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Working for Recovery: How the Americans with Disabilities Act and State Human Rights Laws Can Facilitiate Successful Rehabilitation for Alcoholics and Drug Addicts

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WORKING FOR RECOVERY: HOW THE AMERICANS WITH DISABILITIES ACT AND STATE HUMAN RIGHTS LAWS CAN FACILITATE SUCCESSFUL REHABILITATION FOR ALCOHOLICS AND DRUG ADDICTS

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I. INTRODUCTION

The opioid epidemic kills an average of 91 Americans each day.[1] In West Virginia, 884 people died of drug overdoses in 2016 alone—the highest overdose fatality rate in the nation, and one that is largely fueled by opioid abuse.[2] The rate of drug overdoses has steadily grown during the first two decades of the 21st century, and the problem only appears to be compounding.[3] For every one opioid-related death, the Centers for Disease Control and Prevention (CDC)

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1 Rose A. Rudd et al., *Increases in Drug and Opioid-Involved Overdose Deaths – United States, 2010–2015*, 65 MORBIDITY AND MORTALITY WKLY. REP. 1445 (2016), https://www.cdc.gov/mmwr/volumes/65/wr/pdfs/mm655051e1.pdf; *cf.* HOLLY HEDEGAARD ET AL., DRUG OVERDOSE DEATHS IN THE UNITED STATES, 1999–2016 (2017), https://www.cdc.gov/nchs/data/databriefs/db294.pdf (finding that West Virginia had the highest observed age-adjusted drug overdose death rates in 2016 (52.0 per 100,000)).

2 Eric Eyre, *WV Panel to Develop Plan to Combat Opioid Epidemic*, CHARLESTON GAZETTE-MAIL (Nov. 30, 2017), https://www.wvgazettemail.com/news/wv-panel-to-develop-plan-to-combat-opioid-epidemic/article_f20bed97-c09e-5205-9b5c-5bbefe0f0cda.html; *cf.* Eric Eyre, *Drug Firms Fueled 'Pill Mills' in Rural WV*, CHARLESTON GAZETTE-MAIL (May 23, 2016), https://www.wvgazettemail.com/news/cops_and_courts/drug-firms-fueled-pill-mills-in-rural-wv/article_14c8e1a5-19b1-579d-9ed5-770f09589a22.html.

3 This mirrors a national trend that "[t]he amount of prescription opioids sold to pharmacies, hospitals, and doctors' offices nearly quadrupled from 1999 to 2010." *Opioid Overdose: Understanding the Epidemic*, CDC (Aug. 30, 2017), https://www.cdc.gov/drugoverdose/epidemic/index.html; Leonard J. Paulozzi et al., *Vital Signs: Overdoses of Prescription Opioid Pain Relievers — United States, 1999–2008*, 60 MORBIDITY AND MORTALITY WKLY. REP. 1487 (2011), https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6043a4.htm. However, "there had not been an overall change in the amount of pain that Americans reported." Hsien-Yen Chang et al., *Prevalence and Treatment of Pain in EDs in the United States, 2000 to 2010*, 32 AM. J. EMERGENCY MED. 421, 427 (2014), http://www.ajemjournal.com/article/S0735-6757(14)00021-7/pdf; Matthew Daubresse et al., *Ambulatory Diagnosis and Treatment of Non-Malignant Pain in the United States, 2000–2010*, 51 MED. CARE 870 (2013), https://insights.ovid.com/pubmed?pmid=24025657.

estimates that there are 150 people who abuse or are dependent on opioids.[4] Fatal overdoses from the nerve-pain drug gabapentin in West Virginia increased from three in 2010 to 109 in 2016.[5] That is a 3,600% increase in gabapentin deaths. Overdose deaths related to methamphetamine in West Virginia increased by 500% in four years, with a record-number 129 people dying from meth-related overdoses in 2017.[6]

As public money remains scarce, advocates must turn to private resources for recovery and community renewal. Private employers can play a more prominent role in supporting recovery by providing reasonable accommodations that help workers remain employed while participating in rehabilitation. Private-employer involvement is justified and appropriate medically and legally because addiction is a disability, is defined as such under disability anti-discrimination laws, and should be acknowledged as such in the workplace. Furthermore, private-employer involvement is justified economically and morally because the workplace has contributed to the oversupply of opioids that fueled the present epidemic—notably through the prolonged prescription of opioids (known as "opioid maintenance analgesia") in the workers' compensation system.[7] Opioids are disfavored by the medical community as a method of long-term treatment for chronic pain.[8] Yet, privately insured workers' compensation carriers have authorized extensive volumes of opioids for long-term pain treatment.[9] When West Virginia privatized its workers' compensation system beginning in 2004, private insurance carriers and

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4 Leonard J. Paulozzi et al., *CDC Grand Rounds: Prescription Drug Overdoses – a U.S. Epidemic*, 61 MORBIDITY AND MORTALITY WKLY. REP. 10 (2012), https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6101a3.htm.

5 Eric Eyre, *Opioid Alternative Linked to Spike in WV Overdose Deaths*, CHARLESTON GAZETTE-MAIL (Jan. 21, 2017), https://www.wvgazettemail.com/custom/opioid-alternative-linked-to-spike-in-wv-overdose-deaths/article6e29cb9d-f143-55d9-ac0f-1a0bc680d969.html.

6 Eric Eyre, *Meth-Related Overdose Deaths Hit Record Number in WV*, CHARLESTON GAZETTE-MAIL (Dec. 2, 2017), https://www.wvgazettemail.com/news/health/meth-related-overdose-deaths-hit-record-number-in-wv/article_67cb7c01-fba3-5dbc-80c8-f9913e07dfde.html

7 *See* W. VA. CODE R. §§ 85-20-53.2–53.12 (2006).

8 *Risks of Opioids Outweigh Benefits for Headaches, Back Pain, Other Conditions*, AM. ACAD. NEUROLOGY (Sept. 29, 2014), https://www.aan.com/PressRoom/Home/PRessRelease/1310.

9 Opioids constitute over a third of the total medical expenditure on workers' compensation claims that were lengthier than three years. "[O]n average, workers' compensation prescription drugs account for 19 percent of total medical spend, which equates to slightly less than 11 percent of 'ultimate developed' total incurred claim costs." KEITH E. ROSENBLOOM, OPIOIDS WREAK HAVOC ON WORKERS' COMPENSATION COSTS 2 (2012), http://www.lockton.com/Resource_/PageResource/MKT/wc-pbm-3%20update%208-31.pdf (citing Barry Lipton, Chris Laws, & Linda Li, Narcotics in Workers Compensation, NCCI Holdings, Inc. (2009), https://www.ncci.com/Articles/Documents/II_narcotics_in_wc_1209.pdf). "Opioids themselves account for an average of 25 percent of that pharmacy spend, and 35 percent or greater for claims over three years old." *Id.*

self-insured employers began exercising authority over how long an injured worker should be on opioids—whereas previously those decisions were subject to more rigorous public oversight through the Workers' Compensation Commission.[10]

The U.S. response to the opioid epidemic has been hindered by the lack of adequate support in the workplace as workers undergo rehabilitation and long-term recovery. Unaffordability and concerns over workplace repercussions are among the most common reasons reported by untreated addicts for not receiving treatment.[11] Workers may also be embarrassed or fear what co-workers would think if they knew of the addiction. Workers may be so broken that they lack knowledge about recovery programs or are too functionally impaired to find such programs. Successful recovery also requires developing stable peer groups apart from other addicted friends. When workers lack sufficient workplace flexibility and support, they may remain untreated, withdraw from treatment, or relapse into active drug abuse.[12]

The Americans with Disabilities Act (ADA)[13] and West Virginia Human Rights Act (WVHRA)[14] protect addicts' rights by providing that no covered employers may discriminate against addicted workers or job applicants because of their addiction. These laws recognize that recovering drug addicts, and society at large, are harmed by exclusion, discrimination, and unaccommodating workplace conditions. By better utilizing these laws to ensure access to gainful employment for recovering addicts, the labor and employment bar can make an important contribution to resolving the vexing opioid epidemic.

II. DETERMINING WHETHER THE ADDICT EMPLOYEE IS COVERED BY THE AMERICANS WITH DISABILITIES ACT AND THE WEST VIRGINIA HUMAN RIGHTS ACT

Drug addicts and alcoholics hold legal rights as persons with a disability if they meet a variety of legal tests. Generally, "standards governing the

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10 *See* W. VA. CODE R. § 85-20-53.12.d (2006).

11 *See* SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN. et al., RECEIPT OF SERVICES FOR BEHAVIORAL HEALTH PROBLEMS: RESULTS FROM THE 2014 NATIONAL SURVEY ON DRUG USE AND HEALTH (2015), https://www.samhsa.gov/data/sites/default/files/NSDUH-DR-FRR3-2014/NSDUH-DR-FRR3-2014/NSDUH-DR-FRR3-2014.htm.

12 *See generally* U. S. COMM'N ON CIVIL RIGHTS, *Substance Abuse Under the ADA*, *in* SHARING THE DREAM: IS THE ADA ACCOMMODATING ALL? (2000), http://www.usccr.gov/pubs/ada/main.htm (stating that a recovering addict may be entitled to a reasonable accommodation under the Americans with Disabilities Act which may include a modified work schedule so that an employee may attend rehabilitation meetings) (citing 42 U.S.C. § 12111(9) (1994)).

13 *See* 42 U.S.C. § 12112(a) (2012).

14 *See* W. VA. CODE ANN. § 5-11-1 to § 5-11-20 (West 2018). We are using the WVHRA as an example of how state human rights laws can complement the ADA.

ADA . . . and the WVHRA are coextensive" and often correspond to one another.[15] However, the Fourth Circuit acknowledges that the WVHRA constitutes an "independent approach to the law of disability discrimination that is not mechanically tied to federal disability discrimination jurisprudence."[16] This section explores the protections for recovering addicts under those laws, and highlights certain differences.

A. Overview

To be disabled, the addicted worker must show that (1) the addiction places a substantial limitation on one or more major life activities; (2) the worker has a record of being substantially limited in a major life activity due to alcoholism or drug addiction; or (3) the worker is regarded by the employer as being an alcoholic or drug addict.[17] The regulations implementing the ADA Amendments of 2008 explain that the definition of substantial limitation provides for "expansive coverage . . . to the maximum extent permitted by the terms of the ADA," and the regulations set forth extensive rules of construction as to the wide-ranging definition of "substantially limits" —stating that proof of a substantial limitation "usually will not require scientific, medical, or statistical analysis."[18] Likewise, ADA regulations expressly provide that "major life activity" includes such conditions as "concentrating, thinking, communicating, interacting with others," and brain function, which may be said plainly to arise from addiction even where the addiction does not materially interfere with the

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15 Shafer v. Preston Mem. Hosp. Corp., 107 F.3d 274, 281 (4th Cir. 1997), *abrogated on other grounds by* Baird *ex rel.* Baird v. Rose, 192 F.3d 462 (4th Cir. 1999); *cf.* Cooper v. Norfolk & W. Ry. Co., 870 F. Supp. 1410, 1418 (S.D.W. Va. 1994); Thomas v. Shoney's, Inc., 845 F. Supp. 388, 390 (S.D.W. Va. 1994) (citing Heston v. Marion Cty. Parks & Rec. Comm'n, 381 S.E.2d 253, 256 (W. Va. 1989)); Hosaflook v. Consolidation Coal Co., 1996 WL 717106, at *6–7 (W. Va. Dec. 10, 1996) (analyzing WVHRA claim under ADA framework); Skaggs v. Elk Run Coal Co., 479 S.E.2d 561, 1996 WL 391539, at *6–7 (W. Va. July 11, 1996) (same); *but cf.* Barefoot v. Sundale Nursing Home, 457 S.E.2d 152, 159 (W. Va. 1995) (observing that the Court had "consistently held that cases brought under the West Virginia Human Rights Act . . . are governed by the same analytical framework and structures developed under Title VII . . . .").

16 *See* Calef v. FedEx Ground Packaging Sys., Inc., 343 F. App'x 891, 896 (4th Cir. 2009) (citing Stone v. St. Joseph's Hosp., 538 S.E.2d 389, 404 (W. Va. 2000)).

17 *See* 29 C.F.R. § 1630.2(g) (2018) (noting that a worker need not demonstrate a substantial limitation to establish that he or she is "regarded as" disabled); *cf. Id.* § 1630.1(c)(4) (noting the broad definition of disability, as expanded by the 2008 ADA Amendments).

18 *See id.* § 1630.2(j)(1)(i)–(ix).

major life activity of working.[19] The question "whether an individual meets the definition of disability under this part should not demand extensive analysis."[20]

Assuming the worker can prove that his or her addiction substantially limits a major life activity,[21] he or she has a record of being limited by such, or is regarded as having an addiction (i.e., a disability), the worker may receive workplace protections as a person with a disability under the ADA and WVHRA. To prevail on a claim for failure to accommodate or for discrimination, the worker must show that his or her addiction does not preclude performing the essential functions of an available job (with a reasonable accommodation). Furthermore, the worker must not violate the Current User Rules.[22] As a matter of law, the worker bears the burden of proving that he or she is, or is regarded as, a qualified individual, with addiction as a disability, who is able to perform the essential functions of the job with an accommodation.

B. Current User Rules—and Safe Harbor for Workers Enrolled in Rehabilitation

The Current User Rule is a method by which the employer-defendant may dispute the plaintiff-worker's prima facie evidence that he or she is qualified to perform the essential functions of the job.[23] If a worker is "currently engaging in the illegal use of drugs," he or she may lose protection under the ADA[24] and possibly the WVHRA.[25]

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19 *See id.* § 1630.2(i)(1)(i)–(ii); *cf.* W. VA. CODE R. § 77-1-2.6 (1994) (setting forth a non-exhaustive list of representative activities); EQUAL EMP'T OPPORTUNITY COMM'N, TECHNICAL ASSISTANCE MANUAL: TITLE I OF ADA § 2.1(a)(ii) (1992) [hereinafter EEOC], https://askjan.org/links/ADAtam1.html.

20 29 C.F.R. § 1630.1(c)(4). At the pleading stage, a plaintiff under the ADA is "not required . . . to go into particulars about the life activity affected by [the] alleged disability or detail the nature of [the] substantial limitations." Mary's House, Inc. v. North Carolina, 976 F. Supp. 2d 691, 702 (M.D.N.C. 2013) (quoting Fowler v. UPMC Shadyside, 578 F.3d 203, 213 (3d Cir. 2009) (holding that plaintiffs' allegations that they were recovering addicts and previously homeless were sufficient at the 12(b)(6) stage to support an inference that they were substantially limited in their ability to work and care for themselves)); *see also* Bray v. Wake Forest, No. 5:14–CV–276–FL, 2015 WL 1534515, at *10–11 (E.D.N.C. Apr. 3, 2015); Rico v. Xcel Energy, Inc., 893 F. Supp. 2d 1165, 1168 (D.N.M. 2012); *cf.* Hopkins v. MWR Mgmt. Co., No. 15 CVS 697, 2016 WL 2840305, at *6 (N.C. Super. Ct. May 13, 2016).

21 See 29 C.F.R. § 1630.2(j) for detailed guidance on the meaning of "substantially limits" under the ADA; *cf.* W. VA. CODE R. § 77-1-2.5 (2018).

22 *See* 42 U.S.C. § 12114 (2012); 29 C.F.R. § 1630.3 (2018); W. VA. CODE ANN. § 5-11-3(m) (West 2018); W. VA. CODE R. § 77-1-2.1.

23 *See* Shafer v. Preston Mem'l Hosp. Corp., 107 F.3d 274, 276 (4th Cir. 1997); Wilson v. Se. Pa. Transp. Auth., No. 98–3411, 1999 WL 58657, at *4 (E.D. Pa. 1999).

24 *See* 42 U.S.C. § 12114; 29 C.F.R. § 1630.3.

25 *See* W. VA. CODE ANN. § 5-11-3(m) (West 2018); W. VA. CODE R. § 77-1-2.1 (2018).

Federal and state laws provide similar but distinct rules for preventing discrimination against drug addicts who are currently using. Under the ADA, the standards for current users are in some sense stricter than they are under the WVHRA; however, the ADA provides a generous "safe harbor" provision for any drug addict who is currently enrolled in rehabilitation.[26] The ADA contains a broad exclusion allowing discrimination against anyone who is currently engaging in the illegal use of drugs, when the discrimination occurs on the basis of such use.[27] By contrast, the WVHRA only allows discrimination against a drug-addicted worker when the current usage actually operates to prevent such worker from performing the duties of the job in question.[28] This is a relatively simple rule that provides more precise guidance for litigants than does the nuanced, fact-specific inquiry under the ADA.[29]

The WVHRA's Current User Rule is contained in the definition of disability. In particular, it removes protections only for those addicts "whose current use of or addiction to alcohol or drugs prevents such persons from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others."[30] Hence, while the WVHRA's and ADA's definitional frameworks are generally congruent, the WVHRA's definition of disability stands apart from the ADA's insofar as the state law provides a relatively more lenient and worker-oriented Current User Rule to be applied by courts and litigants.

The ADA's Current User Rule,[31] which removes from protection "any employee or applicant who is currently engaging in the illegal use of drugs, when the employer acts on the basis of such use," has two parts and operates more stringently than the WVHRA's version.[32] First, to avoid being considered as "currently engaging in illegal use of drugs," the addict must have been drug-free for a significant period of time.[33] In particular, an employee is a current user if

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26 *See* 42 U.S.C. § 12114(b)(1)(2) (2012).

27 42 U.S.C. § 12114(a) (2012).

28 *See* W.VA. CODE ANN. § 5-11-3(m)(3) (West 2018).

29 *See infra* Section II.B.2.

30 W. VA. CODE ANN. § 5-11-3(m) (West 2018).

31 42 U.S.C. § 12114(a); *cf.* 42 U.S.C. §§ 12102(1), (3)(A) (2012).

32 *See* Lyons v. Johns Hopkins Hosp., No. CCB-15-0232, 2016 WL 7188441, at *4 (D. Md. Dec. 12, 2016).

33 *See, e.g.*, Mauerhan v. Wagner Corp., 649 F.3d 1180, 1187 (10th Cir. 2011); Brown v. Lucky Stores, Inc., 246 F.3d 1182, 1186 (9th Cir. 2001); Zenor v. El Paso Healthcare Sys., Ltd., 176 F.3d 847, 856 (5th Cir.1999); Shafer v. Preston Mem. Hosp. Corp., 107 F.3d 274, 281 (4th Cir. 1997), *abrogated on other grounds by* Baird *ex rel.* Baird v. Rose, 192 F.3d 462 (4th Cir. 1999); Teahan v. Metro-North Commuter R.R. Co., 951 F.2d 511, 519 (2d Cir. 1991); Quinones v. Univ. of P.R., No. 14-1331 JAG, 2015 WL 631327, at *5 (D. P.R. Feb. 13, 2015); Vedernikov v. W. Va. Univ., 55 F. Supp. 2d 518, 522 (N.D.W. Va. 1999); Andriacchi v. City of Chicago, No.

he or she uses drugs "during the weeks and months" prior to an adverse employment action, even if drug-free on the day of such action.[34]

Second, the length of abstinence is not necessarily dispositive; relatedly, whether an employer could reasonably believe, at the time of discharge or other adverse employment action, that drug use remained an ongoing problem is also relevant.[35] The Equal Employment Opportunity Commission's ("EEOC") Technical Assistance Manual on the Employment Provisions (Title I) of ADA provides further perspective:

> "Current" drug use means that the illegal use of drugs occurred recently enough to justify an employer's reasonable belief that involvement with drugs is an on-going problem. It is not limited to the day of use, or recent weeks or days, in terms of an employment action. It is determined on a case-by-case basis.[36]

Section 12114(a) applies to "the illegal use of drugs that has occurred recently enough to indicate that the individual is actively engaged in such conduct."[37] The Fourth Circuit has held that a drug addict is considered not to be currently engaging in the illegal use of drugs after one year of abstinence,[38] although the periodic use of illegal drugs during weeks and months prior to a discharge may be considered current use.[39] The Fourth Circuit further characterized the meaning of "current" as "a periodic or ongoing activity in which a person engages."[40] Furthermore, while the current use—if it is sufficiently recent in time—might disqualify a drug addict, the ADA provides a so-called "Safe Harbor" provision that helps to protect current users who are actively participating in a supervised rehabilitation program.[41] The ADA Safe Harbor Rule specifically provides that

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CCB-15-0232, 1996 WL 685458, at *2–3 (N.D. Ill. Nov. 22, 1996); Baustian v. State of La., 910 F. Supp. 274, 277 (E.D. La. 1996); McDaniel v. Miss. Baptist Med. Ctr., 877 F. Supp. 321, 328–29 (S.D. Miss. 1995), *aff'd* 74 F.3d 1238 (5th Cir. 1995); McDaniel v. Miss. Baptist Med. Ctr., 869 F. Supp. 445, 450 (S.D. Miss. 1994).

34 *Shafer*, 107 F.3d at 278–79.

35 *See id.*; *see also Mauerhan*, 649 F.3d at 1187; *Zenor*, 176 F.3d at 856.

36 EEOC, *supra* note 19, § 8.3 (cited by *Vedernikov*, 55 F. Supp. 2d at 522 (Broadwater, J.)); *cf.* EQUAL EMP'T OPPORTUNITY COMM'N, ADA TECHNICAL ASSISTANCE MANUAL ADDENDUM (2002), https://www.eeoc.gov/policy/docs/adamanual_add.html.

37 29 C.F.R. § 1630.3 App. (1996) (cited by *Vedernikov*, 55 F. Supp. 2d at 522 (Broadwater, J.)).

38 United States v. S. Mgmt Corp., 955 F.2d 914, 917–19 (4th Cir. 1992).

39 *Vedernikov* 55 F. Supp. 2d at 523; Shafer v. Preston Mem. Hosp. Corp., 107 F.3d 274, 278 (4th Cir. 1997).

40 *Shafer*, 107 F.3d at 278; *cf. Vedernikov*, 55 F. Supp. 2d at 523.

41 *See* 42 U.S.C. § 12114(b) (2012); *cf.* Clark v. Jackson Hosp. & Clinic, Inc., No. 2:12-CV-836-WKW, 2013 WL 5347450, at *6 (M.D. Ala. Sept. 23, 2013).

"those who have ceased using drugs and either begun or completed a supervised rehabilitation program are qualified individuals."[42]

C. *Actions that Employers Attempt to Take Against Alcoholics and Drug Addicts*

Employers are likely to contemplate taking a wide array of actions in response to addiction. The ADA expressly sets forth an employer's permissible actions. Any adverse action, coercion, interference, threats, harassment, or intimidation that fall outside of the scope of these enumerated permissible actions may be remediable by the aggrieved worker.[43] The employer's express privileges regarding drug-addicted employees include the following: prohibiting alcohol and illegal-drug use at work; prohibiting employees from being under the influence of drugs during working time; requiring employees to comply with certain standards such as those set forth in the Drug-Free Workplace Act[44] or other laws required in the federal sector.[45]

Federal employment law is neutral on drug testing—neither encouraging it nor providing that it constitutes per se discrimination based on addiction. In particular, drug tests are not medical examinations for ADA purposes.[46] Further, the validity of any employment decision associated with a drug test must be evaluated in light of the totality of circumstances surrounding the worker's conduct and the employer's motivations and perceptions.[47]

State drug testing laws often add layers of complexity to the basic, neutral position of drug testing under federal law. The West Virginia Safer Workplace Act expanded firms' authority to test current or prospective workers for drugs or alcohol.[48] The Act erects several requirements for a company's testing policy. Employers must provide employees, when requested or as

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42 *Clark*, 2013 WL 5347450, at *6 (emphasis omitted); McDaniel v. Miss. Baptist Med. Ctr., 869 F. Supp. 445, 450 (S.D. Miss.1994).

43 29 C.F.R. § 1630.12 (2018).

44 41 U.S.C. §§ 8101–8103 (2012).

45 *See, e.g.*, 42 U.S.C. § 12114(c); 29 C.F.R. § 1630.16(b), (c).

46 42 U.S.C. § 12114(d)(1).

47 *See* Martin v. Estero Fire Rescue, No. 213-cv-393-FtM-29DNF, 2014 WL 2772339, at *4 (M.D. Fla. 2014) (denying motion to dismiss ADA discrimination complaint by firefighter who registered positive on a drug test, informed his employer that the positive result was due to disabling anxiety, and requested counseling as a reasonable accommodation for the disability—yet the employer then fired him instead of providing the accommodation); Rosado v. Am. Airlines, 743 F. Supp. 2d 40, 51–52 (D.P.R. 2010) (concluding that employer had legitimate business reasons for terminating clerk based on his history of drug tests positive for cocaine and failing to report for retest); Jones v. Corrections Corp. of Am., 993 F. Supp. 1384, 1387 (D. Kan. 1998) (denying motion to dismiss claim of an employee who was erroneously regarded as disabled when he allegedly inaccurately tested positive for marijuana).

48 W. VA. CODE ANN. § 21-3E-1 to -16 (West 2018).

appropriate, with information regarding the availability of counseling, employee assistance, rehabilitation, and/or other drug abuse treatment programs which the employer offers.[49] If a worker wishes to challenge the results of his or her initial sample test result, that person has the right to have the split sample tested by another laboratory.[50]

The Safer Workplace Act provides that "to qualify for a bar from being subjected to legal claims for acting in good faith on the results of a drug or alcohol test, employers must adhere to the accuracy and fairness safeguards outlined in [the Act]."[51] An employer with a drug testing policy may violate the WVHRA or ADA if it fails to offer the requisite information on counseling or treatment to workers who test positive and then denies the known addict a reasonable accommodation to pursue such employer-sponsored counseling, rehab, treatment programs, or other treatment options.

D. Proving Disability for Drug Addicts and Alcoholics

1. Difficulties Proving Disability by Showing a Current, Substantial Limitation of a Major Life Activity

A plaintiff-worker may demonstrate a disability by showing that his or her addiction currently places a substantial limitation on one or more major life activities. *Wintz v. Cabell County Commission*[52] and *Chamberlain v. Securian Financial Group, Inc.*[53] demonstrate the logical and legal challenges of establishing that a drug-addicted worker has a current, substantial limitation on a major life activity and is able to perform the job duties.[54] In *Wintz*, the court analyzed a failure to accommodate claim for an alcoholic, paying extended attention to the substantial-limitation test.[55] There, the worker's doctor released her to return to work without restrictions regarding her alcoholism.[56] The worker claimed she could perform every basic life function at the time she was terminated.[57] The court found no evidence that the worker was either actually

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49 *Id.* § 21-3E-7(8)(a).

50 *Id.* § 21-3E-7(6).

51 *Id.* § 21-3E-4.

52 No. 3:15-11696, 2016 WL 7320887 (S.D.W. Va. Dec. 15, 2016).

53 180 F. Supp. 3d 381 (W.D.N.C. 2016).

54 *Wintz*, 2016 WL 7320887, at *5; *Chamberlain*, 180 F. Supp. 3d at 398–400. For more detailed guidance on "substantially limits," see 29 C.F.R. § 1630.2(j) (2018); W. VA. CODE R. § 77-1-2.5 (1994). For more guidance on "major life activity," see 29 C.F.R. § 1630.2(i); W. VA. CODE R. § 77-1-2.6.

55 *Wintz*, 2016 WL 7320887, at *5.

56 *Id.* at *1.

57 *Id.* at *5.

disabled or perceived as being disabled at the time she was terminated within the meaning of the WVHRA.[58]

The court did not, however, analyze whether the worker was "disabled" based on having a "record of impairment" that previously substantially limited a major life activity.[59] The court instead simply found that the employer presented ample evidence to show that the worker's alcohol dependence prevented her from doing the job duties—processing mental health petitions—because, as the court further found, mistakes in processing medically sensitive materials raised serious safety concerns.[60] Therefore, the employer was not required to accommodate her for alcohol dependence.[61]

In *Chamberlain*, the court applied the substantial-limitation test in analyzing a wrongful discharge claim because of alcoholism disability in the context of an insurance salesman's disruptive behavior while on a complementary cruise the salesman earned as a job-performance reward.[62] The court found that the worker did not articulate how his alcohol impairment "substantially limit[ed]" his ability to perform any "major life activities."[63] The employee had been sober for nine years before relapsing a few months before the cruise incident.[64] The court declined to analyze whether the testimony regarding the worker's enrollment in a treatment program described a substantial limitation on the worker's other major life activities besides that of working, such as concentrating, thinking, communicating, interacting with others, or other brain functions.[65]

The *Chamberlain* court speciously concluded, without analyzing the limitations on brain function that caused the worker to seek substance abuse treatment, that there was no evidence as to how the worker's alcoholism was *currently* placing a substantial limitation on any major life activities, and that the worker was thus disabled due either to a current impairment or a record of

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58 *See* Syl. Pt. 2, Skaggs v. Elk Run Coal Co., 479 S.E.2d 561, 575 (W. Va. 1996) (explaining that "[t]o state a claim for breach of the duty of reasonable accommodation under the West Virginia Human Rights Act, W. VA. CODE, 5-11-9 (1992), a plaintiff must allege the following elements: (1) The plaintiff is a qualified person with a disability . . . .").

59 *See Wintz*, 2016 WL 7320887, at *5–6.

60 *Id.*

61 *Id.* at *6.

62 *Chamberlain*, 180 F. Supp. 3d at 388–89, 397–400.

63 *Id.* at 397–99; *see also* 29 C.F.R. § 1630.2 (2018); Adams v. Rice, 531 F.3d 936, 946 (D.C. Cir. 2008).

64 *See* Chamberlain Dep. at 133–43 (# 23) at 61–62, (# 33–1) at 13, *Chamberlain*, 180 F. Supp. 3d at 381, (No. 3:14-cv-00453), 2015 WL 13504999. The plaintiff also argued that his alcohol addiction had no effect on his job performance. *See, e.g.*, Pl. Resp. (#33) at 20–21, *Chamberlain*, 180 F. Supp. 3d at 381, (No. 3:14-cv-00453), 2015 WL 13504999.

65 *See Chamberlain*, 180 F. Supp. 3d at 387.

impairment.[66] Consequently, the *Chamberlain* court's analysis failed to adequately consider the full spectrum of major life activities, the full spectrum of impairments arising from addiction, or whether a record of impairment had existed in years past.[67]

2. Difficulties Proving Disability by a Record of Impairment

A plaintiff-worker may show a record of impairment by demonstrating that the addiction has a record of substantially limiting a major life activity, even if it no longer does. In general, an individual has a record of a disability if the individual has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.[68] The ADA implementing regulations clarify that the concept of "record of impairment" is intended to have a broad construction.[69] A non-using drug addict with a record of impairment is entitled to a reasonable accommodation even if his or her addiction does not currently substantially limit a major life activity.[70]

The *Chamberlain* case suggests that a worker may struggle to distinguish a claim of an actual, current impairment from that of record of prior impairment; however, if that distinction is clearly drawn, the evidence in favor of the worker's disability can come into compelling focus.

By contrast, in *Eshelman v. Agere Systems, Inc.*,[71] the Third Circuit upheld a jury's determination that an employee's absence from work during cancer treatments provided a record of being substantially limited in the major life activities of working and thinking, and that the employer relied on that

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66 The court confused the first two prongs of disability, stating: "Because there is no evidence as to how Plaintiff's alcoholism "substantially limits" any major life activities, Plaintiff does not meet the definition of disabled on either the first or second prongs." *Chamberlain*, 180 F. Supp. 3d at 399.

67 *Id.* at 400.

68 29 C.F.R. § 1630.2(k)(1) (2018).

69 *Id.* § 1630.2(k)(2) ("Broad construction. Whether an individual has a record of an impairment that substantially limited a major life activity shall be *construed broadly to the maximum extent permitted by the ADA and should not demand extensive analysis*. An individual will be considered to have a record of a disability if the individual has a history of an impairment that substantially limited one or more major life activities when compared to most people in the general population, or was misclassified as having had such an impairment. In determining whether an impairment substantially limited a major life activity, the principles articulated in paragraph (j) of this section apply.") (emphasis added); *id.* § 1630.2(j)(ii) (disability does not have to prevent or severely restrict an activity to be substantially limiting).

70 *See id.* § 1630.2(k)(3) ("An individual with a record of a substantially limiting impairment may be entitled, absent undue hardship, to a reasonable accommodation if needed and related to the past disability."); *cf.* Buckley v. Consol. Edison Co. of N.Y., Inc., 127 F.3d 270, 274 (2d Cir. 1997) ("[P]ast drug *addiction*, not merely past use, is required to make out a claim under the ADA.") (emphasis in original), *vacated on other grounds*, 155 F.3d 150 (2d Cir.1998).

71 554 F.3d 426 (3d Cir. 2009).

disability in its decision to terminate her.[72] The *Eshelman* court cited the following four pieces of evidence to support its decision. First, the employer's medical department's files documented the employee's symptoms and cancer treatment.[73] Second, the employer received a written note from the worker's doctor stating that she had significant cognitive dysfunction, referred to as "chemo brain," and that she suffered from short-term memory loss after she returned to work.[74] Third, the employee's direct supervisors were aware of her chemotherapy-related memory problems (based on the worker's testimony that she told her supervisors "I have this problem that I can't retain things in my short-term memory" and "I have to write this down, so that it doesn't disappear").[75] Fourth, the employer's proffered reasons for terminating the worker included her inability to travel, which was a memory-based inability, and which the jury could have deemed a substantial limitation (e.g., limiting the major life activities of thinking, working, concentrating, communicating, interacting with others).[76]

While demonstrating a record of impairment in the past is simpler than showing the ongoing nature of the impairment, the flipside of this consideration for the plaintiff-worker is that the medical records of the impairment cannot be so remote in time as to be unreliable. For instance, in *Dismore v. Seaford School District*,[77] a school bus driver with a remote childhood history of depression and attention deficit disorder was found to have no "record of impairment."[78] The driver's early childhood records, which were allegedly held by the defendant but were never produced in the record of the case, were inadequate to demonstrate that the worker had a record of substantial limitation on a major life activity.[79] Thus, the "record of" prong may be an asset to the worker so long as the medical treatment records are actually available as evidence and contain a reliable measure of detail to support a conclusion that the worker has a record of impairment.[80]

3. Difficulties Proving Disability by Showing "Regarded as" Disabled

A plaintiff-worker may show that he or she is "regarded as" having a physical or mental impairment. A worker

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72 *Id.* at 436.

73 *Id.* at 438.

74 *Id.* at 430–31.

75 *Id.* at 438.

76 *Id.* at 438–39.

77 532 F. Supp. 2d 656 (D. Del. 2008).

78 *Id.* at 663–64.

79 *Id.*

80 *See id.*

> meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.[81]

Accordingly, "an individual is disabled if regarded as such, whether or not he in fact has a substantially limiting impairment."[82] That is, the worker need only show that the employer believed that the worker had a mental or physical impairment, not that such impairment affected him or her to any specific degree. Under the "regarded as" prong, the employer's perception about the worker is the court's pivotal inquiry.[83] The employer's knowledge should be proven by facts about addiction that were clearly revealed to or acknowledged by the employer.[84]

Rocha v. Coastal Carolina Neuropsychiatric Crisis Services[85] illustrates the difficulties a worker may have in making an adequate showing under the "regarded as" prong.[86] There, a mental health worker was fired after he failed to disclose three felony convictions for possessing illegal drugs.[87] The court held that the worker's disclosure of criminal drug use during his youth did not have a "logical nexus" to the employer's alleged view that the worker was a drug addict.[88] The court explained that, while the worker alleged that he had attended out-patient addiction recovery meetings following his three convictions, he did not allege that his employer knew about that treatment for drug addiction.[89] The

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81 42 U.S.C. § 12102(3)(A) (2012).

82 A Helping Hand, LLC v. Baltimore Cty., Md., 515 F.3d 356, 365 (4th Cir. 2008) (citing Cline v. Wal-Mart Stores, Inc., 144 F.3d 294, 302 (4th Cir. 1998)); 29 C.F.R. 1630.2(j)(2) (2018) ("Whether an individual's impairment 'substantially limits' a major life activity is not relevant to coverage under paragraph (g)(1)(iii) (the 'regarded as' prong) of this section.").

83 *See* Hilton v. Wright, 673 F.3d 120, 129 (2d Cir. 2012) (holding that under the ADA, a plaintiff only had to show at summary judgment that a genuine issue of material fact existed as to whether the employer "regarded him as having a mental or physical impairment . . . [and] was not required to present evidence of how or to what degree [the employer] believed the impairment affected him"); Horsham v. Fresh Direct, 136 F. Supp.3d 253, 262 (E.D.N.Y. 2015) ("Whether an individual is regarded as having a disability turns on the employer's perception of the employee and is therefore a question of intent, not whether the employee has a disability.") (internal citations and quotations omitted); Sowell v. Kelly Servs., Inc., 139 F. Supp.3d 684, 700 (E.D. Pa. 2015) ("What is relevant here is the employer's perception.").

84 *See* Nielsen v. Moroni Feed Co., 162 F.3d 604, 611–12 (10th Cir. 1998).

85 979 F. Supp. 2d 670 (E.D.N.C. 2013).

86 *See id.* at 678–79.

87 *Id.* at 676.

88 *Id.* at 678.

89 *Id.* at 678–79.

court added that even if the plaintiff-mental-health worker had established a prima facie case of "regarded as" disability discrimination under the ADA, the employer offered a legitimate, nondiscriminatory reason for the discharge: the worker had misstated a material fact on his employment application by representing that he had no criminal convictions.[90]

Chamberlain, by contrast, provides an example of a worker succeeding under the "regarded as" prong. There, the worker contended that the terms that defendants sought to impose as probationary conditions of his employment showed that he was "regarded as" an alcoholic by his employer and punished for his impairment.[91] The probationary terms included conditions not imposed on other employees, such as documenting the worker's attendance at Alcoholics Anonymous meetings, submitting to random drug tests, and applying a zero-tolerance policy for drug and alcohol use both on and off the job.[92] Citing the ADA's instruction that "[t]he definition of disability . . . shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter,"[93] and evidence that could lead a jury to find that defendants regarded the employee as having an impairment, the court found that the plaintiff made the requisite showing that an issue of material fact existed as to whether he was "regarded as" disabled.[94] Ultimately, the employee's success in showing that he was regarded as disabled was not dispositive in his favor because the court concluded that the employer had successfully shown that the probationary agreement was non-discriminatory and non-pretextual.[95]

In *Sternkopf v. White Plains Hospital*,[96] a worker alleged that his employer discriminated against him under the ADA based on his "substance abuse," orthopedic injuries, and bipolar disorder.[97] The court found that the worker failed to expressly allege that he was ever addicted, having pled only that he suffered from "substance abuse."[98] The court in *Sternkopf* failed to consider the EEOC's regulatory rule of construction vis-à-vis "regarded as," which

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90 *Id.* at 679; *see* Americans with Disabilities Act of 1990, § 102(a), 42 U.S.C. § 12112(a) (2012).

91 Chamberlain v. Securian Fin. Grp., Inc., 180 F. Supp. 3d 381, 389 (W.D.N.C. 2016).

92 *See id.* at 399.

93 42 U.S.C. § 12102(4)(A).

94 *Id.* at 399–400.

95 *See Chamberlain*, 180 F. Supp. 3d at 400–04 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)).

96 No. 14-CV-4076 (CS), 2015 WL 5692183 (S.D.N.Y. Sept. 25, 2015).

97 *Id.* at *6–7.

98 *See id.* at 6 (citing Buckley v. Consol. Edison Co. of N.Y., Inc., 127 F.3d 270, 274 (2d Cir. 1997); Skinner v. Amsterdam, 824 F. Supp. 2d 317, 330–31 (N.D.N.Y. 2010) (reciting detailed facts of pro se plaintiff's addiction to painkillers, and evaluating an addiction-based hostile work environment claim under the ADA pursuant to *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)).

provides that "an individual is 'regarded as having such an impairment' if the individual is subjected to a prohibited action because of an actual or perceived physical or mental impairment, whether or not that impairment substantially limits, or is perceived to substantially limit, a major life activity."[99] *Sternkopf* thus illustrates the peril that may befall a "regarded as" claim if the court is not keenly aware that such a claim need not satisfy the "substantially limits" and "major life activity" tests.

Taken together, these cases clarify that the "regarded as" prong is an important aspect of the statutes' efforts to prevent discrimination based on unfounded perceptions of drug addiction.

III. CAUSES OF ACTION FOR THE DRUG ADDICT

A. Failure to Accommodate

As a threshold matter, it is important to note the circumstances that operate to deprive the recovering addict of a livelihood, but which the duty to accommodate may help to alleviate. Recovering addicts' highest priority must be to recover from the disease of addiction because failure to properly curb the addiction is bound to result in relapse. Those in recovery may have already experienced the loss of loved ones through divorce or alienation, economic devastation resulting from debts used to finance the addiction, and interpersonal conflict during substance abuse.[100] Working while recovering can only create added stress for a recovering addict.[101] Further, recovering addicts may have lost their jobs because of their addiction or their addiction was triggered by job loss. Unemployment and the search for employment are themselves additional stressors. Moreover, the longer that an addict is out of work, the greater the risk that treatment becomes unaffordable. Thus, both having a job and not having a job contribute to a stressful environment that may interfere with recovery.

Reasonable accommodations for recovering addicts may include part-time schedules to support inpatient or outpatient behavioral therapy, and may also include flex time or intermittent leave to participate in random drug screenings, rehab sessions, Alcoholics or Narcotics Anonymous meetings, physical activity,[102] medically-assisted treatment (combining behavioral therapy with medications, such as Suboxone, to treat substance abuse disorders), or other recovery-related appointments. It is particularly important for the recovering

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99 29 C.F.R. § 1630.2(l)(2) (2018).

100 *See* Rajita Sinha R & Ania M. Jastreboff, *Stress as a Common Risk Factor for Obesity and Addiction*, 73 BIOLOGICAL PSYCHIATRY 827–35 (2013).

101 *See* Michael G. Marmot, *Status Syndrome: A Challenge to Medicine*, 295 [J]AMA 1304–07 (2006).

102 *See* Mark A. Smith & Wendy J. Lynch, *Exercise as a Potential Treatment for Drug Abuse: Evidence from Preclinical Studies*, 2 FRONTIERS IN PSYCHIATRY 82 (2011).

addict to obtain these accommodations, thereby preventing permanent job loss while permitting the addict to curb the disease of addiction and to work productively.

To establish a claim for failure to accommodate under the WVHRA, the worker must prove the following:

> (1) the [worker was] a qualified person with a disability; (2) the employer was aware of the [worker's] disability; (3) the [worker] required an accommodation in order to perform the essential functions of [his or her] job; (4) a reasonable accommodation existed that [would have] met [his or her] needs; (5) the employer knew or should have known of the [worker's] need[s] and of the accommodation; and (6) the employer failed to provide [an] accommodation [that would have permitted the worker to remain in the position at issue].[103]

Similarly, to establish a claim for failure to accommodate under the ADA, a worker must prove that (1) he or she "qualifies as an 'individual with a disability;'" (2) the employer had notice of the disability; (3) he or she "could perform the essential functions of [his or] her job with a reasonable accommodation;" and (4) the employer "refused to make any reasonable accommodation."[104] Under the ADA, a worker who qualifies as a person with a disability based only on the "regarded-as" prong is not entitled to a reasonable accommodation.[105]

An employer has "a good-faith duty to engage with [its employee] in an interactive process to identify a reasonable accommodation," and courts must in turn review the accommodation on a case-by-case basis.[106] Determining whether an accommodation is reasonable "requires a fact-specific, individualized

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103 Williams v. Charleston Area Med. Ctr., 592 S.E.2d 794, 797 n.2 (W. Va. 2003) (quoting Skaggs v. Elk Run Coal Co., 479 S.E.2d 561, 575 (W. Va. 1996)); *see* W. VA. CODE R. § 77-1-4 (1994).

104 Reyazuddin v. Montgomery Cty., Md., 789 F.3d 407, 414 (4th Cir. 2015) (analyzing elements under Rehabilitation Act); *accord* 29 U.S.C. § 794(a) (2012); Wilson v. Dollar Gen. Corp., 717 F.3d 337, 345 (4th Cir. 2013); Tyndall v. Nat'l Educ. Ctrs., Inc. of Cal., 31 F.3d 209, 212–13 (4th Cir. 1994); *cf.* Mobley v. Advance Stores Co., 842 F. Supp. 2d 886, 889 (E.D. Va. 2012) (citing Rhoads v. FDIC, 257 F.3d 373, 387 n.11 (4th Cir. 2001)) (cited by Garrett v. Aegis Commc'ns Grp., LLC, No. 1:13-cv-13, 2014 U.S. Dist. LEXIS 88376, at *7–8 (N.D. W. Va. June 29, 2014)).

105 29 C.F.R. § 1630.9(e) (2018).

106 *See* Jacobs v. N.C. Admin. Office of the Courts, 780 F.3d 562, 580 (4th Cir. 2015) (quoting 29 C.F.R. 13 § 1630.2(o)(1)(ii)) (internal quotation marks omitted); *cf.* 42 U.S.C. § 12111(9)(B) (2012); School Bd. of Nassau Cty. v. Arline, 480 U.S. 273, 287 (1987) (requiring review on case-by-case basis); Champ v. Baltimore Cty., 884 F. Supp. 991, 996 (D. Md. 1995) (mem.).

analysis of the disabled individual's circumstances."[107] For incumbent workers, scenarios that could give rise to claims for failure to accommodate include employers denying the flexibility to complete rehabilitation or to report for the administration of medically assisted treatment. That is, a worker may have a disabling addiction—or a record of such addiction—that substantially limits his or her concentrating, thinking, communicating, interacting with others, or other brain functions. That worker may require an accommodation to prevent the addiction from compromising his or her ability to perform the essential functions of the job. For job applicants, scenarios could involve not being able to participate in a continuous multi-day interview or orientation sessions due to mandatory reporting for random drug testing or similar reporting requirements connected to rehabilitation.

The legal claim for a failure to accommodate represents a powerful tool for workers who are recovering addicts, drug counselors, and family members of recovering addicts. Individuals in recovery may consider filing charges for failure to accommodate even before any escalated adverse action occurs, so they can pre-emptively protect their livelihood while remaining in treatment.

B. Discrimination or Disparate Treatment

Discrimination against drug addicts can arise in various settings at the workplace. The employer may fail to promote or refuse to provide a raise for the incumbent worker. Employers may discriminate against a job applicant based on his or her appearance (such as tattoos depicting drug paraphernalia), a resume or other information that indicates the applicant had participated (or is participating) in rehabilitation programs, or unexplained gaps in a resume implying prior rehabilitation.

Lopreato v. Select Specialty Hospital Northern Kentucky[108] was an ADA discrimination case brought by nurses who were refused job offers after having previously lost their licensure due to drug addiction. In that case, the nurses alleged discrimination, but failed to allege that the employer-hospital treated them differently than similarly situated applicants who were not disabled.[109] The hospital did not hire any non-disabled applicants who had prior restrictions on

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107 Runyon v. Hannah, No. 2:12-1394, 2013 WL 2151235, at *4 (S.D.W. Va. May 16, 2013) (citing Wong v. Regents of the Univ. of Cal., 192 F.3d 807, 818 (9th Cir.1999) (citing Crowder v. Kitagawa, 81 F.3d 1480, 1486 (9th Cir.1996)); *accord* Pandazides v. Va. Bd. of Educ., 13 F.3d 823, 833 (4th Cir. 1994). In *Pandazides*, a case under the Rehabilitation Act of 1973, 29 U.S.C. §§ 701–718, which prevents disability discrimination by federal agencies and federal contractors, the court declared "the various elements of a Rehabilitation Act claim alleging employment discrimination, including the reasonableness of any accommodations, to be questions of fact." *Runyon*, 2013 WL 2151235, at *4.

108 640 F. App'x 438 (6th Cir. 2016).

109 *Id.* at 443.

their licenses arising from misconduct that was unrelated to drug abuse.[110] Relying on those facts, the Sixth Circuit found that "an employer's decision to reject an applicant because the applicant did not have a neutral characteristic which the employer requires of all employees is legitimate and nondiscriminatory, even if the rejected applicant lacks the desired characteristic because he is disabled."[111] Accordingly, the hospital's practice was legitimate and nondiscriminatory because its practice applied equally to all nurses with current or prior restrictions on their licenses.[112]

Discrimination claims play an important role in reducing the social costs of addiction and recovery by promoting workforce participation by recovering addicts and alcoholics. These claims may indirectly increase the availability of reasonable accommodations, and thus keep workers on the job, because employers have an incentive to avoid causing damages and incurring litigation expenses for failing to accommodate or for discharging an employee who is disabled because of alcoholism or drug addiction. When an addicted worker is discharged, the lack of income and associated stress may aggravate the risks of relapse. Securing relief for discrimination in such situations can assist workers financially and emotionally in restoring them to the pathway of successful long-term recovery.

C. Disparate Impact

Disparate impact is proven by "(1) demonstrating that the employer uses a particular employment practice or policy and (2) establishing that such particular employment practice or policy causes a disparate impact on a class protected [from discrimination]."[113] If the plaintiff-worker establishes this burden, then the employer must prove that the practice or policy is "job related" and "consistent with business necessity."[114] The worker can then rebut the defense by "showing that a less burdensome alternative practice exists which the employer refuses to adopt."[115]

To demonstrate disparate impact of a policy or practice, the proper statistical comparison is between the composition of protected class members among the qualified persons in the labor market and the composition of protected class members holding the job or jobs at issue for the aggrieved worker or

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110 *Id.*

111 *Id.*

112 *Id.*

113 Barefoot v. Sundale Nursing Home, 457 S.E.2d 152, 159 (W. Va. 1995) (quoting West Virginia Univ. v. Decker, 447 S.E.2d 259 (W. Va. 1994)); *cf.* 42 U.S.C. § 12112(b) (2012).

114 42 U.S.C. § 12112(b)(6); *Barefoot*, 457 S.E.2d at 159.

115 *Id.* at 166.

class.[116] Employers disparately impact drug addicts by using employment tests that exclude drug addicts, or by adopting work rules that prohibit workers from taking intermittent leave to participate in random drug testing or treatment (if such work rules are not essential given the duties of the job).

Disparate impact claims for addicts under the ADA should be developed and pleaded in light of *Raytheon Co. v. Hernandez*.[117] Raytheon fired an employee for failing an employer-administered drug test.[118] The employee successfully completed a drug rehab program, remained drug free for an extended period of time, and then sought re-employment.[119] However, the employer denied his application based upon its policy against rehiring employees who had been fired for cause.[120] The Ninth Circuit held that the no-rehire policy, although non-discriminatory on its face, was unlawful as applied because it had the potential to discriminate against employees who were lawfully forced to resign for illegal drug use but have since been rehabilitated.[121] The Supreme Court reversed, holding that the plaintiff had not timely developed a disparate impact case and that the facts did not constitute disparate treatment—i.e., reliance on the employer's "no-rehire" policy, even when applied to persons with disabilities, was a legitimate reason for declining to rehire the plaintiff, absent evidence that the policy was instituted for the purpose of excluding individuals with disabilities or that it was used in this case as a pretext to exclude the plaintiff because of his disability.[122] *Raytheon* indicates that disparate impact claims may be just as viable for workers suffering from substance abuse disorders as they are for any others. Disparate impact claims can be directed towards employment policies, hiring tests, and similar gate-keeping devices that tend to exclude groups of addicts *en masse* from equitable access to the workplace.

D. Defenses

Plaintiffs may find themselves contending with two affirmative defenses that operate somewhat differently for addicts than they do for other disability

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116 *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 650–51 (1989) (applied by Syl. Pt. 3, Guyan Valley Hosp., Inc. v. W. Va. Human Rights Comm'n, 382 S.E.2d 88 (W. Va. 1989), *overruled on other grounds*, W. Va. Univ./W. Va. Bd. of Regents v. Decker, 447 S.E.2d 259 (W. Va. 1994)); *cf.* Pittsnogle v. W.Va. Dept. of Transp., 605 S.E.2d 796, 801 (W. Va. 2004).

117 540 U.S. 44, 50 (2003) (comparing disparate impact with disparate treatment for a worker disabled by addiction); *cf.* Vargo v. Nat'l Exch. Carriers Ass'n, Inc., 870 A.2d 679, 690–91 (Super. Ct. N.J. 2005).

118 *Hernandez*, 540 U.S. at 47.

119 *Id.*

120 *Id.*

121 *Id.* at 50.

122 *Id.* at 53–54.

claims: the "direct threat" defense and the undue hardship defense.[123] While these defenses are not couched in strictly identical terms in the state and federal statutes, they operate in a similar manner under the ADA and WVHRA. This Section presents an overview of these defenses to highlight their relevance to claims by drug addicts. Further reading will yield important guidance for the practitioner and scholar alike, especially as to additional defenses that arise commonly in disability claims such as the business necessity defense under the ADA and the bona fide occupational qualification defense under the WVHRA.[124]

1. Direct Threat

Under the ADA, an employer need not accommodate employees who pose a direct threat to themselves or others.[125] The "direct threat" defense has

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[123] *See generally* 42 U.S.C. § 12113(a) (2012) (occupational qualifications); *id.* § 12113(b) (direct threat); 42 U.S.C. § 12112(b)(5)(A) (2012) (undue hardship). Direct threat means "significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." 29 C.F.R. § 1630.2(r) (2018); *cf.* 42 U.S.C. § 12111(3) (statutory definition); 42 U.S.C § 12113(b).

> The determination that an individual poses a "direct threat" [is] based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job . . . [and] a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. . . . [F]actors to be considered include: [] duration of the risk; [] nature and severity of the potential harm; [] likelihood that the potential harm will occur; and [] imminence of the potential harm.

29 C.F.R. § 1630.2(r). The WVHRA generally employs definitions of a direct threat that are coextensive with those under the ADA. *See* W. VA. CODE R. § 77-1-4.7, 4.8 (1994).

[124] *See* Calef v. FedEx Ground Packaging Sys., Inc., 343 F. App'x 891, 896 (4th Cir. 2009) (citing Stone v. St. Joseph's Hosp. of Parkersburg, 538 S.E.2d 389, 404 (W. Va. 2000); *cf.* 42 U.S.C. § 12112(b)(6); 29 C.F.R. § 1630.15(b); W. VA. CODE ANN. § 5-11-9 (West 2018); W. VA. CODE R. § 77-1-4.10 to -4.15. Defenses to claims of failure to accommodate, disparate treatment, and disparate impact are set forth at 42 U.S.C. § 12113(a) (2012) ("It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.").

[125] 42 U.S.C. § 12111(3); 29 C.F.R. §§ 1630.2(r), 1630.15(b)(2). In the Fourth Circuit, the "direct threat" issue is treated as an affirmative defense whereby the defendant has the burden of establishing that plaintiff presented a direct threat to himself or others. *See* Darcangelo v. Verizon Commc'ns, Inc., 292 F.3d 181, 188 (4th Cir. 2002), *applied by* Cousin v. United States, 230 F. Supp. 3d 475, 492, n.11 (E.D. Va. 2017), *aff'd*, 691 F. App'x 780 (4th Cir. 2017); *cf.* Mullins v. Mayor & City Council of Baltimore, No. TJS-14-2698, 2017 WL 784120, at *3 (D. Md. Mar. 1, 2017) (citing Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73, 78 (2002)). However, note that there has been a circuit split on the question of whether the direct threat defense is an affirmative defense or a prima-facie component of a claim. *See generally* Sarah R. Christie, *AIDS, Employment, and the Direct Threat Defense: The Burden of Proof and the Circuit Court Split*, 76 FORDHAM L. REV. 235, 236 (2007).

been relied upon to exclude non-current drug addicts from "safety sensitive" jobs or jobs where they have ready access to controlled substances.[126] Although an employee may not have a sufficiently current drug addiction to remove his or her classification as a person with a disability, there are nonetheless circumstances in which the employer's perception about the gravity of the non-current drug addiction can effectively remove the person's protection under the ADA. In *Altman v. New York City Health Hospitals Corp.*,[127] a physician who served as the Chief of the Department of Internal Medicine at Metropolitan Hospital in East Harlem had successfully completed an alcohol rehabilitation program and there was no evidence of current use of alcohol. Nonetheless, based on the danger of relapse, the difficulty of detecting a relapse, and the danger that a relapse would impose on patients, the court in the Southern District of New York found that the hospital was justified in concluding that reinstating the doctor would pose a "direct threat to the health and safety of others."[128]

2. Undue Hardship: The Reasonable Accommodation Would Cause Employer to Suffer an Undue Hardship

Employers are required to provide reasonable accommodations unless such accommodation would cause an undue hardship on the employer.[129] While a particular accommodation may be reasonable in most cases, there may be extenuating circumstances for a given employer, at a given time, under particular circumstances, that create such a hardship. The existence of an undue hardship turns on the particular employer's resources, and on whether the accommodation is unduly extensive, substantial, or disruptive, or would fundamentally alter the nature or operation of the business.[130]

As a general rule, an employer must allow an alcoholic or drug-addicted worker to obtain treatment and miss work—as it would any disabled worker—unless the employer can prove that such a leave of absence would cause undue

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126 *See The Americans with Disabilities Act: Applying Performance and Conduct Standards to Employees with Disabilities*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, § III.B, III.D. & n. 87, https://www.eeoc.gov/facts/performance-conduct.html#alcohol (last modified Dec. 20, 2017) (citing 42 U.S.C. § 12114 (c)(3) and (5)). *See generally* Paula Barran, *So Which Positions Are Safety Sensitive?*, DJC OREGON (May 23, 2008, 1:00 AM), http://djcoregon.com/news/2008/05/23/so-which-positions-are-safety-sensitive/ (describing criteria in determining which jobs are "safety-sensitive" under the ADA).

127 903 F. Supp. 503 (S.D.N.Y. 1995), *aff'd*, 100 F.3d 1054 (2d Cir. 1996).

128 *Id.* at 509.

129 29 C.F.R. § 1630.15(d).

130 *See* 42 U.S.C. § 12111(10) (2012); 29 C.F.R. § 1630.2(p) (setting forth factors for determining undue hardship); *cf.* W. VA. CODE R. § 77-1-4.6 (setting forth undue hardship factors under WVHRA).

hardship.[131] Congress has determined that it is not unduly burdensome for employers to provide workers with the necessary flexibility to tend to their medical needs such as a disabling drug addiction.[132] Congress has further determined that uninterrupted attendance at work in the face of a family medical emergency is not a necessary job requirement and does not unduly burden employers.[133]

Rodgers v. Lehman[134] illustrates an accommodation framework that the Fourth Circuit found not to cause undue hardship on a large employer, and the case provides an exemplary model of a five-step reasonable accommodation for recovering addicts. This consolidated appeal of two cases, arising under section 501 of the Rehabilitation Act,[135] involved federal employees who were alcoholics and whose employers had treated their addictions leniently, but had nonetheless denied them the chance to take extended periods of leave for inpatient treatment programs before being discharged from their jobs.[136]

The Court held that the employers must "afford [the addicted employee] an opportunity to participate in an inpatient program, using accrued or unpaid leave, unless the [employer] can establish that it would suffer an undue hardship from the employee's absence."[137] The Court outlined a five-step process that an employer must provide as a reasonable accommodation for an addicted worker whose non-disqualifying addiction-related conduct continually violates workplace policies. The five-step process represents an accommodation that ensures appropriate treatment and support for the worker in recovery, without causing an undue hardship: (1) upon employer learning of or suspecting addiction, "inform the employee of available counselling services," (2) if unsatisfactory job performance continues, employer must "clearly and unequivocally warn the employee that unsatisfactory job performance caused by [addiction] will result in discipline," (3) "employee must be permitted to

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131 *See* Rodgers v. Lehman, 869 F.2d 253, 259 (4th Cir. 1989); McElrath v. Kemp, 714 F. Supp. 23, 27 (D.D.C. 1989); Callicotte v. Carlucci, 698 F. Supp. 944, 949 (D.D.C. 1988); Bonnie McClure v. AT&T Corp., & Nan Hutsenpiller, No. 04-C-1915, 2005 WL 5455537 (W. Va. Cir. Ct. Oct. 20, 2005) (Zakaib, J.) (case involving failure to accommodate and discrimination based upon a mental impairment, arising under WVHRA, citing ADA cases for proposition that leave for treatment is a reasonable accommodation under the WVHRA).

132 S. REP. NO. 101-116, at 37 (1989); H.R. REP. NO. 101-485, pt. 2, at 71 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 353 (reports on the ADA by the Senate Committee on Labor and Human Resources and the House Committee on Education and Labor).

133 *See* 29 U.S.C. §§ 2601–2654 (1994) (outlining the details of the Family and Medical Leave Act); *see also* Cehrs v. Ne. Ohio Alzheimer's Research Ctr., 155 F.3d 775, 782–83 (6th Cir. 1998) ("Medical leave as an accommodation is not a novel concept. . . . [A] medical leave of absence can constitute a reasonable accommodation under appropriate circumstances.").

134 869 F.2d 253, 259 (4th Cir. 1989) (Motz, J., sitting by designation).

135 29 U.S.C. § 791 (2012).

136 *Rodgers*, 869 F.2d at 259–60.

137 *Id.* at 259.

participate initially in outpatient treatment," (4) if the employee does not succeed in the outpatient treatment, "the [employer] must, before discharging [the worker], afford [them] an opportunity to participate in an inpatient program," and (5) "if the employee completes the program but thereafter relapses, and as a result fails to perform his job satisfactorily, a decision by the [employer] to discharge him will be presumed to be reasonable."[138] "Only in a rare case, such as where a recovering alcoholic has had a single relapse after a prolonged period of abstinence, can this presumption be rebutted."[139]

This five-step approach gives the worker a fair process by which he or she can participate in recovery while maintaining a job. The Court summed up this point, stating "[e]xcessive sensitivity is no more conducive to a cure than is undue rigor, and in the final analysis 'reasonable accommodation' is the establishment of a process which embodies a proper balance between the two."[140]

IV. CONCLUSION: OPPORTUNITIES FOR CHANGE

Reasonable job accommodations for recovering addicts, and preventing discrimination in the hiring and supervision of drug-addicted workers, can play vital roles in reducing the rate of relapse and combatting the substance abuse epidemic. The labor and employment bar should join with the advocacy community to promote the availability of reasonable accommodations for drug addicts. Private employers represent an indispensable source of payors for patient services to support recovery and drug treatment, and the provision of reasonable accommodations provides a mechanism for accessing those payors.

Regulatory and legislative reforms can enhance the impact of private litigation in combatting the opioid crisis. Regulatory agencies that oversee workers' compensation and health insurance can prioritize the provision of physical therapy and other non-pharmaceutical modalities for the treatment of pain. Even though workers' compensation has been privatized in West Virginia, the Office of the Insurance Commissioner (O.I.C.) does retain the authority to oversee private decisions regarding long-term pain medication "as applicable."[141] The O.I.C. should exercise its authority to require private carriers and self-insured employers to provide greater transparency about their opioid-related treatment decisions.[142] The O.I.C.'s Industrial Council should conduct aggressive oversight of these decisions. The O.I.C.'s Office of the Consumer Advocate should be notified each time that a worker is to be placed on opioids, so that the worker can receive a particularized statement of his or her rights to

138 *Id.*

139 *Id.*

140 *Id.*

141 W. VA. CODE R. § 85-20-53.12.d 2006).

142 *See id.* §§ 85-20-49 to -51, 85-20-49-53 to -62.

appeal that decision and so that the Consumer Advocate can intervene pre-emptively to ensure that opioids are not prescribed when physical therapy or surgery would alleviate the underlying causes of pain.

· Congress may enhance protection for recovering addicts by expanding recovery services through the federal Rehabilitation Services Administration and by facilitating access to group therapy programs that use best practices under Medicare and Medicaid. At the state level, interagency and public-private coordination efforts can support recovering addicts through WorkForce West Virginia, Adult Education, the Division of Rehabilitation Services, and the State Rehabilitation Council.

Finally, the EEOC and the state and local fair employment agencies must acknowledge and prioritize the pursuit of claims for failures to accommodate and discrimination involving addiction. Such efforts are necessary to accomplish the goals of the ADA and the state human rights acts, which wisely intend to provide such protections as an important component of our comprehensive public policy combatting addiction. Such efforts will also help to reduce stigma and to increase access to successful treatment and long-term recovery programs for workers who find themselves ensnared, boxed out, and broken down by the American epidemic of addiction.