession.[113]

To further bolster its holding, the *Maddox* court also cited *Little v. FBI*,[114] a Fourth Circuit decision which acknowledged the disability/conduct distinction.[115] The *Little* court held that no Rehabilitation Act protection was available to an alcoholic employee who relapsed from a rehabilitation program and was intoxicated while on duty.[116] However, both the ADA and the Rehabilitation Acts clearly prohibit protection for this type of conduct while at work; thus, the facts determine the holding much more clearly than in *Teahan* or *Maddox*, where the conduct was not specifically forbidden by the Acts.[117]

---

there may be in the contention that Taub's heroin addiction, and addiction-related criminal possession of heroin, [it] would not remove him from the protection of the Act, [because it] is simply too attenuated when extended to encompass an addiction-related possession of heroin for *distribution*." *Id.* at 11.

112. Maddox v. University of Tenn., 62 F.3d 843, 847 (6th Cir. 1995)

113. *Taub*, 957 F.2d at 11.

114. 1 F.3d 255 (4th Cir. 1993) (holding that termination resulting from an FBI employee's misconduct of driving while intoxicated and off-duty was not caused by his alcoholism), *cited in Maddox*, 62 F.3d at 847. *But see* Cottrell, *supra* note 17, at 1753-54 (characterizing *Little* differently than the *Maddox* court, calling it the "latest installment in a line of judicial interpretations of the [Rehabilitation Act] focusing on the needs of the employers and narrowing the Act's protection for individuals with disabilities").

115. *See generally* Cottrell, *supra* note 17 (discussing the holding of the cases recognizing the distinction between disability and misconduct (specifically *Little*)). Cottrell comments:

> Although the [Rehabilitation Act] clearly does not require employers to endure ineffective and potentially dangerous employees regardless of the failure of treatment, dismissing an employee for a single incident of misconduct without providing an opportunity for treatment may undermine the purpose of the [Rehabilitation Act]: to help disabled individuals participate in the workplace.

*Id.* at 1766-67.

116. 1 F.3d at 255. Although the *Little* decision would appear to support the *Maddox* decision by holding that an FBI agent was fired for misconduct rather than his disability of alcoholism, the facts in *Little* were that a special agent with the FBI, while undergoing treatment for alcoholism, relapsed into alcohol abuse and was intoxicated *while on duty and while at work*, again making these facts easier on which to rule. *Id.* at 256.

117. *See* 42 U.S.C. § 12114(c) (1994) (ADA allows an employer to prohibit illegal use of drugs and alcohol at the workplace); 29 U.S.C. § 706(8)(c)(v) (1994) (stating that Rehabilitation Act protection against discrimination does not include any employee whose current use of alcohol prevents job performance or is a threat to the property or safety of others).

### 3. The Spectrum of Employment Discrimination Case Holdings

As demonstrated by the cases above, there exists a spectrum of conduct covered by courts adjudicating claims brought under the ADA and the Rehabilitation Act. Some addiction-related conduct is found to be protected by all courts; other conduct is forbidden from protection by all courts. The vast majority of addiction-related conduct affecting the workplace, however, does not clearly fall into these "clearly protected" or "clearly unprotected" categories, thus establishing a spectrum of protected conduct that courts may or may not protect.

At one end of the spectrum is addiction-related behavior that is clearly protected by all courts under the Rehabilitation Act and the ADA. For example, the status of being an alcoholic or drug addict is not a proper basis for discrimination in the workplace in and of itself under both the ADA and the Rehabilitation Act.[118]

---

118. The ADA and the Rehabilitation Act protect addicts participating in rehabilitation programs and addicts who have completed such programs from discrimination based on that status in the employment sector. The ADA provides:

> Illegal use of drugs and alcohol
>
> (a) Qualified individual with a disability
>
> For purposes of this subchapter, the term "qualified individual with a disability" shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.
>
> (b) Rules of construction
>
> Nothing in subsection (a) of this section shall be construed to exclude as a qualified individual with a disability an individual who—
>
> (1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use; [or]
>
> (2) is participating in a supervised rehabilitation program and is no longer engaging in such use; . . .
>
> except that it shall not be a violation of this chapter for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs.

42 U.S.C. § 12114. Section 8(C) of the Rehabilitation Act also protects addicts seeking rehabilitation:

> (i) . . . the term "individual with a disability" does not include an individual who is currently engaging in the illegal use of drugs, when a covered entity acts on the basis of such use.
>
> (ii) Nothing in clause (i) shall be construed to exclude as an individual with a disability an individual who—
>
> (I) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;
>
> (II) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

Termination due to an employee's attendance at an Alcoholics Anonymous meeting or Narcotics Anonymous meeting in the evening, on an employee's own time, would be a discriminatory violation of the ADA and the Rehabilitation Act.[119] An employer cannot fire or refuse to hire an employee solely on the basis of his or her status as a recovering addict who is no longer engaging in the use of drugs or alcohol.[120]

At the other end of the spectrum is addiction-related behavior that is clearly not protected under the Rehabilitation Act and the ADA. For example, employees who admit to illegal drug use while at work and while on duty are clearly not protected from termination actions.[121]

Due to its prevalence in employment discrimination actions, behavior between these two extremes is most important to the disposition of addiction-related Rehabilitation Act and ADA cases. The cases described in Subsection 2 and other federal circuit court adjudication of the Acts comprise the middle of the "conduct-covered" spectrum. Examples of addiction-related conduct for which employers have lawfully terminated employees include: driving while intoxicated while off duty,[122] illegal drug use while off duty by a police officer in a department that assigned alcoholics to a rehabilitation program as a "reasonable accommodation" of

---

(III) is erroneously regarded as engaging in such use, but is not engaging in such use;

except that it shall not be a violation of this chapter for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (I) or (II) is no longer engaging in the illegal use of drugs.

29 U.S.C. § 706.

119. *See* 42 U.S.C. § 12114(b) (protecting employees who have completed or are participating in a drug rehabilitation program); 29 U.S.C. § 706(8)(C)(ii) (protecting employees who have completed or are participating in a drug rehabilitation program). *See* statutory text *supra* note 118.

120. *See* Wallace v. Veterans Admin., 683 F. Supp. 758 (D. Kan. 1988) (holding it was a violation of the Rehabilitation Act to refuse to hire a registered nurse who was a recovering addict and was otherwise qualified for an ICU position when she had completed a rehabilitation program, was no longer a current user, had been drug-free for over nine months and had informed prospective employer of her disability); *see also supra* notes 1-5 and accompanying text (explaining the facts of *Wallace*).

121. *See* Collings v. Longview Fibre Co., 63 F.3d 828 (9th Cir. 1995) (holding that terminated employees at a box manufacturing plant who admitted to illegal drug use while at work and while on duty are not protected and were not wrongfully terminated). *See also* 42 U.S.C. § 12114(a); 29 U.S.C. § 706(8)(C)(i) (stating the statutory texts of the ADA and the Rehabilitation Act exempting "current" users of illegal drugs from protection).

122. *See* Despears v. Milwaukee County, 63 F.3d 635 (7th Cir. 1995); Maddox v. University of Tenn., 62 F.3d 843 (6th Cir. 1995).

their condition,[123] driving intoxicated while off duty and coming to work intoxicated[124] and possessing illegal drugs with the intent to distribute heroin to fellow postal employees.[125]

This spectrum of fact-bound holdings leave courts and employers with little guidance and addict employees with little security. A clearer, brighter line delineating protection for addiction and addiction-related conduct should be drawn for the benefit of disabled addict employees, affected employers and the courts adjudicating discrimination claims. Along this spectrum of cases upholding employee terminations, a point exists to draw a clear line and establish a new workable standard for addict discrimination claims brought under the ADA and the Rehabilitation Act.

## III. Reversing the Trend Toward Decreased Protection of Addicts Under the Rehabilitation Act and the Americans with Disabilities Act

After examining the case law to date on discrimination claims brought by addicts under the ADA and the Rehabilitation Act, the analysis turns to judicial and statutory reform that may make the employment sector and the federal court system substantially more protective and predictable for disabled addicts with legitimate discrimination claims. This section argues for increased judicial rejection of the disability/conduct distinction and for changes in employment discrimination legislation to focus on protecting disabled addicts. Changing the focus of employment discrimination law concerning addicts from persecution to protection and preservation will turn the tide of intolerance toward a river of rehabilitation.

### *A. Judicial Reform*

The "conduct-covered" spectrum discussed above demonstrates a federal judicial trend toward intolerance of drug and alcohol addiction, making protection for those suffering from the disability of addiction more difficult to receive under the ADA and the Rehabilitation Act. The federal courts should reverse this trend by focusing on and reiterating the legislative intent behind the ADA and the Rehabilitation Act: to protect individuals with disabilities from discrimination.[126]

123. *See* Copeland v. Philadelphia Police Dep't, 840 F.2d 1139 (3d Cir. 1988).
124. *See* Little v. FBI, 1 F.3d 255 (8th Cir. 1993).
125. *See* Taub v. Frank, 957 F.2d 8 (1st Cir. 1992).
126. For the statutory purposes of the ADA and the Rehabilitation Act, see *su-*

As a first step toward reversing the intolerance trend, federal courts should support and follow the example of those courts rejecting the distinction between addiction and conduct caused by the addiction.[127] A federal court finding that misconduct and the addiction that caused it cannot be separated performs two functions, one procedural and the other substantive. Procedurally, this rejection of the conduct/disability distinction makes it easier for employees to establish a prima facie case of discrimination under the ADA and the Rehabilitation Act. The third element of a prima facie case under the Rehabilitation Act is a demonstration that "[t]he plaintiff is being excluded from participation in, being denied benefits of, or being subjected to discrimination under the program solely by reason of his [disability]."[128] Thus, courts rejecting the disability/conduct distinction note that an employer may rely on a disability in terminating an employee without explicitly stating they are relying on the disability.[129] This reliance shifts the burden to the employer, even though the employer disclaims any reliance on the disability, because the relevant question is what conduct the employer points to in terminating the employee. If the conduct justifying the termination is caused solely by the disability, whether the employer claims reliance on the dis-

---

*pra* note 20. Both intend to protect "individuals with disabilities." 42 U.S.C. § 12101 (1994) ; 29 U.S.C. § 701 (1994). Cottrell criticizes the line of cases recognizing the distinction between disability and conduct and commenting:

> The practice of some courts in finding that "misconduct" obviates the need for a "reasonable accommodation" analysis denies an employee whose addiction causes misbehavior on the job the protection of the Act, even though he may be a far more likely candidate for successful rehabilitation than a more discreet drinker. Such a result reflects societal notions of the blameworthiness of alcoholics, as many people believe that people who arrive at work drunk deserve to be fired. This result seems incongruous, however, when placed in the context of the expansive goals of the [Rehabilitation Act], because it denies help to those who may need it most. In other words, the practice of allowing outright dismissal whenever alcoholism results in misconduct at the workplace excuses employers from their [Rehabilitation Act] duty to provide reasonable accommodation to their employees, simply because the employee's handicap manifests itself at work . . . . [If] one adopts the view that the [Rehabilitation Act] was intended to create a greater level of tolerance for alcoholic employees in order to encourage rehabilitation before dismissal becomes the only available option, then the result of the *Little* line of cases becomes disturbing.

Cottrell, *supra* note 17, at 1767.

127. *See Despears*, 63 F.3d at 636; Teahan v. Metro-North Commuter R.R., 951 F.2d 511 (2d Cir. 1991). For a discussion of the *Despears* holding, see *supra* notes 98-104 and accompanying text.

128. Doherty v. S. College of Optometry, 862 F.2d 570, 573 (6th Cir. 1988), *quoted in* Maddox v. University of Tenn., 62 F.3d 843, 846 (6th Cir. 1995).

129. *See Teahan*, 951 F.2d at 516-17.

ability or not, the employer has indeed improperly relied on the disability in violation of the Rehabilitation Act.[130]

This burden-shifting characteristic of the conduct/disability performs a second and more substantive role as well: it reflects an underlying principle of protection for disabled and diseased individuals who have been shunned and chastised by the legal community and greater society for too long. As the Second Circuit Court of Appeals noted in *Teahan*, the difficulty of allowing courts to divorce a disability from the conduct it causes is that it allows an employer to "'rely' on any conduct or circumstance that is a manifestation or symptomatic of a [disability], and, in so doing, avoid the burden of proving that the [disability] is relevant to the job qualifications."[131] Thus, federal courts have recognized that conduct that does not affect one's job qualifications or one's daily abilities to perform on-the-job tasks should not be the basis for termination without a showing of reasonable accommodation resulting in an undue hardship.[132]

Along the spectrum of facts and holdings discussed in the cases above, a new standard should be established that will provide protection against discrimination for addicts and also adequately guide courts in determining whether specific conduct should be protected by the ADA and the Rehabilitation Act. This new standard would force courts to ask two questions in determining whether conduct is protected: (1) whether the conduct affects the workplace, and (2) whether the conduct is directly caused by the addiction or is secondary in nature.

The first inquiry is important because employers have no legitimate interest in making decisions based on conduct that does not affect the workplace. Therefore, if the conduct in question does not affect the workplace, the individual should be protected as disabled and any termination due to such conduct should be a

---

130. *See id.* The Second Circuit provides the following example of the above discussion for purposes of clarification:

> An employee has one leg shorter than the other, causing him to limp, which we assume is a "handicap" under § 504. The limp causes the worker to make a loud "thump" when he takes a step. He is fired, his employer says, because of the thumping. Under the district court's analysis the employee may not maintain a suit under § 504 because the handicap is the limp, not the thump; hence the worker was not fired "solely by reason of" his handicap, but rather because of an attribute caused by the handicap .... [T]he proper analysis is that the causal connection between the limp (handicap) and the thump (symptomatic manifestation of the handicap) is such that the employer did "rely" on the handicap.

*Id.*

131. *Id.* at 517.

132. *See* Wallace v. Veterans Admin., 683 F. Supp. 758, 767 (D. Kan. 1988).

discriminatory violation of the ADA and the Rehabilitation Act. To answer the second question, if the conduct does affect the workplace and is directly caused by the addiction, protection should be given to the disabled individual. The employee should be afforded an opportunity to prove he is "otherwise qualified," prove that the employer can make "reasonable accommodations" of the disability, or seek rehabilitatory assistance before termination actions begin.[133]

For example, termination of an employee for being convicted of driving while intoxicated when not on-duty, like the plaintiffs in *Ham*,[134] *Despears*,[135] and *Maddox*,[136] should be considered acts of discrimination in violation of the ADA and the Rehabilitation Act. Just as a diabetic who goes into insulin shock at home cannot be fired for conduct that does not affect work, alcoholics should not be fired for conduct relating to their disability while not at work. For example, if an alcoholic employee is a truck driver by profession, firing that employee for driving while intoxicated on-duty is certainly an appropriate sanction since the conduct affects the workplace and is secondary in nature, i.e., not directly caused by the addiction of alcoholism. That is, although an alcoholic cannot always fight the compulsion to drink, which is the primary conduct caused by their addiction, choosing to drink and then get behind the wheel of a truck is a secondary activity choice.

As alluded to above, focusing on the primary effects of addiction affecting the workplace setting also would mean taking another look at what an employer could do to "reasonably accommodate" an addict. Both the ADA and the Rehabilitation Act discuss, in their definitions of "reasonable accommodations," the possibility of part-time or modified work schedules to make rehabilitation programs more accessible.[137] Taking another look at these provisions means making them work for drug and alcohol addicts just

133. For a discussion of bringing an employment discrimination case under the Rehabilitation Act and the ADA, see *supra* Part I.C.

134. Ham v. Nevada, 788 F. Supp. 455 (D. Nev. 1992).

135. Despears v. Milwaukee County, 63 F.3d 635 (7th Cir. 1995).

136. Maddox v. University of Tenn., 62 F.3d 842 (6th Cir. 1995).

137. The ADA provides, in part, that "reasonable accommodation" may include "job structuring, part-time or modified work schedules [and] reassignment to a vacant position . . . ." 42 U.S.C. § 12111(9)(B) (1994). In addition, regulations implementing the Rehabilitation Act provide that "[r]easonable accommodation may include, but shall not be limited to: (1) Making facilities readily accessible to and usable by [disabled] persons, and (2) Job restructuring, part-time or modified work schedules, acquisition or modification of equipment . . . ." 29 C.F.R. § 1613.704(b) (1995). For an example of a reasonable accommodation accomplished by using a part-time schedule, see *supra* note 64.

as they can work for those with diabetes, those with mental disorders and those confined to a wheelchair.

Application of this new standard to federal adjudication of ADA and Rehabilitation Act claims would provide clear guidance and clarify the role of off-duty conduct in deciding discrimination cases brought by addicts. Off-duty conduct has no role in adjudicating employment discrimination claims. Further, focusing on the distinction between on-duty conduct related directly to addiction and on-duty conduct related indirectly to addiction provides a more focused inquiry for courts. If the conduct is attributable directly to the addiction, that is, if the conduct is caused by the addiction, then the conduct must be covered as a part of the employee's disability of addiction. Protecting addicts in the employment context from being terminated for conduct outside of the employment setting, and conduct within the employment setting that is directly caused by the employee's addiction, fulfills the legislative purposes of the ADA and the Rehabilitation Act to protect disabled individuals.[138]

### *B. Statutory Reform*

As one critic writes, "[a]lcoholism raises analytical problems that do not fit neatly into the current framework of the ADA and [the] Rehabilitation Act."[139] The language of the ADA must be reformed in order to reflect the legislative intent as demonstrated in its stated purposes.[140] The ADA states as its first purpose, "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities,"[141] and it invokes the power of congressional authority to enforce the Constitution and address the discrimination faced daily by those with

138. 42 U.S.C. § 12101(b)(1); 29 U.S.C. § 701(b). Clark notes that under section 504 of the Rehabilitation Act, the general focus of courts seems to be on the interest of the federal grantee, rather than on the interests of the employees who suffer from a disabling addiction. Clark, *supra* note 24, at 611. Clark notes that courts have created the dangerous presumption in their interpretation of the Rehabilitation Act that alcoholics who are not in rehabilitation and who are currently using alcohol are unable to perform their jobs effectively or pose a direct threat to the safety of property or others. *Id.* But denying alcoholics who are not rehabilitated or whose addictions are not "under control" the benefit of being classified as an "individual with a disability" *"altogether undermines* a fundamental purpose of the Act—preventing stigmas associated with disabilities and diseases." *Id.* at 612. (emphasis added).

139. Wolverton, *supra* note 23, at 544.

140. 42 U.S.C. § 12101(b). *See* statutory text *supra* note 20.

141. *Id.* § 12101(b)(1).

disabilities.[142] To bring the provisions of the ADA in line with its purpose, the ADA should be changed by limiting the "currently using" exemption[143] to cover addicts only when the addict is "currently using in the employment setting." A blanket denial of protection to addicts contradicts and defeats the stated purpose of the Act: to eliminate discrimination with respect to addicts.[144]

Similarly, the Rehabilitation Act should specifically protect addicts whose current use does not affect their job performance. The Rehabilitation Act addresses more specifically the effects of alcoholism at work than the ADA. The Rehabilitation Act does not protect anyone whose "current use of alcohol prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol abuse, would constitute a direct threat to property or the safety of others."[145] The ADA should adopt this more focused approach to current use and both Acts should adopt a similar approach in relation to the use of illegal drugs as well. Focusing on the way alcohol and drug use affects the work setting makes protection for alcoholics and drug addicts under the ADA more comprehensive and consistent with the protection afforded to other disabled individuals under the ADA. If the ADA was intended to expand the scope of protection afforded individuals with disabilities, ironically the Rehabilitation Act offers more protection, in fact, for those who currently use.[146]

One key improvement needed in both the ADA and the Rehabilitation Act is clarity. The scope of the employer's burden to accommodate alcoholic employees, for example, needs clarification, as does the weight assigned to the duty of an employer to determine if an employee is otherwise qualified.[147] Congress should make it clear that employees bear the burden of informing employers of their disabilities[148] to prevent confusion on the part of

142. *Id.* § 12101(b)(4). For example, the ADA waives a state's Eleventh Amendment immunity so claims may be brought against state governments who discriminate in their role as employers of individuals with disabilities. *See supra* note 27.

143. 42 U.S.C. § 12114(a) (1994). The language "*currently* using illegal drugs . . . does not require the employer to prove the individual illegally used drugs at the time of the action. The act is intended to deny protection to an individual whose illegal use of drugs has 'occurred recently enough to justify a reasonable belief' that the person's drug use is current." Murphy, *supra* note 63, at 22. (emphasis added).

144. 42 U.S.C. § 12101(b)(1). *See* statutory text *supra* note 20.

145. 29 U.S.C. § 706(8)(C)(v) (1994).

146. Kass, *supra* note 22, at 2 n.2.

147. Cottrell, *supra* note 17, at 1776.

148. *Id.*

the disabled employee trying to maximize his protection. Clearer articulation of what constitutes a reasonable accommodation[149] or a direct threat would also help employers protect themselves from liability and help employees protect their rights from the outset.[150]

## Conclusion

Addiction must be recognized for what it is: a disabling physical and psychological disease.[151] In addition to the disabling effects of addiction, its often private nature makes it an inappropriate subject for employers when effects of the disease are not manifested in the employment setting. The courts and legislature need to recognize that activities outside of the employment setting should not be subject to the intrusion of employers without a manifestation of the disability that affects the workplace. Drug and alcohol addiction should also not be a factor in employment decisions when the employee is "otherwise qualified." The Rehabilitation Act forbids discrimination by employers "solely on the basis of" an employee's disability in such cases.[152]

Courts need to focus on medical realities rather than social prejudices, and protect addicts in the workplace as any other person with a disability is protected by the ADA and the Rehabilitation Act. When a lung cancer patient, who acquires her disease from smoking, experiences a period of remission after a successful round of treatments, we do not stigmatize her habit or tell her that it was "about time" she kicked her "filthy smoking problem." We realize this is not the time to point fingers of blame. It is time to focus on accommodation and healing. Accordingly, the courts interpreting employment discrimination laws must not banish and shun drug and alcohol addicts who start the rehabilitation process. Addicts need help before, during and after treatment just as much as the cancer patient. A frigid, intolerant and discriminatory legislative and judicial system offers little security and encourage-

149. *Id.*

150. For example, the Rehabilitation Act currently prohibits the use of alcohol that creates a direct threat to the property or safety of others. 29 U.S.C. § 706(8)(C)(v). A doctor with an alcohol problem who drinks before work and then performs surgery is clearly a direct threat to "others" (i.e. patients). Although a secretary who drinks before work and then answers phones and greets people seems to be much less a threat, the current definition leaves these discretionary factual decisions to the courts. The legislature should act to protect disabled individuals specifically, rather than wait for the courts to do so.

151. For a discussion of addiction as a disabling disease, see *supra* note 48.

152. *See* 29 U.S.C. § 794(a).

ment to the diseased and disabled addicts whom we are legally and morally bound to protect from discrimination.

The trend toward intolerance must be rejected in favor of a course toward compassion. Judicial interpretations of statutes protecting addicts against discrimination in the workplace as a result of their disability must remember the stated purpose of the legislation: "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[153]

153. 42 U.S.C. § 12101(b)(1).