Journal of Vocational Rehabilitation 58 (2023) 299–305
DOI:10.3233/JVR-230018
IOS Press

The Americans with Disabilities Act, addiction, and recovery

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Received 3 October 2022
Revised 30 January 2023
Accepted 15 February 2023
Pre-press 17 April 2023
Published 23 May 2023

Abstract.
BACKGROUND: The Americans with Disabilities Act (ADA) is sweeping civil rights legislation that affords people with disabilities equality of opportunity, economic self-sufficiency, independent living, and full participation in daily life. The protections of the ADA extend to individuals with alcohol and substance abuse disorders who are in recovery.
OBJECTIVE: The objective of this article is to understand the ADA's definition of disability and how it applies to addiction and recovery. The reader will recognize how the ADA applies to people with addiction to alcohol and those in recovery from substance abuse. The article will describe the rights and responsibilities employers and employees have in the three stages of employment.
METHOD: The material in this presentation was developed based on the authors' research, training, education, knowledge, and skill of the ADA.
RESULTS: Individuals in recovery are often unaware of their civil rights under the ADA. The ADA ensures that people with disabilities, including those with alcohol use disorder and substance use disorders, have the same rights and opportunities in the workplace.
CONCLUSION: The COVID-19 pandemic has resulted in an increase in increased rates of alcoholism and substance abuse. Individuals living with addiction are unaware of the employment protections they may have under the ADA. Title I of the ADA guarantees employment protections to ensure equality in the workplace for people with disabilities. A clearer understanding of the law will ensure that job seekers and employees are treated in an ethical, valued, and courteous way when disclosing disability and the need for accommodation.

Keywords: ADA, addiction, alcoholism, alcohol abuse, substance abuse, recovery

1. Introduction

The COVID-19 pandemic has led to sharp increases in alcohol and substance abuse in the United States and an increase in behavioral health disorders. More than 70% of individuals with alcohol or drug use continue to maintain employment. A study by the American Addiction Center found that 1 in 3 Americans were drinking alcohol during workhours while on lockdown or working from home (American Addiction Centers, 2021). Over 22 million Americans are currently in recovery from alcohol and other drug use disorders (Kelly, 2017). Although addiction affects all demographic groups, drug and alcohol abuse among African American communities is slightly higher than the general population, with rates of substance abuse disorder at 6.9% for African Americans compared to 7.4% of the total popula-

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tion African Americans also have poorer treatment outcomes. According to the 2020 National Survey on Drug Use and Health (NSDUH), 44.7% of adult African Americans reported illicit drug use in the past year (2020 National Survey on Drug Use and Health: African Americans, 2022). American Indian and Alaska Natives have some of the highest rates of substance abuse. Twenty-two percent abuse illicit drugs, and 5% report heavy alcohol use (Ghoshal, 2021).

Individuals in recovery are often unaware of their civil rights under the Americans with Disabilities Act (ADA). The ADA ensures that people with disabilities, including those with alcohol use disorder and substance use disorders, have the same rights and opportunities in the workplace. This article will discuss how the ADA applies to addiction in three phases of employment: pre-offer, post-offer, and employment and use scenarios to apply the ADA as it relates to alcohol, opioids, cocaine, and marijuana.

1.1. The ADA

The ADA is a sweeping civil rights legislation signed into law on July 26, 1990. It prevents discrimination against individuals with disabilities in all aspects of public life, including work, education, transportation, and all public and private places where the public goes to access goods and services (ADA National Network, n.d.). The law ensures that people with disabilities have the same rights and opportunities as anyone else. This includes people who have addiction to alcohol, and people who are in a recovery program from opioid or substance abuse disorders. This includes illegal drugs, addiction to prescribed medication, and taking medications illegally (ADA National Network, 2020).

Under the ADA, disability is defined as a legal term, not a medical term. There are three ways a person can have protection under the ADA (U.S. Department of Justice, n.d.).

1. An individual has a physical or mental impairment that substantially limits one or more major life activities.

Addiction can substantially limit brain and neurological functioning, the ability to work, and our ability to learn. Addiction also interferes with sleeping, eating, concentrating, caring for oneself, and memory. Each of these is considered a major life activity.

2. An individual has a history of a physical or mental impairment that substantially limits one or more major life activities.

After an individual has successfully completed alcohol or substance abuse recovery and no longer uses drugs, they may still have protection under the ADA because they have a record or history of addiction and recovery.

3. An individual is regarded as having a disability.

In the third prong, an employer might hear a rumor or have an assumption that an employee has an addiction. Based upon that belief and without substantive proof, the employer takes a negative employment action. In this case, the employer is regarding the employee as an individual with a disability.

The ADA makes a distinction between alcohol addiction and the illegal use of drugs. Alcohol addiction is generally considered to be a disability regardless of whether the addiction is in the present or past. An individual with alcohol addiction has immediate protection under the ADA. In the case Williams v. Widnall, 79 F.3d 1003 (10th Cir. 1996) the 10th Circuit Court of Appeals upheld that alcoholism was a covered disability under the ADA. (Also see: Adamczyk v. Baltimore County, 1998 U.S. App. LEXIS 1331 (4th Cir. 1998), Miners v. Cargill Communications, Inc., 113 F.3d 820 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 441 (1997) and Office of the Senate Sergeant-at-Arms v. Office of Senate Fair Employment Practices, 95 F.3d 1102 (Fed. Cir. 1996).) Other courts, however, have been reluctant to designate alcoholism as a covered disability and urge a case-by-case evaluation of the existence of a major life impairment. (Also see: Burch v. Coca Cola 119 F.3d 305 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 871 (1998) and Wallin v. Minnesota Department of Corrections 153 F.3d 681 (8th Cir. 1998) (U.S. Commission on Civil Rights, 2000).)

1.2. Is the illegal use of drugs covered under ADA?

An individual who is using drugs illegally is not considered to have a disability when an employer takes an employment action based on that use. Individuals do have ADA protections if they are in a recovery program and no longer currently using drugs illegally. "In recovery" means that the individual is no longer engaging in using drugs illegally or the individual is participating in a supervised rehabilitation program and is no longer using drugs illegally. The term "illegal use of drugs" includes the use of illegal drugs such as heroin or cocaine, the misuse of controlled substances such as opioids or morphine regardless of if the user has no prescription, a fraud-

ulent prescription, or has a prescription but is using more than the prescribed amount (ADA National Network, 2019).

1.3. Current drug use

What does the term "current" mean when determining if someone is currently using drugs? The EEOC offers this guidance: 1) If an individual tests positive on a drug test, he or she will be considered a current drug user, so long as the test is accurate; 2) Current means that the illegal use of drugs was recent enough to form a reasonable belief that someone's drug use is current and presents an ongoing problem; 3) Current is not limited to the day of use, or recent weeks or days, it is determined on a case-by-case basis (U.S. Equal Employment Opportunity Commission, 1992). In Zenor v. El Paso Healthcare Systems, Ltd. 176 F.3d 847, 867 (5th Cir. 1999), the 5th Circuit Court of Appeals held that a pharmacist, who was an employee of El Paso Healthcare, was a current user of illegal drugs because he used cocaine five weeks before he was notified of his termination. In Salley v. Circuit City Stores, Inc. 160 F.3d 977 (3d Cir. 1998), the court remarked that it knew of no case where a three-week period of abstinence would be considered long enough to consider someone no longer an illegal drug user. Finally, in Shafer v. Preston Memorial Hospital Corporation 107 F.3d 274 (4th Cir. 1997), Shafer appealed a lower court ruling in favor of her employer, Preston Memorial Hospital, claiming disability discrimination due to her drug addiction. Shafer had been stealing Fentanyl, a schedule II narcotic analgesic from the hospital, and became addicted. She entered a rehabilitation program but was terminated for gross misconduct involving the diversion of controlled substances. A few weeks after her termination, while working at another hospital, she again used Fentanyl while on duty. On appeal the court ruled that Shafer could offer no credible evidence that her termination was the result of disability discrimination (United States Court of Appeals, Fourth Circuit, 1997).

Individuals with an Opioid Use Disorder (OUD) may be prescribed medication to treat their OUD. These drugs (e.g., methadone, buprenorphine, or naltrexone) are prescribed by a health care professional in a medication-assisted treatment (MAT) program. These three medications are approved by the Food and Drug Administration and are not considered "illegal drugs". Individuals in MAT are considered in a treatment program and have protections under the ADA (U.S. Department of Justice, Civil Rights Division, 2022).

1.4. Substance abuse and the corrections system

Individuals with opioid addiction who are involved in the corrections system face difficulty in attaining and retaining employment upon release leading to increased risk of re-arrest (Blanck, 2017). Prisoners have certain civil rights, including protections against disability discrimination (Blanck, 2017). Nearly 65% of the population of U.S. prisons and jails have opioid addiction and face disability discrimination (Legislative Analysis and Public Policy Association, 2020). Under ADA Title II, inmates with opioid addiction should have access to MAT. Few states, however, offer MAT for prisoners. A lack of MAT results in painful withdrawal and a high risk of relapse when released from jail. Additionally, former inmates with opioid addiction are 130 times more likely to overdose within the first two weeks of release (Legislative Analysis and Public Policy Association, 2020). In Pennsylvania v. Yeskey 524 U.S. 206 (1998), the Supreme Court held that ADA Title II applies to state prisons. Based on Yeskey, the courts have determined that the ADA applies to medical services as well as other programs and services provided by state and local correctional facilities. In Pesce v. Coppinger, Civil Action No. 18-11972 DJC, Geoffrey Pesce was sentenced to 60 days in a Massachusetts prison. At the time, he had successfully completed two years of MAT and was considered in recovery. The prison denied Pesce access to MAT, forcing him into withdrawal. The denial of medical services by the prison was a violation of ADA Title II and the 8th Amendment of the U.S. Constitution, cruel and unusual punishment. The court ruled in Pesce's favor (Pesce v. Coppinger, 2018).

1.5. ADA Title I: Employment protections

ADA protections for people with addiction who are in recovery are found in ADA Title I, the employment protections. Title I of the ADA applies to private employers with 15 or more employees and all state and local government employers (ADA National Network, n.d.). Title I applies to all aspects of the employment process: Phase 1) pre-employment, pre-offer; Phase 2) pre-employment, post-offer; and Phase 3) employed. Title I also applies to all other terms, conditions, and privileges of employment. Under Title I, an employee is considered a qualified

individual if he or she meets the skill, experience, education, and other job-related requirements of a held or desired position, and he or she can perform the essential functions of a job, with or without a reasonable accommodation to how the work is performed (U.S. Equal Employment Opportunity Commission, 1992).

In Phase 1, pre-employment, pre-offer, the ADA prohibits all disability-related questions and medical examinations, even if they relate to the job. Asking disability related questions in this stage of employment may reveal a disability. For instance, employers in this stage cannot ask if the candidate is taking any medication, if they have an impairment, illness, or condition that would prevent the candidate from performing the job. This would include asking if the job candidate had ever been treated for addiction to alcohol, opioids, or other illegal drugs. An employer can ask if the candidate has ever used or currently uses illegal drugs. A positive or negative answer to this question would not reveal an addiction disability (U.S. Equal Employment Opportunity Commission, 1995).

1.6. Employer rights and responsibilities

Often, potential employees who have a history of alcohol or drug addiction have gaps in their work history due to being in recovery. Does the job candidate have to mention their past addiction? One strategy is to explain that the candidate had an illness, is recovered, and is ready to return to work. Should the employer ask more probing questions about a possible addiction, the candidate should be prepared to tell the truth because lying about the addiction would be considered grounds for not hiring, even though the employer's question is illegal (U.S. Equal Employment Opportunity Commission, 1995).

In Phase 2, pre-employment, post-offer, meaning after an offer of employment has been made but the candidate has not started work, employers can make medical inquiries, require medical exams, and ask disability-related questions. These questions must be asked of all candidates within the job category. In this stage, employers may ask about the use of alcohol or drugs and the extent of use, or if the candidate has a diagnosis of alcohol or drug addiction. Job candidates must disclose disability at this stage, if asked (U.S. Equal Employment Opportunity Commission, 1995).

In Phase 3, employment, employers may make disability-related inquiries and require medical examinations only if they are job-related and consistent with business necessity. According to the EEOC, this "job related and consistent with business necessity" means that an employer has a reasonable belief, based on objective evidence, that 1) an employee's ability to perform essential job functions will be impaired by a medical condition; or 2) an employee's medical condition results in a "direct threat" to themselves, coworkers, or the public (U.S. Equal Employment Opportunity Commission, 1995).

Employers may ask if an employee has been drinking alcohol or using illegal drugs. However, employers may not ask about the nature or severity of an employee's disability or ask about an employee's genetic information (U.S. Equal Employment Opportunity Commission, 1995).

1.7. The cannabis conundrum

Cannabis presents a dilemma for employers. Although thirty-eight states have legalized medical marijuana (National Conference of State Legislatures, n.d.) and twenty states and the District of Columbia permit recreational use (The Council of State Governments, 2023), cannabis is still considered a schedule II drug under the Controlled Substance Act of 1970. Therefore, the ADA excludes people from protection because they are illegally using drugs. Even if an employee has a prescription for medical marijuana, the drug is still considered illegal. But the issue is not so black and white. Seventeen states have prohibited discrimination against medical cannabis users and six states protect the rights of recreational users (California Norml, n.d.). Additionally, in May 2022, Attorney General Merrick Garland reiterated that the Department of Justice (DOJ) will not prioritize prosecutions for marijuana use (LaBruyere & Veazey, 2022). This reinforces the August 2013 "Cole Memo" issued by Deputy Attorney General James Cole that stated the DOJ would not prioritize prosecution in states with regulated cannabis distribution systems (U.S. Department of Justice Office of the Deputy Attorney General, 2013). The "Cole Memo" was rescinded in 2018 by Attorney General Jeff Sessions by advising federal prosecutors to decide under what circumstances they would prosecute marijuana cases (The National Law Review, 2022). Without clear guidance, employers may need to consider reasonable accommodations for off premises cannabis use in states where cannabis is legal. However, employers have a "duty of care" to ensure a safe workplace, and

employees who are under the influence of cannabis have no protections in the workplace.

In the current economy, where we face global employee shortages, some employers are ending drug testing to fill jobs and retain workers. A study by ManpowerGroup, conducted in the fourth quarter of 2021, reported that 4,050 (9%) of more than 45,000 worldwide employers were eliminating job screenings or drug testing to "attract and retain in-demand talent" (ManpowerGroup, 2021).

Also, Amazon, the second largest global employer, announced in June 2021 that it would no longer test for cannabis in its pre-employment drug testing for jobs not regulated by the U.S. Department of Transportation (Chappell, 2021).

2. Methods

2.1. Applying the law to four scenarios

To understand the protections the ADA offers to people with addiction or who are in recovery, let's look at four scenarios.

Scenario 1: Marianna has been free of her heroin addiction for six years. She applied for a job that she was qualified to do. The employer, however, refused to hire her because of her past addiction. In this scenario, Marianna has protections under the ADA because she has a history of having an impairment that affected one or more major life activities (i.e., heroin addiction). She has not used heroin for six years, a sufficient period to presume that her drug use is not current. The potential employer violated the ADA when she discriminated against Marianna due to her recovery status.

Scenario 2: Michael is often late to work. He has received verbal disciplinary actions by his employer due to his tardiness. After the fourth time he is late, his employer gives him a written warning, stating that one more late arrival to work will result in termination. Michael admits to his employer that his tardiness is due to his drinking and he is addicted to alcohol. Michael asks for time off work for detox and treatment. In this scenario, Michael has a disability, alcohol addiction. Alcohol addiction is a disability, regardless of whether it is in the past or the present. His employer must grant him time off work as a reasonable accommodation to enter a rehabilitation program, unless Michael's absence from work would cause an undue hardship, meaning it would cause great difficulty or would be too expensive for the employer to grant his accommodation request. It is important to remember that Michael is held to the same standards as any other employee, and any previous disciplinary action stands.

Scenario 3: Julia has a history of opioid addiction. She has been in recovery for five years from addiction to Oxycontin. She is in a medication-assisted treatment program (MAT) supervised by a licensed medical professional. Her employer learns of her former addiction and that she is in MAT. He orders her to "get off" methadone or risk termination. Julia is protected because she is not considered to be a current user of opioids. The methadone prescribed by her doctor is legally prescribed, just as insulin would be prescribed for someone with diabetes. Her employer's threat of termination is a violation of the ADA.

If it was discovered that Julia was using cannabis while in MAT, she would no longer be protected by the ADA. According to EEOC guidance, "[A] person who casually used drugs illegally in the past but did not become addicted is not an individual with a disability based on the past drug use. For a person to be substantially limited because of drug use, s/he must be addicted to the drug" (U.S. Commission on Civil Rights, 2000).

Scenario 4: Juan was prescribed Percocet to treat pain from a serious injury. He takes the medication in the prescribed amounts but has become concerned that he is addicted to the Percocet. He asks his employer for a leave of absence to taper off the drug. Juan is protected under the ADA because he is taking a legally prescribed medication in the proper way. Juan is considered a person with a disability, and he has a right to accommodation. As with Julia, if Juan was illegally using another drug, he would not be protected.

3. Results and discussion

For employees facing termination for illegal use of drugs, some employers may offer an employee with addiction a "last chance" agreement. In these agreements, an employer will agree to not terminate the employee in exchange for the employee's agreement to enter treatment. A violation of the "last chance" agreement usually warrants immediate termination (ADA National Network, 2020).

The COVID-19 pandemic has resulted in an increase in alcoholism and substance abuse. Individuals living with addiction are unaware of the

employment protections they may have under the ADA.

4. Conclusion

Title I of the ADA guarantees employment protections to ensure equality in the workplace for people with disabilities. A clearer understanding of the law will ensure that job seekers and employees are treated in an ethical, valued, and courteous way when disclosing disability and the need for accommodation. Title II of the ADA offers protections to people with alcohol addiction or who are in recovery in programs and services and activities managed by state and local governments or entities under contract to state and local governments. This applies to public education, the corrections system, and state and local courts.

Title II entities must make reasonable modifications to policy and practices to accommodate someone who has an alcohol addiction or in recovery (ADA National Network, 2019). Addiction is a misunderstood and powerful disability. Addiction results in a physical dependency that alters the way we think and behave. As a result, individuals with addiction experience difficulties with work, family life, and daily life activities. The ADA offers protections for individuals experiencing addiction and seek help to overcome their addiction by treatment and recovery.

Acknowledgments

The authors would like to thank Oce Harrison, Ed.D. of the New England ADA Center, for her contributions in the development of this material and her advocacy for individuals with alcohol and substance abuse disorders.

Conflict of interest

The corresponding author is married to Katie Wolf Whaley, a member of the *Journal of Vocational Rehabilitation* Editorial Board.

Ethics statement

Not applicable.

Funding

The contents of this article were developed under a grant from the National Institute on Disability, Independent Living, and Rehabilitation Research (NIDILRR grant number 90DPAD0005-01-00). NIDILRR is a Center within the Administration for Community Living (ACL), Department of Health and Human Services (HHS). The contents of this publication do not necessarily represent the policy of NIDILRR, ACL, or HHS, and you should not assume endorsement by the Federal Government.

Informed consent

Not applicable.

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