DePaul Law Review

Volume 45
Issue 2 *Winter 1996*

Article 8

The Conflict and Interaction of the Americans with Disabilities Act with the Omnibus Transportation Employee Testing Act: Two Modest Proposals to Achieve Greater Synchrony

David L. LaPorte

THE CONFLICT AND INTERACTION OF THE AMERICANS WITH DISABILITIES ACT WITH THE OMNIBUS TRANSPORTATION EMPLOYEE TESTING ACT: TWO MODEST PROPOSALS TO ACHIEVE GREATER SYNCHRONY

INTRODUCTION

Conflicting societal goals are not uncommon. For instance, one may support a woman's right to choose, but detest abortion. One may value civil liberties, but demand aggressive police action to ensure safe streets. Accordingly, our laws, too, must conflict, or at least fail to intertwine with perfect synchrony.

By enacting the Americans with Disabilities Act (ADA),[1] Congress proclaimed that eliminating discrimination against the disabled was a salient societal goal.[2] Additionally, Congress recognized that people suffering from alcoholism or drug addiction are also considered disabled,[3] and that reformed drug abusers are entitled to protection from discrimination based on that disability.[4] While the ADA has been described as the "Emancipation Proclamation" for the disabled,[5] the Act's actual execution may render such statements hyperbole.[6]

---

1. Americans with Disabilities Act (ADA), Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended in scattered sections of 29, 42 & 47 U.S.C.). This Comment discusses only the employment provisions of the ADA, which are contained in Title I of the ADA. Therefore, this Comment's references to the ADA are limited to Title I unless otherwise indicated.

2. *See* 42 U.S.C. § 12,101(a)(8) (Supp. V 1993) (stating that the ADA's goals are to ensure equal opportunities and full participation for disabled individuals); *see also* H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 2, at 22 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 304 (articulating that "the purpose of the ADA is to provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities").

3. *See* S. REP. No. 116, 101st Cong., 1st Sess. 22 (1989) (including alcoholism and drug addiction in a list of conditions, diseases and infections covered by the ADA, while stating that the list does not include all covered disabilities).

4. *See* 42 U.S.C. § 12,114(b) (stating that individuals who no longer use illegal drugs and have been successfully rehabilitated may not be excluded from the ADA's protection).

5. Adam Z. Horvath, *Disabled-Rights Bill Praised and Feared*, NEWSDAY, Sept. 9, 1989, at 2.

6. For example, in 1914 labor leader Samuel Gomper described the Clayton Act, 38 Stat. 730 (1914) (current version at 15 U.S.C. §§ 12-27 (1994)), as "labor's charter of freedom." Gomper's euphoria was short-lived, however, as soon thereafter judicial interpretation of the Clayton Act in *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921), rendered moot the gains that the Clayton Act intended to provide organized labor. ARCHIBALD COX, ET AL., LABOR LAW: CASES AND MATERIALS, 39-51 (11th ed. 1991).

However, the implementation of the ADA into the professional arena may raise legitimate concerns for employers.[7] First, many of the ADA's key terms are ambiguous, and its requirements of fact-specific determinations invite litigation.[8] Second, many employers fear the ADA simply provides further protection to the malfeasants, malcontents, and hypochondriacs in the workforce.[9] Third, the ADA makes it more difficult to comply with other existing federal laws. For instance, much has been written on the ADA's conflicts with the Employment Retirement Income Security Act (ERISA)[10] and the National Labor Relations Act (NLRA).[11]

Federally mandated alcohol and drug testing is an area of federal law which has not received much attention regarding its association with the ADA. A series of high profile transportation fatalities caused by the abuse of alcohol or drugs[12] prompted Congress to enact

---

7. *See* Thomas H. Barnard, *The Americans With Disabilities Act: Nightmare for Employers and Dream for Lawyers?*, 64 ST. JOHN'S L. REV. 229 (1990) (arguing that the Act's ambiguous terms and unclear guidelines will force employers and employees to utilize the courts to resolve even the most basic issues); Robin Andrews, Comment, *The Americans With Disabilities Act of 1990: New Legislation Creates Expansive Rights for the Disabled and Uncertainties for Employers*, 21 CUMB. L. REV. 629 (1990-91) (identifying the ADA's ambiguous provisions and anticipating repercussions to employers).

8. Barnard, *supra* note 7, at 252.

9. One commentator has argued that the types of disability discrimination complaints received by the Equal Employment Opportunity Commission (EEOC) support this notion. Gerald D. Skoning, *Litigious Society Tests Disability Law*, CHI. TRIB., Dec. 6, 1994, § 1, at 23. For instance, back injuries are the most frequently cited disability in EEOC complaints, accounting for 20 percent of all claims. *Id.* Additionally, more than 24 percent of complaints assert some form of emotional, psychiatric, or neurological impairment. *Id.*

10. *See, e.g.*, Kathlynn L. Butler, *Securing Employee Health Benefits Through ERISA and the ADA*, 42 EMORY L.J. 1197 (1993) (exploring how the ADA reinforces the eroding protection afforded under ERISA); Lizette Palmer, *ERISA Preemption and its Effect On Capping the Health Benefits of Individuals With AIDS: A Demonstration of Why the United States Health and Insurance System Requires Substantial Reform*, 30 HOUS. L. REV. 1347 (1994) (explaining how the ADA and ERISA interact in the context of health care benefits for AIDS sufferers); Ted Storer, *The Americans With Disabilities Act: Will the Insurance Field Change?*, 20 OHIO N.U. L. REV. 1031 (1994) (explaining the impact of the ADA and ERISA on the insurance industry).

11. *See, e.g.*, Loren K. Allison & Eric H.J. Stahlhut, *A Reasoned Approach to Harmonizing the ADA and the NLRA*, 43 LAB. L.J. 292 (1994) (advising employers to propose joint union-employer ADA compliance agreements); Mary K. O'Melveny, *The Americans with Disabilities Act and Collective Bargaining Agreements: Reasonable Accommodation or Irreconcilable Conflicts*, 82 KY. L.J. 219 (1993-94) (arguing that these conflicts can be resolved through collective bargaining); Rose Daly-Rooney, Note, *Reconciling Conflicts Between the Americans With Disabilities Act and the National Labor Relations Act to Accommodate People With Disabilities*, 6 DEPAUL BUS. L.J. 389 (1994) (exploring the effects of collective bargaining agreements on the employer's duty to provide reasonable accommodations).

12. *See* S. REP. NO. 54, 102d Cong., 1st Sess. 2-6 (1991) (recounting a multitude of tragic incidents, such as the 1987 collision between an Amtrack passenger train and a Conrail freight train killing 16 people and injuring 170, where the Conrail engineer and brakeman smoked marijuana in the train just prior to the accident).

the Omnibus Transportation Employee Testing Act of 1991 (OTETA).[13] OTETA directed the Secretary of Transportation to implement regulations requiring employers of transportation workers performing safety-sensitive functions to establish alcohol and drug testing programs for their employees.[14] Though employees affected by OTETA run the gamut of transportation modes, by far the largest class of covered employees are truck drivers,[15] who are subject to the Federal Highway Administration's (FHWA) implementing regulations.[16]

This Comment explores the conflicts and interactions between the ADA and OTETA. Part I discusses the substantive provisions of the ADA and OTETA. Section I.A examines the ADA, particularly the ADA's coverage of alcoholism and drug addiction as protected disabilities, as well as the ADA's restrictions on medical and disability-related pre-employment inquiries.

Section I.B explains the substantive provisions of OTETA, emphasizing the FHWA's implementing regulations. Of particular importance is OTETA's mandate that employers make pre-hiring inquiries of an applicant's previous employers and obtain the results of any positive OTETA-required alcohol or drug tests in the last two years. This section also analyzes OTETA's scheme for allowing an employee who has failed an alcohol or drug test to return to performing safety-sensitive functions.

Part II discusses the perils employers face when attempting to comply with both the ADA and OTETA. Section II.A discusses OTETA's requirement that new employers obtain, and previous employers release, the results of an applicant's alcohol and drug tests administered within the last two years, and how this conflicts with the ADA's confidentiality requirements. To resolve this tension, Section II.B proposes that the Equal Employment Opportunity Commission (EEOC) treat alcohol tests administered to detect only the on-duty use of alcohol in the same manner as drug tests administered solely to detect illegal drug use, by holding that they are not subject to the ADA's confidentiality requirements.

---

13. Omnibus Transportation Employee Testing Act of 1991 (OTETA), Pub. L. No. 102-143, 105 Stat. 952, 953 (codified as amended in scattered sections of 45 U.S.C. and 49 U.S.C.).

14. 49 U.S.C. app. § 2717(a) (Supp. V. 1993).

15. *See* S. REP. No. 54, *supra* note 12, at 15 (estimating that 538,000 air carrier employees, 31,816 FAA employees, 90,000 rail industry workers, and 5.5 million truck drivers will be covered by the legislation).

16. Controlled Substances & Alcohol Use and Testing, 49 C.F.R. § 382 (1994).

Section II.C explores the question of whether, given the ADA's protection of alcoholics and drug addicts, transportation employers may exclude all applicants whose OTETA-required pre-employment background check reveals a failed alcohol or drug test from further consideration. The Section concludes that such a blanket policy is vulnerable to attack under a disparate impact theory of disability discrimination. Two defenses are then scrutinized: 1) that the policy is not discriminatory because these applicants pose a direct threat to the safety of others; and 2) that the policy is not discriminatory because it is justified by the business necessity of minimizing tort liability exposure. However, the course charted by each defense leads to a common intersection, where the employer must show that hiring the applicant creates a high probability of harm to others before refusing employment to an ADA-protected applicant. This Section concludes that requiring employers to establish a high probability of harm is contrary to sound public policy, because between the parameters "slightly increased risk" and "high probability of harm," the potential for disaster is very real, particularly in the transportation industry.

Finally, Section II.D argues that Congress should implement a modest modification of the direct threat standard. This Comment proposes a modification which would allow employers to deny employment to persons who posed only an increased risk to safety, if the increased risk was to others, and if the essential job functions required performance of safety-sensitive functions while in contact with others. This standard would better serve the goal of a crash-free transportation system while causing only a miniscule loss of protection for the disabled.

I. BACKGROUND

A. The Americans with Disabilities Act

The ADA is modeled largely after Section 504 of the Rehabilitation Act of 1973,[17] therefore, this Section first discusses the Rehabilitation Act. After discussing the Rehabilitation Act, this Section considers the substantive provisions of the ADA, with particular emphasis on who is covered under the ADA and the protections afforded alcoholics and drug addicts. Finally, this Section examines the theories of discrimination under which an ADA claim may proceed, the ADA's restrictions on medical and disability related inquiries, and the ADA's confidentiality requirements.

17. 29 U.S.C. § 794 (1994); H.R. REP NO. 485, *supra* note 2, at 23, *reprinted in* 1990 U.S.C.C.A.N. at 304; S. REP. NO. 116, *supra* note 3, at 2.

1. *The Rehabilitation Act of 1973*

The Rehabilitation Act prohibits entities receiving federal financial assistance from discriminating against otherwise qualified "handicapped" individuals on the basis of their handicaps.[18] An individual is "otherwise qualified" under the Rehabilitation Act if the person can perform the essential functions of the job with reasonable accommodations.[19] A reasonable accommodation is reached with a change or modification in the structure of a job which does not impose an undue hardship on the employer.[20] Determining whether a specific accommodation imposes an undue hardship requires an individualistic inquiry considering an employer's size, operating budget, and cost of the accommodation.[21]

The Rehabilitation Act fell short of its stated goal of fully integrating the disabled into the mainstream of American life.[22] For instance, in considering the need for stronger legislation, Congress cited a Louis Harris poll finding that two-thirds of all disabled Americans were not working, although sixty-six percent of the non-working group stated they wanted to work.[23]

---

18. 29 U.S.C. § 794(a).

19. *See* School Bd. v. Arline, 480 U.S. 273, 287 (1987) (stating that determining whether a disabled person is otherwise qualified requires an individualized inquiry); *see also* 45 C.F.R. § 84.3(k)(1) (1985) (implementing the Rehabilitation Act).

20. 29 U.S.C. § 794; *see also* 29 C.F.R. § 32.3 (1995) (defining reasonable accommodation in the Department of Labor's regulations implementing the Rehabilitation Act).

21. *See* 45 C.F.R. § 84.12(c) (1994) (enumerating the factors to be considered in determining whether an accommodation is reasonable under Department of Health and Human Services regulations); *see also Arline*, 480 U.S. at 287 n.17 (citing 45 C.F.R. § 84.12(c)(1994)) (listing the factors to be considered in determining whether an accommodation would cause an undue hardship); Prewitt v. United States Postal Serv., 662 F.2d 292, 308 (5th Cir. 1981) (quoting 29 C.F.R. § 1613.704(c) (1994)) (outlining the accommodation duty's contours).

22. *See* H.R. REP. No. 485, *supra* note 2, at 29, *reprinted in* 1990 U.S.C.C.A.N. at 313 (stating that "current Federal and state laws are inadequate to address the discrimination faced by people with disabilities"); S. REP. No. 116, *supra* note 3, at 18-19 (1989) (pointing out the failures of the Rehabilitation Act in eliminating discrimination against the disabled); *see also* Bonnie P. Tucker, *Section 504 of the Rehabilitation Act After Ten Years of Enforcement: The Past and the Future*, 1989 U. ILL. L. REV. 845 (providing a comprehensive analysis of the Rehabilitation Act's shortcomings).

23. H.R. REP. No. 485, *supra* note 2, at 32, *reprinted in* 1990 U.S.C.C.A.N. at 314; S. REP. No. 116, *supra* note 3, at 9 (citing LOUIS HARRIS & ASSOCS., THE ICD SURVEY OF DISABLED AMERICANS: BRINGING DISABLED AMERICANS INTO THE MAINSTREAM 50 (1987)).

Furthermore, the work situation for disabled Americans appears to be regressing. Congress cited statistics showing that in 1980, men with disabilities earned 23 percent less than those without a disability, and that by 1988 this dropped to 36 percent less than their non-disabled counterparts. *See* H.R. REP. No. 485, *supra* note 2, at 32, *reprinted in* 1990 U.S.C.C.A.N. at 314; S. REP. No. 116, *supra* note 3, at 9 (citing BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, Special Studies Series P-23, No. 160, *Labor Force Status and Other Characteristics of Persons with Work Disabilities: 1981-1988* 5 (1989)). "The statistics consistently demonstrate that disabled people are among the poorest, least educated and largest minor-

Three factors have been identified to explain the Rehabilitation Act's failure.[24] First, the Act did not achieve full integration because it applied only to those employers receiving federal financial assistance.[25] Full integration would encompass prohibiting discrimination across all sectors of the economy.[26] Second, the Act lacked a unified enforcement mechanism.[27] Under the Rehabilitation Act, each federal agency was required to implement its own enforcement procedures.[28] Enforcing these regulations was a very low priority for many agencies, leaving aggrieved parties with inadequate remedies.[29] Third, the ambiguous nature of critical terms such as "reasonable accommodation" and "otherwise qualified"[30] often resulted in confusing and conflicting judicial interpretations.[31] By enacting the ADA, Congress at least took a significant step towards remedying the first two of these deficiencies.[32]

---

ity in America." H.R. REP. No. 485, *supra* note 2, at 32-33, *reprinted in* 1990 U.S.C.C.A.N. at 304 (quoting Statement of Vice President George Bush on Disabled Americans); S. REP. No. 116, *supra* note 3, at 9.

24. *See* Tucker, *supra* note 22, at 848-50 (stating that lack of enforcement by appropriate agencies, ambiguous terms, and application to only federal financial assistance recipients are the three major weaknesses of the Act).

25. *Id.* at 906.

26. *Id.* at 908-09; *see also* Simpson v. Reynolds Metals Co., 629 F.2d 1226 (7th Cir. 1980) (dismissing a claim under the Rehabilitation Act because the defendant did not receive federal financial assistance).

27. *See* Tucker, *supra* note 22, at 851 (finding that the dissemination of responsibility prevented effective enforcement of Section 504).

28. 29 U.S.C. § 794(a).

29. *See* Tucker, *supra* note 22, at 851-83 (citing examples where the Department of Education's office of civil rights and the Department of Health and Human Services' office of civil rights failed to enforce the regulations).

30. *See id.* at 884 (stating that the biggest problem facing "disabled people today who seek protection under Section 504 is the lack of consistent standards" to be applied to each case).

31. *Compare* Southeastern Community College v. Davis, 442 U.S. 397, 414 (1979) (holding that an applicant to a post-secondary education program must be otherwise qualified in spite of her handicap) *with* Alexander v. Choate, 469 U.S. 287, 301 (1985) (finding that in the context of providing health services, reasonable accommodations must be made to assure meaningful access).

32. *See* 42 U.S.C. § 12,111(5)(A)(stating that the ADA applies to all employers with 15 or more employees). In addition, Congress designated the EEOC as the sole federal agency responsible for implementing and enforcing Title I of the ADA. *See* 42 U.S.C. § 12,116 (directing the EEOC to implement regulations not later than one year after the ADA's enactment); 42 U.S.C. § 12,117(b) (requiring that all agencies responsible for enforcement work together to avoid duplication of efforts).

Unfortunately, the ambiguity of key terms remains and has been the focus of much commentary. *See* Barnard, *supra* note 7, at 239 (arguing that the uncertainty of key terms will breed litigation); Gregory S. Crespi, *Efficiency Rejected: Evaluating "Undue Hardship" Claims Under the Americans with Disabilities Act*, 26 TULSA L.J. 1, 23-25 (1990) (asserting that the EEOC has underestimated the ADA's cost to employers); George C. Dolatly, *The Future of the Reasonable Accommodation Duty in Employment Practices*, 26 COLUM. J.L. & SOC. PROBS. 523, 547-52

2. *Substantive Provisions of the ADA*

The ADA prohibits certain entities from discriminating against qualified individuals with disabilities because of their disability in job application procedures, hiring, advancement, discharge, compensation, job training and other terms, conditions and privileges of employment.[33] Covered entities include "employers, employment agencies, labor organizations and joint labor-management committees."[34] Employers are those persons "engaged in an industry affecting commerce who ha[ve] 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceeding calendar year."[35] The agents of such employers are also included.[36]

a. Definition of Disability

For an applicant or employee to be protected under the ADA, he or she must be a qualified individual with a disability.[37] A disability is a physical or mental impairment which substantially limits a person in one or more major life activities.[38] Establishing disability involves satisfying a two pronged test: 1) there must be a physical or mental impairment, and 2) it must substantially limit the person in one or more major life activities.[39] The ADA adopts the definition of physical or mental impairment[40] from the Rehabilitation Act's implementing regulations.[41] This definition does not include physical characteristics,[42]

(1993) (advocating a quantitative method of determining when an accommodation is an undue burden); Andrews, *supra* note 7, at 635-39 (outlining the uncertainty employers face with the ADA).

33. 42 U.S.C. § 12,112(a).

34. *Id.* § 12,111(2).

35. *Id.* § 12,111(5)(A).

36. *Id.* However, supervisors who do not independently satisfy the ADA's definition of "employer" cannot be held liable under the ADA. *EEOC v. AIC Security Investigations*, 55 F.3d 1276, 1281-82 (7th Cir. 1995).

37. 42 U.S.C. § 12,112.

38. *Id.* § 12,102(2).

39. *Id.*

40. The EEOC's regulations implementing the ADA define a physical or mental impairment as:

> (1) [a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic or lymphatic, skin, and endocrine; or (2) [a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

29 C.F.R. § 1630.2(h) (1995).

41. *See* Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. app. § 1630.2(g) (1995) (defining "disability"); *see also* H.R. REP No. 485, *supra* note 2, at 50, *reprinted in* 1990 U.S.C.C.A.N. at 332 (stating that the term "disability" in the ADA is similar to

such as right or left handedness,[43] body weight that is not the result of a physiological disorder,[44] or personality traits such as poor judgment and bad temper.[45]

To be disabled under the ADA, the impairment must also substantially limit the person in one or more major life activities.[46] Not all impairments meet this criteria, and a certain impairment may rise to this level for some people, but not others.[47] Major life activities are the normal day to day functions that most people perform with little or no difficulty, including walking, seeing, hearing, speaking, breathing, learning, and working.[48] Such activities are considered substantially limited if the person is either unable to perform them or is significantly restricted in the manner or duration in which the activity can be performed.[49] If medication is required to perform these major life activities, or required medication interferes with the performance of such activities, the person's condition still qualifies as a disability.[50]

---

the term "handicap" in the Rehabilitation Act of 1973); S. REP. NO. 116, *supra* note 3, at 21 (stating that Congress intended to adopt the Rehabilitation Act's definition of "individuals with handicaps" and its relevant case law as the ADA's definition of disability).

42. 29 C.F.R. app. § 1630.2(h). *See* Jasany v. United States Postal Serv., 755 F.2d 1244, 1245 (6th Cir. 1985) (holding that a mild case of "cross-eyes" was not a qualifying impairment under the Rehabilitation Act).

43. 29 C.F.R app. § 1630.2(h).

44. *Id.*; *see* Tudyman v. United Airlines, 608 F. Supp. 739 (C.D. Cal. 1984) (upholding the dismissal of a flight attendant due to bodybuilder's bulk). *But see* Cook v. Rhode Island Dep't of Mental Health, Retardation & Hosps., 10 F.3d 17, 24 (1st Cir. 1993) (explaining that obesity may be a covered disability and that the "voluntariness" of the condition is relevant only in determining whether it has a substantial limiting effect).

45. 29 C.F.R. app. § 1630.2(h); *see also* Daley v. Koch, 892 F.2d 212, 215 (2d Cir. 1989) (sustaining the rejection of a police officer due to poor judgment and irresponsibility). *But see* Hindman v. GTE Data Servs., No. 93-1046-CIV-T-17C, 1994 U.S. Dist. LEXIS 9552, at *11 (M.D. Fla. June 24, 1994) (holding that plaintiff's chemical imbalance raised a triable issue of fact in answering whether his poor judgment in carrying a gun to work was caused by his disability under the ADA).

46. 42 U.S.C. § 12,102(2).

47. *See* 29 C.F.R. app. § 1630.2(j) (explaining that determining whether someone has a disability does not depend upon the name or diagnosis given the impairment, but rather upon the effect the impairment has on the person's life).

48. *See id.* § 1630.2(i) (indicating that this list is not exhaustive); *see also* School Bd. v. Arline, 480 U.S. 273, 280 (1987) (breathing); Bolton v. Scrivner, Inc., 36 F.3d 939, 942 (10th Cir. 1994) (manual tasks); Chandler v. City of Dallas, 2 F.3d 1385, 1390 (5th Cir. 1993) (seeing); and Pandazides v. Virginia Bd. of Educ., 946 F.2d 345, 350 (4th Cir. 1991) (learning).

49. 29 C.F.R. § 1630.2(j).

50. *Id.*; *see Chandler*, 2 F.3d at 1391 (finding that insulin-dependent diabetics are disabled under the Rehabilitation Act since they are unable to function without medication); Sarsycki v. United Parcel Serv., 862 F. Supp. 336, 340 (W.D. Okla. 1994) (holding, consistent with *Chandler*, that insulin-dependent diabetics are disabled under the ADA); *see also* Fehr v. McLean Packaging Corp., 860 F. Supp. 198, 200 (E.D.Pa. 1994) (concluding that evidence that medication taken for depression which had the side effect of hindering plaintiff's breathing in confined spaces was sufficient to raise an issue of fact as to whether he was disabled within the meaning of the ADA).

Therefore, persons suffering from conditions such as epilepsy or diabetes may be disabled even though medication provides for performance of all major life activities.[51] Additional considerations include the nature and severity of the impairment, the duration or expected duration of the condition, and the impairment's permanent or long-term impact.[52]

Further issues arise if the person claims to be substantially limited in working. The inability to perform one particular job does not substantially limit this major life activity.[53] The analysis requires additional considerations, such as the geographical area the individual has access to, the types of similar jobs the individual is excluded from, and the types of other jobs the person may or may not be able to perform.[54] Therefore, individuals may not be substantially limited in working unless they are excluded from a broad class of jobs or there are no other jobs in the same geographical area in which the person may perform.[55]

To receive ADA protection, it is not necessary that a person be disabled at the time of the discriminatory act.[56] The ADA also protects those who have a record of disability but are no longer disabled, or perhaps were never disabled.[57] This theory of disability is potentially problematic. For instance, a record reflecting a percentage of loss in the use of certain body limbs has been held insufficient in itself to establish a protected disability.[58]

In *Flasza v. TNT Holland Motor Express*,[59] the court held that there were no disputed issues of fact as to whether ADA protection should be granted to an employee discharged after an investigation revealed

---

51. 29 C.F.R. app. § 1630.2(j).

52. *Id.*

53. *Id.* § 1630.2(j)(3); *see* Cook v. Rhode Island Dep't of Mental Health, Retardation & Hosp., 10 F.3d 17, 26 (1st Cir. 1993) (ruling that when proceeding under a theory of "regarded as having" a disability, the plaintiff must only show that the employer regarded the plaintiff being unable to perform a broad class of jobs); *Chandler*, 2 F.3d at 1393 (refusing to hold that an insulin-dependant diabetic who was physically unqualified for a driver position but able to perform a wide variety of other jobs was substantially limited in the major life activity of working); *see also* Bolton v. Scrivner, Inc., 36 F.3d 939, 944 (10th Cir. 1994) (upholding the lower court's summary judgment order where the plaintiff submitted no evidence showing he was excluded from a broad class of jobs).

54. 29 C.F.R. app. § 1630.2(j); *see also* Welsh v. City of Tulsa, 977 F.2d 1415, 1419 (10th Cir. 1992) (setting forth the test to determine whether the plaintiff is substantially limited in working under the Rehabilitation Act).

55. 29 C.F.R. app. § 1630.2(j).

56. 42 U.S.C. § 12,102(2)(B)-(C).

57. *Id.* § 12,102(2)(B).

58. Flasza v. TNT Holland Motor Express, 159 F.R.D. 672, 677-78 (N.D. Ill. 1994).

59. 159 F.R.D. 672 (N.D. Ill. 1994).

five separate workers compensation claims with other employers.[60] The court granted the defendant's motion for summary judgment, reasoning that although the employer's investigation revealed a record of impairments, there was nothing in the record indicating that the impairments substantially limited the plaintiff in one or more major life activities.[61] Therefore, the disability prong was satisfied, but the second prong requiring that the impairments must substantially limit at least one major life activity was not met.[62]

The ADA also protects persons erroneously regarded as being disabled.[63] Establishing ADA protection under this theory of disability does not require a showing that the plaintiff was ever impaired or disabled.[64] Rather, the plaintiff must only show that the employer regarded the plaintiff as being substantially limited in one or more life activities.[65]

In sum, ADA protection may be granted where the person is either: 1) currently disabled; 2) no longer disabled but has a record of being disabled; or 3) perceived to be disabled, and both prongs of the disability definition are met. However, protection of an individual in one of these groups also depends on whether that individual is "otherwise qualified."

b. Otherwise Qualified

Even if a person has a disability under the ADA, they are not protected unless they are also "otherwise qualified."[66] Determining whether a person is qualified is a fact-specific, individual inquiry in-

60. *Id.* at 678.

61. *Id.*

62. *Id.*

63. *See* 42 U.S.C. § 12,202(2)(C) (stating that the term "disability" with respect to an individual means being regarded as having such an impairment).

64. *See* Cook v. Rhode Island Dep't of Mental Health, Retardation and Hosps., 10 F.3d 17, 28 (1st Cir. 1993) (finding that a "morbidly obese" but physically capable applicant was protected under the Rehabilitation Act based on the employer's perceptions of her abilities).

65. 29 C.F.R. § 1630.2(g)(3); *see also id.* app. § 1630.2(g) (explaining that an individual who is regarded by the covered entity as having an impairment is considered to have a "disability"). One difficulty with this theory is establishing the employer's subjective beliefs towards the employee. Occasionally though, employers are surprisingly candid. For instance, in *Cook*, a case brought under the Rehabilitation Act, a "morbidly obese" but physically capable applicant was deemed to be protected under the Rehabilitation Act after being denied employment as a mental health worker. *Cook*, 10 F.3d at 28. The court held that the employer's statements regarding how he viewed the plaintiff's physical capabilities was sufficient evidence for the jury to conclude that, despite the applicant not being disabled, the employer, based on prejudicial feelings towards the obese, erroneously regarded her as disabled. *Id.* at 25.

66. *See* 42 U.S.C. § 12,112(a) (prohibiting discrimination against a qualified individual with a disability).

volving two steps.[67] First, the person must satisfy the job position's objective criteria, such as appropriate educational background, possession of required licenses or prerequisite job experience.[68] Second, the person must be capable of performing the essential functions of the job, either with or without reasonable accommodations.[69]

A job function may be essential for any number of reasons, including, the three considerations listed in the EEOC's implementing regulations.[70] The first consideration is whether the position exists to perform that function.[71] For instance, the position of a business college instructor exists to perform the function of teaching class. Therefore, in *Tyndall v. National Education Centers*,[72] an employee suffering from lupus erythematous, an ailment requiring frequent absences from work, was not otherwise qualified for the position, since being present to teach her classes was an essential function of the job.[73] Further, a reasonable accommodation was not available, since she could not teach class if she was not present.[74]

A second consideration is the number of other employees available to perform the function and among which employees the performance

---

67. 29 C.F.R. § 1630.2(m); *see* School Bd. v. Arline, 480 U.S. 273, 287 (1987) (interpreting the Rehabilitation Act and finding that the "otherwise qualified" issue requires the district court to make an individualized inquiry).

68. 29 C.F.R. § 1630.2(m).

69. 42 U.S.C. § 12,111(8). The ADA defines a "qualified individual with a disability" as an "individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." *Id.*; *see* Tyndall v. National Educ. Ctrs., 31 F.3d 209, 214 (4th Cir. 1994) (denying ADA protection to a teacher whose disability prevented her from performing the essential function of being present in the classroom and where no reasonable accommodation was possible); *see also* Reigel v. Kaiser Foundation Health Plan, 859 F. Supp. 963, 976 (E.D.N.C. 1994) (refusing to grant ADA protection to a physician whose limited use of her right arm and shoulder prevented her from performing patient examinations).

70. 29 C.F.R. § 1630.2(n)(3). This section states that

> evidence of whether a particular job function is essential includes, but is not limited to i) The employer's judgment as to which functions are essential; ii) Written job descriptions prepared before advertising or interviewing applicants for the job; iii) The amount of time spent on the job performing the function; iv) The consequences of not requiring the incumbent to perform the function; v) The terms of a collective bargaining agreement; vi) The work experience of past incumbents in the job; and/or; vii) The current work experience of incumbents in similar jobs.

Id.; *see also id.* § 1630.2(n) (explaining the mechanics of inquiring into whether a particular job function is essential).

71. *Id.* § 1630.2(n)(2)(i).

72. 31 F.3d 209 (4th Cir. 1994).

73. *Id.* at 213.

74. *Id.* at 214.

of that function can be distributed.[75] However, in *Jasany v. United States Postal Service*,[76] the Sixth Circuit held that the employer was not required to have other employees perform essential job functions the plaintiff was not capable of performing.[77] The plaintiff's "cross-eyes" made it impossible for him to operate the mail sorting machine he was hired to operate.[78] Even though the plaintiff was required to operate the machine for only a small portion of the day, and other trained employees were available, the court held that since he was hired to operate the machine, it was an essential function of the position, regardless of the availability of others to perform it.[79]

The third consideration is the degree of expertise or skill required for the function.[80] The higher the degree of expertise or skill required, the more likely that function will be characterized as essential.[81] Other important factors include the time spent performing the function and the consequences if the function is not performed.[82] For example, a firefighter's essential job function includes carrying people from burning buildings. Although a firefighter seldom, if ever, performs the function, it is essential since the consequences are grave if not performed.[83]

When ascertaining whether essential functions can be performed, some courts consider the employee's own subjective assessment of his abilities.[84] For instance, in *Reigel v. Kaiser Foundation Health Plan*,[85] the plaintiff certified that she was unable to perform the essential functions of her job on application forms and other items relating to disability insurance and social security benefits.[86] The court held

75. 29 C.F.R. § 1630.2(n)(2)(ii); *see* Treadwell v. Alexander, 707 F.2d 473, 478 (11th Cir. 1983) (finding that an accommodation in the form of assigning additional workers from a limited staff to perform the plaintiff's duties was an undue burden).

76. 755 F.2d 1244 (6th Cir. 1985).

77. *Id.* at 1250.

78. *Id.* at 1247.

79. *Id.* at 1251.

80. 29 C.F.R. § 1630.2(n)(2)(iii).

81. *Id.* § 1630.2(n).

82. *Id.* § 1630.2(n)(3); app. § 1630.2(n).

83. *Id.*

84. *See, e.g.*, August v. Offices Unlimited, 981 F.2d 576, 580-82 (1st Cir. 1992) (holding such language to be a binding admission); Reigel v. Kaiser Foundation Health Plan, 859 F. Supp. 963 (E.D.N.C. 1994) (holding that the plaintiff's own submissions and certifications as to her disability precluded her from demonstrating that she was qualified to perform functions of the job).

85. 859 F. Supp. 963 (E.D.N.C. 1994).

86. *Id.* at 967-69.

these statements to be binding admissions by the plaintiff that she was not otherwise qualified.[87]

The determination whether certain job functions are essential does not, in any way, prohibit an employer from establishing standards, tests, and other selection criteria which are based on job relatedness and business necessity.[88] The ADA is intended to give deference to the employer's judgment as to what standards are required for a certain position.[89] For example, if an employer feels its typists should be able to type 75 words per minute, it is not required to hire an individual with a disability who can only type 65 words per minute.[90] However, if the individual is otherwise qualified and could type 75 words per minute with a reasonable accommodation, that accommodation must be provided.[91]

c. Direct Threat

Aside from establishing performance standards, employers may establish neutral criteria designed to mitigate safety concerns. Nonetheless, these criteria must be job related and required by business necessity.[92] Congress recognized, however, that safety concerns are often based on paternalistic and stereotypic notions of the disabled, have no basis in reality, and are used to justify discrimination.[93] Therefore, safety-related concerns are viewed as job related or mandated by business necessity only if there is a direct threat to the safety of the individual or others.[94]

---

87. *Id.* at 969-70; *see also August*, 981 F.2d at 580-82 (finding that statements made for the purpose of obtaining disability benefits were binding admissions in a subsequent claim under the ADA).

88. 29 C.F.R. § 1630.10; *see id.* app. § 1630.2(n) (emphasizing that such standards must exist in fact, and not simply on paper); *see also* 42 U.S.C. § 12,111(8) (providing that consideration shall be given to the employer's judgment as to what job functions are essential).

89. 29 C.F.R. app. § 1630.2(n). *See* H.R. REP. NO. 485, *supra* note 2, at 55, *reprinted in* 1990 U.S.C.C.A.N. at 337 (reaffirming that the ADA does not undermine an employer's ability to choose and maintain qualified workers); *see also* S. REP. NO. 116, *supra* note 3 at 26 (stating that employers are permitted under the ADA to select the most qualified applicant and make decisions based on reasons unrelated to the existence of a disability).

90. 29 C.F.R. app. § 1630.2(n).

91. *Id.*

92. *Id.* app. § 1630.15(b) & (c).

93. H.R. REP. NO. 485, *supra* note 2, at 56, *reprinted in* 1990 U.S.C.C.A.N. at 338; S. REP. NO. 116, *supra* note 3, at 39-40.

94. 29 C.F.R. app. § 1630.15(b), (c). "The term direct threat means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." 42 U.S.C. § 12,111(3). *But see* Bryan P. Neal, *The Proper Standard for Risk of Future Injury Under the Americans With Disabilities Act: Risk to Self or Risk to Others*, 46 SMU L. REV. 483, 485-488 (1992) (arguing that Congress intended to eliminate all paternalistic concern towards the dis-

A direct threat exists only if an individualistic inquiry reveals objective, factual evidence that the individual poses a substantial risk of harm to him or herself or others.[95] Courts differ in their approach to this mandate. For instance, in *Davis v. Meese*,[96] a case arising under the Rehabilitation Act, the court upheld the Federal Bureau of Investigation's exclusion of all insulin-dependent diabetics from special agent positions.[97] The court stated that although blanket exclusions were generally unacceptable under the Rehabilitation Act, legitimate physical requirements were proper if they were directly connected with and substantially promoted legitimate safety and job performance concerns.[98]

A more recent decision upholding blanket exclusion of all insulin-dependent diabetics is *Chandler v. City of Dallas*.[99] In *Chandler*, the Fifth Circuit upheld the city of Dallas's blanket exclusion of all insulin-dependent diabetics from primary driving positions.[100] The city's policy was modeled after the FHWA's physical requirements for commercial motor vehicle operators.[101] Although the city was not subject to these regulations, the Fifth Circuit held that as a matter of law, drivers with insulin-dependent diabetes present substantial risks to the safety of themselves and others, and are therefore not otherwise qualified.[102] *Chandler* is particularly important because, although the claim was brought under the Rehabilitation Act, the court looked to the ADA and its implementing regulations in reaching its decision.[103]

Other decisions have reached different conclusions. In *Sarsycki v. United Parcel Service*,[104] the court looked to the same FHWA regulations as the *Chandler* court and found that as long as the FHWA regulations did not apply to a specific insulin-dependent driver, the ADA required an individualistic inquiry.[105] The employer in *Sarsycki* at-

---

abled by making available only the "risk to others" standard, and that the EEOC exceeded its authority by also making available a "risk to self" standard in its implementing regulations).

95. 29 C.F.R. § 1630.2(r). This assessment must be based on a reasonable medical judgment relying on the most current medical knowledge and/or the best available objective evidence. *Id.* In determining whether an individual could pose a direct threat, the factors to be considered include (1) The duration of the risk; (2) The nature and severity of the potential harm; (3) The likelihood that the potential harm will occur; and (4) The imminence of the potential harm. *Id.*

96. 692 F. Supp. 505 (E.D. Pa. 1988), *aff'd*, 865 F.2d 592 (3d Cir. 1989).

97. *Id.* at 518.

98. *Id.* at 517-18.

99. 2 F.3d 1385 (5th Cir. 1993).

100. *Id.*

101. *Id.* at 1388.

102. *Id.* at 1395.

103. *Id.* at 1391.

104. 862 F. Supp. 336 (W.D. Okla. 1994).

105. *Id.* at 340-41.

tempted to apply the FHWA regulation prohibiting insulin-dependent diabetics from operating commercial motor vehicles with Gross Vehicle Weight Ratings[106] in excess of 10,000 pounds to its drivers operating vehicles under 10,000 pounds.[107] The plaintiff was employed as a package car driver requiring only the operation of vehicles under 10,000 pounds, which are not subject to the FHWA's medical standards.[108] After the plaintiff's diabetic condition deteriorated to where he was insulin-dependent, the employer removed him from driving duties and assigned him to a part-time non-driving position.[109] In response to the plaintiff's ADA claim, the employer argued that the policy was required by federal law, and to the extent it exceeded federal law, the extension was justified by the same underlying safety concerns.[110] The court rejected this argument, holding that since the federal safety regulations did not apply to the employee, exclusion without an individual assessment of the potential safety threat violated the ADA.[111] The court distinguished *Chandler* by remarking that since the Fifth Circuit's decision, the FHWA has at least provisionally modified its position on the safety threat of insulin-dependent diabetic drivers by establishing a waiver program.[112]

Another case finding that blanket exclusion of insulin-dependent diabetics violates the ADA is *Bombrys v. City of Toledo*.[113] In that case, the Toledo police department dismissed Bombrys from its training academy after he was diagnosed as a diabetic.[114] Bombrys sought

106. The Gross Vehicle Weight Rating is set by the manufacturer and indicates the maximum load the vehicle is designed to carry. 49 C.F.R. § 390 (1994).

107. *Sarsycki*, 862 F. Supp. at 340-41.

108. *Id.* at 338.

109. *Id.*

110. *Id.* at 339-40.

111. *Id.* at 341.

112. *Id.* The court may have overstated the significance of the FHWA's insulin-dependant diabetic waiver program and its evidence of a change in the FHWA's position regarding insulin-dependant drivers. The impetus of the waiver program was the ADA's directive that the Department of Transportation conduct a review of its current medical qualification standards. S. REP. NO. 116, *supra* note 3, at 27-28. The Department of Transportation accepted waiver applications from July 29, 1993 to April 30, 1994 so that the waiver group could be compared with a control group in terms of accident frequency and other safety considerations. Qualification of Drivers, Waivers, Diabetes 58 Fed. Reg. 40,690 (1993). Eligibility was limited to insulin-dependant diabetic drivers not subject to the federal prohibition who had been operating commercial motor vehicles, while insulin dependant, for three years without incident. *Id.* at 40,691. Participation in the program required, among other things, blood glucose monitoring every four hours, the keeping of a blood glucose log, and biannual examinations by an endocrinologist. *Id.* There has not been any extension of the waiver program and waivers are no longer being issued to insulin-dependant diabetics.

113. 849 F. Supp. 1210 (N.D. Ohio 1993).

114. *Id.* at 1213.

injunctive relief, arguing that the city's blanket policy of excluding all diabetics violated the ADA by failing to provide for an individualistic assessment of the safety threat posed.[115] The court agreed, stating that *Davis v. Meese* was an interpretation of the Rehabilitation Act, not the ADA, and that the ADA "makes clear that blanket exclusions are to be given the utmost scrutiny, and are, as a general rule, to be discouraged."[116]

Dismissal resulting from a single serious safety incident satisfies the individualistic inquiry component of the direct threat standard. For instance, in *Siefken v. Village of Arlington Heights*,[117] an insulin-dependent diabetic police officer was dismissed after a hypoglycemic episode caused him to drive his patrol car uncontrollably at high rates of speed.[118] The plaintiff argued that since his diabetes is currently under better control, the employer is required to accommodate him by providing a second chance.[119] The court disagreed, and instead held that one incident was sufficient to conclude that the plaintiff posed a direct threat, and was therefore not qualified.[120]

Finally, if a reasonable accommodation eliminates the substantial risk, the employer must make the accommodation.[121] For instance, in *Strathie v. Department of Transportation*,[122] the plaintiff was denied a school bus driver's license because he could not meet the hearing standard without a hearing aid.[123] Though the defendant cited safety concerns as the reason for the requirement, the Third Circuit found that allowing the plaintiff to wear a hearing aid sufficiently mitigated any legitimate safety concerns and was therefore a reasonable accommodation.[124] As such, the state was required to accommodate Strathie by allowing him to wear a hearing aid to meet the hearing standard.[125]

In *Schmidt v. Safeway, Inc.*,[126] the United States District Court for the District of Oregon addressed the issue of whether an alcoholic

115. *Id.* at 1216-17.

116. *Id.* at 1219-20.

117. No. 94-C-2404, 1994 U.S.Dist. LEXIS 13015 (N.D. Ill. Sept. 13, 1994), *aff'd*, 65 F.3d 664 (7th Cir. 1995).

118. *Id.* at *1.

119. *Id.* at *3-4.

120. *Id.* at *7.

121. *See* 29 C.F.R. § 1630.2(r) (stating that meeting the direct threat standard requires that there be a substantial risk of harm which cannot be eliminated or reduced by making a reasonable accommodation); *see also id.* app. § 1630.2(r) (stating that the employer must determine whether a reasonable accommodation will reduce the threat to an acceptable level).

122. 716 F.2d 227 (3d Cir. 1983).

123. *Id.* at 228-29

124. *Id.* at 232-34.

125. *Id.*

126. 864 F. Supp. 991 (D. Or. 1994).

truck driver posed a direct threat.[127] The court denied the employer's motion for summary judgment, which argued, *inter alia*, that its firing of an alcoholic truck driver did not violate the ADA, because the driver's condition posed a direct threat to the safety of others.[128] The plaintiff was ordered to submit to a urinalysis after supervisors suspected he was drunk while on duty, and was fired when the urinalysis confirmed the presence of alcohol.[129] Thereafter, the employer's medical review officer opined that the plaintiff would be able to safely operate the truck after completing a rehabilitation program.[130] The court held that the medical review officer's finding was determinative as to the direct threat issue, and that providing a leave of absence to allow the employee to complete rehabilitation was a reasonable accommodation required by the ADA.[131]

d. Reasonable Accommodation

An accommodation is reasonable so long as it does not impose an undue hardship on the employer. The ADA sets forth specific factors to be considered when determining whether an accommodation is an undue hardship.[132] However, like other ADA issues, determining the undue hardship issue requires a highly fact-specific inquiry.[133] Employers are concerned about the overly optimistic view of Congress and the EEOC regarding the accommodations available to employers.[134] For instance, the legislative history speaks glowingly of employers providing readers for the blind, sign language interpreters for

---

127. *Id.*

128. *Id.* at 998-99.

129. *Id.* at 998.

130. *Id.*

131. *Id.* at 998-99.

132. 42 U.S.C. § 12,111(10)(B). The following factors should be considered in determining whether an accommodation would impose an undue hardship on a covered entity:

> (i) the nature and cost of the accommodation needed . . . ; (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility; (iii) the overall financial resources of the covered entity; the overall size of the business of the covered entity with respect to the number of its employees; the number, type, and location of its facilities; and (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

Id.

133. *See* 29 C.F.R. app. § 1630.2(p) (indicating that the term "undue hardship" considers several factors, including the cost, extent and disruption caused by the accommodation).

134. Horvath, *supra* note 5, at 2.

the deaf, job restructuring, redelegation of assignments, and other "perfect world" accommodations.[135]

Courts interpreting the Rehabilitation Act and the ADA have been fairly sensitive to employers' concerns and have repeatedly refused to impose accommodations upon the slightest indication they would be unduly costly, substantial, disruptive, or fundamentally alter the nature or operation of the business. For instance, despite the examples in the legislative history and regulatory guidance, courts have generally recognized that employers are under no obligation to reassign employees who become disabled in the course of their employment.[136] Similarly, employers are not required, as was held in *Jasany*, to assign other employees to assist with essential functions.[137] Therefore, the employer in *Reigel* did not violate the ADA by refusing to assign clerical duties to a physician whose disability rendered her unable to perform the essential function of examining patients.[138] Further, the employer was not required, as requested by the plaintiff, to assign a physician's assistant to assist with patient examinations.[139] Finally, in *Copeland v. Philadelphia Police Department*,[140] the Third Circuit held that a police department was not required to accommodate known drug users.[141] The court reasoned that accommodating illegal drug abuse fundamentally altered the nature and operation of a police department, which was to enforce the law.[142]

---

135. *See* S. REP. No. 116, *supra* note 3, at 31-35 (citing job restructuring, redelegating assignments, part-time and modified work schedules, readers for the visually impaired and interpreters for the deaf as examples of reasonable accommodations).

136. *See, e.g.*, Carter v. Tisch, 822 F.2d 465, 467 (4th Cir. 1987) (holding that the employer was not obligated to reassign plaintiff to "light" duty); Simon v. Saint Louis County, 735 F.2d 1082, 1084-85 (8th Cir. 1984) (refusing to reinstate a paraplegic police officer despite evidence that there were many police officer functions not requiring physical ability); Reigel v. Kaiser Foundation Health Plan, 859 F. Supp. 963, 973 (E.D.N.C. 1994) (finding a health care organization was not compelled to reassign disabled physician to clerical duties).

137. *See, e.g.*, Gilbert v. Frank, 949 F.2d 637, 644 (2d Cir. 1991) (refusing to impose a duty on the employer to assign other workers to do the heavy lifting plaintiff's disability prevented); Jasany v. United States Postal Serv., 755 F.2d 1244, 1250 (6th Cir. 1985) (holding that the post office was under no obligation to require other employees to perform the essential functions of the plaintiff's position); Treadwell v. Alexander, 707 F.2d 473, 478 (11th Cir. 1983) (finding the employer did not have to make such an excessive accommodation as to assign additional personnel from a limited staff to cover the plaintiff's duties); *Reigel*, 859 F. Supp. at 973 (concluding that a medical group was not required to assign a physician's assistant to perform portions of medical examinations the plaintiff was unable to perform).

138. *Riegel*, 859 F. Supp. at 973.

139. *Id.*

140. 840 F.2d 1139 (3d Cir. 1988), *cert. denied*, 490 U.S. 1004 (1989).

141. *Id.* at 1149.

142. *Id.*

A recent decision from the Seventh Circuit adopts an even more restrictive interpretation of "reasonable accommodation." In *Vande Zande v. Wisconsin Department of Administration*,[143] the Seventh Circuit held that an accommodation could be unreasonable even though it did not impose an undue hardship on the employer.[144] That court found that an accommodation is unreasonable, and therefore not required under the ADA, if the cost of the accommodation is disproportionate to the benefit the disabled worker receives from the accommodation.[145] Undue hardship, the Seventh Circuit stated, is a separate analysis and merely provides a safe harbor for employers who, because of financial hardship, cannot provide an accommodation which is otherwise reasonable.[146] To conclude otherwise, the Seventh Circuit reasoned, places employers with vast assets in the position of never being able to prove undue hardship.[147] In summary, the ADA provides protection to those who fit into the above-discussed definitions of "disabled" and "otherwise qualified." This Comment will next discuss how alcoholism and drug addiction fit into this paradigm.

3. *Alcoholism and Drug Addiction as Disabilities under the ADA*

The propriety of treating alcoholism and drug addiction as protected disabilities under the Rehabilitation Act and the ADA is quite controversial.[148] Much of the dispute arises from the belief that alcoholism and drug addiction are self-inflicted.[149] However, research indicates that genetic predispositions and other factors place the etiology of addiction beyond the control of the afflicted.[150] Current public policy often reflects the latter view and treats alcoholism and

---

143. 44 F.3d 538 (7th Cir. 1995).

144. *Id.*

145. *Id.* at 543.

146. *Id.* at 542-43.

147. *Id.*

148. *See* Reese J. Henderson, Jr., Special Project, *Addiction As Disability: Protection of Alcoholics and Drug Addicts Under the Americans With Disabilities Act of 1990*, 44 VAND. L. REV. 713 (1991) (discussing the Rehabilitation Act's and the ADA's coverage of alcoholism and drug addiction as protected disabilities); *see also* Marjorie S. Bertman, Comment, *Section 504 of the Rehabilitation Act of 1973: Protection Against Employment Discrimination for Alcoholics and Drug Addicts*, 28 AM. U. L. REV. 507 (1979) (examining the impact of the inclusion of addicts as "handicapped" and thus within the scope of the Rehabilitation Act).

149. *See, e.g.*, 1 NATIONAL INST. ON DRUG ABUSE, U.S. DEP'T OF HEALTH AND HUMAN SERVS., EXTENT AND ADEQUACY OF INSURANCE COVERAGE FOR SUBSTANCE ABUSE SERVICES 28 (1992) (acknowledging the pervasive public attitude towards drug abusers that their affliction results from moral deficiency and a lack of self control).

150. *See, e.g.*, Kenneth S. Kendler et al., *A Population Based Twin Study of Alcoholism*, 286 JAMA 1877 (1992) (exploring the link between genetics and a predisposition towards alcoholism).

drug addiction as "illnesses" requiring "treatment" rather than personality defects indicative of societal deviance.[151]

The Rehabilitation Act as originally drafted was silent on whether alcoholism and drug addiction were protected disabilities.[152] However, while drafting the Rehabilitation Act's implementing regulations, the Department of Health and Human Services solicited an opinion from the Attorney General regarding the issue.[153] The Attorney General opined that alcoholism and drug addiction were protected disabilities under the Rehabilitation Act.[154] The judiciary, following the Attorney General's lead, reached similar conclusions.[155] Although court decisions emphasized that employers may make employment decisions based on performance criteria apart from an employee's addiction,[156] employers became very concerned that they were limited in what actions they could take against alcoholics or drug addicts who, by reason of their addictions, were not performing to standards or had other behavioral problems.[157]

In response to the concerns of many employers, Congress amended the Rehabilitation Act in 1978.[158] The purpose of the amendment was

---

151. *See* H.R. REP. NO. 485, *supra* note 2, at 80, *reprinted in* 1990 U.S.C.C.A.N. at 363 (encouraging employers to offer rehabilitation to alcoholics and drug addicts); *see also* 49 U.S.C. app. § 1434(c) (finding that rehabilitation is a critical component of any testing program for abuse of alcohol or use of illegal drugs and that it should be made available to individuals as appropriate).

152. 29 U.S.C. § 794; Henderson, *supra* note 148, at 727.

153. Henderson, *supra* note 148, at 727.

154. 43 Op. Att'y Gen. No. 12 (April 12, 1977).

155. *See* Whitaker v. Board of Higher Educ., 461 F. Supp. 99, 106 n.7 (E.D.N.Y. 1978) (finding that the Rehabilitation Act protects alcoholics and drug addicts); *see also* Davis v. Bucher, 451 F. Supp. 791 (E.D. Pa. 1978) (holding that exclusion of all job applicants with a history of drug abuse violated the Rehabilitation Act).

156. *See, e.g.*, Flynn v. Raytheon Co., 868 F. Supp. 383, 387-88 (D. Mass. 1994) (finding that although the ADA protects one's status as an alcoholic, an employer may terminate an alcoholic for violating related company policies, such one prohibiting on-duty alcohol use); *Davis*, 451 F. Supp. at 797 n.4 (emphasizing that the Rehabilitation Act protects alcoholics and drug addicts from discrimination based solely on their disability, and not job-related performance factors).

157. *See* 124 CONG. REC. 29,091, at 30,323 (1978) (statement of Sen. Williams) (supporting an amendment clarifying that employers could take action against employees who, because of their alcoholism or drug addiction, were not performing up to their professional standards); Henderson, *supra* note 148, at 728 (stating that Section 504 does not protect drug addicts or alcoholics who cannot perform their jobs adequately).

158. The Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, 92 Stat. 2955 (1978) (codified as amended at 29 U.S.C. § 706 (1994)). The amendment revised the definition of qualified individual with a handicap by stating that:

> such term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual 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.

to make clear that "individuals with handicaps" did not include alcoholics and drug addicts whose disability impaired their job performance, or by reason of current alcohol or drug abuse, constituted a direct threat to the property or safety of others.[159] Further, Congress intended to exclude those alcoholics and drug addicts who had not completed rehabilitation or were not in rehabilitation.[160] Members of Congress recognized, however, that many alcoholics and drug addicts perform their jobs without incident and do not pose risks to the property or safety of others.[161] These alcoholics and drug addicts were protected from being fired or refused employment solely because of their addictions.[162]

Interpreting the amendment created much confusion. Specifically, it was unclear whether alcoholics or drug addicts whose addiction rendered them unable to adequately fulfill or safely perform their jobs were handicapped but not otherwise qualified, or simply not handicapped.[163] The distinction was immaterial, however, since the ultimate result was the same. Nonetheless, courts continued to recognize the clear congressional intent to provide alcoholics and drug addicts protection from discrimination based solely on their addictions.[164]

In drafting the ADA, Congress again recognized that alcoholism and drug addiction were disabilities deserving protection from discriminatory employment actions.[165] However, Congress also sought to strengthen an employer's ability to ensure alcohol- and drug-free

---

Id.

159. *See* H.R. REP No. 1149, 95th Cong., 2d Sess. 22-23 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7312, 7333-34 (describing the amendment which excludes alcoholics and drug abusers from the definition of a "handicapped individual").

160. *Id.*

161. *See* 124 CONG. REC. 29,091, at 30,324 (1978) (statement of Sen. Hathaway) (asserting that alcoholics and addicts often pose no risk to safety and perform adequately).

162. *See* Whitaker v. Board of Higher Educ., 461 F. Supp. 99 (E.D.N.Y. 1978) (finding that the Rehabilitation Act protects alcoholics and drug addicts); *see also* Davis v. Butcher, 451 F. Supp. 791 (E.D. Pa. 1978) (holding that exclusion of all job applicants with a history of drug abuse violated the Rehabilitation Act).

163. *Compare* Crewe v. United States Office of Personnel Management, 834 F.2d 140, 143 (8th Cir. 1987) (finding that an alcoholic applicant was handicapped but not otherwise qualified because of a history of poor job performance and repeated failures at rehabilitation) *with* Heron v. McGuire, 803 F.2d. 67, 69 (2d Cir. 1986) (holding that a police officer dismissed for heroin addiction was not handicapped because the illegal use of drugs made him unfit for the job); *see also* Henderson, *supra* note 148, at 730 n.130 (arguing that the legislative record supports the conclusion that alcoholism and drug addiction are handicaps, but that an alcoholic or drug addict may not be otherwise qualified).

164. *See, e.g.*, Crewe, 843 F.2d at 141 (recognizing that alcoholism and drug addiction are protected disabilities); Simpson v. Reynolds Metals Co., 629 F.2d 1226, 1228 (7th Cir. 1980) (acknowledging that alcoholism is a protected disability under the Rehabilitation Act).

165. S. REP. No. 116, *supra* note 3, at 22.

work environments.[166] Therefore, the new ADA provisions make it more difficult for an alcoholic or drug addict to raise a claim under the ADA than the Rehabilitation Act.[167]

The ADA seeks a balance between providing otherwise qualified alcoholics and drug addicts protection from employment discrimination and the legitimate concerns of workplace health and safety.[168] This balance is sought largely through the exclusion of current illegal drug users from protection under the ADA[169] and by putting forth a wide range of permissible employer actions relating to alcohol and drugs.[170]

Individuals currently engaging in the illegal use of drugs are excluded from the definition of a "qualified individual with a disability,"[171] so long as the employer acts on the basis of current use and not

---

166. *See* H.R. REP. No. 485, *supra* note 2, at 77-81, *reprinted in* 1990 U.S.C.C.A.N. at 359-64 (listing various methods employers may use to ensure a drug-free work place, such as drug-testing); S. REP. No. 116, *supra* note 3, at 40-42 (stating that an employer may prohibit current drug use and take steps to ensure current drug use is not occurring).

167. For instance, under the 1978 Amendment a current alcohol or drug abuser was protected so long as the current abuse did not interfere with the ability to perform job functions or pose a direct threat to property or the safety of others. *See* Pub. L. No. 95-602, 92 Stat. 2955 (1978) (codified as amended at 29 U.S.C. § 706) (excluding those current alcohol abusers or drug users where the drug or alcohol abuse prevents them from performing their duties or creates a threat to the safety or property of others). Under the ADA, however, any current illegal use of drugs places the employee or applicant outside the protection of the statute. *See infra* text accompanying notes 171-95 (discussing the ADA's exclusion of persons currently using illegal drugs from ADA protection).

168. *See* H.R. REP. No. 485, *supra* note 2, at 77-81, *reprinted in* 1990 U.S.C.C.A.N. at 359-64 (balancing the legitimate workplace concerns of employers with the need to protect qualified alcoholics and drug addicts); S. REP. No. 116, *supra* note 3, at 40-42.

169. *See* 42 U.S.C. § 12,114(a) (excluding current illegal drug users from the definition of "qualified individual with a disability").

170. *See id.* § 12,114(c). This section provides that a covered entity

> 1) may prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;
>
> 2) may require that all employees not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;
>
> 3) may require that employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988;
>
> 4) may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee; and
>
> 5) may, with respect to Federal regulations regarding alcohol and the illegal use of drugs, require that employees comply with the standards established in such regulations of the Department of Defense[,] . . . the Nuclear Regulatory Commission . . . and . . . the Department of Transportation.

Id.

171. *Id.* § 12,114(a).

on the basis of a protected disability.[172] Curiously though, this section is silent regarding the current misuse of alcohol.[173] Although the section is titled "Illegal Use of Drugs and Alcohol,"[174] alcoholics currently abusing alcohol do not appear to be excluded from ADA protection as are drug addicts currently using illegal drugs.[175] Though there is some evidence that Congress intended to exclude alcoholics currently engaging in alcohol abuse from the definition of a "qualified individual with a disability,"[176] the EEOC Implementing Regulations,[177] the Interpretive Guidance,[178] the House and Senate Commit-

172. *Id.*; *see also* H.R. REP. NO. 485, *supra* note 2, at 77, *reprinted in* 1990 U.S.C.C.A.N. at 360 (excluding an illegal drug user from the definition of "a qualified individual with a disability"); S. REP. NO. 116, *supra* note 3, at 41; 135 CONG. REC. S11,224-5 (1989) (statement of Sen. Harkin) (indicating concern that employers will use the "currently engaging in" standard to justify other discriminatory actions against the disabled).

173. *See* 42 U.S.C. § 12,114(a) (making reference only to the current illegal use of drugs while failing to mention anything about alcohol).

174. *Id.* § 12,114. This section has five subsections. Subsection (a), while making no mention of alcohol abuse, states that those currently engaging in the illegal use of drugs are excluded from the term "qualified individual with a disability". *Id.* § 12,114(a). Subsection (b) likewise does not mention alcohol abuse, but merely states that those no longer using illegal drugs who have been rehabilitated or are in rehabilitation are not excluded from the term "qualified individual with a disability". *Id.* § 12,114(b). Subsection (c) as it pertains to alcohol merely states that employers may prohibit the use of alcohol at the workplace; may require that employees not be under the influence of alcohol while at work; and may hold an alcoholic employee to the same standards of performance as other employees. *Id.* § 12,114(c). Subsection (d) pertains to drug testing and makes no mention of alcohol use. *Id.* § 12,114(d). Subsection (e) addresses employers regulated by the Department of Transportation and allows testing of transportation employees for the use of drugs and on-duty use of alcohol. *Id.* § 12,114(e).

175. *See id.* § 12,114(a) (making no mention of alcohol use) *See also* H.R. REP. NO. 485, *supra* note 2, at 77-81, *reprinted in* 1990 U.S.C.C.A.N. at 359-64 (referring to "illegal" drug use); S. REP. NO. 116, *supra* note 3, at 40-42 (discussing the exclusion of current illegal drug users from the term "qualified individuals with a disability" but making no reference to current alcohol abusers). *But see* Henderson, *supra* note 148, at 733 n.158 (arguing that Section 104's title, the fact most of its subsections pertain to alcohol use, and the legislative history indicate that the "currently engaging in" standard applies to alcohol use as well).

This exclusion may have been Congress's intent, since alcohol use is legal under most circumstances, even when used by alcoholics. If the title "Illegal Use of Drugs and Alcohol" is indicative at all of congressional intent, it supports the conclusion that current alcohol misuse is not to be excluded from the term "qualified individual with a disability." 42 U.S.C. § 12,114. However, the fact that "alcohol use" appears in some sections of the ADA but not others indicates that "alcohol use" appears where Congress wanted it to appear. Furthermore, unlike the illegal use of drugs, employers cannot ban all employees from engaging in legal misuse of alcohol, therefore making nondiscriminatory enforcement of a "currently engaging in" alcohol policy impossible.

176. *See* 135 CONG. REC. S10,753 (1989) (conversation between Senators Harkin and Armstrong) (indicating that Senator Harkin intended to exclude illegal drug users and alcohol abusers from the definition of a "qualified individual with a disability"); *id.* at S10,777 (conversation between Senators Harkin and Coats) (showing again Senator Harkin's intention).

177. *See supra* note 40 (citing the EEOC's regulations).

178. *See supra* note 44 (citing the Interpretive Guidance on Title I of the ADA).

tee Reports,[179] and the statute itself, all fail to mention current alcohol abuse in their discussions of the exclusion of current illegal drug use from ADA protection. Though the issue is undecided, this Comment will treat the "currently engaging in" exclusion as not applying to alcoholics and their current abuse of alcohol.

An individual does not necessarily have to illegally use drugs "that day" or within a particular time frame to be excluded from ADA protection.[180] "Currently engaging in" means only that use is recent enough to support a conclusion that the individual engages in such conduct.[181] Use recent enough to result in a positive drug test supports a conclusion that the individual is currently engaging in the use of illegal drugs.[182]

Individuals erroneously believed to be illegally using drugs are not excluded from ADA protection.[183] This provision is intended to protect those who erroneously test positive for illegal drug use in employer administered drug tests.[184] However, for ADA protection to be afforded an individual erroneously believed to be a drug user, the employer must also regard the individual as being a drug addict substantially limited in one or more major life activities.[185] If the employer only regards the individual as a casual drug user, there is no refuge in the ADA.[186] This requirement renders ADA protection to persons falsely accused of drug use illusory, since an employer will probably not then assume, or at least not admit it assumes, that a positive drug test means drug addiction.

An "otherwise qualified" drug addict is not excluded from ADA protection if he or she is no longer illegally using drugs and has successfully completed a supervised rehabilitation program, has otherwise been rehabilitated, or is currently participating in a supervised rehabilitation program.[187] Congress recognized that the public has an

179. *See* H.R. REP. No. 485, *supra* note 2, at 77-81, *reprinted in* 1990 U.S.C.C.A.N. at 359-64 (making no mention of alcohol abuse); S. REP. No. 116, *supra* note 3, at 40-42..

180. 29 C.F.R. app. § 1630.3. *See* Collings v. Longview Fibre, Co., 63 F.3d 828, 833 (9th Cir. 1995) (holding that employees' unlawful drug use in the weeks or months prior to dismissal was sufficient to render them not qualified).

181. 29 C.F.R. app. § 1630.3.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. 42 U.S.C. § 12,114(b). The plain language of this section seems to indicate that self-rehabilitation is acceptable, and that completion of a formal treatment program is not required. *See id.* (showing that the phrase "or otherwise been rehabilitated," as between two phrases referring to supervised rehabilitation, supports this notion).

acute interest in encouraging alcoholics and drug addicts to seek rehabilitation.[188] Such an interest is not furthered if the individual fears continued stigmatization and future adverse actions.[189] However, like the "currently engaging in" standard, alcoholics appear to be excused from the requirement for rehabilitation. Therefore, rehabilitated drug addicts and those undergoing rehabilitation may be protected under the ADA. Further, alcoholics may be protected regardless of any effort at rehabilitation.

In addition to permitting employers to take adverse employment action on the basis of current illegal drug use, the ADA specifically authorizes other employer conduct relating to the control of alcohol and drug use in the workplace.[190] First, the employer may prohibit the use of alcohol and the illegal use of drugs in the workplace[191] and require that employees not be under the influence of alcohol or drugs while at work.[192] Second, the employer may require that employees behave in conformance with the Drug-Free Workplace Act of 1988.[193] Third, the employer may hold the alcoholic or drug addict to the same performance and behavioral standards as it holds other employees, even if the substandard performance or behavior is caused by the alcoholism or drug addiction.[194] Finally, an employer regulated by the Departments of Defense or Transportation, or the Nuclear Regulatory Commission may require that its employees meet the standards established by the agency's regulations regarding alcohol and illegal drug use.[195]

To summarize, drug addicts are protected under the ADA only if they are not currently engaging in the illegal use of drugs and are

---

188. *See, e.g.*, S. REP. NO. 116, *supra* note 3, at 106 (statement of Sen. Coats) (arguing that the ADA strikes the proper balance between allowing employers to institute zero-tolerance alcohol and drug policies while encouraging employees with substance abuse problems to seek rehabilitation).

189. *Id.*

190. *See* 42 U.S.C. § 12,114(c)(1)-(5) (setting forth permissible employer conduct relating to the control of alcohol and drug use in the workplace).

191. *Id.*

192. *Id.*

193. *Id.* The Drug Free Workplace Act of 1988, 41 U.S.C. § 701 (a)(1)(1988), requires that employers with government contracts of $25,000 or more ensure a drug-free workplace and 1) publish a statement notifying their workers that the unlawful manufacture, distribution, dispensation, possession, or use of controlled substances is prohibited in the workplace; 2) notify the employees that their continued employment hinges on compliance with the policies outlined in this statement; and 3) establish a drug-free awareness program to inform their employees of the dangers of drug abuse in the workplace. *Id.* § 701(a)(1)(A)-(D).

194. 42 U.S.C. § 12,114(c)(1-5). *See* Despears v. Milwaukee County, 63 F.3d 635 (7th Cir. 1995) (discussing alcoholism as a "cause" of conduct which results in an employee's discharge).

195. 42 U.S.C. § 12,114(c)(1-5).

either in rehabilitation, or have been successfully rehabilitated. There is much confusion over whether alcoholics are excluded if they meet the "currently engaging in" standard and whether they must also meet the rehabilitation requirement. It is important to remember that any impairment, including alcoholism and drug addiction, requires a showing that the impairment substantially limits one or more major life activities.[196] Therefore, casual drug use and improvident misuse of alcohol are not protected under the ADA.[197] Employers may prohibit the illegal use of drugs and misuse of alcohol in the workplace, and may insist that all employees not be under the influence of drugs or alcohol during work hours.[198] Further, employers may hold alcoholics and drug addicts to the same performance and behavior standards as other workers, and may take adverse employment action if those standards are not met.[199] This is so even if the substandard performance and behavior are due to the alcoholism or drug addiction.[200]

The primary focus of this Comment has been on who is protected under the ADA. Next, this Comment will discuss the forms and theories of discrimination which may be asserted under the ADA, as well as other prohibited employer conduct.

4. *Theories of Discrimination under the ADA*

The ADA adopts the powers, remedies, and procedures as set forth in Title VII of the Civil Rights Act of 1964.[201] As such, claimants may assert violations of the ADA under either the disparate treatment or disparate impact theories of employment discrimination set forth in the Title VII context.[202] Further, the ADA creates a third theory of employment discrimination which some have termed "surmountable barrier discrimination."[203]

---

196. 29 C.F.R. app. § 1630.3.

197. *Id.*

198. *See supra* text accompanying notes 171-95 (discussing permissible employer activity regarding alcohol and drug use in the workplace).

199. 42 U.S.C. § 12,114(c)(1)-(5).

200. *Id.*

201. *See id.* § 12,117(a) ("The powers, remedies, and procedures set forth in sections 705, 706, 707, 709, and 710 of the Civil Rights Act of 1964 . . . shall be the powers, remedies, and procedures this title provides to . . . any person alleging discrimination on the basis of disability in violation of any provision of this Act.").

202. *See* 29 C.F.R § 1630.4 (disparate treatment) and 29 C.F.R. § 1630.7 (disparate impact).

203. *Id.* § 1630.9. *See* Prewitt v. United States Postal Serv., 662 F.2d 292, 305 (5th Cir. 1981) (distinguishing between disparate impact discrimination and surmountable barrier discrimination).

a. Disparate Treatment Discrimination

For purposes of the ADA, disparate treatment means that a qualified person with a disability was treated differently because of the disability.[204] Because proving intentional discrimination in the Title VII context was often difficult, the United States Supreme Court in *McDonnell Douglas Corp. v. Green*[205] set forth a series of procedures intended to make asserting a claim of intentional discrimination more plausible.[206] These burden shifting procedures were further clarified in *Texas Department of Community Affairs v. Burdine*,[207] and were adopted for claims arising under the ADA.[208]

Essentially, the plaintiff has the initial burden of establishing by a preponderance of the evidence a prima facie case of unlawful discrimination.[209] This may be done by showing that the plaintiff: 1) belongs to a protected class; 2) applied for and was qualified for a certain job; 3) was rejected; and 4) that after the rejection the employer continued to seek to fill the position.[210] Once a prima facie case is established, the burden then shifts to the employer to come forward with a legitimate, nondiscriminatory reason for the plaintiff's rejection.[211] The evidence presented by the employer must raise a genuine issue of fact as to whether unlawful discrimination occurred.[212] If the employer is successful, the burden shifts back to the plaintiff to show that the reason offered for the rejection is not the true reason.[213] The plaintiff may do this either by direct evidence of a discriminatory motive or by arguing that the explanation lacks credence and should be rejected.[214]

---

204. 29 C.F.R. § 1630.4.

205. 411 U.S. 792 (1973).

206. *Id.*

207. 450 U.S. 248 (1981).

208. *See* Prewitt v. United States Postal Serv., 662 F.2d 292, 304 (5th Cir. 1981) (holding that Title VII jurisprudence was applicable to intentional discrimination based on handicap); *see also* 29 C.F.R. app. § 1630.15(a) (citing *Prewitt* and stating that the traditional disparate treatment defenses existing under Title VII jurisprudence apply to claims under the ADA).

209. *See Burdine*, 450 U.S. at 253; *McDonnell Douglas*, 411 U.S. at 802 (stating that the plaintiff has the initial burden of establishing a prima facie case).

210. *Burdine*, 450 U.S. at 253.

211. *See id.* at 254 (stating that after the plaintiff has established a prima facie case, the defendant then has the burden of producing evidence showing that the plaintiff was rejected for a legitimate, nondiscriminatory reason); 29 C.F.R § 1630.15(a) (allowing a legitimate, nondiscriminatory reason as a defense for the challenged action).

212. *Burdine*, 450 U.S. at 254.

213. *Id.* at 255.

214. *Id.*

b. Disparate Impact Discrimination

The second theory of unlawful discrimination under the ADA is disparate impact discrimination.[215] For purposes of the ADA, "disparate impact" means that a uniformly applied, neutral hiring criteria has an adverse impact on an individual with a disability or a disproportionately adverse impact on classes of individuals with disabilities.[216] This is essentially the disparate impact theory of discrimination articulated in *Griggs v. Duke Power Co.*[217] and its progeny. A minor distinction was noted in *Prewitt v. United States Postal Service.*[218] The *Prewitt* court stated that courts must be careful not to group all handicapped persons into one class or even broad subclasses.[219] For instance, employers facing disparate impact discrimination charges under Title VII often point to the diverse makeup of their workforce as probative of whether the neutral criteria has a disparate impact.[220] However, the fact that an employer has a large group of epileptics does not mean the employer does not discriminate against the blind.[221] Therefore, the only defense to a charge of disparate impact discrimination under the ADA is to argue that neutral hiring criteria was required by job-relatedness and business necessity.[222] If the employer is successful in showing job-relatedness and business necessity, the burden shifts back

---

215. 29 C.F.R. § 1630.7

> It is unlawful for a covered entity to use standards, criteria, or methods of administration, which are not job-related and consistent with business necessity, and (a) That have the effect of discriminating on the basis of disability; or (b) That perpetuate the discrimination of others who are subject to common administrative control.

Id.; *see also* 29 C.F.R. app. § 1630.15(b) - (c) (defining disparate impact in terms of the ADA).

216. *Id.* § 1630.7. Disparate impact theory was first articulated by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971). The *Griggs* court found that establishing a job requirement having nothing to do with predicting successful job performance but impacting disproportionately on protected classes of employees was unlawful discrimination regardless of the employer's intent. *Id.* at 436. Similarly, in Alexander v. Choate, 469 U.S. 287 (1985), the Court made clear that the disparate impact standard necessary in the Title VII context to ensure that congressional efforts to end discrimination "would not ring hollow" applied with equal force to handicap discrimination. *Id.* at 297. *See also* International Bd. of Teamsters v. United States, 431 U.S. 324, 339 (1977) (approving the use of statistics to prove disparate impact discrimination); Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 308 (1977) (narrowing the application of statistical evidence to the employer's relevant labor market).

217. 401 U.S. 424 (1971).

218. 662 F.2d 292 (5th Cir. 1981).

219. *Id.* at 307.

220. *See, e.g.*, Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1118 (11th Cir. 1993) (citing the fire department's defense that a "no-beard" policy did not have a disparate impact on blacks since there was a fair proportion of blacks on the fire department).

221. *Prewitt*, 662 F.2d at 307.

222. 29 C.F.R. § 1630.15(b) & (c).

to the plaintiff to show that the neutral criteria was met, or could have been met with a reasonable accommodation.[223]

c. Surmountable Barrier Discrimination

The third theory under which a claim of unlawful discrimination could be brought is known as surmountable barrier discrimination.[224] Surmountable barrier discrimination occurs when an employer refuses to provide reasonable accommodations to a qualified disabled individual.[225] If the employee is otherwise qualified but requires accommodation to perform an essential job function, the accommodation must be provided as long as it is reasonable.[226] The only defenses to a charge of surmountable barrier discrimination are that the accommodation proposed is unreasonable[227] or imposes an undue burden on the employer.[228] If the employer meets its burden of persuasion by establishing that an accommodation is unreasonable or an undue burden, the burden of persuasion then shifts back to the plaintiff to come forward with sufficient evidence concerning his abilities and possible accommodations sufficient to rebut the employer's evidence.[229]

5. Medical Examinations and Disability-Related Inquiries

The ADA prohibits an employer from conducting any medical examination or disability-related inquiry prior to a conditional offer of employment.[230] Further, an employer may only require medical examinations and make disability-related inquiries when the inquiries are made of all employees in certain job categories.[231] Congress recognized that employers often conduct pre-employment medical exam-

223. *Prewitt*, 662 F.2d at 307.

224. *See* 42 U.S.C. § 12,112(b)(5)(A) (defining discrimination to include an employer's failure to reasonably accommodate the limitations of an otherwise qualified disabled individual); 29 C.F.R. § 1630.9 (requiring employers to reasonably accommodate the needs of disabled individuals).

225. 42 U.S.C. § 12,112(b)(5)(A). *See Prewitt*, 662 F.2d at 307 (holding that failure to provide a reasonable accommodation to an otherwise qualified handicapped employee constitutes unlawful surmountable barrier discrimination).

226. 42 U.S.C. § 12,112(b)(5)(A).

227. *See* Vande Zande v. Wisconsin Dep't of Admin., 44 F.3d 538, 542 (7th Cir. 1995) (defining the term "reasonable" in cost/benefit terms and as it relates to the accommodation of qualified disabled individuals).

228. 29 C.F.R. § 1630.15(d).

229. *See id.* app. § 1630.15(d) (providing that if an accommodation imposes an undue hardship upon an employer, the employer may offer a defense against a charge of failing to reasonably accommodate); *Prewitt*, 662 F.2d at 308 (stating that once an employer presents evidence of undue hardship, the plaintiff must rebut such evidence).

230. 42 U.S.C. § 12,112(d)(2) & (3).

231. *Id.* § 12,112(d)(3)(A).

inations and inquiries to uncover hidden disabilities.[232] Since such inquiries are frequently made at the pre-employment stage, a rejected applicant does not know or is unable to prove that the rejection was based on a real or perceived disability revealed in the inquiry.[233] Once a conditional offer of employment is made, the employer may not rescind its offer based on the medical examination results and disability-related inquiries unless the employer's actions are justified by job-relatedness and business necessity.[234]

The conditional offer of employment must be a bona fide offer.[235] An offer is bona fide if it satisfies the general principles of contract law governing offers.[236] Prior to an offer, the employer must complete all relevant nonmedical inquiries and determine that the applicant is qualified.[237] Only then may the employer extend the conditional offer of employment.[238] Medical examinations and inquiries cannot proceed until the offer is made.[239]

After an offer is made, the employer may require a medical examination and make disability-related inquiries regardless of whether the examinations or inquiries are job related.[240] "Medical examinations are procedures or tests that seek information about the existence, nature, or severity of an individual's physical or mental impairment."[241] The EEOC guidelines set out eight factors to consider when determin-

---

232. H.R. REP. NO. 485, *supra* note 2, at 72, *reprinted in* 1990 U.S.C.C.A.N. at 355; S. REP. NO. 116, *supra* note 3, at 39.

233. S. REP. NO. 116, *supra* note 3 at 38-39.

234. 29 C.F.R. § 1630.14(b)(3).

235. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, No. 915.002, ENFORCEMENT GUIDANCE: PREEMPLOYMENT DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMINATIONS UNDER THE AMERICANS WITH DISABILITIES ACT OF 1990, 36 (1994) [hereinafter EEOC ENFORCEMENT GUIDANCE].

236. *Id.* at 36 n.53. *See* Soar v. National Football League Players Ass'n, 550 F.2d 1287, 1290 (1st Cir. 1977) (holding that the terms of an offer must be of sufficient explicitness that a court can determine the respective obligations of the parties); *see also* ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 11 (1960 & West Supp. 1991) (defining an offer as an expression by one party of his assent to certain definite terms, provided that the other party involved in the bargaining transaction will likewise assent to identical terms); CHARLES G. BAKALY & JOEL M. GROSSMAN, MODERN LAW OF EMPLOYMENT CONTRACTS 29 (1988) (stating that the terms of a valid offer of employment must be reasonably definite).

237. *See* EEOC ENFORCEMENT GUIDANCE, *supra* note 235, at 37; H.R. REP. NO. 485, *supra* note 2, at 73, *reprinted in* 1990 U.S.C.C.A.N. at 355 (indicating legislative intent as to what types of inquiries may be made prior to an offer employment); S. REP. NO. 116, *supra* note 3, at 39 (indicating a congressional intent to require employers to evaluate the applicant's ability to perform the job before considering medical condition).

238. EEOC ENFORCEMENT GUIDANCE, *supra* note 235, at 38.

239. *Id.*

240. 29 C.F.R. § 1630.14(b)(3).

241. EEOC ENFORCEMENT GUIDANCE, *supra* note 235, at 28.

ing if a certain procedure or test is a medical examination.[242] Although drug tests meet most if not all of these factors, tests designed solely to determine the use of illegal drugs are not medical examinations.[243] However, if the drug testing procedures are such that the use of prescription drugs will be revealed, the drug test is a medical examination.[244] In addition, a test to determine the use of alcohol is a medical examination if it employs invasive procedures.[245] The EEOC considers the drawing of breath, a common method of testing for alcohol use and the method required under OTETA, to be an invasive procedure.[246]

Disability-related inquiries are inquiries likely to elicit information about a disability.[247] Inquiries pertaining to the ability to perform certain job functions are not considered disability-related.[248] Therefore,

---

242. *See id.* (listing eight factors for consideration when determining if a certain procedure constitutes a medical examination). These eight factors are as follows:

1) Whether the procedure or test is one that is administered by either a health care professional or someone trained by a health care professional;
2) Whether the results of the procedure or test are interpreted by either a health care professional or someone trained by a health care professional;
3) Whether the procedure or test is designed to reveal the existence, nature, or severity of an impairment, or the subject's general physical or psychological health;
4) Whether the employer is administering the procedure or test for the purpose of revealing the existence, nature, or severity of an impairment, or the subject's general physical or psychological health;
5) Whether the procedure or test is invasive (e.g., whether it requires the drawing of blood, urine, breath, etc.);
6) Whether the procedure or test measures physiological or psychological responses of an individual, as opposed to the individual's performance of a task;
7) Whether the procedure or test would normally be administered in a medical setting (e.g., a health care professional's office, a hospital); and
8) Whether medical equipment or devices are used for administering the procedure or test (e.g., medical diagnostic equipment or devices).

Id.; *see also* Evans v. City of Evanston, 695 F. Supp. 922, 928 (N.D. Ill. 1988) (determining that physical agility tests designed to test activities that the applicant will be required to perform on the job are not medical examinations).

243. 42 U.S.C. § 12,114(d)(1). Note that drug tests, even those strictly limited to the detection of illegal drugs, meet the EEOC's Enforcement Guidance for determining when a procedure or test is a medical examination. *See supra* note 242 (listing the factors to consider when determining if a procedure is a medical examination). Therefore, excluding tests for the use of illegal drugs from the realm of medical examinations appears to be an arbitrary political compromise designed to appease legislators concerned with weakening employers' ability to maintain a drug-free workplace. *See, e.g.*, S. REP. No. 116, *supra* note 3, at 106 (statement of Sen. Coats) (expressing satisfaction that the amendments he proposed to S. 933 ensuring employers' maintenance of a drug-free workplace through drug testing without liability for discrimination were passed).

244. *See* 29 C.F.R. app. § 1630.16(c) (providing that tests to discover the use of illegal drugs are not considered a medical examination).

245. EEOC ENFORCEMENT GUIDANCE, *supra* note 235, at 36.

246. *Id.*

247. *Id.* at 6.

248. *Id.* at 9.

an employer operating a painting service could ask applicants whether they have any problems climbing up and down ladders, although such an inquiry may reveal a disability. Further, an employer may ask about current and past illegal drug use[249] because such activity is outside the scope of ADA protection. However, an employer may not ask about the extent of any illegal drug use or whether the applicant has ever received treatment for alcohol or drug problems, since this inquiry could reveal an alcohol- or drug-related disability.[250] Once the conditional offer of employment is made, it may not be rescinded based on the results of the medical examination or disability-related inquiry unless justified by job-relatedness or business necessity.[251]

Medical and disability-related information obtained in the course of medical examinations and inquiries are subject to stringent confidentiality requirements.[252] The release of medical information is prohibited, except as expressly provided for in the ADA.[253] During the hiring process, only those company officials who need to know the information shall have access to it.[254] Every employee involved in the hiring process does not usually need to know the applicant's medical information.[255] For instance, an employee verifying the applicant's employment history does not need to know the applicant's medical history. Therefore, employers must take steps to keep medical information from those who do not need to know the information.

6. *The ADA: Concluding Remarks*

Employers have three primary concerns regarding ADA requirements. First, employers feel that ambiguous terms and fact-specific

---

249. *Id.* at 20.

250. *Id.* at 21.

251. 29 C.F.R. § 1630.14(b)(3).

252. *See* 42 U.S.C § 12,112(d)(3)(B) (requiring medical information be maintained on separate forms, in separate files, and as confidential medical records). Medical information must be kept confidential except:

> 1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;
>
> 2) First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and
>
> 3) Government officials investigating compliance with [the ADA] shall be provided relevant information on request.

Id.; *see also* 29 C.F.R. § 1630.16(f) (permitting use of medical information for purposes of administering health insurance, life insurance, and other benefit plans); *id.* § 1630.14 (permitting use of medical information in compliance with state workers' compensation laws).

253. 42 U.S.C. § 12,112 (c)(3)(b).

254. EEOC ENFORCEMENT GUIDANCE, *supra* note 235, at 44.

255. *Id.*

determinations required under the ADA invite expensive litigation.[256] Employers may take solace in the fact that the ADA adopted many of the judicial interpretations of the Rehabilitation Act, and therefore a large body of case law already exists interpreting key terms of the ADA. However, employers should not expect to be alleviated from the burden of fact-specific inquiries and case-by-case determinations.

Second, employers are concerned that the ADA will merely protect the malfeasants, malcontents, and hypochondriacs of their work forces.[257] However, ADA protection is limited to impairments substantially limiting one or major life activities. Further, the burden of proving such an impairment rests with the employee. Also, employers are permitted to hold alcoholics and drug addicts to the same performance standards as other members of the workforce, and may take aggressive measures to ensure an alcohol- and drug-free work environment.

The third concern of employers is that the ADA makes it harder to comply with other existing federal and state laws.[258] Here, employers will find little solace. For example, one federal law which renders ADA compliance a more perilous task is OTETA.

B. The Omnibus Transportation Employee Testing Act

On October 28, 1991, President Bush signed the Omnibus Transportation Employee Testing Act (OTETA) into law.[259] OTETA directed the Secretary of Transportation to implement regulations requiring the alcohol and drug testing of employees in safety-sensitive positions in the aviation, motor carrier, rail, and transit industries.[260] OTETA specifically required that employers test employees in safety-sensitive positions for alcohol and drugs as a pre-employment requirement,

256. *See supra* notes 7-11 and accompanying text (setting forth the three major concerns of employers regarding the ADA). For example, individualized inquiries are required to determine whether a person is otherwise qualified, see *supra* text accompanying notes 67-91; whether an accommodation imposes an undue burden, see *supra* text accompanying notes 132-47; and whether an individual poses a direct threat to the safety of others, see *supra* notes 95-131 and accompanying text.

257. *See supra* note 9 and accompanying text (discussing employers' concerns about the ADA's possible protection of the "hypochondriacs, malfeasants, and malcontents" of their work forces).

258. *See supra* notes 10-11 and accompanying text (stating that the ADA creates difficulties for employers in that it conflicts with ERISA and NLRA).

259. Omnibus Transportation Employee Testing Act, Pub. L. No. 102-143, 105 Stat. 952 (codified as amended in scattered sections of 49 U.S.C.).

260. 49 U.S.C. app. § 1434.

randomly, after certain accidents, and upon reasonable suspicion of alcohol or drug abuse.[261]

In February of 1994, the United States Department of Transportation (USDOT) and five of its agencies published final rules implementing OTETA.[262] Employers of commercial motor vehicle drivers, covered by the Federal Highway Administration's (FHWA) final rule,[263] are the largest group affected.[264] Considering that the FHWA Rule has the greatest impact, and that other agency rules are, for the most part, similar to the FHWA Rule, this Comment focuses almost exclusively on the FHWA Rule.

1. Applicability and Implementation

The FHWA Rule applies to employees performing safety-sensitive functions who are required to have Commercial Driver's Licenses (CDL's).[265] Generally, the affected employees operate vehicles with gross vehicle weight ratings (GVWR) or gross combination weight ratings (GCWR) of over 26,000 pounds, vehicles designed to seat 16

---

261. *Id.* The constitutionality of United States Department of Transportation (USDOT) mandated alcohol and drug testing is well established. *See* Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602, 634 (1989) (holding that USDOT-mandated drug testing implicated the Fourth Amendment, but was not an unreasonable search considering the public policy concerns and regulatory scheme); National Treasury Employees Union v. Von Raab, 489 U.S. 656, 657 (1989) (holding that a showing of a drug abuse problem in a particular industry or occupation is not necessary to justify a drug testing requirement); *see also* International Bd. of Teamsters v. Department of Transp., 932 F.2d 1292, 1309 (9th Cir. 1991) (upholding the Federal Highway Administration's requirement for pre-employment, random, post-accident, and reasonable suspicion drug testing for interstate truck drivers); International Bhd. of Elec. Workers v. Skinner, 913 F.2d 1454, 1464 (9th Cir. 1990) (upholding the constitutionality of the Research and Special Programs Administration's requirement of pre-employment, random, and post-accident drug testing of pipeline workers in safety-sensitive positions); Bluestein v. Skinner, 908 F.2d 451, 457-58 (9th Cir. 1990), *cert. denied,* 498 U.S. 1083 (1991) (upholding the constitutionality of the Federal Aviation Administration's requirement that certain categories of employees in the commercial aviation industry undergo random drug testing). *But see* Transportation Inst. v. Coast Guard, 727 F. Supp. 648, 656 (D.D.C. 1989) (holding that the Coast Guard's requirement for random drug testing of all vessel crew members was unconstitutional because the Coast Guard failed to establish that all vessel crew members engaged in safety-sensitive functions).

262. Alcohol and Drug Testing for Transportation Workers, 59 Fed. Reg. 7302 (1994) (Federal Railroad Administration (FRA) Rules to be codified at 49 C.F.R. § 219, Federal Aviation Administration (FAA) Rules to be codified at 49 C.F.R. § 121, Federal Transit Administration (FTA) Rules to be codified at 49 C.F.R. § 653, Research and Special Programs Administration (RSPA) Rules to be codified at 49 C.F.R. § 199, Federal Highway Administration (FHWA) Rules to be codified at 49 C.F.R § 382).

263. 49 C.F.R. § 382 (1994).

264. *See* S. REP. No. 54, *supra* note 12, at 15 (estimating that 538,000 domestic air carrier employees and 31,816 FAA employees will be covered by the FAA regulations, 90,000 employees will be covered by the FRA regulations, 195,000 employees will be covered by the FTA regulations, and 5.5 million employees will be covered by the FHWA regulations).

265. 49 C.F.R. §§ 383.1 - 383.155.

or more passengers, including the driver, or vehicles used to transport hazardous materials[266] which require placards.[267]

An "employer" under the FHWA Rule is any person or entity who owns or leases a commercial motor vehicle for which a CDL license is required, or assigns persons to operate such a vehicle.[268] The definition of "employer" includes the United States, a State, or any political subdivision of a State.[269] Unlike other FHWA safety regulations, the FHWA Rule implementing OTETA is applicable to both intrastate and interstate operations.[270] The FHWA Rule establishes a staggered implementation process based on employer size.[271] Employers with 50 or more CDL drivers on March 17, 1994 must begin compliance by January 1, 1995,[272] and smaller employers, by January 1, 1996.[273]

2. *Alcohol and Drug Testing Procedures*

Under the FHWA Rule, drug testing requires the collection of a urine sample, coupled with detailed procedures to ensure the sample's integrity and reliable test results.[274] After collection, the sample is split into two separate containers.[275] One container is tested as the primary sample, the other is tested only if the primary sample reveals illegal drugs and the employee requests validation of the result.[276] A chain of custody must be established,[277] and the specimens must be forwarded to a National Institute of Drug Abuse (NIDA) approved laboratory.[278] The laboratory must test for only five drugs: mari-

266. *See id.* § 172.101 (listing all materials considered hazardous for transportation purposes). *See also id.* §§ 172.500 - 172.560 (establishing when hazardous material placards are required).

267. *See id.* § 383.5 (defining the term "commercial motor vehicle").

268. *Id.* § 382.107.

269. *Id.*

270. For example, the FHWA's driver qualification requirements, *id.* § 391.11, maintenance requirements, *id.* §§ 393, 396, and hours of service requirements, *id.* § 395, apply only to interstate truck drivers.

271. *Id.* § 382.115.

272. *Id.* § 382.115(a).

273. *Id.* § 382.115(b).

274. *Id.* § 382.105; *see* Procedures for Transportation Workplace Alcohol and Drug Testing Programs, 49 C.F.R. § 40 (1994) (setting forth, *inter alia*, the procedures used to ensure the integrity of the collection process and protection against false positive results). For a more comprehensive explanation of the Procedures for Transportation Workplace Alcohol and Drug Testing Programs, see OFFICE OF THE SECRETARY OF TRANSPORTATION, THE EMPLOYER'S GUIDE TO 49 CFR PART 40 (1990).

275. 49 C.F.R. § 40.25 (f)(10)(ii) (1994).

276. *Id.* § 40.33.

277. *Id.* § 40.25(c).

278. *Id.* § 40.39.

juana, cocaine, opiates, amphetamines, and phencyclidine.[279] The employer may test for additional drugs only under an authority independent of OTETA if a separate sample is taken.[280]

The NIDA-certified laboratory conducts an initial enzyme multiplier immunoassay screen.[281] If the test is negative, a negative result is reported to the employer.[282] If the result is positive, the laboratory must then conduct a gas chromatography/mass spectrometry confirmatory test.[283] If the result of that test is negative, then a negative result is reported to the employer.[284] If the confirmatory test is positive, a Medical Review Officer (MRO) reviews the results.[285] The MRO is a licensed physician with experience in substance abuse disorders and trained in interpreting positive test results.[286] The MRO conducts an interview with the employee to determine medical history and other relevant biomedical information.[287] If the MRO determines that a legitimate medical explanation exists, a negative result is re-

279. *Id.* § 40.21(a). Testing for additional drugs is not permitted under the FHWA Rule. *Id.* § 40.21(c).

280. *Id.* § 40.21(c).

281. *Id.* § 40.29(e). The enzyme multiplier immunoassay test is relatively inexpensive and involves mixing a portion of the urine specimen with an antigen. Ross A. Epstein, Note, *Urinalysis Testing in Correctional Facilities*, 67 B.U. L. REV. 475, 482 (1987). The test is only capable of detecting the presence or absence of a specific drug, and cannot quantify its result. *Id.* at 483. For a further discussion of the immunoassay process, see *id.* at 481-503 (discussing the scientific theory behind the enzyme multiplier immunoassay test, its limitations, and the controversy surrounding it in both federal and state courts). *See also* Charles E. Leal, Comment, *Admissibility of Biochemical Urinalysis Testing Results for Purposes of Detecting Marijuana Use*, 20 WAKE FOREST L. REV. 391, 392-98 (1984) (providing explanations of the various drug testing procedures that lawyers can understand).

282. 49 C.F.R. § 40.29(g)(2).

283. *Id.* § 40.29(f)(1). The gas chromatography/mass spectrometry is a much more expensive and accurate test. Mark A. Rothstein, *Drug Testing in the Workplace: The Challenge to Employment Relations and Employment Law*, 63 CHI.-KENT L. REV. 683, 693 (1987). The drugs are extracted from the urine and converted into a gas. *Id.* They are then sent through a helium tube. *Id.* The mass spectrometry process determines molecular weights and quantifies the amount of drug present. *Id.*

284. 49 C.F.R. § 40.29(g)(2).

285. *Id.* § 40.33(a).

286. *Id.* § 40.33(b)(1).

287. *Id.* § 40.33(b)(3). The MRO must make a reasonable effort to contact the employee. *Id.* § 40.33(c)(1)-(5). If after a reasonable effort the MRO is unsuccessful, the MRO contacts the employer and requests that the employer contact the employee, the employer then directs the employee to contact the MRO. *Id.* If the employer is unable to contact the employee, the employee is placed on temporary medically unqualified status. *Id.* If the employer contacts the employee, but the employee fails to contact the MRO, the MRO may report a positive test result to the employer after 5 days. *Id.*

ported to the employer.[288] If there is no such explanation, a positive result is reported.[289]

If the MRO determines there is no medical explanation for the positive laboratory result, the employee is considered to have failed the drug test and that result is reported to the employer. However, an employee may request that the separate "split" sample be tested by an independent NIDA-certified laboratory. If the independent laboratory fails to confirm the presence of illegal drugs in the sample, then the test is canceled and the employee is exonerated.

Alcohol testing requires a breath sample, which is obtained by blowing into an approved breath-testing device operated by a trained technician.[290] The testing must be done at a site which preserves the employee's privacy and the confidentiality of test results.[291]

The FHWA Rule requires that employers promulgate a written alcohol and drug testing policy.[292] All affected employees must receive a copy of the policy.[293] Contained within the policy must be information concerning the signs and symptoms of an alcohol or drug problem, how alcohol and drug abuse affect an employee's work and home life, and where employees may turn if they feel they have an alcohol or drug problem.[294]

3. *Required Testing and Other Employer Obligations*

OTETA requires applicants for safety-sensitive positions to submit to and pass a pre-employment drug test.[295] Also, the employer must ask the applicant's previous employers whether the applicant has ever failed an OTETA-mandated alcohol or drug test.[296] Employees who perform safety-sensitive functions must submit to alcohol and drug tests on a random basis, after certain accidents, and upon reasonable suspicion the employee is under the influence of alcohol or drugs.[297]

---

288. *Id.* § 40.33(c)(6).

289. *Id.*

290. *Id.* § 40.51. The device is one approved by the National Highway Traffic Safety Administration. *Id.*

291. *Id.* § 40.57(a).

292. *Id.* § 382.601.

293. *Id.* § 382.601(a)(1).

294. *Id.* § 382.601(b)(11).

295. *See infra* notes 298-99 and accompanying text (explaining the pre-employment testing requirements).

296. *See infra* text accompanying notes 300-04 (discussing the requirement that employers make pre-employment inquiries and obtain information on previously conducted alcohol and drug tests).

297. *See infra* text accompanying notes 305-50 (explaining the random, post accident, and reasonable suspicion alcohol and drug testing requirements).

a. Pre-Employment Testing and Inquiries

An applicant must submit to a drug test as a pre-qualification condition.[298] The applicant may not perform safety-sensitive functions until the employer receives a negative drug test result.[299]

The employer must also inquire into the existence of positive alcohol or drug test results and refusals to be tested from the applicant's previous employment.[300] The employer is required to obtain from the applicant's previous employers all information concerning positive alcohol and drug tests and refusals to be tested within the last two years.[301] The release of this information is subject to the applicant's consent.[302] However, if the employer does not receive the information within 14 days of employment, the employee driver must cease performing safety-sensitive functions until the information is received.[303] Thus, the driver's ability to refuse consent and retain employment is limited. Previous employers must release information regarding a former driver's positive test results when a subsequent employer requests the information and presents the former driver's signed written consent.[304]

b. Random Testing

Employers must also establish procedures for random alcohol and drug testing.[305] The employer must conduct random alcohol tests at

298. *See* 49 U.S.C. app. § 2717(a) (directing the issuance of regulations requiring motor carriers to conduct pre-employment tests, including tests for alcohol or drug use); 49 C.F.R. § 382.301 (mandating that a driver undergo drug and alcohol tests prior to performing safety-sensitive functions).

299. 49 C.F.R. § 382.301(a). A pre-employment alcohol test is not required. On May 15, 1995, the USDOT suspended the requirement. *See* 60 Fed. Reg. 24,765 (1995). The FHWA Rule initially required pre-employment alcohol and drug testing. 49 C.F.R. § 382.301. Pre-employment alcohol testing was hotly contested by the transportation industry who viewed the requirement as wasteful and having little impact on transportation safety. *See* Comments, 59 Fed. Reg. 7340, 7342 (1994) (restating the transportation industry's expressions of concern over the pre-employment alcohol testing requirement). The FHWA agreed, but felt that the requirement was mandated by OTETA, and the Agency therefore lacked the authority to disregard it. *See* Comments, 59 Fed. Reg. 7484, 7487 (1994) (agreeing that pre-employment alcohol testing will have a minimal affect on transportation safety, but further stating that doing away with the requirement required re-writing the legislation, which was beyond the Agency's authority). The controversy was resolved in American Trucking Assns., Inc. v. Federal Highway Admin., 51 F.3d 405 (4th Cir. 1995), when the United States Court of Appeals ruled that the FHWA had discretion to abandon the pre-employment alcohol testing requirement. *Id.* at 414.

300. 49 C.F.R. § 382.413(b).

301. *Id.*

302. *Id.*

303. *Id.* § 382.413(c).

304. *Id.* § 382.405(f).

305. *Id.* § 382.305.

an annual rate of 25 percent of the average number of CDL driver positions,[306] and random drug tests at an annual rate of 50 percent of the average number of CDL positions.[307] The employer must reasonably disperse the tests throughout the year.[308]

The FHWA Rule requires that the employer use a "scientifically valid" selection process, but allows the employer to establish its own selection methodology so long as each driver has an equal opportunity of selection each time.[309] An employer's selection process may be as crude as putting all names in a "hat" or as sophisticated as computer software that randomly chooses assigned numbers. Another option available to an employer is to join a consortium.[310] A consortium is an association of employers whose alcohol and drug testing programs are administered by a common third party.[311] Drivers employed by consortium members may be placed into one testing pool. The consortium then randomly selects drivers for testing. So long as the consortium tests at the required rates, each consortium member is in compliance even though the selection rates for an individual employer may fall below the required rates.[312]

The selection system used must be truly random. Each driver must have an equal chance of selection.[313] Drivers picked at one selection return to the pool for the next selection.[314] Therefore it is possible for some drivers to be selected many times and other drivers not at all.

Employees selected for random alcohol or drug tests must proceed immediately to the collection facility after being notified of their selection.[315] Random alcohol tests must be conducted just before, during, or just after performing safety-sensitive functions.[316] For example, if an employee selected for a random alcohol test was performing only clerical duties that day, the employer should not test the employee then. The employer would keep the employee's selection

306. *Id.* § 382.305(a)(1).

307. *Id.* § 382.305(a)(2).

308. *Id.* § 382.305(g). For example, an employer with an average of 100 driver positions must conduct 25 random alcohol tests and 50 random drug tests spread out over the course of the year. The employer may not, however, conduct all tests during the same month, or half the tests one month, and the other half in a subsequent month.

309. *Id.* § 382.305(e).

310. *See id.* § 382.305(f) (explaining calculation of the testing rates if the employer is a member of a consortium).

311. *Id.* § 382.107.

312. *Id.* § 382.305(f).

313. *Id.* § 382.305(e).

314. *Id.*

315. *Id.* § 382.305(h).

316. *Id.* § 382.305(i).

confidential and test the employee the next time he or she performs safety-sensitive functions. Employees selected for random drug tests, however, may be tested at any time.[317]

c. Post Accident Testing

Employees involved in certain commercial motor vehicle accidents must submit to alcohol and drug testing.[318] The FHWA Rule requires testing of all surviving employees involved in fatal accidents.[319] Drivers must also be tested if issued a traffic citation for a moving violation arising from an accident in which there are either personal injuries treated immediately and away from the scene of the accident, or one or more of the vehicles are towed from the scene due to disabling damage.[320] Employers have a duty to provide employees with sufficient training, information, and procedures so that employees will comply with the requirements.[321] Employees have a duty to remain available for testing.[322] The employer may consider failure to remain available a refusal to be tested.[323] An employee who is deemed to have refused to submit to any of the tests required under OTETA suffers the same ramifications as if the employee tested positive.[324] These ramifications are explained below.[325]

Employees involved in accidents meeting the above criteria must submit to an alcohol test as soon as practical,[326] but no later than two

317. *Id.* § 382.305(h).

318. *Id.* § 382.303(a)-(e).

319. *Id.* § 382.303(a)(1).

320. *Id.* § 382.303(a)(2). *See id.* § 382.107 (referring the reader to 49 C.F.R. § 390.5 for further definitions used in the subchapter). Section 390.5 defines the term "accident" as:

> an occurrence involving a commercial motor vehicle operating on a public road which results in
>
> i) A fatality;
>
> ii) Bodily injury to a person who, as a result of the injury, immediately receives medical treatment away from the scene of the accident; or
>
> iii) One or more motor vehicles incurring disabling damage as a result of the accident, requiring the vehicle to be transported away from the scene by a tow truck or other vehicle.

Id. § 390.5.

321. *Id.* § 382.303(d).

322. *Id.* § 382.303(c).

323. *Id.*

324. *See id.* § 382.211 (stating that no driver shall refuse any post-accident, random, reasonable suspicion, or follow-up alcohol or drug test); *see also id.* §§ 382.501 & 382.503 (setting forth the ramifications for employees who violate the FHWA Rule, including employees who refuse to be tested).

325. *See infra* text accompanying notes 351-65 (discussing the consequences for employees who fail an OTETA-required test).

326. 49 C.F.R. § 382.303(a).

hours after the accident.[327] If an alcohol test is not performed within that time, but is completed within eight hours of the accident, the employer must document the reason for the delay.[328] If the alcohol test is not performed within eight hours, the employer must cease attempts to test the driver and document why the test was not performed.[329] Drivers may not consume alcohol until the test is conducted, or for eight hours, whichever occurs first.[330]

Following an accident meeting the above criteria, employees must also submit to a drug test.[331] The test must be conducted as soon as practical,[332] but no later than 32 hours after the accident.[333] If the drug test is not performed within 32 hours, the employer must cease attempts to test the driver and document why the test was not performed.[334]

If a law enforcement agency orders an alcohol or drug test in conjunction with its accident investigation, and the employer obtains the results, the employer need not conduct that test.[335] For example, if the police have probable cause to believe the driver is under the influence of alcohol and order a test, the employer does not have to conduct its own alcohol test, provided the employer obtains the results. However, unless the law enforcement agency conducts a drug test as well, the employer still must conduct that test.[336]

d. Reasonable Suspicion Testing

An employer must require that an employee submit to an alcohol or drug test when reasonable suspicion exists to believe the employee is under the influence of alcohol or drugs.[337] Reasonable suspicion must be based on specific and contemporaneous observations concerning the appearance, behavior, speech, or body odors of the employee.[338] A supervisor trained in detecting indicators of probable alcohol and drug misuse must make the observations.[339] Supervisors must receive,

327. *Id.* § 382.303(b)(1).
328. *Id.*
329. *Id.*
330. *Id.* § 382.209.
331. *Id.* § 382.303(a).
332. *Id.*
333. *Id.* § 382.303(b)(2).
334. *Id.*
335. *Id.* § 382.303(e).
336. *Id.*
337. *Id.* § 382.307(a-f).
338. *Id.* § 382.307(a) (alcohol) & (b) (drugs).
339. *Id.* § 382.307(c).

and document, at least sixty minutes of training on alcohol abuse and sixty minutes of training on drug abuse.[340]

Observations generating reasonable suspicion of alcohol misuse must occur just before, during, or just after an employee performs a safety-sensitive function.[341] Once observed, the driver may not perform safety-sensitive functions until the driver submits to an alcohol test and the driver's alcohol concentration is below 0.02.[342] The employer should administer the test within two hours of the observation.[343] If not, the employer must document the reason for the delay.[344] If the test is not conducted within eight hours, the employer must cease attempts to test the employee and document why the test was not conducted.[345] Regardless of whether the test is conducted, the employee may not perform safety-sensitive functions for 24 hours after reasonable suspicion exists.[346]

Conducting a drug test based on reasonable suspicion does not require that the behavior giving rise to the suspicion occur in association with performing a safety-sensitive function.[347] Because proscribed drug use is unlawful whenever it occurs, it results in sustained impact on performance, the observation may occur while the driver is off-duty or performing activities not considered safety-sensitive.[348] If the employer has reasonable suspicion that the driver has violated FWHA rules proscribing drug use, the employer must require the driver to submit to a drug test.[349] The supervisor making the observation must document what indicators gave rise to the suspicion.[350]

4. *Ramifications of Failing a FHWA-Required Alcohol or Drug Test*

If an employee tests positive for alcohol or drugs, the employee may not perform safety-sensitive functions before satisfying certain requirements. One requirement is that the employee must be retested and receive a negative result.[351] In addition, employers must refer

340. *Id.* § 382.603.
341. *Id.* § 382.307(d).
342. *Id.* § 382.307(e)(2)(i).
343. *Id.* § 382.307(e)(1).
344. *Id.*
345. *Id.*
346. *Id.* § 382.307(e)(2)(ii).
347. *See id.* § 382.307 (specifying only that controlled substance tests be based on specific, contemporaneous and articulable observations).
348. *Id.*
349. *Id.* § 382.307(b).
350. *Id.* § 382.307(c).
351. *Id.* § 382.301(a).

employed CDL drivers with positive tests to a Substance Abuse Professional (SAP).[352] A SAP is a licensed physician, psychologist, social worker, or addiction counselor with knowledge of and clinical experience in the diagnosis and treatment of alcohol and drug abuse disorders.[353] If the employer wishes to retain the driver, or is required by other law or agreement to retain the driver, an SAP must evaluate the driver.[354] The SAP determines what assistance, if any, the driver needs in resolving problems associated with alcohol and drugs.[355] If the SAP determines that the driver does not need assistance, the driver may return to performing safety-sensitive functions after either an alcohol test indicating concentration of less than 0.02, or a negative drug test, depending upon what test the driver failed.[356]

If the SAP finds that the employee needs additional assistance, the SAP prescribes a course of rehabilitation.[357] The employee may not return to performing safety-sensitive functions until the SAP determines that the employee has properly completed the rehabilitation program prescribed.[358] The employee must also submit to a return-to-work test.[359] Additionally, the employee must submit to unannounced follow-up alcohol or drug tests after the driver's return to duty.[360] The SAP determines the number and frequency of tests, but there may not be less than six tests in the first twelve months.[361] The SAP may terminate the follow-up tests after the employer conducts at least six tests.[362] However, follow-up testing may not continue for more than 60 months after the driver's return.[363]

The FHWA Rule does not place a duty on employers to pay for substance abuse evaluation and treatment.[364] It states only that the employer should assign the costs in accordance with employer/employee agreements and employer policies.[365] Many employers will simply make it their policy to give the required referral and terminate the driver. The FHWA Rule does not prohibit this. However, other

352. *Id.* § 382.605(a).
353. *Id.* § 382.107.
354. *Id.* § 382.605(b).
355. *Id.*
356. *Id.* § 382.605(c)(1).
357. *Id.* § 382.605(b).
358. *Id.* § 382.605(c)(2)(i).
359. *Id.* § 382.605(c)(1).
360. *Id.* § 382.605(c)(2)(ii).
361. *Id.*
362. *Id.*
363. *Id.*
364. *Id.* § 382.605(d).
365. *Id.*

laws, as well as collective bargaining and other employer/employee agreements may limit the employer's options.

5. *Concluding Remarks: OTETA*

OTETA-mandated alcohol and drug testing is probably here to stay. The constitutionality of such requirements is well established and the requirements appear invulnerable to attack on other fronts.[366] Employers of transportation workers performing safety-sensitive functions must ensure that their employees submit to and pass pre-employment, random, post-accident and reasonable suspicion alcohol and drug tests.[367] Further, employers must obtain from an applicant's previous employers the results of positive alcohol and drug tests, and release to a former employee's new employer these results when presented with the driver's written consent.[368] Employees who fail an alcohol or drug test may not perform safety-sensitive functions until they are evaluated by an SAP, successfully complete any prescribed rehabilitation regimen and pass a return-to-work alcohol and drug test.[369]

Implementing and administering these requirements is a considerable burden and expense to transportation employers.[370] Regardless, the transportation industry generally supports the requirements.[371] Most transportation employers feel that alcohol and drug testing contributes significantly to transportation safety, and welcome federal support for employment practices they would implement regardless of a regulatory mandate.[372] However, the ADA interferes with OTETA

366. *See supra* note 261 (addressing the constitutionality of USDOT mandated alcohol and drug testing).

367. *See supra* text accompanying notes 298-350 (explaining pre-employment, random, post-accident and reasonable suspicion alcohol and drug tests required by OTETA for workers performing safety-sensitive functions).

368. *See supra* text accompanying notes 300-04 (explaining OTETA's requirement for pre-employment inquiries).

369. *See supra* text accompanying notes 351-65 (discussing OTETA's requirements for returning to work after failing an OTETA-required test).

370. *See* Michael Richman, *American Trucking Association Fights DOT Alcohol Test Requirements in Court*, TRAFFIC WORLD, J. OF COM. 50 (Aug. 1, 1994) (quoting Secretary of Transportation Federico Pena as stating that, when the USDOT rules were first established, alcohol and drug testing would cost the industry approximately 200 million dollars annually).

371. *Id.* (quoting American Trucking Association (ATA) General Counsel Linda Mounts as stating that the ATA has vigorously supported past USDOT drug testing initiatives, but views the pre-employment alcohol test requirement as an unnecessary expense). *See also* S. REP. NO. 54, *supra* note 12, at 5 (citing a Motor Carrier Safety Survey of trucking industry employees indicating that 68 percent supported random drug testing and 90 percent supported post-accident testing).

372. *See* S. REP. NO. 54, *supra* note 12, at 5 (stating that during a strike, Greyhound determined that 30 percent of its applicants failed a pre-employment drug test).

and the desire for an alcohol and drug-free transportation system. Presently, this interaction unnecessarily requires transportation employers to walk a fine regulatory tightrope. Therefore, this Comment next addresses the interaction of the ADA with OTETA and identifies the pitfalls facing employers required to comply with both.

II. ANALYSIS - THE CONFLICT AND INTERACTION OF THE ADA WITH OTETA

This section discusses how the ADA and OTETA interact and the perils facing employers required to comply with both. Section A discusses OTETA's requirement that new employers obtain, and previous employers release, the results of an applicant's alcohol and drug tests administered within the last two years, and how it conflicts with the ADA's confidentiality requirements. To resolve this conflict, Section B proposes that the EEOC find that alcohol tests administered to detect only the on-duty use of alcohol are not medical examinations and therefore not subject to the ADA's confidentiality requirements. Since the EEOC has already held that drug test results reflecting only the use of illegal drugs do not constitute medical records subject to the ADA's confidentiality requirements, the EEOC should be consistent and require parallel treatment of alcohol and drug test results.

Section C explores the question whether, given the ADA's protection of alcoholics and drug addicts, a transportation employer could institute a blanket policy excluding from further employment consideration in safety-sensitive positions all applicants whose OTETA-required pre-employment background check revealed a failed alcohol or drug test. The section first describes how one could mount a challenge to this hiring criteria, and concludes that the disparate impact theory of disability discrimination makes the criteria vulnerable to attack.

This section next probes the strengths and the weaknesses of two defenses. The first defense is that the blanket policy does not discriminate under the ADA because these applicants pose a direct threat to the safety of others.[373] The second defense argues that the policy is justified by the business necessity of reducing exposure to tort liability by keeping drivers with records of alcohol or drug abuse off the roads.[374] The analysis concludes that a blanket exclusion of these applicants violates the ADA. Further, both defenses lead to a common

373. *See infra* text accompanying notes 426-78 (exploring whether the direct threat defense justifies blanket exclusions of all applicants who previously failed an OTETA test).

374. *See infra* text accompanying notes 479-511 (exploring whether the business necessity defense justifies blanket exclusion of applicants who previously failed an OTETA test).

point, with the employer having to show that the threat of harm is substantially increased.[375]

Section D argues that Congress must modify the direct threat standard because applying the standard to employers of workers engaged in safety-sensitive functions is contrary to sound public policy. The direct threat standard requires that employers show that employing the applicant would substantially increase a significant risk to safety. Congress could not have intended to require users of the nation's transportation system to incur an increased threat to safety lying somewhere between "slightly increased" and "substantially increased" when enacting the ADA. Therefore, Section D proposes a modified direct threat standard. The modified direct threat standard would allow employers to deny employment to persons who posed only an increased risk to safety, if the risk was to others, and the essential job functions required performance of safety-sensitive functions while in contact with others. This standard would better serve the nation's goal of a crash-free transportation system while causing only a minuscule loss of protection for the disabled.

A. The Requirement that Employers Release Alcohol Test Results upon Request from Subsequent Employers Violates the ADA'S Confidentiality Provisions

The ADA strictly limits the circumstances under which an employer may release confidential medical information.[376] EEOC enforcement guidelines state that employers may only release information to third parties as expressly provided by law.[377] The employer's obligation to maintain the confidentiality of medical records does not begin with or terminate with the employment relationship.[378] Therefore, employers must keep medical information obtained during pre-employment processing confidential even though the employer did not hire the individual.[379] Likewise, all medical information must remain confidential after the employment relationship terminates.[380]

OTETA requires that employers obtain the results of an applicant's positive alcohol and drug tests conducted within the last two years

375. *See infra* part II.C.3 (finding that both defenses require the employer to demonstrate a high probability of harm).

376. *See supra* text accompanying notes 230-55 (explaining the ADA's requirements for release of medical records).

377. EEOC ENFORCEMENT GUIDANCE, *supra* note 235, at 45.

378. *Id.* at 46.

379. *Id.*

380. *Id.*

from the applicant's previous employers.[381] Once the current employer presents the previous employer with the employee's written consent authorizing release of the alcohol and drug tests results, OTETA requires the previous employer to release the information to the requesting employer.[382] If the current employer does not obtain the information within 14 days of employment, the employee must cease engaging in safety-sensitive functions until the information is obtained.[383]

Under the ADA, a drug test strictly limited to determining only the use of illegal drugs does not constitute a medical examination.[384] Therefore, the results of these drug tests are not medical records subject to the ADA's confidentiality requirements.[385] However, if any portion of the drug testing procedures reveal the use of prescription or other legal drugs, then the confidentiality requirements apply to the test results.[386] As long as employers conduct their drug testing so that the tests are not medical examinations, then employers may release drug test results to subsequent employers without violating the ADA's confidentiality provisions.[387]

However, OTETA-mandated alcohol tests qualify as medical examinations, since they require the invasive procedure of drawing breath.[388] Therefore, alcohol test results must remain a confidential medical record. Accordingly, they may only be released to third parties as expressly provided by the ADA.[389] The ADA does not expressly provide for the release of confidential medical records to other employers, with or without the employee's consent. Therefore, the OTETA's rule requiring employers to release alcohol test results to a former employee's new employer conflicts with the ADA's confidentiality provisions.

This conflict is addressed in the USDOT's rulemaking.[390] The USDOT agrees that if alcohol testing qualifies as a medical examination under the ADA, then employers must maintain alcohol test results as

381. 49 C.F.R. § 382.413(b).

382. *Id.* § 382.405(f).

383. *Id.* § 382.413(c).

384. 42 U.S.C. § 12,114(d)(1).

385. *See* 29 C.F.R. app. § 1630.16(c) (stating that only information regarding use of otherwise legal drugs which may indicate a disability must be kept as confidential medical records).

386. *Id.*

387. *Id.*

388. EEOC ENFORCEMENT GUIDANCE, *supra* note 235, at 28-29.

389. *See supra* note 252 (listing exceptions to the required confidentiality of medical records).

390. Limitation on Alcohol Use by Transportation Workers, Common Preamble, 59 Fed. Reg. 7302, 7313-14 (1994).

confidential medical records.[391] However, the USDOT feels that since their regulation requires release of the records only after the employee gives written consent, it is consistent with the medical community's accepted standards regarding the release of confidential medical records and with the ADA.[392] The USDOT argues that the intent of any confidentiality provision is to protect the employee's right to privacy.[393] The employee can waive this right according to the USDOT.[394] The USDOT further states that "[i]t would clearly be anomalous to view a medical records confidentiality provision as prohibiting an employee from voluntarily agreeing that a previous employer . . . could send a medical record to a current employer . . . ."[395] The USDOT does not discuss the coercive nature of how the current employer obtains the employee's consent, in that continued employment is conditioned upon providing consent.[396] It may be somewhat presumptuous of the USDOT to equate consistency in accepted medical standards governing the release of confidential medical records with compliance with the ADA's standards governing the release of confidential medical records. Nonetheless, this places employers sensitive to ADA compliance in a no-win situation, with the choice of complying with the strict tenets of the ADA and violating OTETA, or complying with OTETA and violating the ADA.

B. Proposed Solution: The EEOC Should Reverse its Finding that Tests to Determine the On-Duty Use of Alcohol Are Medical Examinations

The conflict between the ADA's confidentiality of medical records provisions and OTETA's requirement that employers release alcohol and drug test results to subsequent employers is best reconciled through an EEOC determination that tests to determine the on-duty use of alcohol do not constitute medical examinations. The EEOC has already held that drug tests to determine the use of illegal drugs are not medical examinations.[397] The rationale behind this decision suggests that even though drug tests may identify a possible disability (i.e. drug addiction) the employer may base employment decisions on the current use of illegal drugs, and may prohibit their use. Under the

391. *Id.* at 7314.
392. *Id.*
393. *Id.*
394. *Id.*
395. *Id.*
396. *Id.*
397. *See supra* text accompanying notes 242-46 (discussing the EEOC's conclusion that tests used to determine drug use are not medical examinations for ADA purposes).

ADA, these drug tests are not medical examinations even though they require much more intrusive procedures and greater medical expertise to conduct and interpret than OTETA's breath-based alcohol test.[398]

The same rationale applies with equal if not greater force to tests used to determine the on-duty use of alcohol. As with the current use of illegal drugs, the employer may base employment decisions on and prohibit the on-duty use of alcohol.[399] Though OTETA alcohol tests meet the requirements set by the EEOC to qualify as medical examinations, and they provide results which could indicate a possible disability (i.e. alcoholism) the same holds true for drug tests. Further, OTETA breath alcohol tests are far less intrusive, requiring only the rendering of a breath sample as opposed to blood or urine, and require far less medical expertise to conduct the test and interpret the results. Therefore, it makes little sense to hold that tests for illegal drug use are not medical examinations but tests for the on-duty use of alcohol are.

If breath alcohol tests used to determine the on-duty use of alcohol are not medical examinations, then the conflict between OTETA's requirement for the release of alcohol test results and the ADA's confidentiality requirements disappears.

C. *Interaction: May Employers Refuse to Hire all Applicants with Records of Failing OTETA-Required Alcohol or Drug Tests without Violating the ADA?*

In the interest of safety and reducing their exposure to tort liability, many transportation employers may want hiring policies that eliminate all applicants with histories of failing OTETA-required alcohol or drug tests. This particularly holds true since OTETA requires employers to obtain this information,[400] and employers may be charged with knowledge of the applicant's propensity for alcohol or drug misuse in any potential litigation.[401] While access to an applicant's previous alcohol and drug test results is a new source of hiring data for transportation employers, the great majority of employers have always reviewed an applicant's driving record for drunk and drugged

398. *See supra* text accompanying notes 245-46 (discussing the EEOC's conclusion that tests used to determine alcohol use are medical examinations for ADA purposes).

399. 42 U.S.C. § 12,114(c).

400. 49 C.F.R. § 382.413(b).

401. *See infra* text accompanying notes 479-92 (discussing negligent hiring liability).

driving convictions.[402] Congress specifically recognized this by stating in the House Conference Report that

> licensing of motor carrier drivers and railroad engineers, and certification of airplane pilots involves consideration of drunk and drug-related driving convictions, as recorded by individual States and made available to employers through the National Drivers Register at the Department of Transportation. In addition, records of other drug or alcohol related violations of State or Federal law may be considered as indicators of "fitness for duty" for safety-sensitive transportation positions.[403]

The phrase "records of other drug or alcohol related violations of State or Federal law" indicates an intent to allow employers to consider records of failing OTETA-required alcohol or drug tests when making hiring decisions. If this is Congress's intent, it is not readily apparent in the ADA or its implementing regulations. Admittedly, this statement falls short of evincing an intent to sanction employer policies providing for the blanket exclusion of all applicants with records of failing OTETA-required tests. However, Congress clearly did want transportation employers to have the opportunity to consider past records of drunk and drugged driving convictions, a common practice throughout the transportation industry. It is unclear whether Congress intended to allow transportation employers to continue the common practice of categorically excluding all applicants with drunk or drugged driving convictions.

If an employer could categorically exclude all applicants with drunk or drugged driving convictions, why couldn't the employer exclude all applicants with records of failing OTETA-required alcohol or drug tests? The only distinction lies in that the former is a conviction, while the latter is simply the result of a test conducted by the employer. This distinction should carry little weight though, since the procedural safeguards instituted to ensure testing reliability and protect the employee's rights have withstood judicial scrutiny.[404] Unfortunately, the ADA and the EEOC implementing regulations bring the legality of these common sense hiring procedures into question.

---

402. 49 C.F.R. §§ 391.23 & 391.25. Interstate trucking operations subject to the FHWA's safety regulations are required to obtain a copy of the driver's state motor vehicle record and conduct an annual review of the driver's driving record. *Id.*

403. H.R REP. No. 485, *supra* note 2, at 78, *reprinted in* 1990 U.S.C.C.A.N. at 361.

404. *See supra* note 261 (addressing the constitutionality of USDOT-mandated alcohol and drug testing).

1. *Disparate Impact Discrimination*

An employer's policy of refusing employment to all applicants with records of failing OTETA-required alcohol or drug tests is a neutral hiring criteria uniformly applied. Therefore, an applicant must challenge this policy under the disparate impact theory of employment discrimination.[405] Nonetheless, the threshold question in any ADA claim is whether the applicant suffers from a disability.[406] A person is disabled only if one possesses a physical or mental impairment that substantially limits one or more major life activities, has a record of such impairment, or is regarded as having such an impairment.[407]

An applicant who failed an OTETA-required alcohol or drug test with a previous employer arguably has a record of an impairment, but for this to qualify as disabled under the ADA the impairment must also have substantially limited the individual in one or more major life activities.[408] Mere casual drug use or the improvident misuse of alcohol does not substantially limit one or more major life activities, and therefore does not amount to a disability.[409] If failing the OTETA-required alcohol or drug test resulted from factors short of addiction, such as poor judgment in deciding to have a few drinks over lunch, the ADA does not protect the applicant. Further, ADA protection does not extend to individuals currently using illegal drugs.[410]

In the context of OTETA, evidence of whether the positive alcohol or drug test resulted from behavior linked to a substantially limiting disability would likely come from the SAP's evaluation. The SAP determines the extent of the individual's alcohol or drug problems and recommends a course of treatment.[411] The SAP evaluation must occur before an applicant who previously failed an OTETA-required alcohol or drug test can be otherwise qualified.[412] The burden of proof

405. *See supra* text accompanying notes 204-14 (discussing disparate impact discrimination).

406. *See* Bolton v. Scrivner, Inc., 36 F.3d 939, 942 (10th Cir. 1994) (discussing whether the plaintiff in this ADA claim suffered from a disability after a work-related injury occurred which resulted in his employer refusing to rehire him).

407. *See supra* text accompanying notes 37-65 (defining "disability" under the ADA).

408. *See* Flasza v. TNT Holland Motor Express, Inc., 159 F.R.D. 672, 677 (N.D. Ill. 1994) (finding that the plaintiff was not disabled because he did not have a physical or mental impairment that substantially limited one or more major life activities, had no record of such impairment, and was not regarded as having such impairment).

409. 29 C.F.R. app. § 1630.3.

410. 42 U.S.C. § 12,114(a).

411. 49 C.F.R. § 382.605(b).

412. *Id.*

is on the applicants to come forward with the SAP evaluation indicating that alcoholism or drug addiction disabled them.[413]

Even if applicants suffer from a disability within the meaning of the ADA, employers may still reject applicants if they are not otherwise qualified.[414] First, the applicant must meet the position's appropriate standards and qualifications.[415] The applicant must satisfy all USDOT or appropriate state regulations pertaining to the qualifications of employees performing safety-sensitive functions. The ADA expressly permits employers regulated by the USDOT to require that employees performing safety-sensitive functions comply with the USDOT's regulations.[416] If the employer is subject to federal or state safety regulations, applicants need to possess a valid CDL license[417] and meet the FHWA's or their state's physical and driver qualification requirements.[418] Additionally, applicants who previously failed OTETA-required alcohol or drug tests must undergo an evaluation by the SAP, successfully complete all rehabilitation prescribed, and pass a return-to-work test.[419] Finally, the employer may also establish neutral, job-related requirements for the applicants, such as previous experience and a satisfactory driving record.[420]

The second step of the "otherwise qualified" analysis is to determine whether the applicant can, either with or without reasonable accommodation, perform the essential functions of the job.[421] Provided that the applicant meets all the criteria in step one and does not currently suffer from any other disability, a rehabilitated alcoholic or

413. *See supra* text accompanying notes 66-91 (explaining that the burden of proof is on the employee to prove they are otherwise qualified).

414. *See supra* text accompanying notes 66-91 (discussing the "otherwise qualified" standard).

415. *See supra* text accompanying note 68 (discussing satisfaction of the job position's objective criteria).

416. *See* 42 U.S.C. § 12,114(c)(5)(C) (stating that an employer may require that employees comply with USDOT's regulations for safety-sensitive functions if the employer is subject to the USDOT's regulations); 29 C.F.R. § 1630.16(b)(6) (providing that employers subject to regulations of the Department of Defense, Department of Transportation and Nuclear Regulatory Commission may require employees in safety-sensitive positions to comply with those regulations); *see also* S. REP. NO. 116, *supra* note 3, at 27 (stating that disabled employees covered by USDOT regulations must satisfy the physical qualification standards to be otherwise qualified).

417. 49 C.F.R. § 383.

418. *Id.* § 391.41(b)(1) - (13).

419. *See supra* text accompanying notes 351-65 (explaining the requirements needing satisfaction before an employee who failed an OTETA test may return to performing safety-sensitive functions).

420. *See supra* text accompanying note 68 (discussing satisfaction of the job position's objective criteria).

421. *See supra* text accompanying notes 70-91 (discussing factors to consider when determining whether a job function is essential).

drug addict would not normally require a reasonable accommodation to successfully perform the essential functions of the job.[422]

Therefore, applicants who previously failed OTETA-required alcohol or drug tests find protection under the ADA only if alcoholism or drug addiction disabled them, they are otherwise qualified by reason of meeting all licensing requirements, FHWA physical requirements, the employer's neutral and job-related hiring criteria, have successfully completed rehabilitation, and do not currently use drugs unlawfully.[423] The ADA protects otherwise qualified individuals with disabilities who without reasonable accommodation can perform the essential functions of the job.[424] They could therefore challenge an employer's policy of excluding from employment consideration all applicants with a record of failing an OTETA-required alcohol or drug test as resulting in a disparate impact in violation of the ADA. Such a policy involves a neutral hiring criteria with a disparate impact since it operates to deny employment to otherwise qualified individuals with disabilities, i.e. alcoholics or drug addicts who have satisfied OTETA's scheme for returning to performing safety-sensitive functions after failing a required alcohol or drug test. The employer can only defend against such a charge by showing either that the applicants are not otherwise qualified because they posed a direct threat to the safety of themselves or others, or that the neutral hiring criteria is job-related and required by business necessity.[425]

2. *Employer Defenses to a Charge of Disparate Impact Discrimination*

a. Direct Threat to the Safety of Self or Others

Once an applicant establishes a prima facie case of discrimination, the employer must defend the neutral hiring criteria as being rooted in job-relatedness and business necessity.[426] Safety concerns are frequently invoked in such endeavors.[427] However, invoking safety con-

422. *See supra* text accompanying notes 351-65 (explaining the requirements for an applicant who previously failed an OTETA test to be otherwise qualified).

423. If the "currently engaging in" standard applies to alcohol use as well, the driver cannot be currently engaging in the misuse of alcohol. *See supra*, notes 171-79 and accompanying text (discussing the confusion regarding whether the "currently engaging in" standard applied to alcoholics).

424. *See supra* text accompanying notes 66-91 (defining otherwise qualified individuals with disabilities).

425. 29 C.F.R. § 1630.15(b)(1)-(b)(2).

426. *Id.*

427. *See, e.g.*, Chandler v. City of Dallas, 2 F.3d 1385, 1394 (5th Cir. 1993) (naming safety concerns as the basis for a policy preventing insulin-dependent diabetics and employees with impaired vision from working as primary drivers); Sarsycki v. United Parcel Serv., 862 F. Supp.

cerns under the ADA requires satisfaction of the "direct threat" standard.[428] The standard is met if an individualized assessment determines that there exists a significant risk of substantial harm.[429] A "significant risk" means a high probability of harm to an individual or others.[430] The risk must be more than slightly increased, and the fear of harm cannot be merely speculative or remote.[431] Courts have differed, however, regarding whether individualized assessments are required and what constitutes a significant risk of substantial harm.[432]

The USDOT safety regulations have been influential in determining whether individualized assessments are required.[433] Recall that in *Chandler v. City of Dallas*,[434] the Fifth Circuit held that since USDOT safety regulations prohibited insulin-dependent diabetics from employment as interstate truck drivers, an insulin-dependent driver was a direct threat as a matter of law. The insulin-dependent driver was a direct threat even though the USDOT safety regulations did not specifically apply to him.[435] Also, in *Davis v. Meese*,[436] a federal district court upheld the FBI's blanket exclusion of insulin-dependent diabetics from special agent positions.[437] The court stated that blanket exclusions were permitted if they substantially furthered legitimate safety and job performance concerns.[438]

However, recent decisions distinguish both *Chandler* and *Davis*. In *Sarsycki v. United Parcel Service*,[439] a federal district court held that, because the federal safety standards banning insulin-dependent drivers did not apply to Sarsycki, the ADA requires an individual assessment of the threat Sarsycki's insulin-dependent diabetes poses to the

---

336, 340 (W.D. Okla. 1994) (using safety concerns as the reason for a rule banning insulin-dependent diabetics from driver positions).

428. *See supra* text accompanying notes 92-131 (discussing the direct threat standard).

429. *See supra* text accompanying notes 92-131 (discussing the direct threat standard).

430. 29 C.F.R. § 1630.2(r).

431. *Id.*

432. *Compare Chandler*, 2 F.3d at 1395 (holding that insulin-dependent drivers were a direct threat as a matter of law) *with Sarsycki*, 862 F. Supp. at 340-41 (ruling that as long as FHWA regulations did not apply to the specific driver, an individual assessment of the threat posed was required before an insulin-dependent diabetic could be excluded from a driving position).

433. *See Chandler*, 2 F.3d at 1395 (eschewing an individual assessment in holding that insulin-dependent diabetics are not otherwise qualified to operate motor vehicles as a matter of law); *Sarsyki*, 862 F. Supp. at 340-41 (examining USDOT regulations to determine whether an individual assessment was necessary).

434. 2 F.3d 1385 (5th Cir. 1993).

435. *Id.* at 1395.

436. 692 F. Supp. 505 (E.D. Pa. 1988), *aff'd without opinion*, 865 F.2d 592 (3rd Cir. 1989).

437. *Id.* at 521.

438. *Id.* at 517-18.

439. 862 F. Supp. 336 (W.D. Okla. 1994).

health and safety of others.[440] Therefore, so long as the FHWA standards do not apply, the ADA prohibits blanket exclusion of all insulin-dependent diabetics.[441] The court questioned the validity of *Chandler*, observing that since *Chandler*, the FHWA relaxed its total ban on insulin-dependent drivers by instituting a waiver program.[442]

Also, in *Bombrys v. City of Toledo*,[443] a federal district court refused to uphold the Toledo Police Department's blanket exclusion of insulin-dependent diabetics from police officer positions.[444] The court distinguished *Davis* by observing that the case was decided before the enactment of the ADA, which subjects blanket exclusions to the strictest scrutiny.[445]

Despite the apparent conflict, an individual assessment is a required element of the direct threat defense. Applicants with records of alcoholism or drug addiction disabilities who have failed an OTETA-required alcohol or drug test in the past two years, but who have satisfied OTETA's requirements to return to performing safety-sensitive functions, are sufficiently distinguishable from the employees in *Chandler* and *Davis*. Unlike the employees in *Chandler*, FHWA regulations do not ban these applicants from driving. In fact, FHWA regulations issued under OTETA provide the mechanism for an applicant to qualify to drive again.[446] Thus, once these applicants satisfy certain requirements of FHWA, they are not banned from driving.

Though the same FHWA physical requirements which prohibit insulin-dependent diabetics from operating commercial motor vehicles also apply to alcoholics and drug addicts, the prohibition is limited to only those applicants with a current clinical diagnosis.[447] If the applicant satisfies FWHA's regulatory scheme to return to performing

---

440. *Id.* at 340-41.

441. *Id.*

442. *Id.* at 341.

443. 849 F. Supp. 1210 (N.D. Ohio 1993).

444. *Id.* at 1218-19.

445. *Id.* at 1219-20.

446. *See supra* notes 351-65 and accompanying text (explaining how employees who failed OTETA-required test may again be qualified to perform safety-sensitive functions under FHWA rules).

447. *See* 49 C.F.R. § 391.41(b)(12) (stating that current users of Schedule I drugs — amphetamines, narcotics, or other habit-forming drugs — are physically unqualified); *Id.* § 391.41(b)(13) (stating that individuals with a current clinical diagnosis of alcoholism are physically unqualified); *see also* MEDICAL REGULATORY CRITERIA FOR EVALUATION UNDER 49 C.F.R. PART 391.41(b)(1-13), UNITED STATES DEPARTMENT OF TRANSPORTATION 18 (defining current clinical diagnosis of alcoholism as encompassing "a current alcoholic illness or those instances where the individual's physical condition . . . has not fully stabilized").

safety-sensitive functions, there should not be a current clinical diagnosis of alcoholism or drug addiction.[448]

The *Davis* court held that a law enforcement employer's blanket exclusion hiring policy was acceptable if it substantially furthered legitimate safety concerns.[449] But in the transportation industry, USDOT safety regulations establish the hiring criteria.[450] As *Sarsycki* noted, an employer must conduct an individual assessment if it applies USDOT hiring criteria in circumstances not covered by the safety regulations.[451] Therefore, an applicant with a record of alcoholism or drug addiction who previously failed an OTETA-required alcohol or drug test, but who currently meets FHWA safety standards, cannot be excluded because of safety concerns without an individual assessment of whether the applicant poses a direct threat.

Finding that an individual assessment is necessary is only half the inquiry. An applicant may still be denied employment if the employer conducts an individual assessment and determines that a direct threat exists.[452] When conducting an individual assessment, an employer must consider: 1) the duration of the risk; 2) the nature and severity of the potential harm; 3) the likelihood that the potential harm will occur; and 4) the imminence of potential harm.[453] The first two factors are known to the employer making the determination, but the remaining factors involve speculation.

The duration of the risk is a function of the type of driving position applied for. If the position involves only local deliveries for a short period of the work day, the duration of risk is short. However, many driving positions require long distance, over-the-road hauling, with little or no direct supervision. For these positions, the duration of risk is great. The nature and severity of harm is also great. Truck drivers interact with the public for many hours each day while operating 80,000 pound tractor trailers.[454] Performing these functions while

448. *See supra* text accompanying notes 351-65 (explaining the return to duty and follow-up testing requirements that ensure that a driver does not have a current alcohol or drug illness).

449. *See* Davis v. Meese, 692 F. Supp. 505, 517-18 (E.D. Pa. 1988), *aff'd without opinion*, 865 F.2d 592 (3d Cir. 1989) (finding the FBI's blanket exclusion to be rationally based on medical opinion and health and safety concerns).

450. *See* 49 C.F.R. § 391.41(b)(1) - (13) (specifying requirements a person must satisfy to be physically qualified to drive a motor vehicle).

451. *See* Sarsycki v. United Parcel Serv., 862 F. Supp. 336, 340-41 (W.D. Okla. 1994) (stating that an individual assessment was required because the USDOT regulations did not apply to the vehicle to be driven by the applicant).

452. *See supra* notes 92-131 and accompanying text (discussing the direct threat standard).

453. 29 C.F.R § 1630.2(r).

454. FHWA hours of service regulations permit a truck driver to drive for 10 hours. 49 C.F.R. § 395.3(a). The driver may continue for another 10 hours only after 8 consecutive hours off-

under the influence of alcohol or drugs has the potential for grave disaster and multiple loss of life.[455]

The likelihood and imminence of the potential harm is largely unknown. Predicting which alcoholics and drug addicts will suffer relapses requires knowledge of each applicant's social and economic background, family life, the degree and type of stress in the applicant's life, the maturity and sophistication of the applicant's coping mechanisms, the type of treatment received, and a myriad of other factors the employer has no way of determining or evaluating.[456] The SAP's evaluation aids the employer, but that evaluation may have occurred as much as two years earlier. Moreover, even the best mental health practitioners cannot predict with certainty who will suffer relapses.[457]

Nonetheless, in *Schmidt v. Safeway, Inc.*,[458] a federal district court held that an alcoholic truck driver does not necessarily pose a direct threat.[459] Though the case arose prior to implementation of OTETA, the facts are illustrative of a scenario which will likely be played out with greater frequency under OTETA. The employee in *Schmidt* was fired after a urinalysis revealed he had reported to work under the influence of alcohol.[460] The test was ordered after supervisors suspected the employee of being drunk on duty.[461] The MRO believed that once the employee completed a rehabilitation program, the employee would be capable of safely driving a truck.[462] After the employee was terminated, he brought suit claiming that, as an alcoholic, he is entitled under the ADA to the reasonable accommodation of time off to complete a rehabilitation program.[463]

The plaintiff moved for summary judgment on the employer's defense that the employee posed a direct threat to the safety of others.[464] The court granted the motion, holding that the employer

---

duty. *Id.* This process may repeat itself until the driver has been on-duty 70 hours in the last 8 consecutive days. *Id.*

455. *See* S. REP. NO. 54, *supra* note 12, at 3-4 (citing a litany of trucking fatalities in which truck drivers were under the influence of alcohol or drug abuse).

456. *See* Peter E. Nathan, *Alcohol Dependancy Prevention and Early Intervention*, 103 PUB. HEALTH REP. 683, 684 (1988) (pointing out that treatment outcomes vary depending on a number of factors specific to the patient).

457. *Id.*

458. 864 F. Supp. 991 (D. Or. 1994).

459. *See id.* at 978 (stating that an alcoholic truck driver was not a direct threat where employer's MRO believed the driver would be able to safely drive a truck after completing a rehabilitation program).

460. *Id.* at 998.

461. *Id.*

462. *Id.* at 997.

463. *Id.* at 996.

464. *Id.* at 998-99.

failed to put forth any evidence establishing that the employee had a high probability of relapse.[465] On the contrary, the employer's MRO found that the employee would be able to safely operate a truck after rehabilitation.[466] Further, the employee would have to obtain the MRO's certification that he could safely operate the truck prior to returning to work.[467] Allowing the employee a leave of absence to undergo rehabilitation was a reasonable accommodation which sufficiently mitigated any direct threat.[468] The district court did find, however, that the ADA would not protect the employee if the firing was based on an evenly applied employer policy prohibiting on-duty intoxication.[469]

Schmidt is not useful to employers who, based on concerns for safety and reducing exposure to tort liability, prefer not to hire applicants who have previously failed OTETA-required alcohol or drug tests. However, it is too early to tell how far *Schmidt* will extend. Therefore, it is helpful to explore other theories which may support denial of employment to these applicants.

Employers seeking to deny employment to applicants with a record of alcoholism or drug addiction based solely on their record of failing an OTETA-required test within the last two years may find support in *Siefken v. Village of Arlington Heights*.[470] Siefken was dismissed after his employer conducted an inquiry into an incident where he had a hypoglycemic episode while driving his police car.[471] Siefken argued that his diabetes was under better control since the episode, and that the ADA required the employer to reasonably accommodate him by giving him another chance.[472] The court rejected this argument, holding that one serious safety incident sufficiently met the direct threat standard, and the employer was not required to endure the possibility of a second episode.[473] An inquiry conducted by the employer into the incident was sufficient to satisfy the individual assessment requirement.[474]

---

465. *Id.*

466. *Id.*

467. *Id.*

468. *Id.*

469. *Id.* at 1001.

470. No. 94-C-2404, 1994 U.S. Dist. LEXIS 13015 (N.D. Ill. Sept. 14, 1994), *aff'd*, 65 F.3d 664 (7th Cir. 1995).

471. *Id.* at *1-2.

472. *Id.* at *2.

473. *Id.* at *7.

474. *Id.* at *6-7.

Since OTETA-required alcohol and drug tests are narrowly tailored to test for the presence of alcohol or drugs only in conjunction with the employee's performance of safety-sensitive functions,[475] failing an OTETA-required test indicates the employee was performing or was about to perform safety-sensitive functions while under the influence of alcohol or drugs. This is a serious safety hazard just as a hypoglycemic episode is a serious safety incident to a diabetic. The inquiry required under OTETA, which reflects whether the applicant came to work drunk or under the influence of drugs in the last two years, should satisfy the individual assessment requirement. Like Siefken, alcoholics or drug addicts who fail an OTETA-required test must subsequently satisfy OTETA's scheme to return to performing safety-sensitive functions by establishing that their alcoholism or drug addiction is under better control. But as the district court in *Siefken* recognized, to predict when a diabetic will have a hypoglycemic episode is difficult, if not impossible, regardless of how well their condition is under control.[476]

It is equally as difficult to predict when an alcoholic or drug addict will suffer a relapse.[477] Surely, Congress did not intend to provide greater protection to alcoholics and drug addicts than it does to diabetics. If one hypoglycemic episode is sufficient to conclude that a diabetic poses a direct threat, courts should also find that the failure of one alcohol or drug test is sufficient to find that an alcoholic or drug addict poses a direct threat. Siefken was a current employee and not an applicant. But it is difficult to argue that Siefken's current employer should not be required to risk the possibility of Siefken suffering a second serious safety incident while any subsequent employer must assume that risk.

The ADA's stringent standards and employers' limited ability to predict alcohol or drug relapses create great difficulty for employers trying to meet the direct threat standard. Admittedly, truly rehabilitated alcoholics or drug addicts do not pose direct threats as long as their condition remains stable. However, the employer's and the mental health community's inability to identify the truly rehabilitated creates an increased risk.[478] Whether the public should incur a risk lying somewhere between "slightly increased" and "high probability

475. *See supra* text accompanying notes 259-61 (explaining that OTETA was implemented to require testing of employees who engaged in safety-sensitive functions).

476. *Siefken*, 1994 U.S. Dist. LEXIS at *6.

477. *See* Nathan, *supra* note 456, at 684 ("[A]s surveys of the treatment outcome literature . . . continue to show, even when long-term, alcohol dependant persons are treated, treatments are only partly effective.").

478. *Id.* at 684.

of substantial harm" is a public policy issue Congress may not have fully appreciated.

b. Avoidance of Negligent Hiring Liability as a Business Necessity

Aside from safety concerns, an employer may argue that a blanket policy excluding all applicants with records of failing OTETA-required alcohol or drug tests is required by the business necessity of mitigating tort liability exposure. Whether this is a viable business necessity defense under the ADA has not been resolved. However, courts entertaining this argument in other employment discrimination contexts have been unsympathetic.[479]

Fear of negligent hiring suits is an overriding concern in establishing hiring criteria, particularly in the transportation industry. A negligent hiring claim arises when an employer knew or should have known that an applicant was unfit for the position, the unfitness created a danger to third parties, and the employer hired the applicant anyway.[480] The negligent hiring claim is attractive for plaintiffs because it is not necessary, as in respondeat superior claims, to show that the employee was acting within the scope of employment.[481] For instance, in *Malorney v. B & L Motor Freight, Inc.*,[482] a trucking company's driver picked up and raped a hitchhiker.[483] The driver had previous criminal convictions for sexual crimes while employed with other trucking companies involving this same modus operandi.[484] The driver answered "None" to an employment application question regarding criminal convictions.[485] However, the employer failed to verify the information.[486] Ruling on the defendant's motion for summary judgment, the court

479. *See, e.g.*, International Union v. Johnson Controls, Inc., 499 U.S. 187, 210 (1991) (pointing out that if state tort law furthers discrimination in the workplace, then it impedes the will of Congress); Toledo v. Nobel-Sysco, Inc., 892 F.2d 1481, 1492 (10th Cir. 1989), *cert. denied*, 495 U.S. 948 (1990) (finding that increased tort liability exposure in hiring a truck driver who used peyote for religious purposes was too speculative and remote to justify a discriminatory employment practice).

480. Easley v. Apollo Detective Agency, 387 N.E.2d 1241, 1249 (Ill. App. Ct. 1979). *See also* 53 AM. JUR. 2D *Master & Servant* § 422 (1970) (stating that retaining in employ a servant who is, or should be, known to be incompetent, habitually negligent, or otherwise unfit, is negligence on the part of the master that will render him liable for injuries to third persons resulting from the acts of the incompetent).

481. *See* Malorney v. B & L Motor Freight, 496 N.E.2d 1086, 1088 (Ill. App. Ct. 1986), *cert. denied*, 113 Ill.2d 560 (1986) (stating employers have a duty to exercise reasonable diligence in hiring, and that failure to exercise such care may subject an employer to negligent hiring in Illinois).

482. 496 N.E.2d 1086 (Ill. App. Ct. 1986), *cert denied*, 113 Ill.2d 560 (1986).

483. *Id.* at 1087.

484. *Id.*

485. *Id.*

486. *Id.*

held that an issue of fact existed whether the trucking company breached its duty to hire competent drivers by failing to investigate the driver's non-driving background.[487]

Cases relating directly to the negligent hiring of alcoholics or drug addicts are scarce, but the framework established by the negligent hiring case law supports the notion that an employer who hired an applicant with knowledge of past alcohol or drug test failures would be liable to third parties in the event that the driver has an alcohol or drug related accident. For instance, in *Gonzales v. City Wide Insulation, Inc.*,[488] an off-duty employee in possession of a company truck stopped at a tavern and consumed a large quantity of alcoholic beverages.[489] The employee then drove the company truck from the tavern and shortly thereafter collided with another vehicle, killing two women.[490] The company moved for summary judgment on the negligent hiring and negligent entrustment counts, arguing the company did not know, nor should it have known, of the employee's alcoholism.[491] The court rejected the motion, holding that a jury could find that the employer's failure to inquire about the employee's alcoholism constituted negligence.[492] If failing to inquire about an employee's alcoholism or drug addiction constitutes negligent hiring, then conducting the inquiry and finding evidence of an alcohol or drug problem, but hiring the applicant anyway most certainly constitutes negligent hiring.

Existing case law is not very supportive of recognizing increased exposure to tort liability as a defense to a charge of employment discrimination. In *Toledo v. Nobel-Sysco, Inc.*,[493] the Ninth Circuit discussed whether increased exposure to tort liability was an undue hardship in the Title VII context.[494] The plaintiff was denied a position as a truck driver when he admitted that, as a member of the Native American Church, his religious practices involved the occasional consumption of peyote.[495] The plaintiff brought suit under Title VII of the Civil Rights Act challenging the defendant's policy of denying employment to current drug users as a discriminatory employment

487. *Id.* at 1089.

488. No. 88-C-1299, 1990 U.S. Dist. LEXIS 6360 (N.D. Ill. May 25, 1990).

489. *Id.* at *2.

490. *Id.*

491. *Id.* at *3.

492. *Id.* at *9.

493. 892 F.2d 1481 (10th Cir. 1989), *cert. denied*, 495 U.S. 948 (1990).

494. *Id.* at 1489-92.

495. *Id.* at 1484.

practice based on religion.[496] The plaintiff acknowledged the employer's concerns, but argued that the peyote use was infrequent, occurred only while off-duty and in conjunction with a religious ceremony, and that allowing him 24 hours off from duty when he did use peyote was a reasonable accommodation sufficiently mitigating the safety concern.[497] The court held that the increased liability in hiring the plaintiff was too remote and speculative to create an undue hardship.[498]

A year later, the Supreme Court in *International Union v. Johnson Controls, Inc.*,[499] discussed how tort liability interacts with Title VII compliance.[500] *Johnson Controls* involved a Title VII challenge to an employment policy restricting fertile women, but not fertile men, from jobs involving lead exposure.[501] The Court rejected the employer's bonafide occupational qualification (BFOQ) argument,[502] because the policy was unrelated to a woman's ability to perform the work.[503] Though the issue was not directly raised by the employer, the Court entertained the argument that avoiding increased exposure to tort liability to yet unborn persons may be a business necessity.[504] The majority felt that as long as the employer complied with OSHA regulations, fully informed women of the risk, and was not otherwise negligent, the risk of tort liability was remote at best and not a justification for discriminatory employment practices.[505] Further, the majority seemed to imply federal pre-emption when it stated that state tort law impedes the will of Congress to the extent it furthers discrimination against protected classes.[506]

A concurring opinion by Justice White, in which Justices Rehnquist and Kennedy joined, was more sympathetic to the employer's dilemma.[507] Justice White first noted that it was far from clear whether Title VII pre-empted state tort law.[508] Justice White then observed that warnings to mothers would not insulate the employer from liabil-

496. *Id.* at 1483.
497. *Id.*
498. *Id.* at 1492.
499. 499 U.S. 187 (1991).
500. *Id.* at 208-11.
501. *Id.* at 190.
502. *Id.* at 206.
503. *Id.*
504. *Id.* at 208-11.
505. *Id.*
506. *Id.* at 210.
507. *Id.* at 211 (White, J., concurring).
508. *Id.* at 213.

ity to their unborn children.[509] Further, Justice White instructed that compliance with OSHA regulations has never been a defense to negligence.[510] Justice Scalia's concurring opinion stated that substantially increased exposure to state tort law liability would be a business necessity, but that Johnson Controls failed to establish that its exposure was substantially increased by hiring fertile women.[511]

3. *Conclusion: Both Defenses Require the Showing of a High Probability of Harm - With Safety-Sensitive Positions, this High Standard Unnecessarily Places the Public at Increased Risk*

While the issue is unsettled, it appears that a business necessity defense based on increased exposure to tort liability would fail unless the increased exposure was substantial.[512] Therefore, employers are essentially in the same position here as they are with the direct threat standard. Increased exposure to tort liability is a business necessity only if there is a high probability of harm, which in turn substantially increases tort liability exposure. But if employers can establish that exposure to tort liability is substantially increased, then they can also meet the direct threat standard.

Requiring that transportation employers or other employers involved in hazardous activities establish a high probability of harm before safety concerns can justify denying employment to a disabled individual is contrary to public policy when the threat is to the safety of others. It would be unconscionable to ask the public to bear an increased risk somewhere between "increased risk of harm" and "high probability of harm." Between these two standards, the potential for disaster is very real.

Since both employer defenses bisect at the point of having to show a high probability of harm, a solution to the employer's dilemma lies in modification of only one of the defenses. Looking towards modification of the direct threat standard to mitigate the employer's dilemma has the advantage of side-stepping the murky waters surrounding federal pre-emption of state tort law, while accomplishing the same result. As the path of least resistance, this is the course the

509. *Id.*

510. *Id.* at 214.

511. *Id.* at 223-24 (Scalia, J., concurring).

512. *See Johnson Controls*, 499 U.S. at 210 (stating that argument in support of a substantial increase in tort liability was premature in absence of substantial evidence); Toledo v. Nobel-Sysco, Inc., 892 F.2d 1481, 1492 (10th Cir. 1989), *cert. denied*, 495 U.S. 948 (1990) (finding a speculative risk of tort liability insufficient to justify discriminatory practices).

Comment chooses. Therefore, the Comment proposes that Congress modify the direct threat standard as part of their current efforts to enact legislative reform.

D. Proposed Solution: Congress Should Implement A Modest Modification of the Direct Threat Standard

Congress imposed the direct threat standard because of concern that employers were overly paternalistic in worrying that disabled employees would hurt themselves.[513] Further, Congress recognized that fears of increased safety risks were often based on stereotypic and patronizing notions of the capabilities of the disabled.[514] These concerns are very real and justified. When considering only safety to themselves, the disabled are in a better position to determine the risk they wish to incur.[515] However, when others must bear the increased risk, as in the context of transportation, the direct threat standard goes beyond what is required to meet the anti-discrimination concerns of the disabled and imposes increased risks the public does not knowingly accept.

When imposing the direct threat standard, Congress may have felt that employers' compliance with USDOT physical qualifications would eliminate disabled persons posing an increased risk less severe than a direct threat from employment in safety-sensitive functions.[516] However, alcoholics and rehabilitated drug addicts may meet the FHWA's physical qualifications and yet be disabled under the ADA.[517] Given the potential for and unpredictability of relapse,[518]

---

513. *See* H.R. REP. NO. 485 *supra* note 2, at 56, *reprinted in* 1990 U.S.C.C.A.N. at 338 (requiring employers to review possible accommodation without patronizing attitudes); S. REP. NO. 116, *supra* note 3, at 39-40 (warning that paternalistic concerns for disabled individuals shall not be used to disqualify otherwise qualified applicants).

514. S. REP. NO. 116, *supra* note 3, at 39-40.

515. *Id.*

516. For example, FHWA safety regulations prohibit from operating in interstate commerce drivers who have 1) a loss of foot, leg, hand, or arm; 2) an impairment which interferes with prehension or power grasping, or an arm, foot, or leg impairment which interferes with performing the normal tasks associated with operating a motor vehicle; 3) insulin-dependent diabetics; 4) heart disease and high blood pressure; 5) respiratory dysfunction which interferes with the ability to safely operate a motor vehicle; rheumatic, arthritic, orthopedic, muscular, neuromuscular, or vascular disease; 6) epilepsy or other illness leading to a loss of consciousness; 7) mental, nervous, or psychiatric disorder likely to affect the safe operation of a motor vehicle; vision not correctable to 20/40; 8) hearing beneath a certain standard; 9) current drug abuse; 10) a current clinical diagnosis of alcoholism. 49 C.F.R. § 391.41(b)(1) - (13).

517. For example, the ADA protects individuals with records of disabilities who may not currently have a disqualifying condition under FHWA rules, but who are prone to suffer relapse without notice because of the nature of their disability. *See supra* text accompanying notes 41-65 (discussing who may qualify as disabled under the ADA).

employing persons who within the last two years have failed an OTETA-required alcohol or drug test carries with it an increased risk. When the risk involves the safety and well being of others, employers should be empowered, not handcuffed, to mitigate the risk.

Both congressional concern for paternalistic treatment of the disabled by employers and protection of the traveling public could be achieved through a modified direct threat standard. This standard would allow an employer to deny employment to persons posing only an increased risk to safety, if the risk is to others; and, if the essential job functions require public contact while engaged in safety-sensitive functions. The direct threat standard as currently enacted would still need to be met for direct threats to the safety of the disabled person alone, and for non safety-sensitive positions.

Under the modified direct threat standard, there must still be an individual assessment and a genuine increase in the risk to safety. Therefore, unsubstantiated fears would be insufficient to eliminate the disabled from the full range of employment opportunities. However, by eliminating the high probability of harm requirement, the public is better protected. The increased risk must be to others, not the employee alone. Therefore, employers may not act paternalisticly toward the disabled, and must continue to recognize that the disabled are best able to assess for themselves the risk they choose to incur. Finally, the modified direct threat standard applies only where an employee's essential job function requires contact with others while performing safety-sensitive functions. This requirement ensures that the modification does not swallow the rule. Safety-sensitive functions in the transportation context are defined in OTETA.[519] Other safety-sensitive functions could include driving an automobile, operating machinery, certain construction work, etc. The rule would apply only if the safety-sensitive functions are performed while interacting with others.

CONCLUSION

The aims of both the ADA and OTETA are certainly essential for any modern industrialized nation. Maintaining economic prosperity requires that all citizens be given opportunities to contribute to the fullest extent of their capabilities. Likewise, the movement of goods and people along a safe and efficient transportation system is vital to a

518. *See* Nathan, *supra* note 456, at 684 (arguing that treatment success rates are so discouraging that focus has shifted from treatment to prevention).

519. Safety-sensitive functions are those on-duty functions set forth in 49 C.F.R. § 395.2 (1)-(7). 49 C.F.R. § 382.107.

nation's economic health. In the zeal to achieve these goals, Congress has unfortunately enacted two statutory schemes that fail to mesh with perfect synchrony. The two modest proposals put forth in this Comment would go far in resolving conflict between the two statutes while continuing to further the congressional goals of both. The first proposal calls for reconsideration of the EEOC's holding that breath alcohol tests are medical examinations subject to the ADA's confidentiality requirements. If the EEOC would simply provide alcohol tests the same exception from the ADA's confidentiality requirements as it provides drug tests, a direct conflict between the ADA and OTETA disappears. The second proposal calls for Congress to modify the ADA's direct threat standard. This modification will facilitate the achievement of Congress's goal of an alcohol- and drug-free transportation system while causing an inconsequential loss of employment rights for the disabled. Providing employers with a less conflicted regulatory scheme and the public with improved transportation safety are two concerns which merit immediate consideration of these two modest proposals.

David L. LaPorte