

THE ADA'S FAILURE TO PROTECT DRUG ADDICTED EMPLOYEES WHO WANT TO SEEK HELP AND REHABILITATION

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I. INTRODUCTION

Illegal drug use is a prevalent problem in the United States that often goes untreated¹ and that is not limited to a single social class or to a specific category of employment.² Employers in a variety of businesses throughout the country must deal with the difficulties of controlling substance abuse in the workplace and handle problems that may arise from drug use among employees. Several laws have been enacted to protect employees who are willing participants in drug rehabilitation from being discharged from their jobs while they seek treatment for their "disability."³

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1. See Drug Addiction, *Millions of Americans In Denial About Their Own Drug Abuse*, http://www.drug-addiction.com/drugs_and_denial.htm (last visited Jan. 29, 2007) (providing statistics from 2001 that show "of the 5.0 million people who needed but did not receive treatment in 2001, an estimated 377,000 reported that they felt they needed treatment for their drug problem. This includes an estimated 101,000 who reported that they made an effort but were unable to get treatment and 276,000 who reported making no effort to get treatment").

2. See generally Substance Abuse & Mental Health Services Administration, Worker Alcohol, Drug Use and Workplace Policies by Occupation, <http://oas.samhsa.gov/occupation.htm> (showing statistics of drug use among various occupations in the United States in 1994 and 1997).

3. See, e.g., Rehabilitation Act of 1973, 29 U.S.C. § 701 (2000) (protecting individuals in recovery from alcoholism or drug dependence and forbidding employers from discriminating against job applicants and employees because of their history of or treatment for alcohol or drug dependence, if those individuals are qualified to perform their jobs); see also LEGAL ACTION CENTER, EMPLOYMENT DISCRIMINATION AND WHAT TO DO ABOUT IT: A GUIDE FOR NEW YORK COUNSELORS FOR INDIVIDUALS WITH CRIMINAL RECORDS OR IN RECOVERY FROM ALCOHOL AND DRUG DEPENDENCE (2000), available at www.lac.org/pubs/gratis/employment_discrimination.pdf (providing legal advice to

However, these laws offer limited employee protection so that job productivity and capital are not sacrificed in order to accommodate employees who are not serious about treatment.⁴ Case law demonstrates that such laws are often effective in practice and protect employees who are currently enrolled in rehabilitation programs or those who are already rehabilitated for prior drug addictions from being fired on that basis.⁵ But the plaintiffs who successfully bring suits against their employers for discrimination under the Americans with Disabilities Act (ADA)⁶ and the Family and Medical Leave Act (FMLA)⁷ are usually blue-collar workers and employees in low-income jobs.⁸ Although many wealthy individuals in high-powered jobs abuse illegal drugs, there are few, if any, cases of professionals bringing drug-related discrimination suits against their employers. Thus, in practice, the ADA and FMLA, when effective at all, protect mainly blue-collar workers and employees in low-income jobs. This Comment will show that professionals in the work-force are equally susceptible to drug addiction and that laws designed to protect employees with disabilities from employment discrimination fail to protect middle-class professionals who use drugs and want to undergo rehabilitation. This phenomenon may mean that the law perpetuates a pertinent and widespread problem instead of providing a remedy.

II. DRUGS IN THE WORKPLACE

There is no dispute that drugs in the workplace are a problem in the United States. Studies show that “almost 73 percent of all current drug users ages 18-49 are full- or part-time employed [which amounts to] more than 8.3 million workers.”⁹ A study from 1992 showed that substance

counselors who inform those with criminal records or substance abuse problems of the legal protection available to them if they are discriminated against by their employers on the basis of their histories or alleged disabilities).

4. See, e.g., The Americans with Disabilities Act, 42 U.S.C. § 12114 (2000) (specifying that individuals currently engaged in the illegal use of drugs are excluded from protection under the Act).

5. See, e.g., *Hernandez v. Hughes Missile Systems Co.*, 362 F.3d 564, 568 (9th Cir. 2004) (applying the ADA to prohibit an employer from making an employment decision based on an employee’s disability and including within the meaning of “disabled” under the Act an employee who has been rehabilitated for prior drug-reliance and is no longer using drugs).

6. 42 U.S.C. §§ 12111-12114 (2000).

7. 29 U.S.C. § 2601 (2000).

8. See, e.g., *Raytheon Co. v. Hernandez*, 540 U.S. 44, 44 (2003); *Hernandez*, 362 F.3d at 566 (evidencing plaintiff’s position as a janitor and then later as a service technician).

9. Drug Addiction, *Drugs at Work: The Substance Abuse Costs to Society and Workplaces are Huge*, http://drug-addiction.com/drugs_at_work.htm (last visited Jan. 29, 2007).

abuse cost society about \$246 billion that year, and estimated that this amount would increase by \$30 billion over the following three years.¹⁰ In addition, data from 1994 and 1997 national household surveys of drug use conducted by HHS¹¹ and SAMHSA¹² showed that the percentage of full-time workers between the ages of eighteen and forty-nine who used illicit drugs in those years totaled 7.6% and 7.7%, respectively, and that those who abused alcohol totaled 8.4% and 7.5%, respectively.¹³ The categories of employment in the study ranged from blue-collar jobs, such as construction work and machine operators and inspectors, to white-collar jobs, such as executive, administrative, and managerial positions and professional specialties.¹⁴ Although there was a disparity in the illicit drug use and heavy alcohol use among the different occupational categories, 5.1% of those with a professional specialty reported illicit drug use--about the same percentage reported by movers, technicians, administrative support staff, protective service workers, and those in executive, administrative and managerial positions.¹⁵ Furthermore, within the professional category, there was little to no change over the three-year span from 1994 to 1997 in the amount of either drugs or alcohol used by employees.¹⁶ Such data suggests that the abuse of drugs and alcohol by professional workers is not a trend, but an ongoing problem within the workplace.

III. THE FEDERAL GOVERNMENT'S ATTEMPT TO CONTROL SUBSTANCE ABUSE IN THE WORKPLACE AND EMPLOYMENT DISCRIMINATION

The federal government has taken measures to deal with employee

10. *Id.*

11. HHS is the U.S. Department of Health and Human Services which is a "Cabinet department of the United States government" devoted to "protecting the health of all Americans and providing essential human services." Wikipedia, *United States Department of Health and Human Services*, http://en.wikipedia.org/wiki/United_States_Department_of_Health_and_Human_Services (last visited Jan 29, 2007).

12. SAMHSA is the Substance Abuse and Mental Health Services Administration, a "US federal agency charged with improving the quality and availability of prevention, treatment and rehabilitative services in order to reduce illness, death, disability, and cost to society resulting from substance abuse and mental illness." Wikipedia, *Substance Abuse and Mental Health Services Administration*, http://en.wikipedia.org/wiki/Substance_Abuse_and_Mental_Health_Services_Administration (last visited Mar. 29, 2007).

13. Worker Alcohol and Drug Use and Workplace Policies by Occupation, *supra* note 2 (providing a Worker Report from 1997 that shows Illicit Drug Use and Heavy Alcohol Use by Demographic and Workplace Characteristics for that year).

14. *Id.*

15. *Id.*

16. *Id.*

drug use by offering protection to those who are willing to seek rehabilitation through both the Americans with Disabilities Act (ADA)¹⁷ and the Family and Medical Leave Act (FMLA).¹⁸ These acts recognize the importance of protecting those with histories of drug or alcohol abuse from being discriminated against by employers or discharged from employment based on their abuse, provided they have sought rehabilitation and are no longer abusing the substance. The ADA specifically offers protection to any individual who “has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use.”¹⁹ Thus, the Act is narrowly tailored to exclude any employee who is still using the drug from being protected under the Act.

While it is important to shield employers by limiting the protected class to those who have manifested a true intent to seek help for their drug addictions,²⁰ it is also unrealistic to assume that every job allows an employee the time to enroll in a rehabilitation program and achieve rehabilitative success without interfering with his or her work hours or responsibilities.²¹ In many cases, an employee may have to seek permission from the employer for the time to engage in rehabilitation. Such an employee would fall short of belonging to the defined class protected by the ADA, since the employer would have knowledge of the substance abuse prior to treatment.²² Thus, the employee would risk discharge by confronting the employer to ask permission for a leave of absence even if he or she was serious about, and personally dedicated to, seeking treatment for the problem.

IV. THE PRACTICAL EFFECTS OF THE ADA

In practice, the ADA has proved to be a useful federal remedy for those employees with a history of substance abuse who do fall within the definition of an individual with a “disability” under the Act. In *Raytheon*

17. 42 U.S.C. § 12114 (2000).

18. 29 U.S.C. § 2601 (2000).

19. 42 U.S.C. § 12114(b)(1) (2000).

20. See *Drugs at Work*, *supra* note 9, at 4 (documenting how serious and pervasive a workplace problem substance abuse is).

21. See, e.g., Project for Attorney Retention, *Better On Balance? The Corporate Counsel Work/Life Report* (Dec. 2003), available at http://www.pardc.org/Publications/BetterOnBalance_sum.shtml (comparing the work hours of attorneys who work in house to those who work in law firms and stating that while working in house full-time “often means a fifty-hour workweek. . . [in] a law firm . . . billable hours can stretch even longer, and business development is expected in addition” making it difficult for attorneys to achieve a balance between work and personal life).

22. See 42 U.S.C. § 12114(a) (2000) (excluding from the definition of “disability” one who is currently engaging in drug use).

Co. v. Hernandez,²³ an employee who had worked for a company as a janitor for twenty-five years tested positive for cocaine and voluntarily resigned to seek rehabilitation. After recovering from both an alcohol problem and his drug addiction by attending rehabilitation, AA meetings and joining a church, he reapplied for a new job at the company two years later, with letters of recommendation that verified his recovery and his current drug- and alcohol-free status.²⁴ The company rejected his application and Mr. Hernandez brought suit for discrimination under the ADA.²⁵ The Supreme Court granted summary judgment in favor of the employer because it determined that while Mr. Hernandez did qualify as a disabled person under the Americans with Disabilities Act, the employer was justified in denying his application based on the company's uniform no-rehire policy.²⁶ On remand, the court of appeals reversed and remanded the decision, deciding that Hernandez had presented sufficient evidence for a jury to find that his application had been rejected based on his history of alcoholism and drug addiction.²⁷

*Raytheon*²⁸ provides an example of a blue-collar worker with a history of drug and alcohol abuse who, after successfully recovering from his past addictions, was able to challenge an employer's rejection of his job application, and therefore, demonstrates that the law can be effective in practice. But the case also reaffirms that the standard for an individual protected by the ADA is limited to those "who have successfully completed or are participating in a supervised drug rehabilitation program and are no longer using illegal drugs, as well as individuals who are erroneously regarded as using drugs when in fact they are not."²⁹

Another case that shows a similar point is *Collings v. Longview Fibre Co.*³⁰ In *Collings*, eight manual laborers were discharged for drug use that violated company rules. The Ninth Circuit found that they were not protected by the ADA although they alleged to have a drug addiction disability.³¹ In this case, the job involved the operation of heavy machinery and company policy strictly disallowed the use of drugs at the workplace.³² Furthermore, the company was governed by the Drug-Free Workplace Act

23. 540 U.S. 44 (2003).

24. *Id.* at 47.

25. *Id.*

26. *Id.* at 55.

27. *Hernandez v. Hughes Missile Systems Co.*, 362 F.3d 564, 564 (9th Cir. 2004).

28. 540 U.S. 44 (2003).

29. *Hernandez*, 362 F.3d at 568 (quoting *Collings v. Longview Fibre Co.*, 63 F.3d 828, 831-32 (9th Cir. 1995)).

30. 63 F.3d 828 (9th Cir. 1995).

31. *Id.* at 836.

32. *Id.*

of 1988³³ which “requires that no federal funding will be available for institutions or individuals who do not have in place a drug-free workplace policy” and provides that the institution must “[publish] a statement notifying employees that the unlawful manufacture, distribution, dispensation, possession or use of a controlled substance is prohibited in the workplace and specifying the actions that will be taken against employees for violation of such prohibition.”³⁴ The court relied on the fact that the Act specifically declines to protect those who are currently engaging in the use of illicit drugs.³⁵ The employees argued that “they were all drug-free at the time of their discharges and had either completed drug rehabilitation programs or were in the process of being rehabilitated,”³⁶ but the court rejected the argument, clarifying:

the term ‘currently engaging’ is not intended to be limited to on the day of, or within a matter of days or weeks before, the employment action in question. . . . Therefore, the fact that the employees may have been drug-free on the day of their discharge is not dispositive. Their own admissions of drug involvement in the weeks and months prior to their discharge indicated that they were recently involved in drug-related misconduct.³⁷

In *Collings*, the court determined that the employees were fairly discharged for violating workplace rules and that such discharge did not constitute discrimination based on an employee’s disability regardless of rehabilitative efforts.³⁸

V. THE “COMPANY POLICY VIOLATION” EMPLOYER DEFENSE AND ITS COUNTER-EFFECT ON THE ADA’S PROTECTION OF EMPLOYEES

*Collings*³⁹ is an example of how an employer may rely on company policy violation to circumvent the protection the ADA offers to those who have “successfully completed a supervised drug rehabilitation program and [are] no longer engaging in the illegal use of drugs” or “[are] participating in a supervised rehabilitation program and [are] no longer engaging in such use.”⁴⁰ Similarly, in *Shafer v. Preston Memorial Hospital Corp.*,⁴¹ a nurse

33. 41 U.S.C. §§ 701-707 (2000).

34. See Research Administration (SPARCS), *Drug Free*, <http://www.ncsu.edu/sparcs/policy/drug.html> (last visited Jan. 29, 2006).

35. *Collings*, 63 F.3d at 832.

36. *Id.*

37. *Id.* at 833.

38. *Id.* at 835-36.

39. *Collings*, 63 F.3d at 828.

40. 42 U.S.C. § 12114(b)(1) (2000).

41. 107 F.3d 274 (4th Cir. 1997). Although *Shafer* no longer constitutes good law, the court still upholds its ruling that violation of company policy is sufficient to terminate

anesthetist who admitted to using illegal drugs at some time prior to her discharge was also found to be outside the protection of the ADA. The court specified that it was irrelevant that "she [had] entered drug rehabilitation after being caught and was not using drugs on the day she was fired."⁴² *Shafer* is another example where even a willing participant in drug rehabilitation fails to be protected as an employee with a disability and thus, may be lawfully discharged from her current employment.

Most companies and institutions have some policy prohibiting employees from using drugs and alcohol in the workplace.⁴³ With such a policy in place, the narrow definition of "disabled" persons who receive protection under *Collings*⁴⁴ and *Shafer*⁴⁵ excludes those who cannot control their drug-use even if they are seeking rehabilitation for their habits. However, these employees are precisely the ones who ought to be protected under the Act. It is difficult to see how a drug-addiction over which the employee is able to take control and independently seek help without informing the employer and without violating company drug policies is considered an employee with a disability; yet, those who have been uncontrollably violating company policies because of their addictions, and who have decided to seek help, are not considered disabled under the ADA. Furthermore, employees who have jobs with long hours who might be required to ask permission from the employer for a leave of absence to engage in rehabilitation certainly would not be protected under the Act because the employer would have knowledge of both the company policy violation and the drug use prior to rehabilitation.

VI. THE INEFFECTIVENESS OF THE FMLA IN PRACTICE

In the case where the drug-addicted employee wants to be treated for his or her disability and asks permission from the employer to take a leave of absence, the Family and Medical Leave Act might also fail to protect that employee. For example, in *Doe v. King County*,⁴⁶ the Ninth Circuit determined that an employer was justified under the FMLA in discharging

employment regardless of whether the employee is disabled by a drug-addiction. The case was overruled on the basis that the court failed to address the causation requirement, that is, it did not require the plaintiff to show that her disability was a but-for cause of the discrimination as is required by the ADA. See also, 45A Am. Jur. 2d *Job Discrimination* §407 (using *Shafer* as an example of those who are not protected under the ADA).

42. *Shafer*, 107 F.3d at 278.

43. Institute for a Drug-Free Workplace Gallop Survey, <http://www.drugfreeworkplace.org/survey/page27.html> (showing that over seventy percent of companies have an employee policy regarding workplace drug use).

44. 63 F.3d at 828.

45. 107 F.3d at 274.

46. No. 97-35876, 1999 WL 50860, at *1 (9th Cir. Jan. 7, 1999).

an employee who had taken leave to seek treatment for his cocaine habit. The court came to this conclusion because the employer attributed the termination to the employee's "illegal conduct and the resulting loss of trust" rather than to his leave of absence.⁴⁷ The decision stated that under the Act, the employee "[had] no claim unless he was terminated for taking leave."⁴⁸ Again, the court found the employer justified in discharging the employee regardless of whether the employee's drug addiction constituted a disability, because the employer said that he fired the employee "not because [he] suffered from a mental or physical disability, but because [he] . . . had engaged in illegal activity."⁴⁹ Thus, under the FMLA, a violation of company policy and any circumstance where the employee is found to have been using drugs at some time during the employment period annihilates any protection offered to an employee with a drug addiction. Once more, a willingness to engage in and even a current enrollment in rehabilitation is deemed insufficient to protect the employee from discharge, although the employee may not have control over her addiction and may be regarded as having a disability under the Act for purposes of future employment.⁵⁰

VII. THE PURPOSE OF THE ADA & THE INABILITY OF THE EXISTING ACT TO ACHIEVE ITS PURPORTED GOALS

In determining whether employees with drug addictions are protected adequately from unjust discharge under current federal law and whether the federal law has met its objectives, it is important to look at the desired goal of the ADA and the purpose of the Act as asserted by Congress. Section (b) of the ADA defines the statute's goal broadly as providing "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."⁵¹ Furthermore, Senator Kennedy of Massachusetts elaborated on the purpose of the statute in the congressional debates anticipating the passage of the ADA. He argued that instituting such protections

is an absolutely essential component of our national war against drugs.

It also helps to carry out our national commitment to encourage all those who need it to come forward for treatment and to ensure that individuals who have successfully overcome drug problems will not face . . . barriers that work to impede their full

47. *Id.*

48. *Id.*

49. *Id.*

50. 29 U.S.C. § 2601 (2000).

51. 42 U.S.C. § 12101(b)(1) (2000).

reintegration into society.⁵²

In the same debate, Senator Jesse Helms of North Carolina added that, "Anyone who wants to help himself break the cycle of drug addiction should be given that chance. We should not hinder those who legitimately want to make their life better."⁵³ Yet, he followed up on his statement by assuring President Bush that the language of the ADA would eliminate current abusers of illegal drugs from qualifying as individuals with disabilities under the Act.⁵⁴ Thus, the Act was proposed and enacted such that only those who have overcome drug and alcohol problems and are no longer using any illegal drug are to be protected.⁵⁵ While the Act is cautious of shielding employers, it fails to encourage an employee who may want to "help himself break free of the cycle of drug addiction" to come forward and seek treatment because it denies protection to any employee currently using drugs.⁵⁶ The statute need not be overly broad such that it puts employers at risk of losing capital and work-productivity by offering excessive protection to employees with substance-abuse problems. But the Act fails to achieve its purpose if it prevents those who recognize they have drug dependencies from seeking rehabilitation for fear of being fired.⁵⁷

VIII. THE FAILURE TO RECOGNIZE THE MIDDLE-CLASS DRUG PROBLEM AS AN EXPLANATION OF WHY THE LAW FALLS SHORT OF ACCOMPLISHING ITS OBJECTIVES

One reason why the ADA and FMLA may be so narrowly tailored as to indefinitely exclude those who have professional careers and do not have adequate time to pursue drug rehabilitation without employer knowledge is that middle class drug abuse is not a problem that is sufficiently acknowledged in the United States. While studies show that those with professional specialties abuse drugs in surprisingly high numbers, employees in lower income occupations are far more likely to engage in drug abuse.⁵⁸ Furthermore, organizations such as the National Institute On Drug Abuse and The Partnership for a Drug-Free America portray cocaine and methamphetamine abuse as an epidemic particular to America's

52. 135 CONG. REC. S10775 (1989) (statement of Sen. Kennedy).

53. 135 CONG. REC. S10775 (1989) (statement of Sen. Helms).

54. *Id.*

55. 42 U.S.C. § 12114(b)(1) (2000).

56. 135 CONG. REC. S10775 (1989).

57. *See* 42 U.S.C. § 12101 (2000) (enumerating the findings and purposes of the ADA).

58. *See* Worker Alcohol and Drug Use and Workplace Policies by Occupation, *supra* note 2 (giving statistics of employees engaged in different types of employment who abuse drugs and alcohol).

youth.⁵⁹ However, articles published in the *New York Times* and other news sources show otherwise: that the problem is not limited to any specific age group, career, socio-economic community or demographic area. These articles point out that “the problem with drugs crosses all economic borders” and that “the real emphasis (of drug use) is people with money and the capacity to buy and share drugs.”⁶⁰ An article on eMedicineHealth.com from 2004 pointed out that although the surveys from the National Institute On Drug Abuse identify cocaine addicts as mostly “older, inner-city crack addicts . . . field reports are identifying new groups of users” including middle-class suburbanites.⁶¹ Furthermore, in commenting on the occupations with the highest rates of illicit drug-use, the National Criminal Justice Reference Service notes that women in the legal profession, including lawyers and legal assistants, comprise one of the four employment categories with the highest usage among females in the U.S.⁶² That same article quotes a 50-year-old businessman confessing his “major investment” in cocaine over the last month, and states that eighty out of eighty-one people in Portland, Oregon who were found to be growing marijuana in 1996 were white, middle-class citizens.⁶³

Several articles and reports also comment on the spread of methamphetamines and heroin to the suburbs and the growing use among middle-class professionals. A *New York Times* article from 2002 entitled *Meth Building Its Hell’s Kitchen in Rural America* discusses how various states including California and Washington have seen an increase in methamphetamine use since 1990.⁶⁴ The article calls “meth” the “drug of

59. See PARTNERSHIP FOR A DRUG-FREE AMERICA, 2003 PARTNERSHIP ATTITUDE AND TRACKING STUDY: SURVEY OF TEENS’ ATTITUDES AND BEHAVIOR TOWARD MARIJUANA (2003), available at http://www.whitehousedrugpolicy.gov/publications/pats/final_rpt.pdf (presenting a study performed for the Office of National Drug Control Policy and Partnership for a Drug-Free America that limited the research to the drug behaviors and attitudes of students in the United States in grades six through twelve). See also NATIONAL INSTITUTE OF HEALTH, PUBL’N NO. 99-4342, NIDA RESEARCH REPORTS--COCAINE ABUSE AND ADDICTION (2004), available at <http://www.nida.nih.gov/ResearchReports/Cocaine/Cocaine.html> (presenting the drug problem in the United States as a teen and youth epidemic).

60. Ethan G. Machado & Robin Roth, *White Collar Drugs: Professional People Fuel the Drug Trade*, OUR TOWN, Apr. 28, 1997, at 1, available at http://www.marijuanalibrary.org/OT_White_collar_042897.html.

61. eMedicineHealth, Cocaine Abuse, <http://www.emedicinehealth.com/articles/19855-1.asp> (last visited Mar. 2, 2007).

62. Machado & Roth, *supra* note 60. The other occupations that the study reported as having the highest use of illicit drugs among women included food handlers, social workers, and psychologists. Among men, the occupations with the highest rates of illicit drugs included writers, artists, entertainers, athletes, food handlers and construction workers.

63. *Id.*

64. Timothy Egan, *Meth Building Its Hell’s Kitchen in Rural America*, N.Y. TIMES, Feb. 6, 2002, at A14.

choice among rural whites in the Midwest, parts of the South and most of the West.”⁶⁵ In December 2000, a National Drug Intelligence Center report on drug abuse in California stated: “heroin use has moved to middle-class suburbs The user population covers a broad spectrum from white-collar professionals in affluent suburbs to kids in small farm communities.”⁶⁶ Additionally, the report noted that although between 1998 and 1999, those seeking treatment for heroin abuse were anywhere from 18 to 55 years of age, most of those seeking rehabilitation “were in the 26- to 50-year-old group; they were predominantly male (over 65 percent) and white.”⁶⁷

In addition to addressing drug problems among middle-class and professionals in the United States, these articles and reports identify the difficulties of seeking rehabilitation while belonging to a certain societal class or professional occupation. The United States Sentencing Commission contends that “success rates for cocaine drug treatment . . . vary from 25 to 50 percent [with higher rates being] characteristic of abusers who are professional or skilled workers.”⁶⁸ However, “Chuck Long, chairman of the drug-free workplace committee for RDI⁶⁹ . . . says that only in cases where situations clearly demand attention will a company ask an employee to seek treatment.”⁷⁰ He goes on to say that

[i]f there is an individual in a high-level or responsible position using drugs, he is not going to admit it The only way the company would know if that individual used drugs is if that person came forward or if the drug use impacted their work performance to the point where something had to be done.⁷¹

Without legal protection under the ADA or another federal statute, the likelihood of a high-level employee coming forward with a drug habit is very slim due to a fear of both an injured reputation in the workplace and discharge by the employer. Therefore, even if professionals do have the highest rate of successful rehabilitation, it seems likely that few will be

65. *Id.*

66. NAT'L DRUG INTELLIGENCE CTR., U.S. DEP'T OF JUSTICE, CALIFORNIA--SOUTHERN DISTRICT DRUG THREAT ASSESSMENT, (2000), available at <http://www.usdoj.gov/ndic/pubs/654/heroin.htm>.

67. *Id.*

68. UNITED STATES SENTENCING COMMISSION, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY, UNITED STATES SENTENCING COMMISSION 56 (1995), available at <http://www.ussc.gov/crack/chap1-4.pdf>.

69. RDI is the Research and Development Institution, a consulting firm that designs personalized programs for a variety of non-profit organizations including social service groups and that has taken on an involvement in the drug-free workplace project. See the RDI website, http://www.rdinow.com/about_rdi.html, for an explanation of the history and function of RDI consulting.

70. Machado & Roth, *supra* note 60.

71. *Id.*

willing to risk their jobs by seeking treatment. The article, *White Collar Drugs*, also points out that while “*Time* magazine recently published a statistic that indicated drug use has gone down in the workplace,” this result may be attributed to two factors unrelated to actual drug use.⁷² First, employees may have become more familiar with ways to sabotage drug tests;⁷³ and second, most companies fail to test for drug-use among their employees once they have administered the initial routine pre-employment drug testing.⁷⁴

IX. THE DRUG TREND AMONG THE MIDDLE CLASS AS AN INTERNATIONAL EPIDEMIC

Skepticism regarding a decline in workplace drug use in the United States is aroused further by government survey statistics and news articles from other English-speaking populations in Europe and throughout the world. These countries acknowledge that cocaine use among middle-class professionals is both widespread and increasing.⁷⁵ An Australian government website notes that those who use cocaine most heavily tend to fall into one of two categories: “middle class, well educated professionals who generally snort the drug” or “injecting drug users”⁷⁶ An article from 2002 on *irishhealth.com* entitled *Cocaine Users Come From All Classes* states that in Ireland “there has been an alarming rise in the number of people seeking help for cocaine addiction ‘over the last six to twelve months.’” However abuse of the drug is not restricted to the middle and

72. *Id.*

73. See, e.g., Pass USA, How to Pass a Drug Test, <http://www.passusa.com/> (last visited Mar. 2, 2007) (advocating that “What people do on their own time in the privacy of their homes is their business” and providing suggestions and detoxifying merchandise for sale to help those subject to drug testing pass their tests illegitimately).

74. Machado & Roth, *supra* note 60.

75. The countries that have reported white-collar drug use as a prevalent problem in their societies include Australia, England (London, in particular), Ireland, and Scotland. See London Net, *Drug Secrets of Britain's Snorty Somethings*, Nov. 19, 2001, http://www.londonnet.co.uk/ln/talk/news/archive/2001/nov/headlines_20011119_913.html (presenting a poll that shows that senior managerial staff in London, referred to in the article as “snorty-somethings,” abuse cocaine and ecstasy almost as much as students); see also, *The Age*, *Drugs Attract Young Middle Class*, June 23, 2004, <http://www.theage.com.au/articles/2004/06/23/1087845005795.html>; Sylvia Patterson, *Cocaine Nation*, THE OBSERVER, <http://observer.guardian.co.uk/drugs/story/0,,686657,00.html> (showing that ecstasy, cocaine, and methamphetamines are popular drugs among the middle-class in Australia, England and Scotland).

76. Australian Department of Health and Aging, Alcohol & Other Drugs: Cocaine, <http://www.aodgp.gov.au/internet/aodgp/publishing.nsf/Content/cocaine-3> (last visited May 8, 2007).

upper classes but has permeated all classes.”⁷⁷ Similarly, a British website called Drugscope posted an article in 2001 called *Middle-Aged Managers on Coke* that said a recent survey found “middle-class professionals and managers are the most likely to snort cocaine and take ecstasy.”⁷⁸ It went on to specify that “work stress, career pressures and even staying slim were blamed for drug use.”⁷⁹ Although cultures and drug availability differ from country to country, it would be naïve to think that middle-class professionals in the U.S. have escaped the white-collar drug epidemic that is ubiquitous in other nations, especially with so much American journalistic evidence that the same problem exists in the United States.⁸⁰

X. THE CONFLICT PROFESSIONALS MAY FACE WHEN CONSIDERING DRUG TREATMENT

Federal law clearly falls short of protecting employees who can identify that they have a drug problem and want to both take responsibility and seek rehabilitation without losing their jobs. Professionals who work long hours may be coerced into drug use by the nature of their jobs, which require long hours and physically unnatural energy levels.⁸¹ These employees may be conflicted as to their desire to be drug-free for their personal health and well-being and their desire to be productive and compete with other high-performance employees within the workplace. However, while an employee may want to seek rehabilitation for personal reasons, he might be concerned that admitting to a drug problem will have negative effects on his career and may fail to seek treatment.⁸² If, on the

77. Deborah Condon, *Cocaine Users Come from All Classes*, IRISHHEALTH.COM, June 6, 2006, <http://www.irishhealth.com/?level=4&id=3939>.

78. Drug Scope, *Middle-Aged Managers on Coke*, Nov. 15, 2001, http://www.drugscope.org.uk/news_item.asp?a=1&intID=576.

79. *Id.*

80. See, e.g., Machado & Roth, *supra* note 60 (stating that drug use is prevalent among all segments of the United States population). See also Egan, *supra* note 64 (describing the “meth” problem confronted by rural Americans).

81. An article in *U.S. News & World Report* called *The Dark Side of the Boom* discusses that “a growing number of tech workers have serious drug problems—stimulants such as meth and cocaine” and notes that these addictions might be getting worse as the businesses make more money. An executive at a Silicon Valley start-up company was quoted as saying, “We’re working our engineers around the clock—and it’s not coffee that’s keeping them up.” The article also mentions that “[t]here aren’t yet any major studies showing whether drug use is more prevalent among tech workers than other professionals,” but notes: “The long hours, high pay, and young staff make the tech world fertile breeding ground for drug abuse.” Vince Beiser, *The Dark Side of the Boom*, U.S. NEWS & WORLD REPORT, Mar. 19, 2001, available at http://www.usnews.com/usnews/biztech/articles/010319/archive_002477.htm.

82. See Machado & Roth, *supra* note 60 (discussing the potential problems facing

contrary, this same employee knew that federal law supported an employee's decision to seek treatment for a drug addiction and offered protection to prevent an employer from discharging him, he might be more inclined to pursue rehabilitation and come forward with an otherwise-hidden drug addiction.

While many workplaces have internal programs designed to allow employees to seek help for their drug addictions and have policies that prevent the employer from discharging employees on the basis of their drug addictions if they are willing to seek help,⁸³ such programs are not instituted across the board and are only encouraged, not required by law.⁸⁴ Furthermore, most employers who do adopt such programs are those whose employees operate heavy machinery or are engaged in jobs that might present physical danger to other employees or themselves if using drugs while working.⁸⁵ These employers have an incentive to institute well-designed drug prevention and rehabilitation programs for their employees⁸⁶ because of both safety reasons and the financial benefit of keeping employment compensation insurance costs low.⁸⁷ On the other end of the spectrum, employers who assume their employees are highly educated, intelligent, productive and responsible people who take their careers very seriously take a different approach. They are more likely to focus on the productivity and work-quality of their employees and less on the potential for drug abuse in the workplace.

Employees who work in professional fields tend to be more valuable

employees if they confess to a drug addiction).

83. See 2000 FLA. DIV. OF WORKERS' COMP. ANN. REP., 26, available at http://www.fldfs.com/WC/pdf/DrugFreeWorkplace_new.pdf (explaining that many states offer employers financial incentives such as tax credits or reductions in their insurance premiums for adopting Drug-Free Workplace programs which require them to implement drug testing and to provide Employee Assistance Programs (EAP) which offer employees who have tested positive for drug use counseling regarding their substance abuse instead of discharging them).

84. See, e.g., FLORIDA DIVISION OF WORKERS' COMPENSATION, AN EMPLOYER'S GUIDE TO A DRUG-FREE WORKPLACE, (rev. 2005), available at <http://www.fldfs.com/wc/pdf/DFWPman.pdf> (explaining the 1990 legislation enacted to create the Florida Drug-Free Workplace Program).

85. See 2000 FLA. DIV. OF WORKERS' COMP. ANN. REP., *supra* note 83 (explaining Florida's DFW program, enacted in 1990, which focuses on controlling drug use in the workplace by using financial incentives to help enforce safety rules and regulations in jobs with high-risk of injury, such as refusing to compensate an employee for his injuries if he has tested positive for drugs following a workplace accident).

86. Even with the incentives in place, employer participation is very limited, overall. The most common employers to adopt DFW (Drug-Free Workplace) Programs are those involved in construction, manufacturing, agriculture and mining, and even within those sectors there is no evidence of a pattern of consistency in renewal of DFW certification. See *id.* at 43 (describing the inconsistency of renewals with DFW certifications).

87. See *id.* at 28 (stating the benefits companies receive by instituting drug prevention programs).

to their employers and are more difficult to replace than those in less specialized fields. Thus, such employers might be more likely to accommodate a need or request for rehabilitation without retaliation. Nevertheless, the concern remains that employees will not be willing to risk confrontation with the employer to request a leave of absence because there is no protective law on which they may rely to guarantee they will not be fired.⁸⁸

Anti-discrimination laws are designed sensibly to protect employers as well as employees, but as a result, they fail to extend their protection to many categories of employees in need of that protection. In the case of drug-addiction and the ADA, it seems that professionals in high-stress careers who work long hours and are prone to developing drug habits are one of the groups who are inadvertently excluded from receiving its benefits.⁸⁹ In addition, the ADA generally does not function to allow employees to keep their current jobs provided they seek and achieve rehabilitation. Rather, it allows the current employers to discharge them because of their drug addictions and only prevents employers from discriminating against their history of drug use in the future once they are rehabilitated.⁹⁰ This policy implies that many drug-abusing employees who want to seek help, but are restrained from doing so because of the number of hours per week their jobs require, will remain in the workplace with their drug habits to avoid the risk of being discharged.⁹¹

XI. ESTABLISHING A BALANCE FOR THE SAKE OF PUBLIC POLICY

Public policy supports why it is desirable to protect employers, companies and businesses from the cost and loss of capital that might result from accommodating employees with drug disabilities, but also, why it is necessary to protect employees who develop drug habits and would like to seek rehabilitation. While it is important that discrimination laws do not become so overly broad that they allow employees to continue with drug habits in the work-place,⁹² it is also important that these laws extend their protection evenly to employees of all social classes, in jobs of different natures and on every type of career path. The laws cannot protect

88. See Machado & Roth, *supra* note 60 (describing people's fear of revealing their drug usage).

89. Americans With Disabilities Act of 1990, 42 U.S.C. §§ 12114 (a) & (b)(1) (2000).

90. Hernandez v. Hughes Missile Systems Co., 362 F.3d 564, 567 (9th Cir. 2004).

91. See Machado & Roth, *supra* note 60 (describing employees' hesitation to come forward with their drug usage due to potential reprisals).

92. See *Drugs at Work*, *supra* note 9 (reporting that "A new study of 1992 data estimates the economic costs to society of substance abuse at \$246 billion for that year, and \$276 billion projected for 1995. . . . Workplaces take the brunt in lost/poor performance, accidents, and crime.").

employees who make false testimonies that they promise to seek rehabilitation at some time in the future without any intent to do so. But they must allow employees to request a leave of absence when they are genuine about their intent to seek help, but cannot cease drug-use and begin rehabilitation without their employers' knowledge. The 2000 Florida Division of Workers' Compensation Annual Report regarding Florida's Drug Free Workplace Program for Private Employers observes, "[t]he public perception that drug abuse is a pervasive social problem readily translates into a desire on the part of policymakers to adopt effective countermeasures. The problem, however, is to separate what is truly effective from what merely *seems* likely to be effective."⁹³ Furthermore, it observes, "Many government programs in the war on drugs focus on the supply side of the illegal drug market."⁹⁴ These statements suggest that there are two main problems with the current political method of addressing the issue of drugs in the workplace. First, policies and legislation may fail to properly tailor the effects and purposes of acts and statutes to resolve the drug problems that are actually ailing employers and employees in society. Second, the government tends to focus on a narrow area of drug use in the U.S. in an effort to side step the problem⁹⁵ instead of determining measures to provide help, protection and encourage rehabilitation for those already afflicted by the epidemic.

XII. CONCLUSION

If the government was willing to address the reality that drug use is not a phenomenon particular to the uneducated, low socio-economic community, perhaps statutes such as the ADA would cover a broader class of employees with drug disabilities. The admission that drug use infiltrates all classes, age groups and workplaces in the United States⁹⁶ would trigger the recognition that protecting only rehabilitated employees is insufficient to safeguard workplaces, the well-being of the population, and the

93. 2000 FLA. DIV. OF WORKERS' COMP. ANN. REP., *supra* note 83, at 27.

94. *Id.* at 26. See also, NAT'L DRUG INTELLIGENCE CTR., U.S. DEP'T OF JUSTICE, NATIONAL DRUG THREAT ASSESSMENT 2005 SUMMARY REPORT (2005), available at <http://www.usdoj.gov/ndic/pubs11/13846/13846p.pdf> (discussing the abuse of illicit drugs in the U.S. as the product of its availability attributed to drug trafficking, while specifically stating that 6.8 million people in the United States were found to be dependent on or abusers of illicit drugs in 2003, and 35 million people in the United States over twelve years old were found to have used an illicit drug in the year preceding the 2005 Summary Report).

95. See, e.g., G.A. Res. S-20/2, U.N.Doc.A/RES/S-20/2 (June 10, 1998), available at http://www.unodc.org/unodc/resolution_1998-06-10_1.html (discussing the devotion by members of the U.N., including the United States, to remedy the international drug problem by adopting strategies to reduce drug trafficking).

96. See Egan, *supra* note 64 at A14.

economic growth of the nation.

I do not propose that the government mandate employment security for all those abusing drugs in violation of company policies. However, those who recognize they have a drug addiction and want to seek treatment without forfeiting current employment should be encouraged to come forward with the problem in order to achieve their rehabilitative goals. The alternative to amending the law is not to have a multitude of drug-free employees reapplying for jobs with the ADA's protection from discrimination, but to have an abundance of employees safeguarding their habits, employees who might be functional at work, but are actually fueling the drug trade and sabotaging the morale and efficiency of the professional workforce.

There is no reason why the law cannot be narrowly tailored to make an exception under the ADA for certain types of employees at high-risk of drug use who are not currently protected under the Act. Those who have time-intensive jobs and need to ask permission to limit their work hours deserve the opportunity to address a problem that is both personal and work-related, and also beyond their control. If professionals who have worked very hard to attain their high-level positions in the workplace are disqualified from protection under the ADA, they will need to weigh the value of their current established careers and reputations against the cost of treating their addictions. Presumably, this consideration will not always result in high-level professionals choosing their health and mental well-being over their source of income and their investment and devotion to their professions. Thus, such employees should be entitled to protection under the ADA as qualified individuals with disabilities and permitted to seek treatment without losing their jobs under the law.