SMU | Dedman School of Law

SMU Law Review

Volume 54 | Issue 4 Article 13

January 2001

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INTRODUCTION

"SOME 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older."[1] Congress placed this statement in the preamble to the Americans with Disabilities Act of 1990 (the "ADA") to emphasis the magnitude of the problem it is seeking to ameliorate—millions and millions of disabled persons are discriminated against every single day. Thus, at the outset, Congress indicated that it intends the scope of the ADA to be broad so that it will reach as many of those millions as possible.[2] This breadth of coverage is necessary in order to effectuate the purpose of the ADA, which is to end discrimination against individuals with disabilities.

Congress enacted the ADA to prevent covered entities from discriminating against qualified individuals with "physical or mental impairment[s]" that "substantially [limit] one or more of [a person's] major life activities."[3] Prohibited acts include:

1. discriminating in regard to job application procedures,
2. the hiring, advancement, or discharge of employees,
3. employee compensation,
4. employee job training, and
5. other terms, conditions, and privileges of employment.[4]

Alcoholics, however, rarely fall within the broad scope of the ADA, even though courts have recognized that alcoholism may qualify as a disability under the ADA.[5] Alcoholism, like all potential impairments, is not considered to be a *per se* disability under the act.[6] This is because courts

1. 42 U.S.C. § 12101(a)(1)(1994).
2. *See, e.g.*, Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 859 (1st Cir. 1997) (holding that mitigating measures should not be taken into account when evaluating whether a person has a disability under the ADA).
3. 42 U.S.C. § 12102(2)(A) (1994).
4. 42 U.S.C. § 12112(a) (1994).
5. *See, e.g.*, Rogers v. Lehman, 869 F.2d 253, 259 (4th Cir. 1989) (arguing that there should be a framework to guide employers dealing with alcoholic employees and their requests for reasonable accommodations).
6. *See* Burch v. Coca-Cola Co., 119 F.3d 305, 316 (5th Cir. 1997) (holding that the alcoholic plaintiff failed to prove he was substantially limited in a major life activity.

have agreed that the ADA requires an individualized determination of each person's impairment.[7] Thus, while alcoholism may "rise to the level of a disability in some circumstances, it is insufficient for [a] plaintiff to merely state that he is an alcoholic."[8] Likewise, a court cannot assume that all alcoholics are similarly and equally impacted.[9]

But there is an even bigger problem with evaluating alcoholism as a disability for the purposes of the ADA. Although an alcoholic is recognized by the ADA as someone who *may* be a "qualified individual with a disability,"[10] the burden an alcoholic must meet in order to establish his prima facie case is far greater than that of other disabled persons because the nature of the disability itself produces symptoms which employers are allowed to discriminate against. This inconsistency arises because the ADA allows employers to hold an alcoholic to the "same qualification standards for employment or job performance and behavior that such entity holds other employees, *even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee.*"[11]

This comment explores the disparate treatment of alcoholism as a disability under Title I of the ADA, which prevents employers from discriminating against an employee because of an employee's disability. Part I of this comment sets out Title I's statutory basis and focuses on the divergent treatment of alcoholism under the ADA in federal case law. Part II examines the controversy surrounding alcoholism and whether it should qualify as a disability in the first place—because people make a choice each and every time they drink. Finally, Part III discusses solutions for establishing clear rules for deciding cases brought by alcoholics under the ADA.

DISCUSSION

I. THE STATUTORY FRAMEWORK OF TITLE I OF THE ADA

A. PURPOSE AND SCOPE OF THE ADA

Congress enacted the Americans with Disabilities Act in 1990, expanding the scope of protection for persons with disabilities.[12] The legislation was prompted by the "continuing existence of unfair and unnecessary discrimination and prejudice [which] denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which free society is justifiably famous, and costs

7. *See id.* at 315-16.
8. *See id.* at 316.
9. *See* Goldsmith v. Jackson Mem'l Hosp. Pub. Health Trust, 33 F. Supp. 2d 1336, 1342 (S.D. Fl. 1998) (arguing that 'usual limitations' suffered by alcoholics do not necessarily equate to 'substantial limitations').
10. *See, e.g.*, Fuller v. Frank, 916 F.2d 558, 561 (9th Cir. 1990).
11. *Id.* (emphasis added).
12. The ADA was the second major act legislating the prohibition of employment discrimination legislation. The first was the Rehabilitation Act, enacted in 1973 "to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society.'" 29 U.S.C. § 701(b) (1994).

the United States billions of dollars in unnecessary expenses resulting from dependency and non-productivity."[13]

B. Covered Entities and Possible Recovery Under the ADA

Title I of the ADA covers the actions of private employers, employment agencies, labor unions, and joint labor management committees.[14] Under the Act, those covered entities are required to refrain from discriminating against qualified individuals with "disabilities," as defined by the ADA.[15]

The ADA empowers employees and job applicants to bring action against private employers who discriminate[16] against disabled individuals who are "otherwise qualified."[17] Under Title I of the ADA, injured parties may recover both monetary damages and equitable relief.[18] Additionally, a successful plaintiff may recover both compensatory and punitive damages for *intentional* employment discrimination.[19] While Title I does not preempt federal, state, or local laws that provide greater or equal protection for persons with disabilities,[20] it does preempt laws that provide *less* protection.[21]

C. Definition of "Disability" Under the ADA

The ADA defines "disability" with respect to an individual as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;[22] (B) a record of such an impairment; or (C) being regarded as having such an impairment."[23] For the purposes of the ADA, an individual is only disabled if he is restricted from performing a "class or a broad range of jobs in various classes" and

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13. 42 U.S.C. § 12101(a)(9) (1994).

14. But the scope of Title I is limited in that only those entities with fifteen employees or more are "covered entities" under the ADA. *See* 42 U.S.C. § 1981a(b)(3)(A) (1994).

15. *See* 42 U.S.C. § 12111(2) (1994).

16. *See* Ellenwood v. Exxon Shipping Co., 984 F.2d 1270, 1277 (1st Cir. 1993) (holding that the ADA and the Rehabilitation Act do not preclude the availability of additional state or federal remedies).

17. *See* 42 U.S.C. § 12102 (1994).

18. *See* 42 U.S.C. § 1981(a)2 (1994); *see, e.g.*, Dutton v. Johnson County Bd. of County Comm'rs, 868 F. Supp. 1260, 1263-65 (D. Kan. 1994) (awarding both back pay and job reinstatement to public works equipment operator after firing for excessive absences due to disability).

19. *See* 42 U.S.C. § 1981 (1994); *But see* 42 U.S.C. § 1981a(b)(3) (1994) (capping aggregate compensation awards, dependant upon the size of the employer). For companies with 15-100 employees, the cap is $50,000, for those with 101-200 employees, the cap is $200,000, and for those with over 500 employees, the cap is $300,000.

20. *See* 29 C.F.R. § 1630.1(c)(2) (1994).

21. *See id.*

22. "Physical or mental impairment" means "[a]ny physiological disorder, or condition . . . affecting one or more of the following body systems: neurological, musculoskeletal, . . . hemic and lymphatic, . . . and endocrine; or[a]ny mental or psychological disorder, such as . . . emotional or mental illness. . . ." 29 C.F.R. § 1630.2(h) (1996).

23. *See* 42 U.S.C. § 12102(2)(a)-(c) (1994). The touchstone for determining activity's inclusion as a "major life activity" under the ADA is its significance. *See* Abbott v. Bragdon, 107 F.3d 934, 941 (1st Cir. 1994).

not merely the particular job that his suit focuses on.[24]

1. Impairment in a Major Life Activity

Whether or not an impairment is disabling focuses on whether it impairs or is perceived by the employer to impair the individual in a "major life activity."[25] Major life activities are "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working, those basic activities that the average person in the general population can perform with little or no difficulty: including sitting, standing, lifting, [and] reaching."[26] In order for an impairment to be considered substantially limiting, the impairment must be "a significant restriction on the major life activity."[27]

Congress created the Equal Employment Opportunity Commission (the "EEOC") to monitor the enforcement of the ADA and promulgate regulations and guidelines regarding the ADA. The EEOC clarifies substantially limiting impairments as follows:

> [A]n impairment is substantially limiting if it significantly restricts the duration, manner, or condition under which an individual can perform a major life activity as compared to the average person in the general population's ability to perform that same major life activity. Thus, for example, an individual who, because of an impairment, can only walk for very brief periods of time would be substantially limited in the major life activity of walking. An individual who uses artificial legs would likewise be substantially limited in the major life activity of walking because the individual is unable to walk without the aid of prosthetic devices.[28]

a. The Difficulty in Proving Substantial Limitation

The Fifth Circuit case, *Burch v. Coca-Cola Co.*,[29] illustrates how difficult it can be for an alcoholic plaintiff to carry his burden of proof on the first method of proving a disability under the ADA—showing that he has a "substantially limiting" impairment. In *Burch*, the alcoholic plaintiff attended a company dinner meeting, became intoxicated, and mouthed an obscenity to a fellow manager.[30] Afterward, the plaintiff voluntarily admitted himself to a ten-day inpatient program followed by a four-week outpatient program.[31] The employer fired him two days before his expected release to full-time work, citing his inappropriate behavior at the

24. *See* 42 U.S.C. § 12102(2)(C) (1994). *See also* Goldsmith, 33 F. Supp. 2d at 1340 (holding that a plaintiff who could not perform the duties of a clinic physician because of his hand tremors was not necessarily prevented from performing a broad range of jobs).

25. *See* 29 C.F.R. §1630.2(k) (1996).

26. 29 C.F.R. §1630.2(i) (1996).

27. Taylor v. Pheonixville Sch. Dist., 998 F. Supp. 561, 556 (E.D. Pa. 1998), *rev'd on other grounds*, 184 F.3d 296 (3rd Cir. 1999).

28. 29 C.F.R. § 1630.2(j) (1996).

29. 119 F.3d 305 (5th Cir. 1997).

30. *See id.* at 311.

31. *See id.* at 312.

dinner party as the reason for his termination.[32] The trial court found in favor of the plaintiff, and the employer appealed the judgment.[33]

The Fifth Circuit Court of Appeals reversed the trial court's decision, holding that (1) alcoholism is not a per se disability, and (2) the plaintiff failed to prove that his alcoholism caused him to be *substantially limited in a major life activity*.[34] The plaintiff in *Burch* alleged that when he "drank too much," he was limited in his ability to walk, talk, think, and sleep[35] and that the accompanying hangovers affected his memory, but the Court of Appeals characterized his symptoms as *temporarily* incapacitating.[36] The Fifth Circuit argued that "[p]ermanency, not frequency, is the touchstone of a substantially limiting impairment."[37] The court considered it important that the plaintiff "produced no evidence that the effects of his alcoholism-induced inebriation were *qualitatively* different than those achieved by an overindulging social drinker."[38] The court further noted that although the plaintiff's alcoholism may be "permanent," he presented "no evidence that he suffered from [a] substantially limiting impairment of any significant duration."[39]

The court in *Burch* made no attempt to draw a distinction between an alcoholic and an overindulgent social drinker, nor did it specify what sort of impairments would have qualified. Had the plaintiff shown that his ability to walk, think, talk, and sleep were permanently impaired, as the court apparently would have required, he surely would not have been able to perform the essential functions of his job and would not have been a *qualified* individual with a disability under the ADA in the first place.[40]

2. *Record of a Substantially Limiting Impairment*

The second method available to a plaintiff proving his prima facie case is to establish his disability by showing that he has a record of impairment. In order to meet this second prong of the ADA disability definition, the plaintiff "must demonstrate 'a history of, or [be] misclassified as having, a mental or physical impairment that *substantially limits* one or more of his major life activities.'"[41]

Numerous plaintiffs have attempted to satisfy this prong of the disability definition of the ADA by asserting that a record of impairment has

32. *See id.* at 311.
33. *See Burch*, 119 F.3d at 305.
34. *See id.* at 325.
35. These are examples of major life activities as defined by the EEOC.
36. *See id.* at 316.
37. *Id.* at 316.
38. *Id.*
39. *Id.*
40. The ADA requires that the plaintiff establish that he can perform the essential functions of the job, with or without reasonable accommodation, in order to be qualified. *See* 42 U.S.C. § 12102(2)(A) (1994).
41. Wilson v. S.E. Pa. Transp. Auth., No.98-3411, 1999 WL 58657, at *5 (E.D. Pa. Jan. 26, 1999) (quoting 29 C.F.R. § 1630.2(k) (emphasis added).

been shown *per se* if the plaintiff has been hospitalized and the defendant has knowledge of it.[42] In *Bilodeau v. Mega Industries*,[43] the court discussed its agreement with the Sixth, Seventh, and Eighth Circuits that "a hospitalization for an impairment does not in and of itself establish a record of such a disability."[44] This reasoning is supported by the ADA's requirement that there must be more than a record of a disability, the record must be of a disability that substantially impairs the plaintiff in a major life activity.[45]

3. *Regarded as Having a Disability*

The third method a plaintiff may use to establish that he suffers from a disability under the ADA is to show that he is regarded as having an impairment that substantially limits him in one or more major life activities.[46] "To be 'regarded as having a disability,' [the] plaintiff must be perceived by [the] defendant as generally unable to work in either a class of jobs or a broad range of jobs in various classes as compared with the average person having comparable training, skills and abilities."[47] Thus, a plaintiff can be disabled under the ADA even if he is not substantially impaired in a major life activity, as long as others regard him as such.[48] But the plaintiff cannot merely demonstrate that "the employer regarded [him] as somehow disabled; rather, the plaintiff must show that the employer regarded [him] as disabled within the meaning of the ADA."[49] Even if the defendant concedes that the plaintiff has an impairment, the plaintiff still bears the burden of proof to further prove that the defendant perceived his impairment to be one that *substantially limited* him in a major life activity.[50] Just because the employer is aware of the employee's disability does not mean the employer regarded the employee as disabled or that the adverse employment action was taken because of the perception.[51]

The EEOC has promulgated regulations defining under what circumstances an individual is "regarded as" having an impairment. These circumstances include employers who view an employee as one who: (1) has a physical or mental impairment that does not substantially limit life activities but is treated by a covered entity as constituting such limitations, (2) has a physical or mental impairment that substantially limits major life

42. *See, e.g.*, Bilodeau v. Mega Indus. 50 F. Supp. 2d 27, 36-37 (D. Me. 1999) (holding that plaintiff could not simply introduce evidence of hospitalization to establish that she had a record of impairment).
43. 50 F. Supp. 2d 27, 36-37 (D. Me. 1999).
44. *See id.* at 38.
45. *See* 29 C.F.R. § 1630.2(k) (1996). *See also Burch*, 119 F.3d at 321.
46. *See* 42 U.S.C. §12102(2)(C) (1994).
47. 29 C.F.R. § 1630.2(j)(3)(i) (1996).
48. *See* 29 C.F.R. § 1630.2(1) (1996).
49. *See* Roberts v. N.Y. State Dep't. Of Corr. Serv., 63 F. Supp. 2d 272, 289 (W.D.N.Y. 1999)
50. *See Wilson*, 1999 WL 58657, at *5 (E.D. Pa. 1999).
51. *See id.*

activities only as a result of the attitudes of others toward such impairment; or (3) has none of the impairments defined by the EEOC regulations but is treated by a covered entity as having a substantially limiting impairment.[52]

a. The Difficulty in Satisfying the "Regarded As" Prong

The case of *Wilson v. International Board. of Teamsters, Chauffeurs, and Warehousemen,*[53] illustrates a plaintiff's failure to prove his disability under the "regarded as" prong of the ADA. The plaintiff, Wilson, was a personal assistant and chauffeur who shared an apartment with his employer during the week.[54] Wilson regularly drank alcohol with his employer after working hours.[55] He was fired by his employer and subsequently filed suit, alleging that the employer regarded his alcoholism as substantially impairing the plaintiff in the major life activity of working.[56] The employer knew Wilson was an alcoholic and reprimanded him on many occasions for problems associated with his drinking.[57] But the employer introduced evidence sufficient to establish that he did not perceive the alcoholism as "substantially limiting" in the major life activity of working—even as a chauffeur. The court thus held that the plaintiff failed to establish his disability through the "regarded as" prong of the ADA.[58]

This decision appears problematic for two reasons. First, the employer repeatedly reprimand the plaintiff for his drinking, indicating that he perceived Wilson's alcoholism as interfering with his work. Second, the plaintiff was a chauffeur whose job was to drive his employer from place to place, yet the court readily accepted the employer's assertion that he did not believe the plaintiff's alcoholism substantially impaired his ability to work—in this case, to drive a vehicle. The holding in this case appears to be result-oriented. Perhaps the court could not reconcile the plaintiff's choice to drink with his choice of profession and therefore, reasoned that he was not disabled within the meaning of the ADA.

D. The Process of Bringing a Discrimination Claim Under the ADA

1. Establishing a Disability under the ADA

The ADA provides a framework for all plaintiffs suing under the statute. The first step a plaintiff must take when bringing an action against an employer is to establish that: (1) he is a qualified individual with a

52. 29 C.F.R. § 1630.2(l) (1996).
53. 47 F. Supp. 2d 8 (D. Col. 1999).
54. *See id.*
55. *Id.* at 9.
56. *See id.* at 8.
57. *See Wilson*, 47 F.Supp. 2d at 9.
58. *See id.* at 11.

disability,[59] and (2) the employer's adverse employment action was taken "because of [his] disability."[60] The ADA defines a "qualified individual" as one who (1) satisfies the requisite skill, experience, education, and other job-related requirements of the employment position, and (2) can perform the essential functions of the position, with or without reasonable accommodation.[61] Reasonable accommodations and essential functions will be discussed separately.

2. *Direct Evidence Method and the McDonnell Douglas Indirect Evidence Method*

A plaintiff bears the burden of proving that he is an otherwise qualified person with a disability under the ADA. A plaintiff may meet this burden using either of two separate methods in order to satisfy his prima facie case of discrimination as prescribed by the ADA. First, the plaintiff can introduce direct evidence of discrimination on the part of the employer.[62] Second, the plaintiff may use indirect evidence, utilizing the method of proof established for Title VII actions in *McDonnell Douglas Corp. v. Green*.[63]

Direct evidence could include blatant acknowledgments on the employer's part, such as admitting that the individual is not being hired or is being demoted because he or she is an alcoholic. If the plaintiff cannot establish his prima facie case through direct evidence, then he must resort to the *McDonnell Douglas* method.

There are four prongs to satisfying a plaintiff's burdens of proof under the *McDonnell Douglas* burden-shifting framework. First, the plaintiff must show that he is disabled as the term is defined in the ADA. Second, he must demonstrate that he is qualified for the position he seeks, with or without reasonable accommodation. Third, he must prove that he was subject to an adverse employment action. Fourth, he must establish that a non-disabled person replaced him, or that he was treated less favorably than non-disabled employees were.[64]

Once the plaintiffs has established his prima facie case of discrimination against the employer, the burden of *production* shifts to the employer, who must then articulate a legitimate, non-discriminatory reason for taking the adverse employment action.[65] It is important to note that the employer's burden at this time is not one of *proof*, but of *produc-*

59. *See* 42 U.S.C. § 1212(a) (1994).
60. *Id.*
61. *See* 29 C.F.R. § 1630.2(m) (1996).
62. *See, e.g.* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506-07 (1993).
63. 411 U.S. 792, 802 (1973).
64. *See id.* (holding that to establish a prima facie case of racial discrimination under Title VII, a plaintiff must show "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications").
65. *See* Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

tion.[66] In *St. Mary's Honor Ctr. v. Hicks*,[67] the United States Supreme Court explained the difference between *proof* and *production*. The Court held that although the *McDonnell Douglas* presumption shifts the burden of *production* to the defendant to articulate a legitimate, non-discriminatory reason for the adverse employment action, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains *at all times* with the plaintiff."[68] The employer's burden of production is minimal. The employer has to produce only evidence sufficient to support a finding by a reasonable trier of fact that unlawful discrimination was not the cause of the adverse employment action.[69]

Finally, the burden shifts back to the plaintiffs, who must demonstrate that the employer's proffered reason *is pretextual* and that the real reason for his termination is that the employer discriminated against him *because of* his disability.[70] There are three ways a plaintiff can establish that an employer's proffered reason is pretextual. First, the plaintiff can show that the employer's purported reasoning had no basis in fact. Second, he can prove that the employer's reason was not that which actually motivated the employer's action. Third, the plaintiff can show that the employer's proffered reason(s) were insufficient to motivate the employer's action.[71]

If the plaintiff produces direct evidence that the employer's proffered reason is pretextual, then, and only then, does the burden of *proof* shift to the employer to show that the action was not taken because of the plaintiff's disability.[72] The plaintiff may accomplish this by tendering words or writing(s) by the employer that evidence a discriminatory motive on the employer's part.[73] Ultimately, a plaintiff must establish by a *preponderance of the evidence* that the employer's adverse employment actions were taken because of the employee's disability.[74]

In most discrimination cases "the issue [of whether an employer's proffered reason is pretextual] is a factual question of motivation: Could a reasonable jury find that the adverse action was taken because of the employee's disability rather than because of the purported nondiscriminatory reason?"[75] If the answer to this question is yes, then the judge must allow the case to get to the jury.[76] As the court in *Stepanischen v.*

66. *See St. Mary's Honor Ctr.*, 509 U.S. at 506.
67. 509 U.S. 502 (1993).
68. *Id.* at 506 (emphasis added).
69. *See id.*
70. *See* Daigle v. Liberty Life Ins. Co, 70 F.3d 394, 396 (5th Cir. 1995) (holding that it is clear that the Title VII *McDonnell Douglas* burden shifting framework applies in ADA cases).
71. *See* Kocsis v. Multi-Care Mgmt., Inc., 97 F.3d 876, 883 (6th Cir. 1996).
72. *See* Brown v. E. Miss. Elec. Power Ass'n., 989 F.2d 858, 861 (5th Cir. 1989).
73. *See id.*
74. *See St. Mary's Honor Cntr.*, 509 U.S. at 507.
75. *See Bilodeau*, 50 F. Supp. 2d at 42.
76. *Id.*

Merchants Despatch Transp. Corp.[77] noted, courts have to be "particularly cautious" about granting an employer's motion for summary judgment.[78]

a. The Difficulty Faced by Alcoholics in Establishing that the Employer's Proffered Reason is Pretextual

Murphy v. Village of Hoffman Estates[79] illustrates a plaintiff's failed efforts to establish that his employer's motive for terminating him was pretextual. The plaintiff's employer brought disciplinary action against the plaintiff, Murphy, on a number of occasions.[80] Murphy's employer eventually terminated him as a result of the numerous alleged infractions.[81] Murphy argued that the numerous occasions of disciplinary action, and indeed, his ultimate termination, was all a pretext for discrimination on the part of his employer.[82] Murphy proffered evidence that his employer had a policy of expunging disciplinary records every twelve months but that the employer failed to follow this policy with regards to Murphy's record.[83] The court refused, however, to consider this as evidence of pretext, because the employer's policy was only to expunge employee's records if they avoided disciplinary incidents for at least twelve months, and there was evidence that Murphy had not done so.[84]

Maddox v. University of Tennessee.[85] is another example of a case where the plaintiff unsuccessfully tried to prove that the defendant terminated him because he was an alcoholic, rather than for the allegedly legitimate reasons proffered.[86] The plaintiff, Maddox, introduced evidence that while he was undergoing rehabilitative treatment, he met with the athletic trainer[87] and that the trainer told him that "he had been advised" that one of the directors "did not want *another alcoholic* in the program."[88] The court held that the evidence was inadmissible as double hearsay—thus the plaintiff was effectively prevented from establishing that the defendant's proffered reasons for termination were pretextual.[89]

If the plaintiff establishes his prima facie case and the burden-shifting analysis is completed, the employer may raise certain affirmative defenses to the plaintiff's discrimination claim. Affirmative defenses will be discussed separately.

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77. 722 F.2d 922 (1st Cir. 1983).
78. *See id.* at 928.
79. *Murphy*, No. 95CJ192, 1999 WL 160305 (N.D. Ill. March 17, 1999).
80. *See id.* at 3.
81. *See id.*
82. *See id.* at 5.
83. *Murphy*, 1999 WL 160305 at *5.
84. *See id.*
85. 907 F. Supp. 1144 (E.D. Tenn. 1994).
86. *See id.* Note that *Maddox* was a case brought under the Rehabilitation Act, but the method used to show that a defendant's proffered reasons were pretextual is the same under the ADA and the Rehabilitation Act.
87. The athletic trainer was unavailable because he died before the trial.
88. *See id.* at 1148. (emphasis added).
89. *See id.* at 1152.

E. Alcoholism as a Disability Under the ADA

Each time a plaintiff files suit under the ADA, the court must make an individual determination as to whether the plaintiff has produced enough evidence that a reasonable jury could find that he is a qualified individual with a disability under the ADA.[90] As mentioned earlier, under the ADA, employers may hold alcoholics and drug users to the same job performance standards as other non-disabled employees.[91] The plaintiff bears the "burden of proving that his alcoholism did not affect his job and that he was performing to the same standard as other employees."[92] This means that even if the alcoholism was a causal factor leading to improper behavior or non-compliance with company standards, the alcoholic person gets no special privileges. The following two cases illustrate this point.

1. Rollison v. Gwinnet County

The first case illustrating this standard is *Rollison v. Gwinnet County*.[93] In *Rollison*, the plaintiff police officer's employer deemed the plaintiff's performance "average to good and sometimes going to excellent."[94] But his off-duty behavior was not acceptable and included "repeated involvement in fights, domestic altercations, [and a] traffic violation."[95] These behaviors fell below the standards that the county required of its police officers.[96] The court held that "the facts of [*Rollison*] fell squarely within the ADA's treatment of alcoholic employees who do not perform up to the standards required by their employer" and denied the plaintiff recovery under the Act.[97] The court applied this harsh result even though the plaintiff was not accused of drinking or being under the influence of alcohol on the job, and even though his off-duty indiscretions were *causally related* to his alcoholism.[98] Thus, although there was a causal connection between the plaintiff's behavior and his disability, the court did not view the county's action as one of discrimination.

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90. *See Bilodeau*, 50 F. Supp. 2d at 47.

91. *See* 42 U.S.C. § 12114(c)(4) (1994). *See also* Altman v. New York City Health and Hosps., Corp. 100 F.3d 1054, 1059 (2d Cir. 1996) (holding that plaintiff chief of internal medicine was guilty of being under the influence of alcohol on the job).

92. Conley v. Vill. of Bedford Park, 1999 WL 412441, *3 (N.D. Ill. 1999) (holding that the plaintiff, who had repeatedly turned down overtime work and admitted others with less seniority deserved to be promoted over him because of better performance ratings, had not carried his burden).

93. *See* 865 F. Supp. 1564, 1572 (N.D. Ga. 1994).

94. *Id.* at 1572.

95. *Id.*

96. *See id.*

97. *Id.*

98. A covered entity may hold an employee who is an alcoholic to the same standards that it holds other employees *even if the unsatisfactory performance or behavior is related to the alcoholism of the employee. See* 42 U.S.C. § 12114(c)(4) (emphasis added).

2. Despears v. Milwaukee County

The Seventh Circuit case *Despears v. Milwaukee*[99] further illustrates this point. The plaintiff in *Despears*, an alcoholic, was required to have a driver's license for his job. He was arrested and convicted for driving under the influence of alcohol.[100] Because having a driver's license was a prerequisite for his position, his employer demoted him to a position where a license was not required.[101]

The plaintiff brought an ADA action against his employer alleging that the employer had a discriminatory motive in demoting him, but he could not even get past the summary judgment stage.[102] He argued that his disability (alcoholism) caused him to drink. Then, once he was drinking, his judgment was impaired, and his impaired judgment caused him to drive while intoxicated. Thus, it was this pattern of behavior, caused by his alcoholism, which subsequently caused him to lose his license.[103] From the plaintiff's perspective, his alcoholism was ultimately the reason for his demotion.[104] In analyzing the plaintiff's case, however, the Seventh Circuit rejected the plaintiff's argument, explaining that "criminal law proceeds on the premise that even alcoholics can avoid driving while [intoxicated]."[105] The court argued that the plaintiff made a conscious choice to drive his automobile while under the influence of alcohol.[106] As the court explained, alcoholism was merely one factor in his decision to drive while intoxicated.[107] In the eyes of the court, the plaintiff's choice to drink and his subsequent choice to drive deserved greater weight than his addiction.[108] The court stated that the plaintiff's disability "contributed to, but did not compel the action that resulted in [his] demotion.[109]

The *Despears* court also identified the slippery slope that would be created if courts were to require employers to sanction criminal behavior. The court reasoned that using the ADA to impose liability against employers in "such circumstances would indirectly but unmistakably undermine the laws that regulate dangerous behavior," because it would give alcoholics and others with disabilities special privileges allowing them "to avoid some of the normal sanctions for criminal activity."[110] The court feared that doing so would communicate the message that, just because it is more difficult for an alcoholic to choose not to drive while intoxicated than it is for non-alcoholics, the sanctions should be lightened for

99. 63 F.3d 635 (7th Cir. 1995).
100. *See id.*
101. *See id.*
102. *See id.* at 635-36.
103. *See id.* at 636.
104. *See Despears*, 63 F.3d at 636.
105. *Id.* at 637.
106. *See id.*
107. *See id.* at 636.
108. *See id.*
109. 63 F.3d at 637.
110. *Id.*

them.[111] They would be allowed to "keep [their] jobs in circumstances where anyone else engaged in the same criminal behavior would lose it."[112] This argument is faulty, however, because the plaintiff was not arguing that he should not be held criminally liable for driving under the influence of alcohol, he was arguing that his employer should not be able to take action against him when his disability led to his behavior. The Seventh Circuit's analysis concluded that "the refusal to excuse, or even alleviate the punishment of, the disabled person who commits a crime under the influence is not "discrimination against the disabled; it is a *refusal to discriminate in their favor.*"[113]

The EEOC regulations apply equivalent standards to employees disabled by alcoholism and to non-disabled employees. Further, the regulations restrict *who* may be considered disabled under the ADA because of drug addiction or alcoholism. Those engaging in current *illegal drug use* are not considered disabled under the ADA,[114] but those who have successfully completed or are currently participating in a supervised drug rehabilitation program and are *no longer engaging in such use* are disabled.[115] On the other hand, the EEOC treats addictions to illegal drugs and addictions to alcohol differently. There is no requirement that the alcoholic currently be abstaining from the use of alcohol to be covered under the ADA.[116] Employers may, however, prohibit the use of illegal use of drugs *and* alcohol in the workplace[117] and prohibit employees from being under the influence of illegal drugs or alcohol in the workplace.[118]

F. When is an Alcoholic "Otherwise Qualified" under the ADA?

An employee must show that he is a disabled person who is otherwise qualified to perform the job "with or without reasonable accommodation" before he has standing to file suit under the ADA. Discrimination under the ADA includes failing to reasonably accommodate the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee.[119] The ADA defines an "otherwise qualified," individual as one who is able to perform the essential functions of the position with or without reasonable accommodations.[120] The court must perform individual assessments as to what functions are deemed essential on a case-by-case basis.[121] Evidence of which functions are essential includes, but is not limited to:

111. *Id.*
112. *Id.*
113. *Id.*
114. *See id.* at § 12114(a) (1994).
115. *See id.* at § 12114(b)(1),(2) (1994).
116. *See id.*
117. *See* 29 C.F.R. § 1630.16(b)(1) (1996).
118. *See id.* at § 1630.16(b)(2).
119. *See* 42 U.S.C § 12112(b)(5)(A) (1994).
120. *See id.*
121. *See* 29 C.F.R. § 1630.2(m) (1996).

1. the employer's judgment as to which functions are essential,
2. written job descriptions of the position,
3. the amount of time spent on the function,
4. the consequences of not requiring the disabled individual to perform the function,
5. the terms of a collective bargaining agreement,
6. the work experience of past persons in the same position, and/ or
7. the current work experience of other persons in the same position.[122]

Other factors may apply if a particular function is a specialized ability. Then the court should consider (1) whether the position exists mostly to perform that function, (2) whether there is a limited pool of employees available to perform that function, and (3) whether the function is highly specialized and the incumbent is hired specifically for his expertise.[123]

When bringing an action under the ADA, the plaintiff "cannot simply allege that he 'could' have performed the essential functions of his job."[124] Instead, the plaintiff must "allege that, at the time he was terminated, he was meeting his employer's legitimate performance expectations.[125]

G. Employer's Duty to Provide Reasonable Accommodations

The ADA requires employers to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability."[126] A reasonable accommodation is one that would allow a person with a disability to perform the essential functions of the position.[127] Accommodations may include, but are not limited to:

1. making existing facilities readily usable by the disabled individual,
2. job restructuring,
3. part-time or modified work schedules,
4. reassignment to a vacant position,
5. acquisition or modification of equipment, and
6. other similar accommodations.[128]

Failure to provide reasonable accommodations to persons with known disabilities is *prima facie* evidence of discrimination.[129] But this standard is not as harsh as it sounds. In *Taylor v. Principle Financial Group, Inc.*,[130] the Fifth Circuit held that the disabled plaintiff must show he

122. *See* 29 C.F.R. § 1630.2(n)(3) (1996).
123. *See* 29 C.F.R. § 1630.2(n)(2) (1996).
124. *Id.*
125. *Id.*
126. 42 U.S.C. § 12112(b)(5)(A) (1994).
127. *See* Rizzo v. Children's World Learning Cntrs., Inc., 84 F.3d 758, 762 (5th Cir. 1996).
128. *See* 42 U.S.C. § 12112 (1994). *See, e.g.*, H. Rep. No. 101-485, 84, U.S. Code Cong. & Admin. News 1990, p.451 (Part-time or modified work schedules are accommodations intended for people with disabilities who cannot work a standard or customary schedule).
129. *See* 42 U.S.C. § 12112(b)(5)(A) (1994).
130. 93 F.3d 155 (5th Cir. 1996).

made a request for reasonable accommodation.[131] After the employee requests accommodation, the employer must make a reasonable effort to provide the appropriate accommodation to *qualified* individuals with disabilities.[132] Then the employer should use a problem-solving approach, working with the employee, to implement appropriate accommodations.[133] But the individual must first demonstrate that he is substantially impaired in a "major life activity"[134] at the time the accommodation is sought before the ADA will require the employer to make any such accommodation to the individual.[135]

1. What is a "Reasonable" Accommodation?

The ADA specifically defines the criteria for what qualifies as a reasonable accommodation. Accommodations are not considered reasonable if they would (1) eliminate an essential function of the position, (2) impose an undue burden on the employer, or (3) pose a direct threat to the health and safety of others.[136] Whether the employer has provided reasonable accommodation is generally a question of fact, and the employer bears the burden of proving its inability to accommodate.[137]

a. Elimination of an Essential Function is Not Reasonable

First, the ADA states that any accommodation which would require the employer to eliminate an essential function of the position is not *reasonable* under the ADA.[138] In *Barber v. Nabors Drilling, U.S.A., Inc.*,[139] the Fifth Circuit held that individuals are not considered "otherwise qualified" under the ADA if the only successful accommodation is for the disabled person not to perform an essential function of the job.[140]

b. It is Not Reasonable to Impose an Undue Hardship on the Employer

Second, the ADA provides that an accommodation is not reasonable if it would impose an "undue hardship" on the employer.[141] The ADA defines "undue hardship" as any action "requiring significant difficulty or expense" in light of such considerations as the cost involved and the diffi-

131. *See id.* at 163-64.
132. *See* 29 C.F.R. § 1630.9 (1995) (emphasis added).
133. *See id.*
134. Major life activities include "those basic activities that the average person in the general population can perform with little or no difficulty." *See* 29 C.F.R. § 1630.2(I) (discussing which activities qualify as major life activities under the ADA).
135. *See* Burch, 119 F.3d at 315.
136. *See* Robertson, 161 F.3d at 295-96.
137. *See, e.g., Fuller*, 916 F.2d at 562, n.6; Schmidt v. Safeway Inc., 864 F. Supp. 991, 997 (D. Or. 1994).
138. *See Robertson*,161 F.3d at 295.
139. 130 F.3d 702 (5th Cir. 1997).
140. *See id.* at 709.
141. *See* 42 U.S.C. § 12112(b)(5)(a) (1994).

culty of implementing the accommodation.[142] An employer may affirmatively defend a lawsuit under the ADA by showing that his business would be put under undue hardship if he were required to accommodate the employee in the manner suggested.[143] But because the employer bears the burden on this issue, it must be able to demonstrate that the accommodation would cause a negative economic impact on the company or disrupt the company's operations.[144]

c. It is Not Reasonable to Pose a Direct Threat to the Health or Safety of Others in the Workplace

Third, employers are not required to accommodate employees if doing so would pose a direct threat to the health or safety of others in the workplace.[145] The EEOC defines "direct threat" as 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.[146] Courts examining whether an employee poses a direct threat should look at the individual's present ability to safely perform the essential functions of the job.[147] In making this determination, courts should consider a number of factors, including:

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.[148]

This concept is illustrated in *Altman v. New York Health and Hosp. Corp.*[149] In *Altman*, the plaintiff, physician Kurt Altman, was Chief of Internal Medicine at Metropolitan Hospital Center.[150] While working at Metropolitan, he had been cited for professional misconduct, including drinking alcohol in the workplace and being under the influence of alcohol while working.[151] Subsequently, Altman successfully completed a supervised inpatient rehabilitation program.[152] Metropolitan did not want Altman to return to his position because the Chief of Internal Medicine was required to be on-call 24 hours a day, and the hospital feared that he

142. *See* 42 U.S.C. § 12111(10)(A) (1994).
143. 42 U.S.C. § 12112(b)(5)(A) (1994).
144. *See* Riel v. Elec. Data Sys., 99 F.3d 678, 682 (5th Cir. 1996).
145. *See* 42 U.S.C. § 12113(b) (1994).
146. *See* 29 C.F.R. § 1630.2(r) (1997).
147. *See id.*; *See also Rizzo*, 84 F.3d at 763.
148. *See* C.F.R. § 1630.2(r) (1997).
149. *See* 100 F.3d 1054, 1061 (2nd Cir. 1996) (holding that alcoholic physician with history of on-the job drinking and absenteeism was not qualified to serve as hospital's chief of internal medicine).
150. *See id.* at 1055.
151. *See id.* The medical director at the hospital discovered Altman treating a patient while inebriated. *See id.*
152. *See id.* at 1055-56. Altman's treating physician at the detoxification center released him with a guarded prognosis, citing his continued alcoholism, underestimation of his disease, and control issues. *See id.* at 1056.

would relapse.[153] Thus, if Altman did relapse and was called in to work, there might be a repeated incident of drinking on the job, even treating patients while intoxicated. Engaging in such behavior would certainly pose a direct threat to the health and safety of others in the workplace.

As a proposed reasonable accommodation, Metropolitan told Altman that he could return to the hospital as an attending physician.[154] His salary in the position would be $40,000 less than his salary as chief of medicine, but $10,000 more than other staff physicians were being paid.[155] Altman objected to the accommodation, claiming that it was not an equivalent position, in status or in salary.[156] But both the district court and the Second Circuit court of appeals agreed with Metropolitan that the proposed accommodation was reasonable.[157]

The problem with the analysis employed by the two courts, however, is that everyone, Metropolitan, the district court, and the Second Circuit Court of Appeals all agreed that it would be a reasonable accommodation to allow Altman to return to work as an attending physician,[158] *working with patients.* If the reason that Altman could not return to work as chief of internal medicine was that there was a possibility of relapse, then how did it make sense for him to return to treating patients at all?[159] And why, if he would be doing the same work as other attending physicians, would he be making $10,000 more? Again, it appears that the court was engaging in result-oriented analysis. Perhaps the hospital feared that leaving Altman in such a prominent position with his history of alcoholism would leave it open to lawsuits, and the court did not want to punish Metropolitan for choosing to keep Altman, but merely placing him in a less conspicuous position. But there is no place in the ADA for such reasoning. Altman either does or does not pose a direct threat to the patients, and he would be working with patients in either the Chief of Internal Medicine position or the staff physician position. The only real differences would be the salary and the title.

H. What Qualifies as Reasonable Accommodation for the Alcoholic Employee?

The following sections illustrate some of the difficulties alcoholics have in establishing that they are "otherwise qualified" for the job, "with or without reasonable accommodations" under the ADA.[160] Alcoholism is treated differently than other disabilities in many ways. Alcoholics bring-

153. *See Altman*, 100 F.3d at 1056.
154. *See id.* at 1059.
155. *See id.*
156. *See id.* at 1058.
157. *See id.*
158. *See id.*
159. *See id.* The court included other factors, such as the great number of people Altman would be in charge of as chief of internal medicine. *See id.* at 1057-1058.
160. *See* 42 U.S.C. § 12111(8) (1994) (requiring that individuals prove that they can perform the essential functions of the position, with or without reasonable accommodation).

ing a discrimination claim under the ADA have a greater burden than those with other disabilities do. It is extremely difficult for alcoholics to establish (1) that they have a substantially limiting impairment[161] and (2) that they are "otherwise qualified to perform the essential functions of the position."[162] The difficulty lays in the paradox involved in the ADA allowing employers (1) to hold alcoholics to the same standards as other employees,[163] and (2) to discharge alcoholics for below-standard behavior,[164] even if such behavior is causally related to the alcoholism.[165]

1. *Providing a Framework for Reasonable Accommodation: Rogers v. Lehman*

The Fourth Circuit case, *Rogers v. Lehman*,[166] provided a framework for analyzing the question, "What is a reasonable accommodation of an alcoholic employee?"[167] In *Rogers*, the court examined two consolidated cases. Two alcoholic employees sued the Army and the Navy, respectively, alleging that their employers failed to reasonably accommodate them.[168] The first plaintiff was discharged for alcohol related absenteeism.[169] The second plaintiff was discharged both for alcohol-related absenteeism *and* for drinking on the job,[170] clearly proscribed under the ADA.[171] Each plaintiff had already completed supervised *outpatient* rehabilitation programs.[172]

The *Rogers* court held that, when dealing with an alcoholic employee, the employer must follow a progressive course of action.[173] The employer should:

1. inform the employee of available counseling services as soon as a problem is recognized,
2. provide the employee with a firm choice between treatment and discipline,
3. provide an opportunity for outpatient treatment, with discipline for continued misconduct; and
4. afford an opportunity for inpatient treatment if outpatient treatment fails.[174]

If the employer discharges an employee after *inpatient* treatment fails, then there is a rebuttable presumption that the employer's action was

161. *See, e.g.*, *Burch*, 119 F.3d at 315.
162. *See* 42 U.S.C. § 12114(c)(4) (allowing employers to hold alcoholics to the same standard as non-disabled persons).
163. *See id.*
164. *See id.*
165. *See id.*
166. 869 F.2d 253 (4th Cir. 1989).
167. *See id.*
168. *See id.* at 254, 256-57.
169. *See id.* at 255-57.
170. *See Rogers*, 869 F.2d at 255-57.
171. *See* 49 U.S.C. § 12114(c)(1).
172. *See Rogers*, 869 F.2d at 255-56.
173. *See id.* at 259.
174. *See id.*

justified under the ADA.[175] Furthermore, the plaintiff may succeed in rebutting this presumption only in "rare case[s] such as where a recovering alcoholic had a single relapse after a long period of abstinence."[176] The court examined the actions of the two employers and determined that because the Army and Navy did not allow each plaintiff the opportunity for *inpatient* treatment before discharge,[177] they denied the employees reasonable accommodations.[178] The court then reinstated both plaintiffs to their former positions.[179]

The Fourth Circuit ruling in *Rogers* appears to conflict with the Fifth Circuit's holding in *Burch*,[180] where the plaintiff was terminated while participating in his first rehabilitation program.[181] It *might* be possible to reconcile the two cases if one categorizes the plaintiff's conduct in *Burch*, mouthing an obscenity to a fellow employee,[182] as crossing the line to egregious behavior. The more logical assumption, however, is that the two Circuits differ in where their sympathies lie: with the employee or the employer.

The Fourth Circuit's framework for providing reasonable accommodations to alcoholics is pro-employee, requiring employers to undertake a number of steps before terminating alcoholic employees. But courts have not interpreted this framework to lay the burden of unlimited tolerance on the employer, as indicated in the following sections.

2. *Limitations on an Employer's Duty to Reasonably Accommodate Alcoholics*

a. Employers Do Not Have to Condone Criminal Behavior: *Hinnershitz v. Ortep of Pennsylvania, Inc.*

In *Hinnershitz v. Ortep of Pennsylvania, Inc.*,[183] the plaintiff was an oil truck driver and oil burner cleaner.[184] The plaintiff voluntarily admitted that he suffered from alcoholism, and he requested permission from his employer, Ortep, to participate in a nineteen-day in-patient treatment program for alcohol abuse.[185] After he completed the program, the program director advised the plaintiff and his employer that the plaintiff should continue to attend both counseling sessions and Alcoholics Anon-

175. *See id.*
176. *See id.*
177. *See Rogers*, 869 F.2d at 254. Rodgers was given leave to attend an inpatient treatment program, but he was terminated for conduct prior to entering the program. *See id.* at 256. The court deemed that he was not afforded the proper opportunity to undergo inpatient treatment prior to his discharge. *See id.* at 254.
178. *See id.* at 259.
179. *See id.* at 260.
180. 119 F.3d 305.
181. *See id.* at 312.
182. *See id.* at 311.
183. 1998 WL 962096 (E.D. Pa. Dec. 22, 1998).
184. *See id.* at *1.
185. *See id.*

ymous meetings at least four times a week.[186] The plaintiff disagreed with the director's assessment, deemed both follow-up measures unnecessary, and chose not to comply with the director's recommendations.[187]

During the time that Ortep employed the plaintiff, there was never any evidence that he either drove an oil truck while intoxicated or that he drank alcohol during working hours.[188] But as the court in *Hinnershitz* reasoned, under the Code of Federal Regulations ("C.F.R") pertaining to qualifications of drivers, a person cannot be considered physically qualified to drive a commercial vehicle, such as a fuel oil truck, if the person is currently clinically diagnosed as an alcoholic.[189] Furthermore, the C.F.R. prohibits an employer from allowing an unqualified person to drive a commercial vehicle.[190] And if a disease (such as alcoholism) has impaired a driver's ability, then the C.F.R. requires that he be physically examined and certified as physically qualified to operate a commercial motor vehicle."[191]

In contrast to the *Hinnershitz* court's reasoning, the court in *Wilson v. Southeastern Pennsylvania Transportation Authority*[192] refused to even acknowledge C.F.R regulations pertaining to drivers of public transportation for purposes of an ADA analysis. The *Wilson* court reasoned that "Congress significantly did not exclude alcoholics from ADA protection as it did current illegal drug users."[193] When drafting the ADA, Congress specifically excluded employees currently using illegal drugs from the ADA's protection, citing current drug users as an exception to those considered to be otherwise qualified individuals with disabilities.[194] Therefore, the *Wilson* court reasoned, because Congress explicitly chose not to exclude alcoholics from the statute's coverage, the C.F.R. regulations governing the operators of public transport vehicles should not apply to actions brought by alcoholics under the ADA.[195] The court's reasoning in *Wilson* was made even bolder because the plaintiff in this case was a driver of *public* transportation, not merely a commercial vehicle.

Even though the plaintiff in *Hinnershitz* had successfully completed a nineteen-day, *in-patient* drug rehabilitation program, the defendant contended that in order to avoid having a "current clinical diagnosis of alcoholism," the plaintiff had to attend both the counseling sessions and the Alcoholics Anonymous support group meetings prescribed by the rehabilitation program director.[196] The defendant further argued that its offer to allow the plaintiff to attend the rehabilitation program and to attend

186. *See id.* at *2.
187. *See id.*
188. *See id*, 1998 WL 962096, at *1.
189. *See* 49 C.F.R. § 391.41(b)(13) (1998); 1998 WL 962096, at *4.
190. *See* 49 C.F.R. § 391.11(a) (1998); 1998 WL 962096, at *4.
191. *See* 49 C.F.R. § 391.45(c) (1998); 1998 WL 962096, at *4.
192. *See* 1999 WL 58657, at *4 (E.D. Pa. Jan. 26, 1999).
193. *See* 1998 WL 58657, at *4; 42 U.S.C. § 12114(a) (1994);
194. *See* 42 U.S.C. § 12114(a).
195. *See* 1999 WL 58657, at *1.
196. *See* 1998 WL 962096, at *5.

the counseling sessions and AA meetings were reasonable accommodations of the plaintiff's disability.[197] The court agreed with the defendant, citing *Aka v. Washington Hosp. Center*[198] for the proposition that an employer is only required to provide the employee with a reasonable accommodation, which may not necessarily be the accommodation that the *employee prefers*.[199] "An employee cannot use the ADA to compel an employer to offer a particular reasonable accommodation."[200] "The employer providing the accommodation has the ultimate discretion to choose between effective accommodations and may choose the less expensive accommodation or the accommodation that is easier for it to provide."[201] "A plaintiff has no right to make the employer provide a particular accommodation 'if another reasonable accommodation is instead provided.'"[202] In essence, the *Hinnershnitz* court's decision implies that, because the employer provided the plaintiff time to attend the counseling sessions and "meetings, the plaintiff had to accept the accommodations and could not choose to do otherwise."

Additionally, because the plaintiff in *Hinnershitz* had no contrary evidence on the issues of whether he needed to attend counseling and AA sessions except his own self-judgment, he could not produce sufficient evidence to get past the defendant's motion for summary judgment.[203] The defendant had articulated a legitimate, non-discriminatory reason for the plaintiff's discharge: his refusal to complete prescribed outpatient treatment and his refusal to cooperate in efforts to decide whether an alternative type of treatment was a viable option.[204] And the plaintiff offered no evidence that the defendant's asserted reasons were pretextual.[205]

The plaintiff in *Hinnershitz* had never done anything to show that he was unqualified to perform the essential functions of his job. Nor had he ever, even allegedly, been under the influence of alcohol during working hours. Nevertheless, he was prohibited from even going beyond the summary judgment stage in an action against his employer who discharged him because of his alcoholism.

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197. *See id.*

198. 156 F.3d 1284, 1305 (D.C. Cir. 1998), quoting Gile v. United Airlines, Inc., 95 F.3d 492, 498 (7th Cir. 1996).

199. 1998 WL 962096 at *5;

200. Turner v. Fleming Cos., Inc., 1999 WL 68580, at*5 (6th Cir. Jan. 21, 1999) (holding that the plaintiff could not hold out for the accommodation he preferred when the employer had already reasonably accommodated him by allowing him to leave work during the day to attend counseling sessions).

201. Hankins v. The Gap, Inc., 84 F.3d 797, 800-01 (6th Cir. 1996) (quoting 29 CFR § 1630, app. § 1630.9 (interpretive guidance accompanying ADA regulations).

202. Turner v. Fleming Cos., Inc., 1999 WL 68580, at *5 (quoting *Hankins*, 84 F.3d at 800-01.

203. 1998 WL 962096, at *7.

204. *See id.*

205. *See id.*

b. Employers Do Not Have to Condone Absenteeism, Even if it is Related to the Employee's Alcoholism

In addition to holding that employers do not have to make concessions where criminal behavior is involved, courts have interpreted the ADA to provide even more leeway for employers. One example of this is the courts' leniency on employers who discriminate against employees who have problems with absenteeism, even if the problems are related to their alcoholism.[206] Whether employees can establish that an employer discriminated against them because of absenteeism caused by their alcoholism may depend on the reasons for their absences. There are certain valid reasons to be absent, such as current participation in a supervised rehabilitation program or attendance at alcoholics anonymous meetings,[207] and there are invalid reasons, such as being hung over from a night of heavy binge drinking. Both are causally related to employees' alcoholism, but while an employer may not usually discriminate against absent employees in a supervised rehabilitation program, it may discriminate against employees for being absent due to other alcohol-related causes.

3. Leave of Absence

A request by an alcoholic employee for an unpaid leave of absence to attend a treatment program is often considered a request for reasonable accommodation.[208] In *Schmidt v. Safeway*,[209] the plaintiff, a truck driver for Safeway, filed suit against his former employer, alleging that Safeway failed to reasonably accommodate him when it refused to give him an unpaid leave of absence to obtain treatment for his alcoholism.[210] The court agreed with the plaintiff, stating "[A] leave of absence to obtain medical treatment is a reasonable accommodation if it is likely that, following treatment, [the] plaintiff would have been able to safely perform his duties as a truck driver."[211] But the court made it clear that an employer would *not* be required to offer any accommodation that is likely to be futile.[212] The court explained that the futility of the accommodation would mean that the employee would not be able to "safely and efficiently" perform the essential functions of the job and so would not be

206. *See, e.g.*, Teahan v. Metro-North Commuter R.R., 951 F.2d 511, 517 (2nd Cir. 1991) (holding that adverse action taken in response to absenteeism caused by a disability is action taken because of the disability).

207. Persons are considered disabled under the ADA while participating in a supervised rehabilitation program as long as they are no longer using the substance. *See* 42 U.S.C. § 12114(b)(2).

208. *See* Schmidt v. Safeway, 864 F. Supp. 991, 997 (D. Or. 1994) (holding that the employer's refusal to allow the employee to take a leave of absence to obtain treatment was unreasonable in light of the fact that the employer's Medical Review Officer recommended the leave and where there was no evidence that the leave would impose an undue hardship on the employer).

209. 864 F. Supp. 991 (D. Or. 1994).

210. *See id.* at 996-97.

211. *See id.*

212. *See id.*

considered qualified under the ADA.[213] Thus, 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).[214]

4. How Company Policies on Absenteeism Can Affect an Alcoholic Who Requests a leave of Absence

Alcoholics may need to be reasonably accommodated by obtaining permission to leave work for extended time periods to attend inpatient programs, or for short time periods to attend outpatient meetings, counseling sessions, and AA meetings. Such absences from work can cause serious problems for alcoholics who work in environments with strict absenteeism policies.

a. Personal Contact: *Turner v. Fleming*

One example of such a restrictive absenteeism policy is the "personal contact" requirement many companies have. In *Turner v. Fleming Cos., Inc.*,[215] the employer required employees to make "personal contact" with the employer in order to obtain permission *before* being absent from work.[216] Turner, the plaintiff, worked in what his employer classified as an "unskilled" position B loading milk onto trucks.[217] Turner had never had trouble on the job before, and his supervisor referred him to as his "best loader."[218] Before he requested a leave of absence to attend an inpatient alcohol rehabilitation program, he worked the second shift primarily and occasionally helped out on the first shift.[219]

Turner had completed an inpatient rehabilitation program for his alcoholism, and he was attending an outpatient treatment program.[220] He made personal contact with his employer by calling him to request that he be able to work the first shift, because he needed to attend his outpatient rehabilitation meetings four days a week in the afternoon.[221] Without checking on availability of openings in the first shift, his supervisor denied his request and told Turner that there were no available positions on the first shift.[222] The supervisor offered to allow Turner to attend the outpatient meetings in the afternoon during his shift. But he told Turner that he would only allow him fifteen minutes travel time to the meet-

213. *See id.*
214. *Id. See also* Holmes v. Willamette University, 971 P.2d 914, 919 (Ct. App. Or. 1998) (holding that, in order to obtain summary judgment, the employer had to introduce evidence that undue hardship would result if they allowed the employee, a law professor, to take a year of unpaid leave to obtain treatment).
215. 1999 WL 68580, at *5 (6th Cir. Jan. 21, 1999).
216. *See id.*
217. *See id.*
218. *Id.*
219. *See id.*
220. *See id.*
221. *See id.*
222. *See id.*

ings.[223] Turner thought the allotted travel time was inadequate, so he faxed his supervisor, informing him that the proposed accommodations were not acceptable to him and stated in the fax that he awaited a reply.[224] His supervisor did not reply, and Turner did not show up at work.[225] The employer then fired Turner for failing to make "personal contact" in compliance with company policy.[226]

In analyzing Turner's claim against his former employer, the Sixth Circuit held that his violation of the employer's "personal contact" policy was a legitimate, non-discriminatory reason to fire the plaintiff.[227] The court held that the two faxes the plaintiff sent were not personal contact, even though the plaintiff requested a reply, stating that the company policy placed the burden of proof on the plaintiff to show personal contact.[228]

Turner was left with little recourse. He did not believe that he could get to and from his meetings in fifteen minutes during the second shift, and his employer would not allow him to work during the first shift. While trying to establish a way for his accommodation to work, he established a way for his employer to legitimately discharge him.

b. "Consecutive Absence" Policies

Another company policy that provides employers with a legitimate reason to terminate alcoholic employees for absenteeism is the "consecutive absence" policy. Many employers have "consecutive absence" policies, whereby an employer will automatically terminate an employee with a certain number of consecutive unauthorized absences from work.[229] In *Brown v. Lucky Stores, Inc.*,[230] Lucky Stores, Inc. ("Lucky") employed Brown as a checker. Brown was arrested for driving under the influence of alcohol ("DUI") and was immediately taken to a mandatory rehabilitation program by the police.[231] Lucky then fired Brown for non-compliance with its "unauthorized absence" policy.[232] The court held that Lucky legitimately terminated Brown under its absenteeism policy, which called for automatic termination for three unauthorized absences.[233] This rule was applied even though the absences were related to a DUI violation that was, at least in part, caused by the plaintiff's alcoholism. The plaintiff missed her third shift while in a court mandated 24-hour-a-day rehabilitation program, but the court held that this was not an excuse that

223. *See id.*
224. *See id.*
225. *See id.*
226. *See id.*
227. *See id.*
228. *See id.*
229. *See, e.g.* Brown v. Lucky Stores, No. C98-00122, 1999 WL 66138 (N.D. Cal. Feb. 8, 1999)
230. *Id.*
231. *See id.* at *1.
232. *See id.*
233. *See id.* at *4.

the plaintiff missed her shift because she "had committed several crimes, not because she was an alcoholic."[234]

Such an analysis seems to violate the spirit of the ADA. Alcoholism can be a disability under the ADA, and employers can be forced to reasonably accommodate alcoholic employees under the ADA by giving them leave to participate in rehabilitation programs. But if an employee is placed in a mandatory rehabilitation program by the state because of actions in part caused by the alcoholism, then the employer is free to terminate the employee for violation of company absenteeism policy.

c. Employers May Terminate Alcoholic Employees for Engaging in Egregious Misconduct, Even if Such Conduct is Caused by the Alcoholism

Another hurdle alcoholic plaintiffs face when suing under the ADA, is that if they engage in egregious misconduct, even if it is causally related to their alcoholism, employers may legitimately terminate them.[235] "Even assuming an impairment, real or perceived, the ADA does not immunize employees from terminations based on misconduct in the workplace."[236] The protections provided by the ADA do not extend to the *misconduct* of the disabled individual, so an alcoholic employee is unable to protect himself under the ADA's umbrella, even when his conduct is related to the alcoholism.[237] A case previously referred to, *Rollison*,[238] illustrates this point.[239] The police officer in *Rollison* was discharged because of his egregious off-duty behavior.[240] The employer's decision in *Rollison* was legitimate under the ADA, both because the police officer's actions fell below the standard of behavior required of other officers in the county and because his alcoholism could not excuse his behavior, including the traffic violation.[241]

Courts analyzing ADA claims agree that discharging individuals for unacceptable misconduct is not the same as discharging them because of their disability, even when the disability leads to the misconduct.[242]

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234. *See id.* at 3.

235. *See* 42 U.S.C. § 12114(c)(4) (even if unsatisfactory performance or behavior is related to drug use or alcoholism, employer may hold employee to its regular workplace standards of conduct).

236. 42 U.S.C. § 12114(c)(4). *See also* Conley, 1999 WL 412441 at *3 (holding that the employer could legitimately demote the plaintiff from driving a city vehicle to painting the pump room after he previously arrived at work with alcohol on his breath).

237. *See, e.g.*, Maddox v. University of Tenn., 62 F.3d 843, 848-49 (6th Cir. 1993) (holding that the employer's adverse employment action was justified when the plaintiff football coach was fired for his off-duty DWI arrest, which was caused by his alcoholism).

238. 865 F. Supp. 1564 (N.D. Ga. 1994).

239. *See id.* at 1572.

240. *See id.* at 1568-69.

241. *See id.*

242. The Sixth Circuit in *Maddox* made this argument, relying on the provision in 42 U.S.C. § 12114(c)(4) allowing employers to hold all employees, including disabled employees, to the same standards. *See* 62 F.3d at 846. *See also* Conley, 1999 WL 412441 at *3 (holding that employer's choice to demote the plaintiff was justified when the plaintiff was caught with alcohol on his breath at work).

Courts have further emphasized that no employer has to tolerate employees that work while intoxicated.[243] In *Murphy v. Village of Hoffman Estates*,[244] the court stated that "there is nothing improper about an employer, especially one whose employees publicly operate heavy and dangerous equipment, expressing a policy against its employees working while intoxicated.[245] Nothing in the ADA sanctions an employer for requiring its employees not to work while intoxicated."[246] The court in *Murphy* went further to make the distinction that "discipline due to misconduct, working while intoxicated, is not necessarily synonymous with discipline due to a disability, even if the misconduct stems from an alcohol-related disability."[247]

Thus, there are many different caveats that allow employers to ignore any duty to accommodate and terminate the alcoholic employee, including non-compliance with company absenteeism policies and egregious behavior. And these reasons are still legitimate, even if the employee's behavior is causally related to his alcoholism.

II. THE VOLITIONAL ASPECT OF ALCOHOLISM

This section will examine the controversy surrounding alcoholism and whether it should in fact qualify as a disability in the first place because people, alcoholic or not, make a choice *each and every time they drink.* The center of this controversy, and the reason that alcoholism is not treated similarly to other disabilities covered by the ADA, is that reasonable persons continue to disagree as to both the origin of alcoholism, and the degree of volition involved. Take the following example:

Sam, an alcoholic, gets up every morning and mixes vodka with his coffee. He chooses vodka because he knows it is the easiest to conceal. The coffee masks the faint odor of alcohol on his breath. The thought of drinking his coffee without the vodka does not occur to him. He tried it before, a long time ago, but he got the shakes so badly that he could not concentrate on anything at work, and his head was pounding all day, until he went home at lunch and had a drink. Sam drinks his vodka and coffee throughout the morning, working all the while. He has never been in trouble at work, never had any complaints about his performance and he has been doing this for fifteen years.

All of the courts agree that should Sam's employer ever discover that he has been drinking on the job, the employer has every right to fire him immediately, no employer has to tolerate drinking on the job.[248] But how is this result a fair one, if alcoholism is a disability, if it is a disease that Sam cannot control? It is in this question that the controversy lies, be-

243. *See, e.g.*, Murphy v. Vill. of Hoffman Estates, 1999 WL 160305, at * 3 (ND. Ill. Jan. 19, 1999).
244. No. 95CS192, 1999 WL 16035 (N.D. Ill. Mar. 17, 1999).
245. *See id.* at *3.
246. *See id.*
247. *See id.*
248. *See, e.g., id.*

cause while alcoholism has been repeatedly recognized as a disease,[249] it was Sam's choice to take the first drink.

A. The Disease Model of Alcoholism

The controversy over the applicability of the ADA to alcoholism centers on the disagreement over whether alcoholism should be characterized as a disease or as a choice. Since it's inception in 1953, the American Psychiatric Association has included alcoholism in each new addition of its Diagnostic and Statistical Manual of Mental Disorders.[250] Additionally, both the National Council on Alcoholism and the American Medical Society on Alcoholism have agreed on the following definition of alcoholism: "Alcoholism is a chronic, progressive, and potentially fatal *disease.* It is characterized by tolerance and physical dependency or pathologic organ changes, or both—all the direct or indirect consequences of the alcohol ingested."[251]

Those who dispute the disease model of alcoholism call it a mere "useful fiction" designed to relieve alcoholics of responsibility for their actions.[252] To agree with the disease model, opponents argue, is to completely ignore the volitional aspect of alcoholism, in that an alcoholic must choose to take the first drink.[253]

In 1971, Supreme Court Chief Justice Marshall noted in *Powell v. Texas,*[254] that the medical profession could not decide within itself whether alcohol is physically "'addicting' or merely psychologically 'habituating.'"[255]

In recent years, courts have concluded that there is significant support for the proposition that alcoholism is a disease,"[256] recognizing the "shame which we have associated with alcoholism,"[257] and have sought to replace "reflexive reactions" with "actions based on reasoned and medically sound judgments."[258]

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249. *See, e.g.* AM. Psychiatric Assoc., Diagnostic and Statistical Manual of Mental Disorders. The current edition is the DSM-IV.

250. See *id.*

251. *See* AM. Psychiatric Assoc., Diagnostic and Statistical Manual of Mental Disorders. The current edition is the DSM-IV.

252. Wright, Alcohol and Free Will, NEW REPUBLIC, Dec. 14, 1987, at 14, 16.

253. See Fingarette, The Perils of Powell: In Search of a Factual Foundation for the "Disease Concept of Alcoholism," 83 HARV. L. REV. 793, 802-08 (1970) (discussing disease concept's disregard for the volitional element of alcoholism).

254. 392 U.S. 514 (1968).

255. *See id.* at 518.

256. *See* Traynor v. Turnage, 485 U.S. 535, 550-551 (1988) (acknowledging that there is a substantial body of medical evidence to support the proposition that alcoholism is a disease, but stressing the importance of the volitional aspect alcoholism).

257. *Powell,* 392 U.S. at 531.

258. School Bd. of Nassau County v. Arline, 480 U.S. 273, 285 (1987).

III. SOLUTIONS TO THE PROBLEMS CREATED BY THE DISPARATE TREATMENT OF ALCOHOLISM UNDER THE ADA

A. CONGRESS SHOULD CLARIFY WHAT QUALIFIES AS A "SUBSTANTIALLY LIMITING" DISABILITY

The drafters of the ADA inadvertently created a problem with assessing disabilities under the act because there are no set criteria for making the assessment. While a disability must substantially impair the individual in a major life activity, it is completely up to the court's discretion to decide what exactly is "substantial." There need to be more objective criteria to guide the courts as to what is substantial, especially for the alcoholic plaintiff. A prime example of this is *Burch*.[259] Recall that in *Burch*, even though the plaintiff showed that when he drank too much he had difficulty walking, talking, and sleeping, and that he had memory-impairing hangovers the next morning, the Fifth Circuit Court of Appeals characterized his symptoms as *temporarily* incapacitating, and therefore not substantially limiting.[260] The court in *Burch* focused on the permanency of the impairment, but even though the effects of the alcohol were temporary, they were occurring repeatedly, on what possibly could have been a permanent basis.[261]

Additionally, while the EEOC guidelines provide that *working* is a major life activity, an alcoholic has the "burden of proving that his alcoholism did not affect his job and that he was performing to the same standard as other employees."[262] Thus, while persons with other disabilities can claim that they are substantially limited in the major life activity of working, alcoholics essentially cannot.

Congress has already defined "disability," "otherwise qualified," and "major life activity"; it needs to clarify exactly what "substantial" means. Alcoholics especially need this certainty, as their condition lends itself to "temporary" side effects. Thus, if the legislature intends the ADA to apply to alcoholism, then it needs to explicitly indicate that "temporary" impairments can be substantial, if they occur persistently. Further, the burden for showing substantial impairment in a major life activity should be the same for all individuals bringing claims under the ADA. If alcoholism is a disability, then someone who has epilepsy should not be allowed to show that he is substantially impaired in the major life activity of working if someone with alcoholism could not ever prevail on the same showing.

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259. 119 F.3d 305 (5th Cir. 1997).

260. *See id.* at 316.

261. *See id.*

262. *See Conley*, 1999 WL 412441, at *3 (N.D. Ill. June 10, 1999) (holding that the plaintiff, who had repeatedly turned down overtime work and admitted others with less seniority deserved to be promoted over him because of better performance ratings had not carried his burden).

B. Congress Should Adopt the Fourth Circuit's Framework for Reasonable Accommodation of Alcoholic Employees

Another problem for alcoholic plaintiffs is that there is divergence among the courts as to the employers' duty to reasonably accommodate alcoholic employees who are otherwise qualified for the job. In order to clarify and provide uniformity for alcoholics under the ADA, Congress should adopt the framework provided in the Fourth Circuit case *Rogers v. Lehman*.[263] Recall that under the *Rogers* framework, the employer is required to:

1. inform the employee of available counseling services as soon as a problem is recognized,
2. provide the employee with a firm choice between treatment and discipline,
3. provide an opportunity for outpatient treatment, with discipline for continued misconduct; and
4. afford an opportunity for inpatient treatment if outpatient treatment fails.[264]

Employers adhering to this framework achieve a number of goals. First, the problem is recognized and dealt with as soon as it occurs. Employers are not allowed to wait until the problem reaches the level of "egregious conduct" and simply terminate the alcoholic. Second, the plan puts the responsibility on the plaintiffs. There is a volitional aspect to alcoholism, and forcing the alcoholics to make a choice assures that this aspect is not ignored. They must choose between treatment and discipline and live with the consequences of their choice. Third, by providing an opportunity for outpatient treatment as a starting point, alcoholics who may not need to be hospitalized are allowed the opportunity to seek treatment for their disease without being forced to leave their homes and families and sources of emotional support. Fourth, by forcing employers to allow alcoholics to participate in in-patient treatment if outpatient treatment fails, the plan gives credence to the seriousness of alcoholism as a disease—one that may not be easily curable; one that may indeed require hospitalization before it is effectively cured. Finally, the framework provided in *Rogers* prevents many of the issues that arise when alcoholics are fired because of problems related to their alcoholism, such as absenteeism.

IV. CONCLUSION

Since the inception of the ADA, courts have treated alcoholics less favorably than other disabled persons seeking recovery under the act. Alcoholics bear a heavier burden in establishing that their disability is substantially limiting, in proving that they are "otherwise qualified," and

263. 868 F.2d 253 (4th Cir. 1989).
264. *See id.*

in receiving reasonable accommodations from their employers. Both the EEOC and federal courts alike have recognized that alcoholism is a potentially disabling impairment. Thus, in order to effectuate equal treatment of alcoholism as a disability, it is necessary for Congress to lay out specific requirements as to what qualifies as "substantially limiting" and adopt a uniform framework for all employers to follow when working with alcoholic employees. These measures will assure that alcoholics are treated similarly to other disabled persons under the act, and will help achieve the purpose of the ADA, which is to provide reasonable accommodations to disabled persons to that they can work and function in our society.

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