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Note

Wiping the Slate Clean: Expunging Records of Disability-Caused Misconduct as a Reasonable Accommodation of the Alcoholic Employee Under the ADA

Gloria Y. Lee*

William Singer was a dispatcher in the communications center of the United States Capital Police.1 Although his supervisors commended him for excellent work, he experienced difficulties in his job.2 He had attendance problems and frequently violated a "call-off" rule, which required officers who request unscheduled leave to do so at least one hour before their shifts are to begin.3 The source of his misconduct was his alcoholism.4

As a result of numerous infractions of company policy, Singer's employer issued him notices of discipline.5 Singer initially denied having a drinking problem, but eventually disclosed that he was an alcoholic and voluntarily entered a rehabilitation program.6 After recommending his removal, his employer then offered him a last-chance agreement.7 The employer, however, refused Singer's request for "a firm choice and a fresh start," which would have entitled him to a choice between treatment and discipline.8 Under such an agreement, if

* J.D. Candidate 1998, University of Minnesota Law School; B.A. 1994, Swarthmore College.
2. Id.
3. Id.
4. See id. (relating that Singer disclosed to his employer that he was an alcoholic and that his alcoholism caused him to violate the "call-off" rule).
5. Id.
6. Id.
7. Id. Singer's employer proposed the last-chance agreement as an alternative to his discharge. Id.
8. See id. (noting that the employer's version of the last-chance agree-
Singer chose treatment, prior discipline would be rescinded and all documentation of the discipline would be purged from his personnel file.9

Singer subsequently brought suit under the Government Employee Rights Act of 1991,10 which incorporates Title I of the Americans with Disabilities Act (ADA).11 The administrative board found that the employer failed to make reasonable accommodations by declining to provide Singer with "a firm choice and a fresh start."12 The Federal Circuit reversed, holding that the ADA "does not require a retroactive accommodation for a disability, which is what is meant by a fresh start."13 Accordingly, the court concluded that there was no need to expunge documentation concerning the discipline from Singer's personnel records.14 In arriving at its decision, the court explicitly declined to adopt the reasoning of two federal district courts that held otherwise.15

By bringing his claim under the ADA, Singer participated in an ever-growing area of litigation.16 Passed in 1990, the ADA not only prohibits private employers from discriminating against qualified individuals with disabilities,17 but also requires them to reasonably accommodate disabled individuals to enable them to perform their jobs.18 The ADA does not enumerate specific accommodations considered reasonable and thus leaves the requirement open to much interpretation.

Courts and employers have struggled to determine when an accommodation is reasonable and required by the ADA, particularly when alcoholic employees engage in some sort of misconduct related to their alcoholism. Some courts have upheld employers' decisions to discipline misconduct arising from

9. See id. (describing Singer's version of the last-chance agreement, which the Office of Senate Fair Employment Practices Independent Hearing Board found appropriate as a reasonable accommodation).
11. SSA, 95 F.3d at 1107.
12. Id. at 1104.
13. Id. at 1107.
14. Id. at 1109.
15. Id. at 1108.
16. See infra note 43 and accompanying text (asserting that ADA litigation is on the rise).
18. Id. § 12112(b)(5)(A).
the alcoholism. Others have concluded that employers should not rely on prior disability-caused misconduct related to alcoholism, especially once the individual recovers from the alcoholism. The result of this judicial inconsistency is a lack of clear guidelines for employers to follow. Moreover, some cases have left open the strong possibility that alcoholic individuals will not receive reasonable accommodations. These shortcomings are critical in light of alcoholic employees' tremendous impact on the workplace and the ADA's influence as a recent and fast-growing area of employment discrimination law.

This Note contends that courts should take a consistent approach toward alcohol-caused misconduct and hold that alcoholic employees should receive reasonable accommodation based on the type of disability-caused misconduct in which they engage. Part I discusses the Rehabilitation Act and the ADA, the two primary pieces of legislation that provide federal protection for disabled employees. Part I also discusses the case law on alcoholism as a disability under the two statutes and reviews the courts' treatment of misconduct that arises from a disability. Part II critically examines the reasoning courts use when analyzing disability-caused misconduct, with special emphasis on how courts have failed to differentiate between distinct types of misconduct. Part III argues that employers and courts must distinguish between different types of disability-caused misconduct, especially when considering expunging records as a reasonable accommodation. Part III also proposes that courts allow expungement of records as a reasonable accommodation only under certain conditions. This approach properly balances the legitimate interests of the employer in maintaining a safe and productive workplace with the

19. See infra notes 87-90 and accompanying text (describing the position of the majority of courts regarding the discipline of misconduct arising from a disability).

20. See infra note 106 and accompanying text (indicating that reasonable accommodations include forgiving prior misconduct once the individual starts rehabilitation).

21. For example, one study calculated lost revenue because of alcoholic employees at over $50 billion annually. National Inst. on Alcohol Abuse & Alcoholism, U.S. Dep't of Health & Human Servs., Sixth Special Report to the U.S. Congress on Alcohol and Health 22 (1987). Additionally, 10 to 25% of the American population is "sometimes on the job under the influence of alcohol or some illicit drug." Federico E. Garcia, The Determinants of Substance Abuse in the Workplace, 33 Soc. Sci. J. 55, 56 (1996).

22. See infra note 39 and accompanying text (predicting the ADA's immense impact).
larger policy goal of eliminating employment discrimination against the disabled by providing reasonable accommodations.

I. ALCOHOLISM AND EMPLOYMENT DISCRIMINATION

A. THE ADA: EXTENDING THE PROTECTION OF THE REHABILITATION ACT

Individuals with disabilities find protection from employment discrimination in two different federal statutes: the Rehabilitation Act of 1973 and the Americans with Disabilities Act (ADA). While the substantive provisions are similar in both, Congress enacted the ADA because too many disabled employees were not covered by the Rehabilitation Act, which only applies to federal employers. By prohibiting discrimination by private employers, the ADA greatly expanded the federal prohibition of employment discrimination against the disabled.

1. The Rehabilitation Act of 1973: Attempting to Eradicate Discrimination Against the Disabled in the Public Workplace

As the first piece of major legislation to address discrimination against the disabled, the Rehabilitation Act of 1973 "aimed at improving the lot of the handicapped" and specifically sought to eliminate barriers that the disabled faced in the public workplace. The Act prohibits federal government em-

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25. See infra notes 44-45 and accompanying text (describing the relationship between the Rehabilitation Act and the ADA).
26. See infra notes 35-36 and accompanying text (indicating that Congress enacted the ADA because of the Rehabilitation Act's limited coverage of only federal employees).
30. See 29 U.S.C. § 701 (noting that one of the Act's purposes was to empower individuals with disabilities to maximize employment opportunities);
ployers and contractors from discriminating against qualified individuals with disabilities. The Act also places an affirmative obligation on the employer to accommodate disabled employees and to promote the employment of individuals with disabilities. To comply with the Act, federal agencies must structure their policies and programs to afford disabled employees equal opportunities in both job assignments and promotions.

2. The Americans with Disabilities Act of 1990: Broadening Protection Against Discrimination for the Disabled to the Private Workplace

Recognizing the importance of prohibiting employment discrimination against the disabled in both the public and pri-

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see also Consolidated Rail, 465 U.S. at 632 (suggesting that "enhancing employment of the handicapped was... the focus of the 1973 legislation"); Thomas H. Christopher & Charles M. Rice, The Americans with Disabilities Act: An Overview of the Employment Provisions, 33 S. TEX. L. REV. 759, 761 (1992) (describing the law as "an effort by Congress to increase the opportunities for employment [for] disabled individuals by promoting vocational training and social services and by outlawing employment discrimination against the disabled").

31. The Act is limited to federal government employees and recipients of federal grants. 29 U.S.C. § 794(a). Section 794 provides in pertinent part: 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 any Executive agency or by the United States Postal Service.

Id.

32. Id. The Code of Federal Regulations defines a "qualified handicapped person" as "a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question." 45 C.F.R. § 84.3(k)(1) (1996). Unlike the statutory language in the Rehabilitation Act, which now refers to "qualified individuals with disabilities," the Code of Federal Regulations continues to refer to qualified "handicapped" persons.

33. Southeastern Community College v. Davis, 442 U.S. 397, 410 (1979); Buckingham v. United States, 998 F.2d 735, 739 (9th Cir. 1993); Shirey v. Devine, 670 F.2d 1188, 1201 (D.C. Cir. 1982); see 29 U.S.C. § 791(b) (requiring federal agencies to submit an affirmative action plan for the "hiring, placement, and advancement of individuals with disabilities in such department, agency, or instrumentality" that "shall include a description of the extent to which and methods whereby the special needs of [handicapped] employees... are being met"); id. § 793(a) (stating that federal contractors "shall take affirmative action to employ and advance in employment qualified individuals with disabilities").

vate sectors,\textsuperscript{35} Congress passed the ADA\textsuperscript{36} in 1990. The ADA currently applies to all employers with fifteen or more employees.\textsuperscript{37} The Equal Employment Opportunity Commission (EEOC) is responsible for enforcing Title I of the ADA, which prohibits employment discrimination on the basis of a disability.\textsuperscript{38} It has been called "the most sweeping civil rights legislation since the Civil War era,"\textsuperscript{39} reflecting the remedial purpose of the statute to encourage conscious efforts to eliminate all discrimination against the disabled.\textsuperscript{40}

Because the provisions of the ADA are still relatively new,\textsuperscript{41} the full impact of the ADA on businesses is not yet


\textsuperscript{36} 42 U.S.C. §§ 12101-213 (1994).

\textsuperscript{37} \textit{Id.} § 12111(5). The Act excludes from the ADA the following employers: the federal government, federal government corporations, Indian tribes, and bona fide private membership clubs. \textit{Id.}

\textsuperscript{38} 29 C.F.R. app. § 1630 (1996).

\textsuperscript{39} 135 CONG. REC. S10,714 (daily ed. Sept. 7, 1989) (statement of Sen. Hatch). Others have viewed the ADA as "the most significant disability legislation in American history." Penn Lerblance, \textit{Introducing the Americans with Disabilities Act: Promises and Challenges}, 27 U.S.F. L. REV. 149, 149 (1992). Still others have compared the ADA to the "Emancipation Proclamation." 135 CONG. REC. S10,765-01 (daily ed. Sept. 7, 1989) (statement of Sen. Harkin). The impact of the ADA is immense, considering the 43 million disabled Americans the Act potentially affects. \textit{See} 42 U.S.C. § 12101(a)(1) (documenting congressional findings that "some 43,000,000 Americans have one or more physical or mental disabilities, and that this number is increasing as the population as a whole is growing older")

\textsuperscript{40} 42 U.S.C. § 12101(b)(1). The Equal Employment Opportunity Commission's (EEOC) regulations further describe the ADA as "an antidiscrimination statute that requires that individuals with disabilities be given the same consideration for employment that individuals without disabilities are given." 29 C.F.R. § 1630.1(a). The ADA's simple, yet broad, objective is that "people with disabilities be treated with dignity and respect by being judged as individuals on the basis of ability rather than on the basis of irrational fears or patronizing attitudes." Robert L. Mullen, \textit{The Americans with Disabilities Act: An Introduction for Lawyers and Judges}, 29 LAND & WATER L. REV. 175, 213 (1994).

known, but ADA litigation is rapidly increasing. Noting that Congress modeled the employment provisions of the ADA after the employment sections of the Rehabilitation Act, courts have relied on judicial interpretations of the Rehabilitation Act to interpret cases involving the ADA. Some commen-

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42. See Hindman v. GTE Data Servs., Inc., No. 93-1046-CIV-T-17C, 1994 WL 371396, at *2 (M.D. Fla. June 24, 1994) (noting the “paucity” of cases interpreting the ADA because of its recent enactment); Christopher & Rice, supra note 30, at 760 (predicting the major impact of the ADA on the American business community); Mullen, supra note 40, at 176 (recognizing that the full ramifications of the ADA will not be apparent for some time).


44. Wendy Y. Voss, Note, Employing the Alcoholic Under the Americans with Disabilities Act of 1990, 33 WM. & MARY L. REV. 895, 895 (1992); see id. at 903-04 (noting that most of the language in the two statutes is the same); see also 136 CONG. REC. H2427-28 (daily ed. May 17, 1990) (statement by Rep. Owens) (indicating that the fundamental concepts of the ADA are derived largely from the Rehabilitation Act and its implementing regulations); ADA Employment Regulations, 56 Fed. Reg. 35,726 (1991) (codified at 29 C.F.R. § 1630) (containing the EEOC's specific statement that the agency was guided by the regulations of the Rehabilitation Act and the case law interpreting those regulations in developing the regulations under the ADA).

45. See Maddox v. University of Tenn., 62 F.3d 843, 846 n.2 (6th Cir. 1995) (accepting that the lower court's reasoning with respect to the Rehabilitation Act claim "applied with equal force" to the ADA claim since the protection offered by both Acts is the same); Collings v. Longview Fibre Co., 63 F.3d 828, 832 n.3 (9th Cir. 1995), cert. denied, 116 S. Ct. 711 (1996) (indicating that cases involving claims under the Rehabilitation Act are instructive to cases involving the ADA and commenting that the legislative history of the ADA indicates that Congress intended judicial interpretation of the Rehabilitation Act to be incorporated by reference when interpreting the ADA); McCullough v. Branch Banking & Trust Co., 35 F.3d 127, 131 (4th Cir. 1994) (determining that "[t]he federal policies behind the ADA and the Rehabilitation Act are similar"). Courts have also held that the substantive standards for determining liability are the same whether the suit is filed against a federally funded employer under the Rehabilitation Act or against a private employer under the ADA. Myers v. Hose, 50 F.3d 278, 281 (4th Cir. 1995). Since courts rely on case law regarding the Rehabilitation Act to interpret the ADA and vice versa, this Note will likewise use case law on both statutes interchangeably.

Moreover, the Rehabilitation Act Amendments of 1992, Pub. L. 102-569, 106 Stat. 4344 (1992), provide that courts are to interpret both laws in the same manner with regard to employment discrimination claims. The amendments provide that "[t]he standards used to determine whether this section has been violated in a complaint alleging nonaffirmative action employment
tators have observed, however, that unlike the Rehabilitation Act, the ADA does not require that private employers give priority in hiring or promotions to disabled employees.\textsuperscript{46}

a. Title I: The Employment Provisions

Title I of the ADA\textsuperscript{47} attempts to balance the legitimate interests of disabled individuals to be free from discrimination in the workplace with the interests of private businesses and governments, who have finite resources and capabilities.\textsuperscript{48} To achieve the ADA's comprehensive national mandate for the elimination of discrimination against the disabled, courts may need to compromise the legitimate interests of the employer in maintaining a profitable business.\textsuperscript{49} Ultimately, the weighing of interests involves a delicate and difficult task for the courts.

An ADA violation arises when an employer discriminates against a qualified individual with a disability\textsuperscript{50} in any aspect discrimination . . . shall be the standards applied under title I of the Americans with Disabilities Act of 1990." 29 U.S.C. § 794(d) (1996). \textit{But see} Voss, \textit{supra} note 44, at 908-11 (contending that courts should not automatically adopt case law developed under the Rehabilitation Act in ruling on questions presented under the ADA because the underpinnings of the Acts are different).

\textsuperscript{46} \textit{See}, e.g., Richard H. Nakamura, Jr., \textit{Pride and Prejudice in the Workplace}, \textit{Fed. Law.}, June 1996, at 22, 27 (arguing that the ADA is not an "affirmative action statute"); \textit{see also} \textit{supra} note 33 and accompanying text (discussing congressional intent that the federal government take affirmative action to become the model employer for the disabled). \textit{But see} Mullen, \textit{supra} note 40, at 180 (positing that the ADA is, in reality, an affirmative action law since employers cannot passively achieve compliance with the ADA).

\textsuperscript{47} 42 U.S.C. §§ 12101-213 (1994). At the basis of the employment provisions is the principle that those individuals with disabilities who are able to perform the essential functions of a job, with or without reasonable accommodations, should not be barred from employment opportunities because of a disability. Christopher & Rice, \textit{supra} note 30, at 765.

The ADA is comprised of two other sections. Title II forbids public entities, meaning any state or local government, from excluding or denying services and benefits for disabled individuals because of that person's disability. 42 U.S.C. §§ 12131-34; \textit{id.} §§ 12141-65. Title III provides that places of public accommodation may not discriminate on the basis of a disability in the full and equal enjoyment of goods, services, facilities, privileges, advantages, or accommodations. \textit{Id.} §§ 12181-89.

\textsuperscript{48} Nakamura, \textit{supra} note 46, at 27.

\textsuperscript{49} \textit{For an example of how employers may need to consider the interests of a disabled employee over their own pecuniary interests when providing reasonable accommodations, see infra text accompanying note 68. \textit{But see} text accompanying note 68 (explaining that certain accommodations are not reasonable because they would impose an undue hardship on the employer's business concerns).

\textsuperscript{50} \textit{See} 42 U.S.C. § 12111(8) (stating that the ADA only protects a
of employment, including the application process, hiring and advancement decisions, the discharge of employees, compensation, job training, or any other terms, conditions, and privileges of employment.\(^{51}\) According to the ADA, a disability includes (1) a physical or mental impairment that substantially limits one or more of the major life activities\(^{52}\) of such individual;\(^{53}\) (2) a record of such impairment in the past;\(^{54}\) or, (3) being regarded as having such an impairment.\(^{55}\)

"qualified individual with a disability," which means "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires").

51. *Id.* § 12112(a). The EEOC further detailed the various aspects of employment to which Title I of the ADA applies. The coverage is broad and includes any "term, condition, or privilege of employment." "EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT, at VII-2 (1995) [hereinafter EEOC TECHNICAL ASSISTANCE MANUAL]. In other words, once employees or applicants are deemed to be qualified individuals with disabilities, the ADA protects them from discrimination in virtually "every phase of employment." Mullen, *supra* note 40, at 186.

52. The regulations define major life activities as functions "such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i) (1996).


54. *Id.* Congress added this category to the definition of a "disability" to combat the effects of erroneous, but prevalent, views about individuals with a record of a past disability. School Bd. of Nassau County v. Arline, 480 U.S. 273, 279 (quoting Southeastern Community College v. Davis, 442 U.S. 397, 405-06 n.6 (1979)). Moreover, this part of the statutory definition reflects Congress's desire to protect those who have recovered or are recovering from a disabling condition. *See* H.R. REP. No. 101-485, pt. 2, at 52 (1990), *reprinted in* 1990 U.S.C.C.A.N 334 (noting that "[t]his provision is included . . . in part to protect individuals who have recovered from a physical or mental impairment which previously substantially limited them"); S. REP. No. 101-116, at 23 (1989) (indicating the same); 29 C.F.R. app. § 1630.2(k) (explaining the intent of this provision to ensure that those with a history of disability are not discriminated against).

The EEOC's interpretive guidance, contained in the Appendix that follows the regulations promulgated by the EEOC, states that an employer will violate this provision "if a record relied on by an employer indicates that the individual has or has had a substantially limiting impairment." 29 C.F.R. app. § 1630.2(k).

55. 42 U.S.C. § 12102(2)(C); 29 C.F.R. § 1630.2(g)(3); *id.* app. § 1630; EEOC Compl. Man. (CCH) ¶ 6881 (Mar. 1995); *see also* 45 C.F.R. § 84.3(j)(1) (1996) (offering the same definition under section 504 of the Rehabilitation Act).
b. The Reasonable Accommodations Requirement

The heart of the ADA, and possibly the most controversial part of the Act, is the "reasonable accommodations" requirement. This provision requires employers not only to refrain from disability-based discrimination, but to make affirmative reasonable accommodations for the known physical or mental limitations of an otherwise qualified individual with a disability.61

56. Nakamura, supra note 46, at 22.
57. Christopher & Rice, supra note 30, at 777. Determining what constitutes a "reasonable accommodation" is predicted to be the subject of much debate and litigation in the future. Lerblance, supra note 39, at 155. This is not surprising since the term is an "open-ended" one, leaving considerable room for different interpretations. Schmidt v. Safeway, Inc., 864 F. Supp. 991, 996 (D. Or. 1994).
58. 42 U.S.C. § 12112(b)(5)(A). The best description of the general duty to accommodate is that it requires looking toward the future for the best solution for both the employer and the employee. Hartman, supra note 35, at 927.
59. Although all employers must strive to provide these reasonable accommodations, courts hold federal employers, who are subject to the Rehabilitation Act, to a higher standard in providing accommodations. Carr v. Reno, 23 F.3d 525, 530 (D.D.C. 1994); see Voss, supra note 44, at 933 (contending that courts should recognize that federal employers have a greater duty to accommodate alcoholic employees than private employers and should thus treat the two employers differently).

The rationale behind the higher standard is Congress's view that the federal government should be a model employer. See 29 U.S.C. § 701(b)(2) (1994) (indicating that the federal government should play a "leadership role" in promoting the employment of individuals with disabilities). The Code of Federal Regulations mandates that "[a]gencies shall give full consideration to the hiring, placement, and advancement of qualified mentally and physically handicapped persons. The Federal Government shall become a model employer of handicapped individuals. An agency shall not discriminate against a qualified physically or mentally handicapped person." 29 C.F.R. § 1613.703 (1995). Legislative history on the Rehabilitation Act also suggests that the federal government has a greater affirmative duty in the employment of the disabled. See 95 CONG. REC. 30,347 (1978) (statement of Sen. Cranston) (indicating that Congress expected the federal government to be a leader in the employment of handicapped individuals).
60. Christopher & Rice, supra note 30, at 777.
61. Id. The regulations define "reasonable accommodations" 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 perform 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.
Under the statute, whether an accommodation is reasonable depends on the particular circumstances of each case.62 No duty to make reasonable accommodations for a disability exists, however, if an employer is unaware of the disability.63 Accordingly, an individual with a disability is responsible for informing the employer of the disability and the need for an accommodation.64

c. Employer Defenses: Undue Hardship and Direct Threat

The ADA excuses an employer from the reasonable accommodation requirement if providing such accommodation would be an "undue hardship" on the operation of the business.65 Employers must evaluate four factors when determining whether providing an accommodation would create an undue hardship: (1) the nature and cost of the accommodation, (2) the financial resources of the employer,66 (3) the type of operation of the employer, and (4) the impact of the accommodation on the operation of the facility.67 Even if an accommodation is an undue hardship, the employer must provide as much of the accommodation that would not constitute an undue hardship and permit the disabled employee to provide the remainder.68

29 C.F.R. § 1630.2(o)(1) (1996). The regulations also suggest how employers should determine the appropriate reasonable accommodation given the circumstances. Employers should initiate an informal, interactive process with the qualified individual with a disability in need of an accommodation. Id. § 1630.2(o)(3). They should then attempt to identify the precise limits arising from the disability and the possible accommodations that could overcome those limitations. Id.

Given the broad, generic guidance in the regulations, the confusion over what constitutes a reasonable accommodation is understandable. See supra note 57 (describing the term "reasonable accommodation" as an open-ended one that is causing much debate).

62. See supra note 61 (detailing the various, case-specific factors employers should evaluate to find a reasonable accommodation of a disabled employee).

63. See 42 U.S.C. § 12112(b)(5)(A) (imposing the duty to make reasonable accommodations only of known disabilities); 29 C.F.R. app. § 1630.9 (indicating that an employer would not be expected to accommodate disabilities of which it is unaware); see also Miller v. National Casualty Co., 61 F.3d 627, 630 (8th Cir. 1995) (finding no duty of accommodation because the employee did not inform the employer of her manic depression).


66. Employers may have to incur substantial costs to accommodate an individual with disabilities. 29 C.F.R. app. § 1630.15(d).

67. Id. § 1630.2(p)(2).

68. Id. app. § 1630.15(d).
To prove undue hardship, employers may not simply assert that a proposed accommodation constitutes an undue hardship. Rather, they must present objective evidence that demonstrates that the accommodation will actually cause an undue hardship. An accommodation generally imposes an undue hardship only if it is unduly costly or disruptive or would fundamentally change the nature of the employer’s obligations. Coworkers’ fears or prejudices about a disability or negative morale would not qualify as an undue hardship. The high standard of proof required by the ADA reflects Congress’s intent to place significant responsibility on employers to provide reasonable accommodations.

Because an employer needs to ensure a safe workplace, the ADA provides the employer with a “direct threat” or “safety” defense to the charge of unlawful discrimination. Under this defense, if an employee poses a direct threat to the health or safety of the employee or to others in the workplace, the employee is not protected under the ADA, and the employer may discharge or discipline the employee. The risk, however,

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69. Id.
70. Id.
72. 29 C.F.R. APP. § 1630.15(d). But see Voss, supra note 44, at 947 (suggesting that employers should be able to consider the intangible effects of an individual’s alcoholism, like employee morale and productivity, in analyzing undue hardship).
73. Christopher & Rice, supra note 30, at 783; see H.R. REP. NO. 101-485, PT. 2, AT 68 (asserting that the ADA employs a higher standard than Title VII that is “necessary in light of the crucial role that reasonable accommodation plays in ensuring meaningful employment opportunities for people with disabilities”); H.R. REP. NO. 101-485, PT. 3, AT 40 (contending that the “duty to provide reasonable accommodation... is a much higher standard than the duty to remove barriers in existing buildings... and creates a more substantial obligation on the employer”).
74. 42 U.S.C. § 12113(b) (1994).
75. Direct threat means “a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.” 29 C.F.R. § 1630.2(r). Hence, it is important that employers first consider whether a reasonable accommodation would decrease the risk of harm to an acceptable level. Employers must base their determination on reasonable medical judgment and consider the following factors: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and, (4) the imminence of the potential harm. Id.
must be significant and probable; a speculative or remote risk is insufficient. In claiming a direct threat to safety, the employer must rely on objective, factual evidence rather than on subjective perceptions or irrational fears. According to one commentator, requiring objective evidence allows an employer to consider only the individual's current condition.

B. ALCOHOLISM AS A DISABILITY

Alcoholism is a recognized disability under the Rehabilitation Act and the ADA. While the ADA does not explicitly name alcoholics as a protected class, it specifically protects recovered or recovering substance abusers. This protection

77. 29 C.F.R. app. § 1630.2(r). Many courts, however, have not followed the EEOC's strict standard. Christopher G. Bell, ADA and FMLA Litigation Results from Around the Country, in EMPLOYMENT LAW HANDBOOK 1, 4 (Minn. Bar Ass'n No. 1277, 1996). As a result, many employers have successfully raised the direct threat defense. Id.; see, e.g., Doe v. University of Md. Medical Sys. Corp., 50 F.3d 1261, 1266 (4th Cir. 1995) (holding that a neurological resident with HIV presented appreciable risk of catastrophic harm which justified exclusion from the residency program); Bradley v. University of Tex. M.D. Anderson Cancer Center, 3 F.2d 922, 955 (5th Cir. 1993) (upholding involuntary reassignment of surgical technician with HIV because of appreciable risk of catastrophic harm).

78. 29 C.F.R. app. § 1630.2(r); see Mullen, supra note 40, at 191 (noting the EEOC's cautioning that subjective perceptions, irrational fears, patronizing attitudes, or stereotypes about the nature or effect of a particular disability or disability in general will not support a direct threat defense).

79. Christopher & Rice, supra note 30, at 790.


82. The statute never states that the ADA applies to alcoholics, although case law and the regulations clearly indicate that alcoholics are covered. See sources cited supra note 81.

83. See 42 U.S.C. § 12114(b)(1)-(2) (1994) (stating that the ADA neither
prevents employers from discriminating against individuals on
the basis of their past substance abuse and rewards and en-
courages rehabilitation. Consequently, employers may not
rely on the employee’s status as an alcoholic as grounds for
discipline or discharge. The ADA, however, provides that an
employer may hold an alcoholic employee to the same qualifi-
cation standards for employment, behavior, or job performance
used for other employees, even if problematic performance or
behavior is related to the employee’s alcoholism.

1. Disability-Caused Misconduct

The majority of courts have held that an employer may
discipline a substance-addicted employee for misconduct, even
when that misconduct arises because of the substance addic-
tion. The premise behind these courts’ reasoning is that the
excludes those who are rehabilitated and no longer engaging in substance
abuse nor those who are participating in a rehabilitation program and no
longer engaging in such use); cf. Grimes v. United States Postal Serv., 872 F.
Supp. 668, 674 (W.D. Mo. 1994) (concluding that courts extend protection un-
der the Rehabilitation Act only to those who have successfully completed a
drug rehabilitation program or are currently in such a program and not using
drugs at the time); Nisperos v. Buck, 720 F. Supp. 1424, 1427 (N.D. Cal. 1989)
(finding that a rehabilitated drug or alcohol abuser is a protected individual
under the Rehabilitation Act).

The second prong of the statutory definition of “disability,” namely having
a record of a substantially limiting impairment, also protects rehabilitated or
rehabilitating alcoholics. Christopher & Rice, supra note 30, at 770-71. Ac-
cordingly, if an employer relies on an individual’s record of past alcohol abuse,
the employer may violate the ADA. See supra note 54 (explaining that a record
of a substantially limiting impairment qualifies as a disability and that an em-
ployer discriminates on the basis of the disability if relying on that record).

(positing that the policy reason for protecting rehabilitated drug users is to
prevent employers from firing them solely on the basis of their past drug use).

85. See, e.g., Burka v. New York City Transit Auth., 680 F. Supp. 590, 600
(S.D.N.Y. 1988) (indicating that protecting rehabilitated or rehabilitating drug
users is consistent with strong public policy of encouraging abusers to seek
of including past drug abusers within the protection of the Rehabilitation Act
since, as a matter of public policy, Congress should provide assistance for
those who have overcome their addiction and give some incentive to those who
are attempting to overcome it).

86. 42 U.S.C. § 12114(c)(4).

87. See, e.g., Despears v. Milwaukee County, 63 F.3d 635, 636 (7th Cir.
1995) (indicating that an employer could lawfully discharge an alcoholic main-
tenance worker for driving drunk); Maddox v. University of Tenn., 62 F.3d
843, 847 (6th Cir. 1995) (recognizing the distinction between discharging
someone for unacceptable misconduct and discharging someone because of the
disability); Collings v. Longview Fibre Co., 63 F.3d 828, 832 (9th Cir. 1995)
ADA is not meant to shield disabled individuals from misconduct and thereby discriminate in their favor, especially if the misconduct is criminal or egregious in nature. The majority of courts, therefore, allow employer disciplinary action for misconduct that results from a disability while prohibiting discrimination on the basis of the disability itself. Nevertheless, the question arises whether an employer who disciplines such misconduct also discriminates against the individual on the basis of the disability and consequently violates the ADA.

Only the Second Circuit in Teahan v. Metro-North Commuter Railroad Co. has found in favor of the terminated em-

(finding that an employer terminated employees because of their drug-related misconduct as opposed to their drug-addiction); Little v. FBI, 1 F.3d 255, 259 (4th Cir. 1993) (concluding that termination based on misconduct is distinct from an employee's status as an alcoholic or drug addict); Taub v. Frank, 987 F.2d 8, 11 (1st Cir. 1993) (holding that an employee who was fired for his addiction-related criminal possession of heroin was not protected by the Rehabilitation Act).

88. See Despears, 63 F.3d at 637 (claiming that a refusal to excuse a disabled person who commits a crime under the influence of the disability is not discrimination against the disabled, but a refusal to discriminate in their favor); cf. Den Hartog v. Wasatch Academy, 909 F. Supp. 1393, 1401 (D. Utah 1995) (commenting that Congress intended the ADA to prohibit unfair stereotypes about the disabled, but not to shield the disabled from consequences of misconduct).

89. See, e.g., Despears, 63 F.3d at 637 (arguing that a reasonable accommodation of an employee's disability should not require employers to overlook infractions of the law); Maddox, 62 F.3d at 848 (concluding that employers subject to the Rehabilitation Act and ADA must be allowed to take appropriate action with respect to an employee on account of criminal or egregious conduct, regardless of whether the employee is disabled); Wilber v. Brady, 780 F. Supp. 837, 840 (D.D.C. 1992) (indicating that those who engage in serious misconduct will not find refuge in the Rehabilitation Act).

90. See, e.g., Maddox, 62 F.3d at 847 (arguing that the language of the Rehabilitation Act and ADA "makes clear that such distinction is warranted"); Collings, 63 F.3d at 832 (recognizing a difference between termination because of misconduct and termination because of a disability); Little, 1 F.3d at 258 (noting that the issue of misconduct is distinct from status as an alcoholic or drug addict).

91. For instances of terminated alcoholic employees making such claims, see Despears, 63 F.3d at 636; Maddox, 62 F.2d at 846-47; Little, 1 F.3d at 257.

92. Several federal district courts have also offered the reasoning set forth by the Second Circuit. See Hindman v. GTE Data Serv., Inc., No. 93-1046-CIV-T-17C, 1994 WL 371396, at *3 (M.D. Fla. June 24, 1994) (accepting that an employer relies on a disability when it justifies termination based on conduct caused by the disability); Hogarth v. Thornburgh, 833 F. Supp. 1077, 1085 (S.D.N.Y. 1993) (asserting that the only logical interpretation of the Rehabilitation Act is that if a disability manifests itself in certain behavior and an employee is discharged because of that behavior, the individual has been terminated solely because of the disability); Ham v. Nevada, 788 F. Supp. 455,
ployee and held that misconduct caused by a disability is protected. The court did not find persuasive the majority view's distinction between lawful disciplining of misconduct and unlawful discriminating on the basis of the disability. Hence, the court held that when an employer terminates a disabled employee because of misconduct that results from the disability, the employer impermissibly discriminates on the basis of the disability itself.

Other courts have implied that if employee misconduct arises as a direct result of the disability, employers cannot rely on that misconduct in discharging the employee. The Seventh Circuit in Despears v. Milwaukee County suggested that an employee would have prevailed on his claim if he could have shown that his alcoholism was the sole cause of the misconduct that resulted in the discharge. Courts have also denied an ADA claim when a disability indirectly caused the misconduct. In other words, a tenuous chain of causation between

459 n.4 (D. Nev. 1992) (purporting that being fired for behavior caused by one's affliction is the same thing as being fired for one's affliction).
93. 951 F.2d 511 (2d Cir. 1991).
94. See id. at 517 (holding that termination of an employee that was justified as being due to absenteeism caused by substance abuse was termination "solely by reason of" that substance abuse).

In Teahan, an alcoholic employee brought a claim under the Rehabilitation Act, alleging that he was terminated because of his excessive absenteeism, which was caused by his alcoholism. Id. at 514. The court observed the legislative purpose in ensuring that rehabilitated or rehabilitating employees are not discriminated against on the basis of past substance abuse and reasoned that employers should not rely on past substance abuse-caused misconduct if the employee is undergoing rehabilitation or is successfully rehabilitated. Id. at 518.

95. See id. (asserting that discharge because of misconduct caused by a disability is equivalent to discharge because of the disability).
96. See id. at 515 (holding that an employee who has excessive unexcused absences from work as the result of alcoholism is terminated "solely by reason" of his disability when the employer relies on the absenteeism to terminate).
97. Some courts have suggested that discipline for misconduct that arises as a direct result of a disability may violate the ADA. Cf., e.g., Florida Bar v. Clement, 662 So. 2d 690, 699 (Fla. 1995) (concluding that because the employee's misconduct was not a direct result of his bipolar disorder, sanctions would not violate the ADA); Magruder v. Runyon, No. 94-3069, 1995 WL 311740, at *3 (10th Cir. May 22, 1995) (requiring employee to show a nexus between the conduct and the alleged alcoholism to raise a factual dispute whether she was terminated because of her disability).
98. 63 F.3d 635 (7th Cir. 1995).
99. Id. at 636.
100. See Taylor v. Dover Elevator Sys., Inc., 917 F. Supp. 455, 463 (N.D. Miss. 1996) (holding that the plaintiff failed to establish a causal chain be-
the disability and misconduct will defeat an employee's claim of discrimination based on the disability.102

2. Employee Defense of Addiction

When a federal agency discharges an employee for misconduct resulting from substance abuse, courts allow employees to rely on addiction as an affirmative defense.102 To establish an affirmative defense of addiction, terminated employees who bring claims under the Rehabilitation Act must demonstrate that they were under the influence of drugs or alcohol at the time of the offense.103 Employees must specifically show that the substance abuse impaired them so badly that they lacked control over their actions and diminished their capacity for exercising judgment at the time of the misconduct.104

3. Reasonable Accommodation of the Alcoholic Employee:
   Expungement of Records

       Consistent with the duty of accommodating other types of disabilities, employers must provide reasonable accommodations to their current and rehabilitated alcoholic employees.105

       tween his disability and his firing). In Taylor, an epileptic employee, who was terminated for fighting with a co-employee, alleged an ADA violation. According to the employee, "[h]e was fired for violating a company rule. He violated a company rule because he was more volatile than usual. He was more volatile than usual because he was taking Felbatol. He was taking Felbatol to control his epilepsy." Id. Because the result was "four times removed" from the disability, the court rejected the employee's claim. Id.

101 See Richardson v. United States Postal Serv., 613 F. Supp. 1213, 1215 (D.D.C. 1985) (rejecting plaintiff's claim because of a "tenuous chain of causation" between his alcoholism and his discharge). Richardson, an alcoholic postal worker, was suspended and eventually terminated after he was charged with assault with intent to kill his wife and himself. Id. at 1214. Richardson claimed that he had been drinking heavily when he had committed the offense. Id. at 1215. The court noted that "[t]he nexus between the crime and the alcohol is ... conjectural." Id. The court then indicated that "Richardson was discharged for his criminal conduct, not because of alcoholism or poor job performance due to alcohol." Id. The court thus suggested that firing an individual because of poor job performance caused by alcoholism would be an actionable claim.


103 Id.

104 Id. (citing Simms v. United States Postal Serv., 39 M.S.P.B. 308, 311 (1988)).

The types of accommodations found reasonable by the courts tend to center on encouraging and rewarding rehabilitation efforts. Some courts have held that forgiveness of prior alcohol-caused misconduct in proportion to the individual's willingness to undergo rehabilitation and favorable response to treatment is among the reasonable accommodations that an employer should provide an alcoholic employee. In *Callicotte* (proposing that the Rehabilitation Act's reasonable accommodation provision required federal employers to "exert substantial affirmative efforts to assist alcoholic employees toward overcoming their handicap before firing them for performance deficiencies related to drinking").

For example, employers may need to inform the employee of available counseling as a reasonable accommodation. See, e.g., Rodgers v. Lehman, 869 F.2d 253, 259 (4th Cir. 1989) (recommending that employers who suspect that an employee's poor job performance results from alcoholism should inform the employee of available counseling). The ADA may also require employers to offer leave without pay to an alcoholic employee who has already failed in treatment, but has an opportunity and is willing to enter another rehabilitation program. *Whitlock*, 598 F. Supp. at 137.

Employers must do more than simply treat the alcoholic employee with great patience and tolerance under the reasonable accommodation requirement. *Burchell* v. Department of the Army, 679 F. Supp. 1393, 1402 (D.S.C. 1988). It is unnecessary, however, that the employer recommend a specific inpatient treatment program before discharging the employee. *Fuller* v. Frank, 916 F.2d 558, 562 (9th Cir. 1990). Instead, reasonable accommodation requires only that the employer assist the employee in locating a program and give the employee time off to participate in it. *Id.* Once an employee enrolls in a rehabilitation program, the employer has an obligation to provide the employee with a reasonable period of time to demonstrate success before taking adverse action. *Keels* v. Department of the Navy, 9 M.S.P.B. 19 (1981). Additionally, the Merit System Protection Board has found that an employer should have canceled the proposed removal action and offered the employee another chance once the employee joined Alcoholics Anonymous and gained control over his alcoholism. *Ruzek* v. General Servs. Admin., 7 M.S.P.B. 437 (1981).


In *Walker*, a former government employee, who was a rehabilitated alcoholic, brought suit against the Department of Defense for discriminating against him as a disabled individual. 600 F. Supp. at 759. Walker alleged that his employer failed to make a reasonable accommodation for his alcoholism when it combined pre-treatment, alcohol-induced misconduct with post-treatment misconduct to calculate the punishment for the post-treatment misconduct. *Id.* The court ultimately rejected the employer's assertion that it made sufficient reasonable accommodations by reducing the initial proposed removal to a ten-day suspension and then allowing him to participate in a government-affiliated alcohol program. *Id.* at 762.

Instead, the court found that a reasonable accommodation entailed forgiving the past alcohol-induced transgressions in proportion to Walker's willingness to undergo, and favorable response to, treatment. *Id.* Further, "[u]sing of pre-treatment records conceded to be attributable to alcohol abuse for disci-
v. Carlucci, a federal district court held that reasonable accommodation of a rehabilitating alcoholic should include expungement of any record of the employee's misconduct and any resulting discipline from the individual's personnel file. The court justified the expungement of records by noting that references to misconduct and disciplinary action would adversely affect an individual's ability to gain employment in the future. Labeling the information in the employee's files prejudicial, the court concluded that the prejudice the employee would suffer outweighed any governmental purpose in preserving that information. Accordingly, the employee was entitled to expungement of all references to misconduct and to disciplinary actions incurred because of her substandard performance while disabled by alcoholism.

In contrast, other courts have held that employers should be able to consider the past history of all employees and applicants, including rehabilitated alcoholics. In Office of the
Senate Sergeant at Arms v. Office of Senate Fair Employment Practices (SSA), the Federal Circuit declined to adopt the reasoning in Callicotte and held that reasonable accommodation of an alcoholic employee does not include expungement of records or forgiveness of past misconduct. The court determined that giving an employee "a fresh start" was inappropriate and unnecessary as a reasonable accommodation because it was actually a "retroactive" accommodation in the sense that it concerned behavior in the past before the employee disclosed his alcohol problem and before the employer was aware of the disability. Since the ADA requires that an employer be aware of the disability before the duty to accommodate arises, the court concluded that expunging records was not a reasonable accommodation.

II. THE COURTS' FAULTY TREATMENT OF DISABILITY-CAUSED MISCONDUCT

The inconsistency and ambiguity of the present judicial approach to disability-caused misconduct under the ADA leaves employers without specific guidelines for disciplining employees for such misconduct. Courts have failed to set forth a consistent and cogent approach because they have not made important distinctions among different types of misconduct. Moreover, by allowing employers to discipline prior disability-caused misconduct, courts have ignored congressional intent and the policy reasons behind the ADA.

A. GENERATING INCONSISTENCY AND AMBIGUITY

1. Failing to Differentiate Misconduct That Is Directly Caused by a Disability from Misconduct That Is Only Related to a Disability

Courts have suggested, but failed to state explicitly, that in some cases the causal connection between a disability and resulting misconduct may be strong enough to warrant the

115. 95 F.3d 1102 (Fed. Cir. 1996).
116. Id. at 1108.
117. See id. (holding that expunging records is not a reasonable accommodation but a retroactive accommodation, which the ADA does not require).
118. Id. at 1107.
120. SSA, 95 F.3d at 1107.
conclusion that the employer did not act on the basis of the misconduct, but on the basis of the disability that directly caused the misconduct. They have also implied that the causal connection is dispositive and that the Rehabilitation Act and ADA should protect disability-caused misconduct. The logical inference from these courts' reasoning is that a direct and strong chain of causation between the disability and the resulting misconduct protects the employee from discharge based on the misconduct. Yet, courts have failed to state these implications and logical inferences explicitly.

For instance, the Seventh Circuit in Despears v. Milwaukee County permitted an employer to terminate an alcoholic maintenance worker after the employee's fourth conviction for driving under the influence of alcohol. The court admitted that "[i]f [by] being an alcoholic he could not have avoided becoming a drunk driver, then his alcoholism was the only cause of his being demoted." In the context of drunk driving, however, the court did not believe that Despae's alcoholism was the sole cause of his misconduct because his decision to drive while drunk was also a contributing cause. Nevertheless, there are certainly instances when an employee's alcoholism is the sole and direct cause of misconduct, and dismissal based on that misconduct would be discriminatory and thus impermissible. By failing to state such a holding explicitly, however, the court did not distinguish between misconduct that is di-

121. See supra note 97 and accompanying text (citing cases in which the courts rejected discrimination claims because the misconduct did not directly result from the employee's disability); supra text accompanying note 99 (discussing a case in which the Seventh Circuit suggested that an employer may not lawfully discipline an employee's misconduct if the disability directly caused the misconduct). These cases reflect some courts' views that employee misconduct that is a direct result of a disability is protected under the ADA. This view contrasts with the majority approach, which holds that employers may discipline misconduct, even though it directly results from a disability. See supra notes 87-90 and accompanying text (reviewing the majority stance that an employer may discipline disability-caused misconduct).

122. See supra notes 100-101 and accompanying text (relating examples of courts that rejected employee discrimination claims because the causal relationship between the disability and the misconduct was too attenuated).

123. 63 F.3d 635 (7th Cir. 1995).
124. Id. at 637.
125. Id. at 636.
126. Id.
127. For example, an employee who verbally insults a customer during an alcoholic blackout engages in misconduct caused solely and directly by alcoholism.
rectly caused by a disability, which should be protected, and misconduct that is only related to a disability, which employers should be able to discipline.

The affirmative defense of addiction also suggests that courts should treat misconduct that directly results from a disability differently from misconduct that is only related to the disability. The addiction defense stems from a belief that the law should not hold those under the influence of a substance accountable for offenses committed while they were substantially impaired. Allowing such a defense implies that courts will "forgive" misconduct if it was directly caused by the disability of substance abuse. Further, courts that ultimately find for the employer often make subtle references suggesting that the outcome may have been different had the misconduct occurred solely because of the disability.

2. Failing to Distinguish Between Criminal, Egregious Misconduct and Harmless Misconduct

Courts have consistently emphasized that employers may act on criminal or egregious misconduct. Permitting employers to discipline criminal or egregious misconduct is understandable and reasonable in light of the employer's legitimate concern about ensuring the safety of the workplace. The

128. See supra text accompanying notes 102-104 (describing the affirmative defense of addiction available to federal government employees who were discharged for misconduct resulting from substance abuse). Although the affirmative defense of addiction exists only under the Rehabilitation Act, this Note contends that courts should extend the rationale to apply to parties bringing claims under the ADA. There is no reason to limit the availability of the affirmative defense to only federal government employees since the two Acts offer the same protection to employees of both private and public employers.

129. See supra text accompanying note 104 (noting that the defense of addiction excuses employees who can demonstrate that their substance abuse seriously impaired their judgment and thus led to the misconduct).

130. For example, in Despears, the court suggested that an employee who could show that his alcoholism was the sole cause of the misconduct that resulted in his discharge would prove that the employer acted unlawfully on the basis of the employee's alcoholism. Despears, 63 F.3d at 636.

131. See supra note 89 and accompanying text (claiming that those who engage in serious misconduct will not find refuge in the Rehabilitation Act or the ADA because those laws do not require employers to overlook infractions of the law).

132. Concerns about workplace safety are costly for employers, and lawsuits for negligent failure to prevent crime represent one of those costs. Thompson, supra note 76, at 25.
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employer defense of direct threat further underscores the need for employers to consider a disabled employee's history of violent and dangerous behavior, regardless of whether the misconduct resulted from the disability.

In contrast, concerns about workplace safety do not surface when the disability-caused misconduct involves harmless and minor infractions of company policies. The natural corollary to allowing employers to discharge employees for criminal or egregious behavior is disallowing discharge for harmless misconduct unless the employer proves that there is a direct threat to the safety of the employee or others in the workplace. Misconduct like excessive absenteeism or failure to follow company policies is harmless in that it does not seriously endanger the safety of the employee or other employees. This type of misconduct does not carry the same sort of dangers that criminal or violent misconduct does. Courts, unfortunately, have not taken this logical step.

In *Little v. FBI*, the Fourth Circuit rejected an FBI agent's claim of wrongful discharge when his employer fired him for drinking on duty. The court considered dispositive the determination of whether Little was terminated because of his alcoholism or because of his misconduct. After deciding that misconduct is distinct from status as an alcoholic, the court concluded that an employer "must be permitted to terminate its employee on account of egregious misconduct, irrespective of whether the employee is handicapped." The court's holding left unanswered whether employers should similarly be allowed to fire employees for harmless misconduct that results from a disability. This type of ambiguity allows for inconsistent judicial approaches and leaves employers unsure of how to discipline harmless disability-caused misconduct.

133. See *supra* notes 75-79 and accompanying text (discussing the requisite elements to prove the employer defense of direct threat).

134. "Harmless and minor" infractions of company policies would, by definition, exclude any criminal or violent behavior.

135. 1 F.3d 255 (4th Cir. 1993); see *supra* note 87 and accompanying text (noting that the *Little* court is part of the majority that allows employers to discipline employees for disability-caused misconduct).

136. *Little*, 1 F.3d at 256.

137. Id. at 257.

138. Id. at 259.
B. IGNORING CONGRESSIONAL INTENT

1. Failing to Encourage Rehabilitation and Facilitating ADA Violations

Permitting employers to discipline prior misconduct arising solely from a disability arguably sanctions discrimination against the disabled in the workplace on the basis of the disability. Such discrimination conflicts with the express primary purpose of the ADA. Yet, courts have facilitated such discrimination by distinguishing between an employee's disability status and any related misconduct without further differentiating between different types of misconduct. Besides condoning such ADA violations, the courts' approach also ignores congressional intent to encourage and reward rehabilitative efforts.

In Office of the Senate Sergeant at Arms v. Office of Senate Fair Employment Practices (SSA), the court failed to acknowledge the employee's voluntary enrollment in a rehabilitation program for his alcoholism in two ways: (1) by allowing the employer to discipline harmless disability-caused misconduct; and, (2) by keeping the disciplinary history on the employee's record. By

139. See supra notes 92-96 and accompanying text (describing a case that held that discharge for disability-caused misconduct is the same as discharge for the disability itself).

140. See supra note 40 and accompanying text (describing the ADA as a conscious effort by Congress to eliminate all discrimination against the disabled).

141. See supra Part II.A.1 (arguing that courts have failed to distinguish misconduct that arises solely because of a disability from misconduct that is merely related to a disability); supra Part II.A.2 (contending that courts have not differentiated between disciplining egregious misconduct and harmless misconduct).

142. See supra note 85 and accompanying text (suggesting that Congress intended the ADA to protect rehabilitated alcoholics and thereby encourage rehabilitation).

143. See Office of the Senate Sergeant at Arms v. Office of Senate Fair Employment Practices, 95 F.3d 1102, 1104 (Fed. Cir. 1996) [hereinafter SSA] (indicating that the employee "voluntarily entered a rehabilitation program").

144. The court seemed to accept that a "causal connection existed between Singer's alcoholism and his attendance problems." Id. This type of misconduct epitomizes harmless misconduct that arises only because of a disability, which this Note argues should be protected under the Rehabilitation Act and the ADA. See infra Part III.A (explaining this Note's proposal concerning treatment of disability-caused misconduct).

145. See SSA, 95 F.3d at 1109 (finding expungement of the employee's disciplinary record unnecessary).
allowing employers to act on prior disability-caused misconduct contained in an employee's record, the court's holding interferes with Congress's goal to protect alcoholics who actively seek treatment. Moreover, the court failed to recognize that any time an employer relies on the record of a disability in an employment decision, a potential ADA violation arises. The ADA specifically prohibits employers from relying on an individual's record of a disability in the past. By preserving an employee's disciplinary record once the drinking problem was gone, the court left open the very real probability that future employers will rely on that record.

2. Distorting the Reasonable Accommodations Requirement

By calling the order to expunge records a "retroactive" accommodation, the SSA court deemed it unreasonable and incompatible with the reasonable accommodation requirement. The SSA court never explained, however, why a "retroactive" accommodation could not also be a reasonable accommodation. Without an adequate explanation of why an accommodation is "retroactive" and thus not reasonable, courts are able to manipulate the reasonable accommodation requirement. The courts' ability to change that definition arbitrarily and summarily reject accommodations without offering any substantive reasoning is contrary to congressional intent.

Furthermore, upon closer examination, expungement of records is not a "retroactive" accommodation. The SSA court found that ordering a "fresh start" and expunging records was retroactive because it dealt with behavior in the past, when the


147. See supra note 54 and accompanying text (setting forth that one of the definitions of a "disability" under the ADA is having a record of such impairment in the past).

148. See 42 U.S.C. § 12201(2) (1994) (defining "disability" to include a record of an impairment in the past).

149. SSA, 95 F.3d at 1107.

150. See id. at 1104 (labeling the accommodation of a "fresh start" a "retroactive accommodation").

151. Congress would not want courts to distort the reasonable accommodations requirement. See supra notes 56-58 and accompanying text (observing that the reasonable accommodations provision lies at the heart of the ADA).
employer was unaware of the disability.\textsuperscript{152} The court's reasoning is faulty, however, because although expunging records concerns prior misconduct, it provides reasonable accommodation for the alcoholic employee in the present and the future.\textsuperscript{153} Specifically, expunging records of alcohol-caused misconduct protects an employee from likely discrimination based on past alcohol abuse when pursuing future employment. Under the ADA, a reasonable accommodation should look toward the future to find the best solution for the employer and the employee.\textsuperscript{154} A reasonable accommodation should encompass more than just enabling the individual to do the job; it should ensure equal opportunity in the workplace.\textsuperscript{155} Therefore, it is irrelevant that the employer was unaware of the alcohol abuse at the time the misconduct took place. Once the employer is aware of the disability, the duty to accommodate arises. Expunging records reasonably accommodates the disabled employee's future needs and protects the employee from future discrimination.

III. TOWARD A CLEAR AND CONSISTENT JUDICIAL APPROACH: LIMITING PROTECTION OF DISABILITY-CAUSED MISCONDUCT AND EXPUNGEMENT OF RECORDS

Courts need a consistent approach toward disciplining alcohol-caused misconduct. A more effective solution to the issue of alcohol disability-caused misconduct and reasonable accommodation requires a two-step approach. First, courts should explicitly differentiate between permissible disciplining of disability-related misconduct and impermissible disciplining of disability-caused misconduct. This step recognizes that discharge on the basis of disability-caused misconduct is discrimination on the basis of the disability itself, but allows employers to act on certain types of disability-related misconduct to protect their valid business interests. Second, courts should ex-

\textsuperscript{152} See SSA, 95 F.3d at 1104 (explaining why the expungement of records constituted a retroactive accommodation).

\textsuperscript{153} See supra text accompanying notes 108-113 (discussing one case in which a federal court found reasonable accommodation to counter possible adverse effect on future employment).

\textsuperscript{154} Hartman, supra note 35, at 927.

\textsuperscript{155} See supra notes 111-113 and accompanying text (justifying the expungement of records as a reasonable accommodation because it would guarantee a rehabilitating alcoholic equal employment opportunities).
punge records as a reasonable accommodation, but only when three conditions are met: (1) the misconduct arises solely and directly because of the employee's alcoholism; (2) the misconduct is neither violent nor criminal; and, (3) the employee is willing to enter rehabilitation and eventually becomes successfully rehabilitated.

The proposed approach offers three distinct advantages over the current judicial ambiguity. With new and significant law like the ADA, courts should make every effort to set forth clear and consistent holdings. Consistent guidelines help both the employer, who needs to know what actions are permissible under the ADA, and the employee, who should know of any legitimate discrimination claims. Additionally, allowing the expungement of records of an alcoholic employee when the misconduct was harmless and directly caused by alcoholism recognizes the legitimate interests of both the disabled employee and the employer. The proposed approach also furthers the ADA's goals of encouraging and rewarding rehabilitation and adheres to established case law on reasonable accommodations for alcoholic employees, which emphasizes rehabilitation.

156. See supra notes 41-43 and accompanying text (commenting on the relative newness of the ADA and the increasing ADA litigation).

157. By limiting the reasonable accommodation to those who actively pursue rehabilitation, the proposed approach ensures that alcoholic employees who do not plan on changing their habits do not get a windfall under the reasonable accommodations provision. An employer may also be relatively certain that any pertinent information concerning workplace safety remains in an employee's record because criminal or violent misconduct would not be expunged as a reasonable accommodation of the alcoholic employee.

The proposed approach also does not offend the ADA's premise that employers need not hire or retain an individual who is not otherwise qualified for the position. See supra note 50 and accompanying text (explaining that the ADA only protects "qualified individual[s] with a disability"). By limiting the accommodation to rehabilitating individuals who would not commit the harmless misconduct but for their alcoholism, the proposed approach insists that the individuals be "otherwise qualified."

158. See supra note 85 and accompanying text (identifying the strong public policy for encouraging substance abusers to seek rehabilitation).

159. See supra note 106 and accompanying text (positing that reasonable accommodations of alcoholic employees often revolve around providing them an opportunity to undergo rehabilitation).
A. DIFFERENTIATION OF TYPES OF DISABILITY-CAUSED MISCONDUCT

1. Cause of the Misconduct Matters: Protecting Misconduct That Is Directly Caused by a Disability

To clarify this unsettled area of law, courts should hold that disability-caused misconduct is different from disability-related misconduct. Such a distinction would excuse alcoholic employees only for misconduct that directly arises from their alcoholism, such as blackouts during which they fight with customers or other employees.

Courts should consider applying the idea of proximate cause, as used in determining causation for negligence claims, to distinguish between disability-caused and disability-related misconduct. Though the determination of causation may seem arbitrary, courts have recognized that some sort of line-drawing is necessary. Proximate cause is a concept that "cuts off liability even though there is cause in fact." In the context of disability-caused misconduct, courts should permit employers to discipline alcoholic employees only when "proximate cause" is lacking between the alcoholism and the subsequent misconduct. Conversely, if the alcoholism is the direct and primary cause of the misconduct, "proximate cause" exists and employers should not act on such misconduct.

2. Gravity of the Misconduct Matters: Protecting Harmless Misconduct

Courts should also recognize that the severity of the misconduct makes a difference and hold that employers should not terminate a disabled employee when the disability-caused misconduct was harmless. The rationale for allowing employers to discharge employees who engage in criminal, violent, or oth-

160. See supra Part II.A.1 (reviewing the courts' failure to distinguish misconduct that directly results from the disability from misconduct that is merely related to the disability).

161. See Atlantic Coast Line R.R. Co. v. Daniels, 70 S.E. 203, 205 (Ga. Ct. App. 1911) (stating that courts, in their "finitude," must deal with cause and effect in a way that is practical and within the scope of human understanding).


163. See supra Part II.A.2 (outlining the courts' failure to differentiate between criminal, egregious misconduct and harmless misconduct).
erwise egregious misconduct, regardless of whether they are
disabled,\textsuperscript{164} does not apply to harmless misconduct like absent-
teeism or minor infractions of company policies.\textsuperscript{165} Although
employers may be able to proffer a business justification for
such a discharge, the firing would violate the ADA's strict re-
quirement of providing the employee reasonable accommoda-
tions at the expense of employers.\textsuperscript{166}

3. Timing of the Misconduct Matters: Protecting Prior
Disability-Caused Misconduct upon Rehabilitation

Important differences exist between disciplining disability-
caused misconduct when it first occurs and disciplining it after
the employee starts rehabilitation and the misconduct stops.
When employers act on present misconduct, they are disciplin-
ing a problem that an alcoholic employee presently has that
will likely resurface without some treatment. This reasoning
does not apply to the rehabilitated alcoholic because the prob-
lems have stopped.

Additionally, concerns about workplace safety with current
alcoholics\textsuperscript{167} do not exist in similar magnitude with rehabili-
tated alcoholics. The direct threat defense requires the em-
ployer to present objective and substantial evidence based on
an individual's current condition\textsuperscript{168} before a court will deter-
mine that accommodating an alcoholic employee would be un-
reasonable.\textsuperscript{169}

The Rehabilitation Act and ADA's policy of protecting re-
habilitating and rehabilitated substance abusers\textsuperscript{170} also indi-

\textsuperscript{164} See \textit{supra} notes 88-89 and accompanying text (conveying the courts'
belief that the ADA does not protect employees who commit criminal acts).

\textsuperscript{165} See \textit{supra} Part II.A.2 (detailing why harmless misconduct does not
involve the same sort of dangers as criminal, violent misconduct).

\textsuperscript{166} See \textit{supra} notes 66-68 and accompanying text (asserting that employ-
ers' duty to provide reasonable accommodations for their disabled employees
may require substantial costs).

\textsuperscript{167} See \textit{supra} notes 132-133 and accompanying text (observing that em-
ployers may be wary about employing current alcoholics because of workplace
safety concerns).

\textsuperscript{168} See \textit{supra} text accompanying note 79 (determining that prior history
of misconduct is not objective evidence).

\textsuperscript{169} See 29 C.F.R. app. § 1630.2(r) (1996) (discussing proper procedure for
employers to follow in determining whether a disabled employee is a direct
threat to workplace safety).

\textsuperscript{170} See \textit{supra} notes 83-85 and accompanying text (proposing that protect-
ing rehabilitated or rehabilitating alcoholics ensures that employers may not
lawfully discriminate against them for past substance abuse).
cates that courts should treat past misconduct and present misconduct differently. The Second Circuit specifically noted that allowing an employer to discharge an employee based on past substance abuse problems that an employee has overcome would defeat the Rehabilitation Act's goal of rewarding rehabilitation. If an employer continues to dredge up prior alcohol-caused misconduct even after the employee fully recovers from the past alcohol abuse, there is little incentive for employees to seek rehabilitation and actively work to overcome the alcoholism. Hence, for policy reasons, courts should adopt the Second Circuit's reasoning and prohibit disciplinary action for prior disability-caused misconduct once the employee enters and completes a rehabilitation program.

Practical reasons also suggest that employers should be cautious about relying on prior disability-caused misconduct to fire an employee. One of the statutory definitions of a disability under the ADA is having a record of a disability. The EEOC indicated that an employer would violate the ADA by relying on a record that indicates that an individual has or had a substantially limiting impairment. When a record identifies both the disability and the misconduct arising from that disability and an employer then uses the prior disability-caused misconduct from the employee's record in a way that adversely affects the employee's career, it would be difficult for the employer to deny that it acted on the basis of the employee's history of a disability.

This practical concern is even more significant in light of the ADA's hope of combating preconceived notions about the

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172. See Walker v. Weinberger, 600 F. Supp. 757, 762 (D.D.C. 1985) (suggesting that an alcoholic employee's knowledge that an employer may resurrect alcohol-related infractions for future punishment may act as a disincentive to obtain necessary treatment).
173. In Teahan, the Second Circuit followed the reasoning in Walker and concluded that the Rehabilitation Act is clearly designed to prevent employers from retroactively punishing rehabilitated or rehabilitating alcoholics. 951 F.2d at 518. The court's conclusion suggests that employers should not rely on pre-treatment alcoholic problems for disciplinary purposes.
175. 29 C.F.R. app. § 1630.2(k) (1996).
176. Examples include an employer denying a promotion based on prior misconduct in the employee's record or a prospective employer denying a position to an applicant because of such information.
disabled and protecting those with a history of a disability, especially with treatable disorders like alcoholism. Considering Congress's goal of ending discrimination against the disabled based on such preconceived notions and stereotypes, employers should not accept the stereotype of "once an alcoholic, always an alcoholic." Employers who continue to rely on prior misconduct in assuming that the alcohol-caused misconduct will return are discriminating against the disabled on the basis of that stereotype.

B. LIMITED EXPUNGEMENT OF RECORDS AS A REASONABLE ACCOMMODATION OF AN ALCOHOLIC EMPLOYEE

To ensure that employees with a record of a disability will continue to have equal opportunities for future employment, courts should find that expungement of records of prior alcohol-caused misconduct is a reasonable accommodation. When prejudicial information remains in an individual's file, discrimination by employers inevitably follows. The proposed approach guarantees that rehabilitated and rehabilitating alcoholics will not continue to face unlawful discrimination by employers because of prior alcohol-caused misconduct. Nevertheless, the ADA also takes into account the employer's valid interests. Because courts must weigh the legitimate and ma-

177. See supra note 54 (addressing Congress's intent that the ADA combat mistaken, but common, views about the disabled); supra notes 83-85 and accompanying text (affirming that the ADA covers rehabilitated and rehabilitating substance abusers to prevent employers from discriminating against such individuals on the basis of past substance abuse).

178. See supra note 40 and accompanying text (finding that Congress enacted the ADA as a comprehensive national mandate to end all discrimination against disabled individuals).

179. See supra text accompanying notes 111-112 (contending that references to disability-caused misconduct and disciplinary action in an individual's file were prejudicial).

180. The District Court for the District of Columbia was concerned about exactly that when it condoned expunging records in Callicote v. Carlucci, 731 F. Supp. 1119, 1123 (D.D.C. 1990). The Callicote court feared that the employee would face prejudice and discrimination in the future if such action was not taken. Id. at 1122. The action was thus a reasonable accommodation. Id. at 1121-22. Other courts have expressed similar concerns. See supra notes 174-176 and accompanying text (arguing that employers who base disciplinary action on a record of disability-caused misconduct would have difficulty proving they did not rely on the individual's history of a disability).

181. See supra text accompanying note 48 (calling the Title I provisions an attempt to balance the interests of employers with the interests of disabled employees). The availability of the employer defenses also suggests that the
terial interests of both the employer and the disabled employee, expunging records as a reasonable accommodation is appropriate only under the following conditions.

1. Permitting Expungement Only for Misconduct Arising Solely Because of the Disability

Courts should only allow the expungement of records for misconduct that directly and solely occurred because of the employee's alcoholism. This limitation prevents employees from demanding that employers remove all types of discipline from their records regardless of how attenuated the connection to the alcoholism. A strong link between the disability and the misconduct also ensures that the misconduct will not likely reappear once the individual receives proper treatment. Once the disability, the sole cause of the misconduct, disappears, the misconduct should also disappear.

2. Retaining Information of Any Violent or Criminal Behavior

An employer has a valid interest in maintaining the safety of the workplace. Eliminating all record of violent and criminal behavior for rehabilitated or rehabilitating alcoholics would certainly affect an employer's ability to monitor workplace conditions. In situations where the rehabilitated or rehabilitating employee's conduct was egregious, an employer should be able to raise a valid direct threat defense and refuse to expunge records. Admittedly, allowing an employer to retain information about a rehabilitated or rehabilitating alcoholic's violent or criminal past behavior may allow employers

ADA is concerned about employers' substantial and legitimate business interests. See supra notes 65-79 and accompanying text (explaining the employer defenses of undue hardship and direct threat).

182. See sources cited supra note 181.

183. See supra notes 121-130 and accompanying text (positing that courts should distinguish between disability-caused misconduct and disability-related misconduct).

184. Many courts have noted this concern. See supra notes 99-101 and accompanying text (reviewing courts' rejections of discrimination claims based on disability because the misconduct was too removed from the actual disability).

185. See supra notes 74-76 and accompanying text (discussing an employer's ability to discharge or discipline an employee who poses a direct threat to the safety of the employee or others in the workplace).

186. Denying expungement of records of criminal or violent misconduct is consistent with this Note's proposal that courts should treat disability-caused misconduct according to the severity of the misconduct.
to act impermissibly based on stereotypes about the disabled, which is arguably inimical to the ADA's larger goal of defeating such harmful stereotypes. A balancing of interests, however, necessitates such a result. When based on substantial evidence, the employer's interest in maintaining a safe work environment outweighs the employee's interest in eliminating all record of past violent or criminal conduct.

3. Requiring Rehabilitation Before Expunging Records

Finally, courts should only allow the accommodation of expunging records in proportion to both the alcoholic employee's willingness to undergo rehabilitation and favorable response to such treatment. An employer need not immediately expunge an alcoholic employee's file once made aware of the employee's alcohol problem. By initially offering to expunge an individual's file, however, the employer provides the alcoholic employee with a real incentive to enter, continue, and complete rehabilitation. Accordingly, once the alcoholic employee seeks treatment, the employer should offer to expunge the employee's file of any record of the alcohol-caused misconduct and eventually expunge records if the treatment is successful.

CONCLUSION

Because the ADA is still relatively new law, courts have not yet developed a judicial stance on how to interpret the statute. Determining what constitutes a reasonable accommodation of the alcoholic employee has perplexed employers and courts alike, especially in the context of disciplining misconduct that arises from alcoholism. In answering this question, courts have failed to identify key distinctions between disability-caused misconduct and disability-related misconduct and between harmless misconduct and criminal, egregious misconduct. As a result, courts' analysis of whether a given accommodation is

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187. See supra note 40 and accompanying text (considering the ADA's objective of preventing discrimination against individuals on the basis of irrational fears or patronizing attitudes).

188. See supra note 107 and accompanying text (contending that a reasonable accommodation for an alcoholic employee means forgiving prior misconduct, but only in proportion to the individual's willingness to enter treatment and the extent of the treatment's success).

189. Although "successful" rehabilitation may be defined in various ways, an employee should only be allowed to claim "successful" rehabilitation when the alcohol-caused misconduct no longer recurs.
reasonable tends to be inconsistent and ambiguous. This is particularly apparent in cases requiring the expunging of records of disability-caused misconduct as a reasonable accommodation of the disabled employee.

A more effective approach involves first differentiating between permissible disciplining of disability-related misconduct and impermissible disciplining of disability-caused misconduct. Under this step, courts should allow employers to act on criminal, egregious misconduct, but not harmless behavior. Courts should apply those same categories when considering expunging files as a reasonable accommodation of an alcoholic employee. Namely, courts should limit the accommodation to instances when the misconduct arose solely because of the employee's alcoholism and the misconduct was neither violent nor criminal. The availability of the accommodation should also correlate to the individual's willingness to enter an alcohol treatment program and to the eventual successful completion of the program. Limiting the accommodation to these situations best comports with the primary ADA goals of encouraging rehabilitation, protecting the disabled from employment discrimination, and balancing the needs of the disabled employee with the legitimate interests of the employer.