

Insight

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Protecting Alcoholics, Preventing Alcohol Misuse and Distinguishing Between the Two

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It has long been clear that the Americans with Disabilities Act of 1990 (ADA) protects alcoholism if it qualifies as a “disability.”¹ That said, courts have consistently held that employers can have legitimate work rules that prohibit alcohol use in the workforce. However, the line between having a protected disability and engaging in unprotected misconduct while working can easily become blurred, and employers across all industries likely have struggled over this issue. The distinction is important because protected alcoholics may be entitled to reasonable accommodations under the ADA and state laws.

Two recent federal district court decisions address both issues. In *Lankford v. Reladyne, LLC*, an Ohio district court considered a plaintiff’s claim that the employer unlawfully terminated the employee upon his return to work from a medical leave for alcohol rehabilitation. A few months later, the Northern District of Mississippi in *Clark v. Boyd Tunica, Inc.* dismissed a former employee’s claim that her employer unlawfully terminated her for being at work while under the influence of alcohol. Both cases touch on the competing issues confronting most employers today—the obligation to accommodate disabled alcoholic workers and the right to enforce policies that prohibit alcohol use while at work.

Alcoholism in workplaces presents many legal and human resource management issues. Correctly navigating federal and state discrimination and leave laws is crucial not only for helping avoid litigation but also for ensuring a safe environment for all employees. These issues and the *Lankford* and *Clark* decisions are discussed below.

¹ References to the ADA include the ADA Amendments Act of 2008.

Employers May Have a Duty to Provide Alcoholics with Reasonable Accommodations, Including a Protected Leave of Absence

Does the ADA Protect the Employee's Alcoholism?

The National Council on Alcohol and Drug Dependence defines alcoholism as: "a primary, chronic disease with genetic, psychological, and environmental factors influencing its development and manifestations. The disease is often progressive and fatal. It is characterized by impaired control over drinking, preoccupation with the drug alcohol, use of alcohol despite adverse consequences, and distortion in thinking, most notably denial." According to the Council, 17.6 million people, or one in every 12 adults, suffer from alcohol abuse or dependence.

Under the ADA, individuals who abuse alcohol may be considered disabled if the person is an alcoholic or a recovering alcoholic.² Indeed, alcoholism can result in the fairly obvious impairment of major life activities such as walking, standing, and thinking. Case law is in agreement. For example, the Federal Circuit Court of Appeals has noted that "it is well-established that alcoholism meets the definition of a disability" under the ADA.³ In addition, the U.S. Court of Appeals for the Eighth Circuit has held that where a plaintiff could show she was regarded as an alcoholic, she was "disabled within the meaning of the ADA."⁴

Some courts, however, have called into question whether alcoholism should categorically be a covered disability. Specifically:

- The Fifth Circuit concluded that alcoholism is not a disability *per se*, finding that the plaintiff's alcoholism was not a covered disability under the ADA because it did not substantially limit any of his major life activities.⁵
- The Eighth Circuit suggested it would analyze alcoholism on an individualized basis regarding whether it is a covered disability under the ADA, mentioning in a footnote that the plaintiff had not presented evidence "that his alcoholism impaired a major life activity."⁶
- Similarly, the Tenth Circuit concluded that while alcoholism could qualify as a disability under the ADA, the plaintiff failed to demonstrate that his condition restricted a major life activity after he testified that he could function normally if he attended Alcoholics Anonymous meetings and that his alcoholism did not affect his ability to go to work and complete his job duties.⁷

2 *Williams v. Widnall*, 79 F.3d 1003 (10th Cir. 1996).

3 *Office of the Senate Sergeant-at-Arms v. Office of Senate Fair Emp't Practices*, 95 F.3d 1102, 1105 (Fed. Cir. 1996).

4 *Miners v. Cargill Communications, Inc.*, 113 F.3d 820, 823 (8th Cir. 1997).

5 *Burch v. Coca-Cola Co.*, 119 F.3d 305 (5th Cir. 1997).

6 *Wallin v. Minnesota Dept of Corr.*, 153 F.3d 681, 686, n. 4 (8th Cir. 1998).

7 *Burris v. Novartis Animal Health U.S., Inc.*, 309 Fed. Appx. 241, 250 (10th Cir. 2009).

When is There a Duty to Accommodate Employees with Alcoholism?

Under the ADA, an employer must engage in the interactive process when an employee asks for an accommodation or when the employer becomes aware of its necessity.⁸ The issue of when the employer becomes aware of the necessity for an accommodation raises an interesting question. Can (or should) an employer ask applicants about their drinking habits? According to the Equal Employment Opportunity Commission (EEOC): “[t]hat depends on whether the particular question is likely to elicit information about alcoholism, which is a disability. An employer may certainly ask an applicant whether s/he drinks alcohol because that does not reveal whether someone has alcoholism. However, questions asking how much alcohol an applicant drinks are likely to elicit information about whether the applicant has alcoholism.”⁹ Therefore, an employer should be wary of making such inquiries and should consult with counsel regarding the circumstances where such inquiries might potentially be appropriate.

A corollary to the duty to engage in the interactive process is the duty to reasonably accommodate employees with covered disabilities.¹⁰ This does not mean, however, the employer must ignore an individual’s use of alcohol in violation of a reasonable work rule. A reasonable accommodation for an employee suffering from alcoholism may be a modified work schedule so the employee can attend Alcoholics Anonymous meetings or a leave of absence so the employee can seek treatment provided the desired accommodation would not cause unreasonable hardship to the employer.¹¹ The many side effects of alcoholism may also require reasonable accommodation. For example, depression, a common disability accompanying alcoholism, may necessitate transfer of the employee to a less stressful position if one is available and the employee is qualified.

However, an employer is generally not required to provide leave to an employee suffering from alcoholism to seek treatment if the treatment would likely be futile. In one Ninth Circuit case, the court held that where the plaintiff’s previous attempts at recovery had not been successful, he could not stave off discharge indefinitely by attempting to enter into yet another course of treatment after several relapses.¹² Similarly, one federal district court concluded that “an employer would not be required to provide repeated leaves of absence (or perhaps even a single leave of absence) for an alcoholic employee with a poor prognosis for recovery.”¹³

Moreover, an employer does not have a duty to provide an accommodation to an employee who denies having a disability and has not requested an accommodation. In one case where the plaintiff denied having a disability, the court held that “imputing . . . knowledge [of the disability] is inappropriate where the employee has openly denied having any problems.”¹⁴ Similarly, one plaintiff’s failure-to-accommodate claim based on the employer’s not offering him a non-driving job or a last-chance agreement allowing him to return to work

8 29 C.F.R. § 1630.2(o)(3).

9 <http://www.eeoc.gov/policy/docs/medfin5.pdf>.

10 29 C.F.R. § 1630.2(o)(3).

11 42 U.S.C. § 12111(9); *Brown v. Lucky Stores, Inc.*, 246 F.3d 1182, 1188 (9th Cir. 2001).

12 *Fuller v. Frank*, 916 F.2d 558, 561-62 (9th Cir. 1990).

13 *Schmidt v. Safeway Inc.*, 864 F. Supp. 991, 997 (D. Or. 1994).

14 *Larson v. Koch Refining Co.*, 920 F. Supp. 1000, 1006 (D. Minn. 1996).

after drinking on the job—the offense for which he was fired—was foreclosed by his failure to request any accommodation from the employer prior to his termination.¹⁵

Does the Family and Medical Leave Act Require an Employer to Grant a Medical Leave to an Employee with Alcoholism?

The federal Family and Medical Leave Act (FMLA) entitles employees who are unable to perform the functions of their job because of a serious health condition to an unpaid leave of absence of up to 12 weeks.¹⁶ The FMLA defines a “serious health condition” as an “illness, injury, impairment or physical or mental condition” that involves “inpatient care in a hospital, hospice, or residential medical care facility;” or “continuing treatment by a health care provider.”¹⁷ Thus, whether an employee’s alcoholism qualifies him or her for FMLA leave depends on whether inpatient care or continuing treatment is necessitated.

The FMLA permits employers to require that employees taking such leave provide medical certification signed by the employees’ health care provider.¹⁸ Leave under the FMLA is not appropriately provided, however, due to the incapacity of an employee to work as a result of intoxication or its after affects.

Employers Can Implement and Enforce Rules Regarding Alcohol in the Workplace

While employers may be required to accommodate alcoholic employees, the law also makes clear that employers can enforce rules concerning alcohol at the workplace, including prohibiting the consumption of alcohol while at work. The Ninth Circuit noted in an ADA case that “alcoholics . . . are not exempt from reasonable rules of conduct, such as prohibitions against the possession or use of alcohol . . . in the workplace, and employers must be allowed to terminate their employees on account of misconduct, irrespective of whether the employee is handicapped.”¹⁹

By the same token, employers can prohibit their employees from being under the influence of alcohol at the workplace. A federal district court judge in Massachusetts explained: “[r]easonable accommodation does not extend to accommodating an alcoholic employee’s showing up to work under the influence of alcohol or drinking alcohol on the job. Because [the plaintiff] violated a company policy . . . he cannot now, without more, belatedly avail himself of . . . [a] reasonable accommodation.”²⁰ Indeed, employers can hold an employee who is an alcoholic to the same standards for employment or job performance and behavior as it does other employees, even if any unsatisfactory performance or behavior is related to the employee’s alcoholism.

A guidance memorandum issued by the EEOC provides the following example:

An employer has warned an employee several times about her tardiness. The next time the employee is tardy, the employer issues her a written warning stating one more late arrival will

15 Blazek v. City of Lakewood, Ohio, 576 Fed. Appx. 512 (6th Cir. 2014).

16 29 U.S.C. § 2612(a)(1)(D).

17 29 U.S.C. § 2661(11); 29 C.F.R. § 825.115.

18 U.S.C. § 2613(a); 29 C.F.R. § 825.305(a).

19 Collings v. Longview Fibre Co., 63 F.3d 828, 832 (9th Cir. 1995).

20 Flynn v. Raytheon Co., 868 F. Supp. 383, 387 (D. Mass. 1994).

result in termination. The employee tells the employer that she is an alcoholic, her late arrivals are due to drinking on the previous night, and she recognizes that she needs treatment. The employer does not have to rescind the written warning and does not have to grant an accommodation that supports the employee's drinking, such as a modified work schedule that allows her to arrive late in the morning due to the effects of drinking on the previous night. However, absent undue hardship, the employer must grant the employee's request to take leave for the next month to enter a rehabilitation program.²¹

On the other hand, the EEOC provided the following scenario:

An employer has a lax attitude about employees arriving at work on time. One day a supervisor sees an employee he knows to be a recovered alcoholic come in late. Although the employee's tardiness is no worse than other workers and there is no evidence to suggest the tardiness is related to drinking, the supervisor believes such conduct may signal that the employee is drinking again. Thus, the employer reprimands the employee for being tardy. The supervisor's action violate the ADA because the employer is holding an employee with a disability to a higher standard than similarly situated workers.²²

Thus, employers must walk the tightrope between terminating employees based on workplace rules violations and terminating them because of their alcoholism. The following cases are illustrative:

- One district court found for the employer in its decision to terminate its police chief after he caused a car accident injuring two people while under the influence on the grounds that he was not a "qualified individual," inasmuch as his conduct violated several clearly established work rules.²³
- An appellate court affirmed a ruling for the employer where the employee alleged he had been wrongly discharged as a result of 12 unexcused absences that were the result of his incarceration due to consequences of his alcoholism.²⁴
- The Ninth Circuit rejected the employee's claim that he could not be discharged for misconduct after a "drunken rampage" because the misconduct was a result of, or linked to, his alcoholism.²⁵
- An appellate court concluded that, even assuming the employee's alcoholism qualified as a disability under the ADA, the employer did not have to accommodate her by overlooking her violations of workplace rules.²⁶

21 <http://www.eeoc.gov/facts/performance-conduct.html>

22 *Id.*

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

24 *Leary v. Dalton*, 58 F.3d 748, 753 (1st Cir. 1995).

25 *Newland v. Dalton*, 81 F.3d 904, 906 (9th Cir. 1996).

26 *Ames v. Home Depot U.S.A., Inc.*, 629 F.3d 665 (7th Cir. 2011).

Recent Federal District Courts Affirm the Duty to Accommodate and Uphold Substance Abuse Work Rules

Jury to decide claims of discrimination and retaliation against an employee diagnosed with alcoholism

In *Lankford v. Reladyne, LLC*,²⁷ the district court in the Southern District of Ohio considered a former employee's claim that his employer unlawfully terminated him upon return from a medical leave for alcohol rehabilitation. In that case, the plaintiff requested and took a 35-day leave of absence to attend an alcohol rehabilitation program. Upon his return from leave, the employer confronted him about some allegations that, prior to his leave, the plaintiff had given a customer free supplies in exchange for a free oil change for his mother. The plaintiff denied the allegations but, nevertheless, was terminated. The plaintiff sued the employer for disability discrimination, FMLA interference and retaliation.

In its motion for summary judgment, the employer argued the plaintiff did not have a disability and, even if he did, the employer lawfully terminated him for misconduct. The court rejected the employer's arguments. On the question of whether the plaintiff had a disability, the court relied on the plaintiff's medical records, which demonstrated that the plaintiff's alcoholism substantially limited major life activities (including the ability to concentrate and care for himself), resulted in his admission to two separate rehabilitation programs and had caused the plaintiff gastrointestinal issues.

In finding a genuine issue of fact as to whether the employer had terminated the plaintiff for lawful reasons as opposed to discriminatory and retaliatory reasons, the court pointed to various internal emails and statements made during the plaintiff's termination meeting and following his termination, which made reference to the plaintiff's medical leave and expressed concern about his "lapses and ethics." In response to why the employer would not re-employ the plaintiff, the general manager stated, "personal life in ruins" and "needs outside help." These facts, in addition to the close proximity between the plaintiff's leave and his termination, resulted in the court denying the employer's motion for summary judgment.

Court dismisses employee's claim that employer unlawfully terminated her after a failed alcohol test

More recently, in March 2016, the district court in the Northern District of Mississippi considered a challenge to an employer's termination of an employee who tested positive for alcohol while working. In *Clark v. Boyd Tunica, Inc.*,²⁸ the employer had a "Substance/Alcohol Abuse and Drug Testing" policy, which required employees to submit to a drug and alcohol test following an on-the-job injury.

The plaintiff twisted and fractured her ankle while working. At the clinic, the plaintiff provided both blood and urine samples for drug and alcohol testing. The urine sample revealed that the plaintiff's blood alcohol content was .12% (above the designated cutoff level for the screening). However, the blood sample was negative for alcohol. After determining that the plaintiff's medications could not have caused a false positive, the employer terminated the plaintiff.

²⁷ 2015 U.S. Dist. LEXIS 156640 (S.D. Ohio, Nov. 19, 2015).

²⁸ 2016 U.S. Dist. LEXIS 25223 (N.D. Miss., Mar. 1, 2016).

The plaintiff sued, claiming the urine test was inaccurate and also claimed the employer was truly motivated by her disability (the ankle injury). The court dismissed the disability discrimination claim, finding the plaintiff could not prove she had a protected disability. Even if she had been able to meet this burden, the court nevertheless concluded the employer had demonstrated a legitimate, non-discriminatory reason for the plaintiff's termination. The employer had presented evidence that employees who tested positive for alcohol while on the job were terminated. The plaintiff maintained that the alcohol test showed a false positive and, thus, claimed the employer's reason was a pretext for discrimination. According to the court, however, "[e]ven if the positive result was in fact false, an employer's reliance on an erroneous result does not create a claim under the ADA absent an independent showing that the real reason for the firing was a disability." The court found it important that the employer had given the plaintiff the "benefit of the doubt" by waiting to terminate her until after the lab determined her medications did not cause a false positive. As a result, the court dismissed the plaintiff's claims.

Recommendations for Employers

Undoubtedly, alcoholism adversely affects employers and their businesses just as it affects those who suffer from it. Threats to safety at work, job injuries, theft, low employee morale, and costs related to absenteeism, recruiting, training, turnover, and healthcare utilization all contribute to the detrimental effects of employees who cannot control their drinking. Correctly navigating employment laws governing what you can and cannot do as an employer is challenging. Consider consulting experienced counsel in making employment decisions regarding employees suffering from alcoholism and in devising drug and alcohol screening programs.

The following are some additional recommendations for employers to consider:

- Establish a policy against alcohol use in the workplace addressing when alcohol consumption is permitted or prohibited and highlighting the availability of rehabilitation services and your employee assistance program. The employee's willingness to consume alcohol should almost never be considered necessary to obtaining or holding a job. Consider adding provisions that allow for post-accident and reasonable suspicion drug and alcohol testing.
- If you suspect alcohol abuse, refer to your workplace drug and alcohol policy and employee assistance program. Educate supervisors and managers about the signs of use and abuse and steps for reporting any suspicious behavior. Such training is important for those who will determine whether an employee will be tested based on the reasonable suspicion of abuse.
- Consider assisting an employee suffering from alcoholism instead of terminating them from employment. As described above, alcoholism may be a disability protected by anti-discrimination laws, thus triggering the employer's duty to engage in the interactive process and to reasonably accommodate an employee suffering from alcoholism.
- Nationwide employers should also familiarize themselves with the myriad state and local laws that regulate employer drug and alcohol testing programs. Some of these jurisdictions restrict the types of drug and alcohol testing employers may conduct, including random testing.

While the above guidance should assist with developing workplace policies, it is recommended that all policies concerning alcoholism in the workplace be considered and implemented with the assistance of counsel.