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REASONABLE ACCOMMODATION OF INDIVIDUALS WITH MENTAL DISABILITIES AND PSYCHOACTIVE SUBSTANCE USE DISORDERS UNDER TITLE I OF THE AMERICANS WITH DISABILITIES ACT

INTRODUCTION

Disability rights advocates herald July 26, 1990 as the dawn of a new era in civil rights protections;¹ on that date President George Bush signed the Americans with Disabilities Act (ADA) into law.² The ADA prohibits discrimination against disabled persons in employment,³ public services,⁴ and public accommodations.⁵ In addition, the

1. See, e.g., Julie M. Buchanan, *A Dramatic Expansion of Rights and Remedies: the Americans with Disabilities Act*, WIS. LAW., Nov. 1991, at 16 (summarizing the Act's main employment provisions and discussing its implications for personnel practices); Tom Harkin, *Our Newest Civil Rights Law: The Americans with Disabilities Act*, 26 TRIAL, Dec. 1990, at 56 (providing a brief overview of the Act); Bonnie Milstein et al., *The Americans with Disabilities Act: A Breathtaking Promise for People with Mental Disabilities*, 24 CLEARINGHOUSE REV. 1240 (1991) (analyzing the ADA as applied to individuals with mental disabilities); Ann Devroy, *In Emotion-Filled Ceremony, Bush Signs Rights Law for America's Disabled*, WASH. POST, July 27, 1990, at A18 (describing the signing ceremony and outlining President Bush's speech); Don Shannon, *Spirits Soar as Disabled Rights Become the Law*, L.A. TIMES, July 27, 1990, at A1 (same).

2. Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101-12213 (Supp. II 1990); 29 U.S.C. §§ 706(8), 791-794 (1985 & Supp. II 1990); and 47 U.S.C. §§ 225, 611 (1991)).

3. 42 U.S.C. §§ 12111-12117 (Supp. II 1990), as amended by Act of Nov. 21, 1991, 42 U.S.C.A. §§ 12111-12112 (West Supp. 1992) (employers may not take adverse action against disabled employees or applicants who are able to perform the essential functions

Act requires employers,⁶ governments,⁷ public accommodations,⁸ and common carriers⁹ to accommodate the needs of disabled individuals.¹⁰ This Note focuses on the application of ADA employment provisions¹¹ to individuals with mental illnesses¹² and psychoactive substance use

of their jobs with or without reasonable accommodation to their needs). *See infra* notes 19-32 and accompanying text for a more detailed discussion of the ADA employment provisions.

4. 42 U.S.C. §§ 12131-12165 (Supp. II 1990) (public entities may not exclude disabled persons from participation in public services or programs if they meet the essential eligibility requirements with or without reasonable modifications of the services or programs).

5. 42 U.S.C. §§ 12181-12189 (Supp. II 1990) (private entities may not exclude disabled persons from public accommodations such as hotels, restaurants, auditoriums, stores, public transportation stations, museums, parks, schools, social service centers, or recreation facilities).

6. 41 U.S.C. § 12111(8)-(9) (Supp. II 1990), *as amended by* Nov. 21, 1991, 42 U.S.C.A. § 12111 (West Supp. 1992).

7. 42 U.S.C. § 12131(2) (Supp. II 1990).

8. 42 U.S.C. § 12182(b)(2)(A)(ii) (Supp. II 1990).

9. 47 U.S.C. § 225(b) (1991) (the Federal Communications Commission must ensure that interstate and intrastate telecommunications relay services are available to individuals with hearing and speech impairments).

10. Each title of the ADA contains a provision waiving the accommodation requirement upon a showing of serious hardship. *See, e.g.*, 42 U.S.C. § 12111(10) and 56 Fed. Reg. 35,734, 35,737 (1991) (to be codified at 29 C.F.R. § 1630.9(a)) (employers need not accommodate if they can show undue hardship on the operation of their business); 42 U.S.C. § 12143(c)(4) (public entities may claim undue financial burden as a defense to the reasonable modification requirement); 42 U.S.C. § 12182(b)(2)(A)(ii) (public accommodations need not make modifications necessary to accommodate disabled individuals if such modifications would "fundamentally alter" the nature of the services); 47 U.S.C. § 225(b)(1) (telecommunications relay services must be provided "to the extent possible and in the most efficient manner").

11. 42 U.S.C. §§ 12111-12117. Employers with 25 or more employees are subject to the ADA as of July 26, 1992, while employers with between 15 and 25 employees need not comply until July 26, 1994. *Id.* § 12111(5)(A). Employers with fewer than 15 employees are not subject to the ADA. *See infra* note 19 for the definition of "employer" under the ADA.

12. A mental disorder is a

clinically significant behavioral or psychological syndrome or pattern that occurs in a person and that is associated with present distress (a painful symptom) or disability (impairment in one or more important areas of functioning) or with a significantly increased risk of suffering death, pain, disability, or an important loss of freedom.

AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS xxii (3d ed. rev. 1987) [hereinafter DSM-III-R]. Mental disorders include clinical syndromes such as schizophrenia and major mood disorders, as well as

disorders.¹³

Numerous commentators¹⁴ have examined the nature of employers' obligations to accommodate employees' physical disabilities under the ADA and its more limited predecessor, the Federal Rehabilitation Act.¹⁵ Only a limited number, however, focus on reasonable accom-

developmental and personality disorders such as mental retardation and antisocial personality disorder. *Id.* at 10, 16, 21, 28, 335.

13. Psychoactive substances include alcohol, amphetamines, marijuana, cocaine, hallucinogens, and opioids. *Id.* at 169. "The essential feature of [psychoactive substance dependence] is a cluster of cognitive, behavioral, and physiologic symptoms that indicate that the person has impaired control of psychoactive substance use and continues use of the substances despite adverse consequences." *Id.* at 166. A substance "abuser" uses psychoactive substances in a maladaptive way, while one who is "dependent" typically exhibits tolerance and withdrawal as well. *Id.* at 166, 169. Tolerance is a "need for increased amounts of alcohol [or other substances] to achieve the desired effect or a diminished effect with regular use of the same amount." WILLIAM F. BANTA & FOREST TENNANT, JR., *COMPLETE HANDBOOK FOR COMBATING SUBSTANCE ABUSE IN THE WORKPLACE: MEDICAL FACTS, LEGAL ISSUES, AND PRACTICAL SOLUTIONS* 106 (1989). Withdrawal consists of the "shakes," a malaise or other symptoms "which are relieved by drinking [or use of another substance] after a period of cessation of or reduction in [use]." *Id.*

14. See, e.g., U.S. OFFICE OF PERSONNEL MANAGEMENT, *HANDBOOK OF JOB ANALYSIS FOR REASONABLE ACCOMMODATION* (1984) (suggesting a procedure for planning accommodations and analyzing a job through identification of functional job requirements and work environment factors); Elliot H. Shaller, "Reasonable Accommodation" Under the Americans with Disabilities Act - What Does It Mean? 16 *EMPLOYEE REL.* L.J. 431 (1991) (addressing the components of reasonable accommodation); C. Geoffrey Weirich, *Reasonable Accommodation Under the Americans with Disabilities Act*, 7 *LAB. LAW.* 27 (1991) (same); Julie Brandfield, Note, *Undue Hardship: Title I of the Americans with Disabilities Act*, 59 *FORDHAM L. REVIEW* 113 (1990) (advocating a presumption favoring accommodations and suggesting a method to narrow the undue hardship defense); Jeffrey O. Cooper, Comment, *Overcoming Barriers to Employment: The Meaning of Reasonable Accommodation and Undue Hardship in the Americans with Disabilities Act*, 139 *U. PA. L. REV.* 1423 (1991) (comparing the concept of reasonable accommodation with other approaches and outlining the substantive and procedural duties placed upon employers under the ADA); Rosalie K. Murphy, Note, *Reasonable Accommodation and Employment Discrimination Under Title I of the Americans with Disabilities Act*, 64 *S. CAL. L. REV.* 1607 (1991) (discussing accommodation as an affirmative duty under the ADA); Margaret E. Stine, Comment, *Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act of 1990*, 37 *S.D. L. REV.* 97 (1992) (exploring the terms "reasonable accommodation" and "undue hardship"); Steven F. Stuhlbarg, Comment, *Reasonable Accommodation Under the Americans with Disabilities Act: How Much Must One Do Before Hardship Turns Undue?* 59 *U. CIN. L. REV.* 1311 (1991) (suggesting that "undue hardship" and "reasonable accommodation" are vague terms of art).

15. 29 U.S.C. §§ 706-794 (1985 & Supp. II 1990). The Federal Rehabilitation Act of 1973 prohibits handicap discrimination by federal agencies and recipients of federal

modation of mental disabilities and substance use disorders.¹⁶ Merely two or three of the many examples of disabilities in the Equal Employment Opportunity Commission's (EEOC) interpretive guidelines on the ADA concern mental or substance use problems.¹⁷

This Note delineates an employer's duty to accommodate individuals with mental disabilities and substance use disorders among its workforce. The first part of the Note reviews the elements of a plaintiff's claim, as well as an employer's defenses, under the ADA. Part I also compares and contrasts the ADA with the Federal Rehabilitation Act of 1973.¹⁸ Part II reviews an employer's obligation under both the

grants and contracts. See *infra* notes 18 and 33-63 and accompanying text for a more detailed discussion of the Rehabilitation Act.

16. Two articles address the application of the Americans with Disabilities Act to mentally disabled persons, drug addicts, and alcoholics; neither focuses on reasonable accommodation. See Patricia A. Maffeo, *Making Non-Discriminatory Fitness-for-Duty Decisions About Persons with Disabilities Under the Rehabilitation Act and the Americans with Disabilities Act*, 16 AM. J.L. & MED. 279 (1990) (emphasizing pre-employment, fitness-for-duty determinations rather than post-employment accommodation); Reese J. Henderson, Jr., Note, *Addiction As Disability: The Protection of Alcoholics and Drug Addicts Under the Americans with Disabilities Act of 1990*, 44 VAND. L. REV. 713 (1991) (reviewing broad contours of ADA and Rehabilitation Act claims by alcoholics and drug addicts, with only passing references to accommodation). One exceptional article discusses accommodation of alcoholics under the ADA in considerable detail. See Wendy K. Voss, Note, *Employing the Alcoholic Under the Americans with Disabilities Act of 1990*, 33 WM. & MARY L. REV. 895 (1992). Only one author addresses accommodation of mental disorders under the Rehabilitation Act in significant detail. See VIGDOR GROSSMAN, *EMPLOYING HANDICAPPED PERSONS: MEETING EEO OBLIGATIONS* 53-60 (1980). Grossman does not address accommodation of substance use disorders.

17. 56 Fed. Reg. 35,739, 35,745 (1991) (to be codified at 29 C.F.R. app. § 1630.2(r)) (determining whether a mentally ill employee poses a "direct threat" to the safety of others); 56 Fed. Reg. at 35,745-46 (to be codified at 29 C.F.R. app. § 1630.3(a)-(c)) (permitting discharge of a user of illegal drugs); and 56 Fed. Reg. at 35,752 (to be codified at 29 C.F.R. app. § 1630.16(b)) (allowing employers to hold alcoholics and drug users to uniform performance and conduct standards).

Recently the Equal Employment Opportunity Commission released a manual that sheds more light on accommodation of mental illnesses and substance use disorders. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *TECHNICAL ASSISTANCE MANUAL FOR THE AMERICANS WITH DISABILITIES ACT* (1992) [hereinafter *TECHNICAL ASSISTANCE MANUAL*] at III-22-23, 30-33 (suggesting possible accommodations for mentally ill and mentally retarded employees), IV-11-14 (analyzing whether a mentally ill individual poses a threat to others' safety), V-7-8 (prohibiting employers from asking about psychiatric or substance use disorders or treatment history).

18. Congress modeled the ADA after the Federal Rehabilitation Act of 1973, which contains three sections prohibiting discrimination against disabled persons. Applying to federal agencies and to recipients of federal grants, § 504 reads in pertinent part:

No otherwise qualified individual with handicaps in the United States . . . shall,

Rehabilitation Act and the ADA to accommodate persons with mental disabilities and presents two illustrative case studies. Part III examines the ADA's approach to psychoactive substance use disorders, which departs considerably from the treatment of substance use problems under the Rehabilitation Act. Lastly, Part III analyzes two case studies involving individuals with psychoactive substance use disorders.

I. BACKGROUND

A. *Elements of a Title I ADA Claim and an Employer's Potential Defenses*

The ADA forbids covered entities¹⁹ to discriminate against qualified

solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service 29 U.S.C. § 794 (1985 & Supp. II 1990). Section 503, which governs federal contractors, provides:

Any contract in excess of \$2,500 entered into by any Federal department or agency . . . shall contain a provision requiring that, in employing persons to carry out such contract, the party contracting with the United States shall take affirmative action to employ and advance in employment qualified individuals with handicaps 29 U.S.C. § 793(a) (1985 & Supp. II 1990). Section 501 imposes similar affirmative action obligations on federal agencies, in addition to the non-discrimination provisions of § 504:

Each department, agency, and instrumentality (including the United States Postal Service and the Postal Rate Commission) in the executive branch shall . . . submit to the [Civil Service] Commission . . . an affirmative action program plan for the hiring, placement, and advancement of individuals with handicaps. . . . Such plan shall include a description of the extent to which and methods whereby the special needs of employees with handicaps are being met 29 U.S.C. § 791(b) (1985 & Supp. II 1990). See *infra* notes 33-63 and accompanying text for a more detailed discussion of the Federal Rehabilitation Act.

19. Congress defined "covered entity" as "an employer, employment agency, labor organization, or joint labor-management committee." 42 U.S.C. § 12111(2). The term "employer" means:

a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.
Id. § 12111(5)(A).

Most federal contractors and grantees will be subject to both the ADA and the Rehabilitation Act, but federal agencies are excluded from ADA coverage. *Id.* § 12111(5)(B)(1).

disabled individuals in hiring, promotion, termination, or any term or condition of employment.²⁰ An individual is disabled if he or she has a physical or mental impairment²¹ that substantially limits²² one or more

20. The statute elaborates:

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of such employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(a).

For example, an employer may not inquire whether a job applicant is disabled or has a history of a disability, but it may inquire whether the applicant can perform job-related functions. *Id.* § 12112(d)(2)(A)(B). An employer may not require an applicant to undergo a medical examination until it has made a conditional offer of employment, and only then if all new employees must submit to such an exam. *Id.* § 12112(d)(3). An employer may not require an employee to submit to a medical exam or inquire whether an employee has a disability unless “such examination or inquiry is shown to be job-related and consistent with business necessity.” *Id.* § 12112(d)(4)(A). Employers must safeguard the confidentiality of medical records and use them only in accordance with the purposes of the ADA. *Id.* § 12112(d)(4)(C).

21. The terms “physical or mental impairment” mean:

(1) Any 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 and lymphatic, skin, and endocrine; or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

56 Fed. Reg. 35,734, 35,735 (1991) (to be codified at 29 C.F.R. § 1630.2(h)).

The existence of an impairment is determined without reference to mitigating factors such as medications. 56 Fed. Reg. at 35,740-41 (to be codified at 29 C.F.R. app. § 1630.2(h)).

22. A person is “substantially limited” when he or she is:

(i) Unable to perform a major life activity that the average person in the general population can perform; or

(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

56 Fed. Reg. at 35,735 (to be codified at 29 C.F.R. § 1630.2(j)(1)).

The following factors should be considered when evaluating whether an individual is substantially limited in a major life activity:

(i) The nature and severity of the impairment;

(ii) The duration or expected duration of the impairment; and

(iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

56 Fed. Reg. at 35,735 (to be codified at 29 C.F.R. § 1630.2(j)(2)).

An individual is substantially limited in the ability to work when “restricted in the ability to perform” a range of jobs in comparison to others with similar skills and abilities. However, “[t]he inability to perform a single, particular job does not constitute a

major life activities,²³ has a record of such impairment,²⁴ or is regarded as having such an impairment.²⁵ A qualified individual with a disability²⁶ is a person who can perform the essential functions²⁷ of his or her job with or without reasonable accommodation²⁸ of the disability. An

substantial limitation in the major life activity of working.” 56 Fed. Reg. at 35,735 (to be codified at 29 C.F.R. § 1630.2(j)(3)(i)).

23. “Major life activities” include “caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.” 56 Fed. Reg. at 35,735 (to be codified at 29 C.F.R. § 1630.2(i)).

24. A person has a “record of such impairment” if he or she “has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.” 56 Fed. Reg. at 35,735 (to be codified at 29 C.F.R. § 1630.2(k)).

25. “Regarded as having such an impairment” means one who:

(1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;

(2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(3) Has none of the impairments defined [above] but is treated by a covered entity as having a substantially limiting impairment.

56 Fed. Reg. at 35,735 (to be codified at 29 C.F.R. § 1630.2(l)).

26. 42 U.S.C. § 12111(8).

27. Congress explained, “[c]onsideration shall be given to the employer’s judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.” *Id.* In determining which job functions are essential, the EEOC and the courts will focus on “the *purpose* of the functions and the *result* to be accomplished, rather than the manner in which the function presently is performed.” TECHNICAL ASSISTANCE MANUAL, *supra* note 17, at II-16.

28. Congress stated that “reasonable accommodation” may include:

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

42 U.S.C. § 12111(9).

The ADA regulations call for an “informal, interactive process” between the covered entity and the qualified disabled person to determine needed and feasible accommodations. 56 Fed. Reg. 35,739, 35,748 (1991) (to be codified at 29 C.F.R. app. § 1630.2(o)(3) and app. § 1630.9). The legislative history describes four steps to this negotiation process: (1) identify barriers to equal opportunity by distinguishing essential from non-essential job duties and identifying environmental impediments; (2) identify potential accommodations; (3) assess the reasonableness of each option in terms of effectiveness, equal opportunity, reliability, and timeliness; and (4) implement the accommodation that is most appropriate for both employer and employee and is not an

employer or other covered entity must accommodate an employee or applicant with a known disability²⁹ unless the accommodation would impose an undue hardship³⁰ on its business.³¹ In preparing their case of discrimination, ADA plaintiffs utilize the procedures and remedies afforded by Title VII of the Civil Rights Act of 1964.³²

Although the ADA does not specify the burdens of proof necessary for each element, cases arising under the Rehabilitation Act outline a complex scheme of shifting burdens of proof and persuasion. Congress expressly intended to model the ADA burdens of proof after the Rehabilitation Act, as well as regulations and case law interpreting that

undue hardship. H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 2, at 66 (1990); S. REP. NO. 116, 101st Cong., 1st Sess. 35 (1989).

29. An employee has a duty to notify his or her employer of any disability that requires accommodation. TECHNICAL ASSISTANCE MANUAL, *supra* note 17, at III-7.

30. "Undue hardship" means "an action requiring significant difficulty or expense" after consideration of the following factors:

(i) the nature and cost of the accommodation needed . . . ;

(ii) the overall financial resources of the facility . . . ; 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 a 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 . . . ; the geographic separateness, administrative, or fiscal relationship of the facility . . . to the covered entity.

42 U.S.C. § 12111(10)(A)-(B).

The House rejected a proposal to define as per se undue hardship any accommodation costing more than 10% of the disabled employee's salary. The rule was set aside because it would disproportionately disadvantage lower-paid employees. 136 CONG. REC. H2471-75 (daily ed. May 17, 1990) (debate of Rep. Olin's amendment); TECHNICAL ASSISTANCE MANUAL, *supra* note 17, at III-15. Some commentators have raised the question whether an employer may aggregate the costs of accommodating all employees' disabilities in formulating an undue hardship defense. See, e.g., MICHAEL A. FAIL-LACE & HOWARD G. ZIFF, *Reasonable Accommodation and Undue Hardship Under the ADA*, in EMPLOYER COMPLIANCE WITH THE AMERICANS WITH DISABILITIES ACT 63, 81-82 (Alan M. Koral & Bruce McLanahan eds. 1990). The statute and regulations are silent on this issue.

31. 56 Fed. Reg. 35,734, 35,737 (1991) (to be codified at 29 C.F.R. § 1630.9(a)).

32. 42 U.S.C. § 12117(a). Title VII creates an elaborate administrative and judicial enforcement scheme and authorizes equitable remedies such as backpay and reinstatement. 42 U.S.C. § 2000e-5 (1981), as amended by Act of Nov. 21, 1991, 42 U.S.C.A. § 2000e-5 (West Supp. 1992). The Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1077 (to be codified in scattered sections of 29 U.S.C. and 42 U.S.C.), amended Title VII, the Rehabilitation Act and the ADA to authorize limited compensatory and punitive damages and to allow for jury trials in cases of intentional discrimination.

Act.³³ Rehabilitation Act plaintiffs have sued under three theories: intentional, surmountable barrier, and disparate impact discrimination.³⁴ Plaintiffs alleging intentional discrimination³⁵ must make a prima facie showing that they are handicapped but otherwise qualified³⁶ for a job, and that their employer rejected or discharged them solely because of their handicap.³⁷ To avoid liability, the defendant must present evidence that it rejected or terminated the plaintiff for reasons other than the disability.³⁸ To overcome the defendant's proffered defenses, the plaintiff must prove that the defendant's reasons are merely pretexts for handicap discrimination.³⁹

Surmountable barrier claims are more common⁴⁰ and constitute a variation of intentional discrimination claims. The plaintiffs must first make a facial showing that they are handicapped but otherwise qualified for a position and that accommodation is feasible.⁴¹ The defendant

33. H.R. REP. NO. 485, *supra* note 28, at 72; S. REP. NO. 116, *supra* note 28, at 38.

34. Henderson, *supra* note 16, at 721-26.

35. The intentional discrimination theory under the Rehabilitation Act parallels the Title VII disparate treatment burden of proof enunciated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

36. The Supreme Court in *Southeastern Community College v. Davis*, 442 U.S. 397, 406 (1979), explained that plaintiffs are "otherwise qualified" if they are able to meet all program requirements "in spite of [their] handicap." See *infra* notes 55-61 and accompanying text for a discussion of the controversy surrounding this definition and the different approach taken by the ADA.

37. See, e.g., *Norcross v. Sneed*, 755 F.2d 113, 116 (8th Cir. 1985) (blind applicant alleging rejection for librarian position because of handicap). In order for an employer to take adverse action against an employee solely because of his or her handicap, the employer must know about that handicap. See, e.g., *Nuccio v. Frank*, No. CIV.A.91-3702, 1992 WL 124800, at *2 (E.D. La. May 28, 1992) (granting Postal Service's motion to dismiss Rehabilitation Act claim, where Service had no notice of plaintiff's alleged impairment of paranoid schizophrenia before it terminated her for absenteeism).

38. *Norcross*, 755 F.2d at 115-17 (noting defendant's rebuttal to plaintiff's prima facie case and accepting defendant's assertion that it would not have rejected plaintiff but for a better qualified applicant).

39. *Id.* But see *Pushkin v. Regents of Univ. of Colorado*, 658 F.2d 1372, 1387 (10th Cir. 1981) (once plaintiff makes out a prima facie case of intentional discrimination, employer has the burden of proof, not merely of production, to show that it was not motivated by discriminatory purposes). See *Murphy*, *supra* note 14, at 1638-39 (critiquing the *Pushkin* burdens of proof scheme).

40. *Murphy*, *supra* note 14, at 1637.

41. See, e.g., *Doe v. New York Univ.*, 666 F.2d 761, 776-77 (2d Cir. 1981) (medical student's initial admission to medical school did not establish that she was "otherwise qualified" within the meaning of the Rehabilitation Act when admission was obtained upon her false representation that she did not suffer from any recurrent illness or emotional problems).

can rebut with evidence that the plaintiffs are not qualified for the position or that accommodation is impossible or unduly burdensome.⁴² To prevail, the plaintiffs must prove their qualifications and the feasibility of accommodation.⁴³

Disparate impact plaintiffs must show that they are qualified for the disputed job except for a handicap, that the handicap precludes them from meeting a neutral job qualification, and that the challenged qualification has a disproportionate impact on them and others with similar handicaps.⁴⁴ The plaintiffs must also make a facial showing that accommodation is feasible.⁴⁵ The defendant then has the burden to prove that the challenged qualification is job-related⁴⁶ and that accommodation is infeasible or unduly burdensome.⁴⁷

B. *Comparison of the Rehabilitation Act and the ADA*

In general, the ADA parallels the Rehabilitation Act,⁴⁸ yet, there are several notable differences. First, the scope of the ADA is far broader than the Rehabilitation Act, for it applies to all employers engaged in interstate commerce,⁴⁹ not just those receiving federal funds.⁵⁰ Second, while the Rehabilitation Act continues to impose an

42. *Id.* at 776.

43. *See Gardner v. Morris*, 752 F.2d 1271, 1280 (8th Cir. 1985) (plaintiffs must present evidence "concerning [their] individual capabilities and suggestions for possible accommodations") (quoting *Prewitt v. U.S. Postal Service*, 662 F.2d 292, 308 (5th Cir. 1981)). *But see Pushkin*, 658 F.2d at 1387 (employer has the burden to prove plaintiff's lack of qualifications or the infeasibility of accommodation).

44. *See, e.g., Prewitt v. U.S. Postal Serv.*, 662 F.2d 292, 309-10 (5th Cir. 1981) (outlining the requirements of a prima facie case); *Wallace v. Veterans Admin.*, 683 F. Supp. 758, 764 (D. Kan. 1988) (same).

45. *Prewitt*, 662 F.2d at 310; *Wallace*, 683 F. Supp. at 764.

46. A qualification is job-related if it ensures that employees can perform the essential functions of their positions safely and efficiently. *Prewitt*, 662 F.2d at 310.

47. *Id.* at 309-10; *Wallace*, 683 F. Supp. at 764.

48. The Senate and House Committees explicitly recognized that "[t]he ADA incorporates many of the standards of discrimination set out in the regulations implementing section 504 of the Rehabilitation Act of 1973, including the obligation to provide reasonable accommodations unless it would result in an undue hardship on the operation of the business." H.R. REP. NO. 485, *supra* note 28, at 23; S. REP. NO. 116, *supra* note 28, at 2.

Congress selected the term "disability" for the ADA rather than "handicap" as used in the Rehabilitation Act, not because of any difference in meaning, but because the former term is less stigmatizing to disabled persons. S. REP. NO. 116, at 21.

49. *See supra* note 19 for the jurisdictional language of Title I of the ADA.

50. *See supra* note 18 for the jurisdictional provisions of the Rehabilitation Act.

affirmative action obligation on federal agencies and contractors,⁵¹ the ADA requires only reasonable accommodation of the needs of disabled employees or applicants. Third, in order to establish a Rehabilitation Act violation, plaintiffs must demonstrate that their handicap was the sole reason⁵² for the adverse employment decision. Under the ADA, plaintiffs need only show that the employer discriminated against them "because of"⁵³ their disability.⁵⁴ Fourth, the Supreme Court in *Southeastern Community College v. Davis*⁵⁵ interpreted the terms "otherwise qualified" in the Rehabilitation Act to protect only those who could meet all program requirements "in spite of [their] handicap."⁵⁶ As a result, many lower courts never reached the reasonable accommodation analysis because plaintiffs could not perform the essential functions of the job despite their handicap.⁵⁷ The Supreme Court changed

51. See *supra* note 18 for the Rehabilitation Act provisions requiring federal agencies and contractors to provide affirmative action.

52. Section 504 provides in relevant part:

No otherwise qualified handicapped individual . . . shall, *solely by reason of his handicap*, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. § 794 (emphasis added).

53. The relevant section of the ADA provides: "No covered entity shall discriminate against a qualified individual with a disability *because of* the disability of such individual . . ." 42 U.S.C. § 12112(a).

54. In this respect the ADA resembles Title VII more than § 504. Under Title VII, a plaintiff need only show that his or her race or sex was a factor in, and not the sole cause of, the adverse employment decision. *Norcross v. Sneed*, 755 F.2d 113, 117 n.5 (8th Cir. 1985).

55. 442 U.S. 397, 406 (1979). *Davis* concerned the obligations of a federally-funded nursing school toward its students and applicants. The Court held that a deaf applicant was not "otherwise qualified" for nursing school where she would have required extensive curriculum modifications and could have endangered patients during clinical rounds. *Id.* at 407. Lower courts recognize that *Davis* governs § 504 suits against employers as well as educational institutions. See, e.g., *Pushkin v. Regents of Univ. of Colorado*, 658 F.2d 1372, 1385-86 (10th Cir. 1981) (analyzing and adopting the *Davis* approach).

56. In perhaps contradictory language, the Court also stated that a disabled individual could be "otherwise qualified" if the educational program could accommodate his or her handicap without undue hardship. *Davis*, 442 U.S. at 412. Most lower courts have failed to pick up on this apparent concession.

57. See, e.g., *Doe v. New York Univ.*, 666 F.2d 761, 775-77 (2d Cir. 1981) (plaintiff suffering from serious psychiatric and mental disorders failed to prove that, despite her handicap, she was qualified for acceptance as medical student); *Pushkin*, 658 F.2d at 1385 (plaintiff suffering from multiple sclerosis supported finding that he was qualified for psychiatric residency program apart from his handicap); *Fields v. Lyng*, 705 F.

its position in *School Board of Nassau County v. Arline*,⁵⁸ and imported a reasonable accommodation analysis into the “otherwise qualified” inquiry.⁵⁹ The ADA adopts the *Arline* approach and clarifies that disabled people are qualified if they satisfy the education and skill requirements of the job,⁶⁰ and if, with or without reasonable accommodation, they can perform the essential functions of the job.⁶¹ Finally, the Rehabilitation Act protected current drug and alcohol users as long as their drug or alcohol use did not impair their work performance or threaten the property or safety of others.⁶² The ADA revokes all protections for current users of illegal drugs, regardless of whether they

Supp. 1134, 1137 (D. Md. 1988) (plaintiff who could not travel safely or be trusted as a negotiator was not an otherwise qualified person in spite of his handicap), *aff'd*, 888 F.2d 1385 (4th Cir. 1989); *Richardson v. U.S. Postal Serv.*, 613 F. Supp. 1213, 1215-16 (D.D.C. 1985) (dismissal stemmed from criminal conduct, not from poor job performance due to alcoholism); *Boyd v. U.S. Postal Serv.*, No. 82-126R, 1983 WL 636, at *7 (W.D. Wash. Aug. 1, 1983) (plaintiff applicant with post-traumatic stress disorder was not otherwise qualified due to his bad work history), *aff'd on other grounds*, 752 F.2d 410 (9th Cir. 1985). *But see* *Wallace v. Veterans Admin.*, 683 F. Supp. 758, 761-63 (D. Kan. 1988) (noting that despite the language of *Davis*, many lower courts have factored the legitimacy of the requirement and the feasibility of accommodation into the determination of whether a plaintiff is otherwise qualified). Some courts have tied the “reasonable accommodation” and “otherwise qualified” inquiries together only in § 501 cases against federal agencies based upon the federal government’s affirmative action obligation. *See, e.g., Treadwell v. Alexander*, 707 F.2d 473, 477-78 (11th Cir. 1983). For further discussion of this ambiguity, *see infra* notes 97-103 and 198-203 and accompanying text.

58. 480 U.S. 273, 287-89 (1987).

59. The Court preserved the *Davis* rule but added the reasonable accommodation analysis to it:

“An otherwise qualified person is one who is able to meet all of a program’s requirements in spite of his handicap.” [*Davis*, 442 U.S. at 406]. In the employment context, an otherwise qualified person is one who can perform “the essential functions” of the job in question. 45 C.F.R. § 84.3(k) (1985). When a handicapped person is not able to perform the essential functions of the job, the court must also consider whether any “reasonable accommodation” by the employer would enable the handicapped person to perform those functions.

480 U.S. at 288 n.17.

60. 56 Fed. Reg. 35,734, 35,735 (1991) (to be codified at 29 C.F.R. § 1630.2(m)). The EEOC’s TECHNICAL ASSISTANCE MANUAL, *supra* note 17, at II-12, explains that this preliminary inquiry, whether an individual satisfies the education and skill requirements, “is sometimes referred to as determining if an individual with a disability is ‘otherwise qualified.’”

61. 42 U.S.C. § 12111(8).

62. The relevant language was added to the Rehabilitation Act in 1978: [T]he term “handicapped individual” . . . 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

display impairment at work or endanger people or property.⁶³

II. REASONABLE ACCOMMODATION OF MENTAL DISABILITIES UNDER THE REHABILITATION ACT AND THE ADA

A. *Scope of the Problem*

Approximately 43 million individuals in the United States have one or more physical or mental disabilities.⁶⁴ Two-thirds of the disabled persons between ages sixteen and sixty-four (8.2 million individuals) do not work, although the majority of them desire employment.⁶⁵ Indeed, most are in dire need of work. In 1984, approximately fifty percent of all disabled adults reported household incomes below \$15,000, while only twenty-five percent of non-disabled adults had comparably low household incomes.⁶⁶

Mental illnesses of various kinds afflict a sizable proportion of the disabled population. Approximately 2.8 million Americans suffer from severe psychiatric illnesses.⁶⁷ Up to seventy percent of these individuals are unemployed for sustained periods.⁶⁸ Mentally ill individuals, especially those with psychoses, demonstrate a lower success rate in

reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.

Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, 92 Stat. 2955, 2984-85 (1978) (prior to 1986 amendment).

63. The ADA provides: "For purposes of this title, the term 'qualified individual with a disability' shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use." 42 U.S.C. § 12114(a). The ADA also amends the Rehabilitation Act to conform in this respect. Americans with Disabilities Act, Pub. L. No. 101-336, 104 Stat. 377 (codified at 29 U.S.C. § 706(8)(A)-(C) (Supp. II 1990)). For further discussion of the exclusion of current drug users from the protection of both the ADA and the Rehabilitation Act, see *infra* notes 209-14 and accompanying text.

64. Statement of Findings, Americans with Disabilities Act, 42 U.S.C. § 12101(a)(1).

65. S. REP. NO. 116, *supra* note 28, at 9.

66. *Id.*

67. NATIONAL INSTITUTE OF MENTAL HEALTH, DEINSTITUTIONALIZATION POLICY AND HOMELESSNESS 2 (1990).

68. H. Keith Massel et al., *Evaluating the Capacity to Work of the Mentally Ill*, 53 PSYCHIATRY 31, 31 (1990) (citing I. Goldstrom & R. Manderscheid, *The Chronically Mentally Ill: A Descriptive Analysis from the Uniform Client Data Instrument*, 2 COMMUNITY SUPPORT SERV. J. 4 (1982)); E. Sally Rogers et al., *Psychiatric Rehabilitation as the Preferred Response to the Needs of Individuals with Severe Psychiatric Disability*, 33 REHAB. PSYCHOL. 5, 8 (1988) ("Studies suggest that no more than 20 to 30% of individuals with psychiatric disability are competitively employed.").

vocational rehabilitation than other disabled persons.⁶⁹

B. *Treatment of Mental Illnesses Under the ADA and the Rehabilitation Act*

Regulations under the ADA⁷⁰ and the Rehabilitation Act⁷¹ prohibit discrimination against qualified individuals with mental impairments, including mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. To dispute the existence of a mental impairment is rare in cases brought under the Rehabilitation Act.⁷² Aside from isolated and unexceptionable exclusions, courts have found the following impairments to qualify for protection under the Rehabilitation Act: paranoid schizophrenia,⁷³ manic-de-

69. Michael McCue & Lynda Katz-Garris, *The Severely Disabled Psychiatric Patient and the Adjustment to Work*, J. REHAB., Oct.-Dec. 1983, at 52, 56. The rate of success in vocational rehabilitation is 15 to 20% lower for persons with psychiatric disabilities than for individuals with other disabilities. Howard Andrews et al., *National Trends in Vocational Rehabilitation: A Comparison of Individuals with Physical Disabilities and Individuals with Psychiatric Disabilities*, J. REHAB., Jan.-Mar. 1992, at 7, 14; Shari Weisz Hirsch, *Meeting the Vocational Needs of Individuals with Psychiatric Disabilities through Supported Employment*, J. REHAB., Oct.-Dec. 1989, at 26 (citing I.D. Rutman, A Comprehensive, National Evaluation of Transitional Employment Programs for the Psychiatrically Disabled (1986) (unpublished paper)).

70. 56 Fed. Reg. 35,734, 35,735 (1991) (to be codified at 29 C.F.R. § 1630.2(h)(2)).

71. 29 C.F.R. § 1613.702(b) (1991).

72. The D.C. Circuit found, for example, that homosexuality did not qualify as an impairment under the Rehabilitation Act. *Blackwell v. U.S. Dep't of Treasury*, 830 F.2d 1183, 1183 (D.C. Cir. 1987). The district court in *Blackwell* held that the plaintiff, a transvestite, could have come within the Rehabilitation Act had he given his employer notice of his impairment. *Blackwell v. U.S. Dept. of Treasury*, 656 F. Supp. 713, 715 (D.D.C. 1986). The court of appeals did not reach the issue of transvestitism but vacated the portion of the district court opinion requiring a plaintiff to notify his or her employer of the disability. 830 F.2d at 1183-84. The ADA specifically excludes transvestitism, as well as other non-physiological sexual disorders, from coverage. 42 U.S.C. §§ 12208, 12211. See *infra* notes 84-85 and accompanying text for further discussion of these exclusions.

The Second Circuit found that poor judgment and impulse control and irresponsible behavior alone did not amount to impairments. *Daley v. Koch*, 892 F.2d 212, 214-15 (2d Cir. 1989). See also, e.g., *Adams v. Alderson*, 723 F. Supp. 1531, 1531 (D.D.C. 1989) (plaintiff failed to demonstrate a handicap where his "adjustment disorder" was merely a reaction to an antagonizing supervisor and, therefore, was merely transitory), *aff'd per curiam*, No. 89-5265, 1990 WL 45737 (D.C. Cir. Apr. 10, 1990).

73. *Franklin v. U.S. Postal Serv.*, 687 F. Supp. 1214, 1218 (S.D. Ohio 1988) (noting that paranoid schizophrenics may fall within the handicapped category). Schizophrenics experience disturbances in one or more of the following areas: "content and form of thought, perception, affect, sense of self, volition, relationship to the external world, and psychomotor behavior." DSM-III-R, *supra* note 12, at 188.

pression,⁷⁴ depression,⁷⁵ post-traumatic stress disorder,⁷⁶ borderline personality disorder,⁷⁷ schizoid personality disorder,⁷⁸ passive-aggressive personality disorder,⁷⁹ kleptomania,⁸⁰ apraxia,⁸¹ transsexual disorder,

74. *Gardner v. Morris*, 752 F.2d 1271, 1279-80 (8th Cir. 1985) (finding, without discussion, that manic depressive was terminated from overseas assignment because of his handicap); *Carty v. Carlin*, 623 F. Supp. 1181, 1184-85 (D. Md. 1985) (noting plaintiff's physical and mental impairments, including manic depression). Individuals in a manic episode experience an unusually elevated or irritable mood, and may display marked impairments in occupational or social functioning, grandiose ideas, decreased sleep, pressured speech, agitation, and initiation of new projects. See DSM-III-R, *supra* note 12, at 214-15. For at least two weeks, depressed individuals suffer from a depressed mood or a "loss of interest or pleasure in all, or almost all, activities." *Id.* at 218. Associated symptoms include disturbances in sleeping and eating patterns, agitation or sluggishness, loss of energy, feelings of worthlessness, difficulties with concentration, and suicidal thoughts. *Id.* at 219. Manic-depression is characterized by fluctuating or simultaneous manic and depressive symptoms. *Id.* at 226.

75. *Doe v. Region 13 Mental Health-Mental Retardation Comm'n*, 704 F.2d 1402, 1408 (5th Cir. 1983).

76. *Schmidt v. Bell*, 33 Fair Empl. Prac. Cas. (BNA) 839 (E.D. Pa. Sept. 9, 1983). Post-traumatic stress disorder is an anxiety reaction to an extremely traumatic event, characterized by recurrent recollections, dreams, flashbacks, or psychological distress; avoidance of the traumatizing stimuli; and persistent symptoms of arousal. DSM-III-R, *supra* note 12, at 250.

77. *Doe v. New York Univ.*, 666 F.2d 761, 766 (2d Cir. 1981) (describing plaintiff's history of psychiatric and mental problems); *Fields v. Lyng*, 705 F. Supp. 1134, 1135-36 (D. Md. 1988) (questioning whether plaintiff suffering from borderline personality disorder was handicapped), *aff'd*, 888 F.2d 1385 (4th Cir. 1989). Persons with borderline personality disorder display a "pattern of unstable and intense interpersonal relationships," impulsiveness, affective instability, inappropriate anger, recurrent suicidal threats or self-mutilating behavior, identity disturbance, chronic feelings of emptiness, and/or fears of abandonment. DSM-III-R, *supra* note 12, at 347.

78. *Guerriero v. Schultz*, 557 F. Supp. 511, 513 (D.D.C. 1983) (finding that employer may have erred in concluding that plaintiff who suffered from a schizoid personality disorder and alcoholism was not handicapped). Persons with schizoid personality disorder form few social relationships and display a limited range of emotional expression. DSM-III-R, *supra* note 12, at 340.

79. *Doe v. New York Univ.*, 666 F.2d 761, 766 (2d Cir. 1981). Passive-aggressive individuals persistently and passively resist demands for adequate social and occupational performance by procrastinating, arguing, sulking, deliberately working slowly, complaining of excessive demands, forgetting obligations, exaggerating accomplishments, resenting advice, and/or criticizing persons of authority. DSM-III-R, *supra* note 12, at 357-58.

80. *Fields v. Lyng*, 705 F. Supp. 1134, 1136 (D. Md. 1988) (assuming, *arguendo*, that plaintiff suffering from mental condition with symptoms of kleptomania was handicapped), *aff'd*, 888 F.2d 1385 (4th Cir. 1989). A kleptomaniac repeatedly fails to resist impulses to steal items "not needed for personal use or their monetary value." DSM-III-R, *supra* note 12, at 322. The ADA explicitly excludes kleptomania from coverage

der,⁸² and mental retardation.⁸³ In reaction to some of these precedents, Congress excluded homosexuality and bisexuality,⁸⁴ various sexual behavior disorders,⁸⁵ compulsive gambling, kleptomania, pyromania, and certain psychoactive substance use disorders⁸⁶ from coverage under the ADA.⁸⁷

but does not amend the Rehabilitation Act to conform. 42 U.S.C. § 12211(b)(2). See *infra* note 87 and accompanying text for further discussion of this exclusion.

81. *Arneson v. Heckler*, 879 F.2d 393, 394-96 (8th Cir. 1989) (finding that plaintiff was terminated because of his handicap which had caused him to perform his job poorly). Apraxia is a neurological disorder causing high levels of distractibility. *Id.* at 394-95.

82. *Doe v. U.S. Postal Serv.*, 37 Fair Empl. Prac. Cas. (BNA) 1867, 1869 (D.D.C. 1985) (finding that plaintiff adequately alleged a "physical or mental impairment" under the Rehabilitation Act). The American Psychiatric Association explains,

The essential features of [transsexual disorder] are a persistent discomfort and sense of inappropriateness about one's assigned sex in a person who has reached puberty. In addition, there is persistent preoccupation, for at least two years, with getting rid of one's primary and secondary sex characteristics and acquiring the sex characteristics of the other sex.

DSM-III-R, *supra* note 12, at 74.

The plaintiff in *Doe* came within the protections of the Rehabilitation Act because his would-be supervisors regarded his transsexual disorder as impairing his ability to work. The plaintiff pleaded a "medically and psychologically established need for gender reassignment surgery" from a man to a woman. 37 Fair Empl. Prac. Cas. at 1868. Although the ADA excludes most sexual disorders from coverage, it allows those resulting from physical impairments. 42 U.S.C. § 12211(b)(1). See *infra* notes 84-85 and accompanying text for further discussion of these exclusions.

83. *Halderman v. Pennhurst State Sch. and Hosp.*, 446 F. Supp. 1295 (E.D. Pa. 1977), *modified on other grounds*, 612 F.2d 84 (3d Cir. 1979), *rev'd*, 451 U.S. 1 (1981). Mental retardation is characterized by significantly subaverage intellectual functioning and deficits in living skills which appear before age 18. DSM-III-R, *supra* note 12, at 28.

84. 42 U.S.C. § 12211(a).

85. The relevant provision of the ADA states, "Under this chapter, the term 'disability' shall not include . . . (1) transvestitism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders . . ." *Id.* § 12211(b).

86. *Id.* § 12211(b)(2)-(3). Specifically, the ADA excludes "psychoactive substance use disorders resulting from current illegal use of drugs." *Id.* § 12211(b)(3).

87. When the Senate Labor Committee reported the ADA to the Floor, the bill contained no categorical exclusions for mental disorders. Several Senators expressed apprehension that the ADA would sanction otherwise illegal or immoral conduct. Senator Rudman declared:

[T]he bill could protect individuals from discrimination on the basis of a variety of socially unacceptable, often illegal, behavior if such behavior is considered to be the result of a mental illness. Some examples that come to mind are compulsive gambling, pedophilia, and kleptomania. I have serious problems with this result.

Establishing a mental impairment is merely the first step in a plaintiff's prima facie case. To recover under the ADA⁸⁸ and the Rehabilitation Act,⁸⁹ a plaintiff must also show that the impairment substantially limits one or more major life activities, that it has done so in the past, or that he or she is regarded as having such a limit. Some courts have been restrictive in interpreting this requirement under the Rehabilitation Act. The Fourth Circuit,⁹⁰ for example, held that a utility systems repairman with acrophobia⁹¹ was not substantially limited in his ability to work because his impairment never previously interfered with his work, nor did it preclude him from obtaining employment that did not require climbing.⁹² The Second Circuit⁹³

135 CONG. REC. S10,796 (daily ed. Sept. 7, 1989) (statement of Sen. Rudman). Congressman Delay articulated the same concern during debates on the House bill. He entered into the Record an op-ed piece that stated:

[T]he amputee could be placed on the same level as the pedophile, the blind on the same level as the transvestite. The consequences of this bill only trivializes [sic] the struggle of the truly disabled to attain equal opportunity and access, and places them in the same category with common criminals.

136 CONG. REC. H2322 (daily ed. May 15, 1990) (statement of Rep. Delay).

Senator Armstrong proposed, and the Senate passed, an amendment that specifically excludes from coverage certain sexual disorders and other conduct-related disorders, as well as some psychoactive substance use disorders. 135 CONG. REC. S10,785 (daily ed. Sept. 7, 1989) (reading of proposed Amendment No. 722). Senator Armstrong explained, "[I]f ADA is enacted the private sector will be swamped with mental disability litigation. My amendment excludes some of the mental disorders that would have created the more egregious lawsuits . . ." 135 CONG. REC. S11,176 (daily ed. Sept. 14, 1989) (statement of Sen. Armstrong). Section 12211 of the ADA embodies Senator Armstrong's amendment.

88. 42 U.S.C. § 12102(2).

89. 29 C.F.R. § 1613.702(c)-(e) (1991).

90. *Forrisi v. Bowen*, 794 F.2d 931, 934-35 (4th Cir. 1986).

91. Acrophobia is the fear of heights. DSM-III-R, *supra* note 12, at 243.

92. The court added that the plaintiff's employer did not perceive him as handicapped just because he was "incapable of satisfying the singular demands of a particular job." 794 F.2d at 934.

The ADA regulations conform to the *Forrisi* court's narrow interpretation of "substantially limit": "The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." 56 Fed. Reg. 35,734, 35,735 (1991) (to be codified at 29 C.F.R. § 1630.2(j)(3)(i)). The regulations also list factors for determining whether an individual is substantially limited in the area of working:

(A) The geographical area to which the individual has reasonable access;

(B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(C) The job from which the individual has been disqualified because of an im-

found that a plaintiff's impulsive personality traits that precluded police department work, assuming they constituted impairments, did not substantially limit his ability to find other work. Other courts have practically dispensed with any analysis on this prong of the plaintiff's prima facie case.⁹⁴ Although the term "major life activities" encompasses more than just the ability to work,⁹⁵ courts may be reluctant to recognize a mental handicap in the absence of a substantial limitation on one's ability to work.⁹⁶

Mentally disabled plaintiffs have had considerable difficulty demonstrating that they are "otherwise qualified" for their positions.⁹⁷ The Supreme Court's restrictive definition of "otherwise qualified" in *Southeastern Community College v. Davis*⁹⁸ partly explains this trend.⁹⁹ Few individuals whose impairments substantially limit their ability to work can perform their job functions in spite of their disabili-

pairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

Id. (to be codified at 29 C.F.R. § 1630.2(j)(3)(ii)).

93. *Daley v. Koch*, 892 F.2d 212, 215 (2d Cir. 1989).

94. *See, e.g., Doe v. New York Univ.*, 666 F.2d 761, 775 (2d Cir. 1981) (holding that despite plaintiff's claim that she suffered no impairments in major life activities, her borderline personality disorder did substantially limit her ability to handle medical school); *Franklin v. U.S. Postal Serv.*, 687 F. Supp. 1214, 1218 (S.D. Ohio 1988) (noting that plaintiff's diagnosis of paranoid schizophrenia may substantially limit some of her major life activities).

95. In fact, the EEOC's interpretive guidelines on the ADA require an employer to consider an employee's ability to work only if the employee is not substantially limited with regard to other major life activities. 56 Fed. Reg. 35,739, 35,741 (1991) (to be codified at 29 C.F.R. app. § 1630.2(j)).

96. *See, e.g., Fields v. Lyng*, 705 F. Supp. 1134, 1136 (D. Md. 1988) (holding that even though plaintiff suffered anxiety from his work-related travels and jeopardized his credibility as a labor negotiator by repeatedly shoplifting, plaintiff was not substantially limited where most of his problems stemmed from off-duty conduct), *aff'd*, 888 F.2d 1385 (4th Cir. 1989).

97. *E.g., Doe v. Region 13 Mental Health-Mental Retardation Comm'n*, 704 F.2d 1402, 1408-12 (5th Cir. 1983) (suicidal therapist not qualified to treat depressed patients); *Fields*, 705 F. Supp. at 1136-37 (depressed federal employee who suffered from anxiety and had kleptomaniac tendencies was not otherwise qualified to perform job as labor negotiator).

98. 442 U.S. 397, 406 (1979). *See supra* notes 55-61 and accompanying text discussing *Davis*.

99. The courts in *Region 13*, 704 F.2d at 1410, and *Fields*, 705 F. Supp. at 1136-37, both relied on *Davis* in determining that the plaintiffs were not otherwise qualified for the disputed jobs.

ties.¹⁰⁰ Thus, for example, the Fifth Circuit upheld a mental health center's decision to discharge a highly competent therapist because of her persistent suicidal feelings and gestures, even though the center had not considered any accommodations in hours, patient load, or extended leave of absence for treatment with a guaranteed job upon her return.¹⁰¹ Another court supported the decision of the U.S. Department of Agriculture to fire a labor negotiator for his travel-related anxiety and off-duty kleptomania, although the agency never contemplated any accommodations to his needs.¹⁰² Other courts have found mentally disabled plaintiffs unqualified for their positions even with substantial accommodations to their needs.¹⁰³

100. The Fifth Circuit in *Region 13* explained: "[t]he 'Catch-22' implicit in virtually all section 504 actions is particularly evident in this case, that is: Ms. Doe was required to prove her handicap for jurisdictional purposes, but simultaneously required to prove that she was not so handicapped as to be unqualified to perform her job." 704 F.2d at 1408 n.6.

101. *Id.* at 1408-12. The employer felt that the plaintiff may have endangered her patients by unconsciously condoning suicide or by abandoning them through her own suicide. *Id.* at 1409. The employer offered the plaintiff a long-term leave for hospitalization without a guaranteed job upon her return. *Id.* at 1405-07. Perhaps a more palatable accommodation could have been arranged had the parties negotiated. The court ignored this possibility and concluded that the plaintiff was not "otherwise qualified" in spite of her illness. *Id.* at 1412.

102. *Fields v. Lyng*, 705 F. Supp. 1134, 1137 (D. Md. 1988), *aff'd*, 888 F.2d 1385 (4th Cir. 1989). Accommodations might have included progressive discipline, a leave of absence for treatment, or a decrease in the employee's travel duties.

103. *See, e.g., Doe v. New York Univ.*, 666 F.2d 761, 775-79 (2d Cir. 1981) (reversing a preliminary injunction ordering a medical school to readmit plaintiff with borderline personality disorder, finding that plaintiff's numerous suicide attempts and violent attacks on others disqualified her from readmission to medical school); *Adams v. Alderson*, 723 F. Supp. 1531, 1532 (D.D.C. 1989) ("One who is unable to refrain from doing physical violence to the person of a supervisor . . . is simply not otherwise qualified for employment"), *aff'd sub nom. Adams v. G.S.A.*, No. 89-5265, 1990 WL 45737 (D.C. Cir. Apr. 10, 1990); *Franklin v. U.S. Postal Serv.*, 687 F. Supp. 1214, 1218-19 (S.D. Ohio 1988) (finding plaintiff who elected to go off her antipsychotic medication, engaged in violent and threatening behavior, and took 464 days of leave without pay over a period of several years was not otherwise qualified); *Schmidt v. Bell*, 33 Fair Empl. Prac. Cas. (BNA) 839, 848 (E.D. Pa. Sept. 9, 1983) (finding plaintiff who suffered from post-traumatic stress disorder was not otherwise qualified because of aggressive outbursts against authority); *Boyd v. U.S. Postal Serv.*, 32 Fair Empl. Prac. Cas. (BNA) 1217, 1223 (W.D. Wash. Aug. 1, 1983) (finding that postal worker with post-traumatic stress disorder was not otherwise qualified for job requiring regular attendance, where he had abandoned three previous jobs and had numerous "absent without leave" notices in his record), *aff'd on other grounds*, 752 F.2d 410 (9th Cir. 1985); *Guerriero v. Schultz*, 557 F. Supp. 511, 514 (D.D.C. 1983) (finding that foreign service officer suffering from schizoid personality disorder and alcoholism was not otherwise qualified where job required overseas service and necessary therapy was unavailable).

The ADA reasonably permits employers to impose on their employees a qualification standard¹⁰⁴ that they “not pose a direct threat to the health or safety of other individuals in the workplace.”¹⁰⁵ Aside from this compelling interest in protecting others, employers who wish to avoid liability should attempt to negotiate accommodations with disabled applicants or employees prior to rejecting or terminating them for their inability to perform the essential functions of a job.¹⁰⁶ Reliance on the Rehabilitation Act concerning the “otherwise qualified” prong of the *prima facie* case is risky.¹⁰⁷

C. *Accommodating Mentally Disabled Employees*

Mentally disabled individuals confront several barriers to successful employment. First, the symptoms of the disorder may impede work performance.¹⁰⁸ Employees with mental retardation or learning disa-

104. The ADA provides:

It may be a defense to a charge of discrimination under this [Act] that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

42 U.S.C. § 12113(a).

105. *Id.* § 12113(b). “The determination that an individual with a disability will pose a safety threat to others must be made on a case-by-case basis and not be based on generalizations, misperceptions, ignorance, irrational fears, patronizing attitudes, or pernicious mythologies.” S. REP. NO. 116, *supra* note 28, at 27. “For people with mental disabilities, the employer must identify the specific behavior on the part of the individual that would pose the anticipated direct threat . . . [and] the assessment that there exists a high probability of substantial harm must be strictly based on valid medical analyses.” H.R. REP. NO. 485, *supra* note 28, at 57, 73.

106. See 42 U.S.C. § 12111(8) and 56 Fed. Reg. 35,734, 35,736 (1991) (to be codified at 29 C.F.R. § 1630.2(o)(3)).

107. See *supra* notes 55-61 and accompanying text for a discussion of the distinction between the ADA and the Rehabilitation Act regarding a plaintiff’s qualifications for the challenged job.

108. Massel et al., *supra* note 68, at 39; McCue & Katz-Garris, *supra* note 69, at 54-55. Some researchers however, disclaim any significant correlation between psychiatric symptoms and vocational outcome. See, e.g., William A. Anthony & Mary A. Jansen, *Predicting the Vocational Capacity of the Chronically Mentally Ill: Research and Policy Implications*, 39 AM. PSYCHOL. 537, 539 (1984) (“[T]here appear to be no symptoms or symptom patterns that are routinely related to individual work performance”); Sharland Trotter et al., *Supportive Work: An Innovative Approach to the Vocational Rehabilitation of Persons Who Are Psychiatrically Disabled*, 33 REHAB. PSYCHOL. 27, 34 (1988) (success in a supported work program “was found to be independent of psychiatric diagnosis and severity of manifest symptomology”).

bilities may display difficulties in learning, comprehension, communication, social interactions, behavior, or movement.¹⁰⁹ Individuals with psychiatric illnesses may experience one or more of the following symptoms:¹¹⁰ delusions or hallucinations, high levels of distractibility,¹¹¹ social isolation or withdrawal, strange behaviors, decreased personal hygiene, agitation,¹¹² confusion, anxiety,¹¹³ depression,¹¹⁴ suicidal ideations,¹¹⁵ poor insight and judgment,¹¹⁶ and impaired interpersonal relationships. Mental illnesses may manifest themselves in more subtle ways as well, such as extended and perhaps unauthorized absences,¹¹⁷ poor work performance,¹¹⁸ violations of work rules,¹¹⁹ hostile and sometimes violent behavior toward others,¹²⁰ or off-duty

109. ROBERT A. WEISGERBER ET AL., TRAINING THE HANDICAPPED FOR PRODUCTIVE EMPLOYMENT 16-18 (1980).

110. This list is adapted from McCue & Katz-Garris, *supra* note 69, at 56-57. See also Massel, *supra* note 68, at 39-40; WEISGERBER, *supra* note 109, at 18-19.

111. See, e.g., Arneson v. Heckler, 879 F.2d 393, 397-98 (8th Cir. 1989) (addressing claims of a social security claims representative with neurological disorder who had difficulty concentrating in a noisy environment).

112. See, e.g., Gardner v. Morris, 752 F.2d 1271, 1276 (8th Cir. 1985) (describing plaintiff's tendency to become agitated, restless, hyperactive, irritable, and confused, and to display explosive and violent behavior during manic phases).

113. See, e.g., Shea v. Tisch, 870 F.2d 786, 787 (1st Cir. 1989) (noting that traffic and weekend work aggravated postal worker's anxiety disorder); Fields v. Lyng, 705 F. Supp. 1134, 1135 (D. Md. 1988) (noting federal labor negotiator's anxiety over work-related travel), *aff'd*, 888 F.2d 1385 (4th Cir. 1989).

114. See, e.g., Doe v. Region 13 Mental Health-Mental Retardation Comm'n, 704 F.2d 1402, 1406 (5th Cir. 1983) (noting therapist's severe depression and threats to colleagues that she would commit suicide).

115. *Id.*

116. See, e.g., Franklin v. U.S. Postal Serv., 687 F. Supp. 1214, 1218 (S.D. Ohio 1988) (addressing plaintiff's election to cease taking antipsychotic medication).

117. See, e.g., Shea v. Tisch, 870 F.2d 786, 787 (1st Cir. 1989) (postal service employee often absent due to anxiety disorder); Fong v. U.S. Dep't of Treasury, 705 F. Supp. 41, 42-43 (D.D.C. 1989) (federal employee with post-traumatic stress disorder and secondary alcoholism was absent 443 hours over a six month period, sometimes without leave); Franklin v. U.S. Postal Serv., 687 F. Supp. 1214, 1217 (S.D. Ohio 1988) (psychotic postal worker took 464 days of leave without pay during a 3.5 year period).

118. See, e.g., Arneson v. Heckler, 879 F.2d 393, 394-95 (8th Cir. 1989) (social security worker with neurological impairment had trouble comprehending written and spoken language and displayed poor handwriting, spelling, and organizational skills).

119. See, e.g., Callicotte v. Carlucci, 698 F. Supp. 944, 945-46 (D.D.C. 1988) (plaintiff who suffered from alcoholism and depression failed to finish assignments and received reprimands for insubordination).

120. See, e.g., Doe v. New York Univ., 666 F.2d 761, 766 (2d Cir. 1981) (applicant for medical school assaulted her doctors and nurses numerous times, attempted suicide,

misconduct.¹²¹

Second, aside from these symptoms, formerly-institutionalized individuals may display deficits in social functioning and basic work skills.¹²² While their peers progressed through school, formative employment experiences, and relationships, hospitalized patients may have learned a passive victim role¹²³ which is incompatible with successful employment and adult relationships.¹²⁴

Third, mentally disabled individuals must contend with the stigma of their illnesses.¹²⁵ Co-workers and supervisors, like others in society, often do not understand the causes and manifestations of mental illness.¹²⁶ Because of their lack of understanding, they may act on the basis of myths and stereotypes, such as the misconception that men-

and engaged in self-mutilating behavior); *Adams v. Alderson*, 723 F. Supp. 1531, 1531 (D.D.C. 1989) (plaintiff with adjustment disorder and compulsive personality disorder assaulted a female supervisor and damaged office equipment), *aff'd sub nom. Adams v. G.S.A.*, No. 89-5265, 1990 WL 45737 (D.C. Cir. Apr. 10, 1990); *Franklin v. U.S. Postal Serv.*, 687 F. Supp. 1214, 1215-17 (S.D. Ohio 1988) (postal worker suffering from psychosis acted belligerently toward co-workers and the public); *Schmidt v. Bell*, 33 Fair Empl. Prac. Cas. (BNA) 839, 840-42 (E.D. Pa. Sept. 9, 1983) (employee disobeyed office policy and verbally attacked his supervisor).

121. See, e.g., *Fields v. Lyng*, 705 F. Supp. 1134, 1134 (D. Md. 1988) (labor negotiator with record of numerous arrests and convictions for off-duty kleptomania), *aff'd*, 888 F.2d 1385 (4th Cir. 1989); *Franklin v. U.S. Postal Serv.*, 687 F. Supp. 1214, 1216 (S.D. Ohio 1988) (schizophrenic postal worker arrested for writing bad checks, defrauding a livery, assault, and disorderly conduct); *Guerriero v. Schultz*, 557 F. Supp. 511, 512 n.2 (D.D.C. 1983) (foreign service officer with schizoid personality disorder and alcoholism engaged in "abnormal sex acts" in a bar).

122. McCue & Katz-Garris, *supra* note 69, at 54-55. The most significant predictor of vocational success among severely mentally ill persons is a prior employment history. Donna L. Stauffer, *Predicting Successful Employment in the Community for People with a History of Chronic Mental Illness*, 6 OCCUP. THER. IN MENTAL HEALTH, Summer 1986, at 31, 46.

123. McCue and Katz-Garris explain: "The reality in which [patients] previously functioned adequately (the psychiatric hospital) is no longer available, replaced by the new reality of the community and its accompanying pressure and stress. Coping methods learned in the hospital do not apply to the new environment and thus result in adjustment difficulties." McCue & Katz-Garris, *supra* note 69, at 55.

124. *Id.*

125. *Id.*

126. One study found that employers fear that mentally ill employees will become violent, suffer a relapse, or engage in bizarre behavior, or that they will not be able to tolerate the pace of work. S. Olshansky et al., *Employers' Attitudes and Practices in the Hiring of Ex-Mental Patients*, 42 MENTAL HYGIENE 391 (1958), cited in McCue & Katz-Garris, *supra* note 69, at 55.

tally ill people are violent.¹²⁷ By enacting the ADA, Congress sought to eliminate stereotypic assumptions concerning disabled persons' abilities to work and contribute to society.¹²⁸

In order to meet their obligations under the ADA, employers must help mentally disabled employees cope with the symptoms of their illnesses, the residual effects of institutionalization, and the stereotypical attitudes of colleagues.¹²⁹ Employers should consider the following

127. ROBERT C. CARSON & JAMES N. BUTCHER, *ABNORMAL PSYCHOLOGY AND MODERN LIFE* 6 (9th ed. 1992) ("A typical former mental patient is no more volatile or dangerous than a 'normal' person. The exceptions to this rule generate much publicity and give a distorted picture"). Cf. John Monahan, *Mental Disorder and Violent Behavior: Perceptions and Evidence*, 47 *AM. PSYCHOL.* 511, 519 (1992) (explaining that, while psychotic patients are significantly more likely than non-psychotic individuals to become violent, approximately 90% of mentally ill persons are not violent).

128. In its Statement of Findings, Congress noted:

[I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society. . . .

42 U.S.C. § 12101(a)(7). The Senate Conference Report quoted from the Supreme Court's decision in *School Board of Nassau County v. Arline*, 480 U.S. 273, 284 (1987): "[S]ociety's accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment." S. REP. NO. 116, *supra* note 28, at 23-24.

During Floor debates, Senator Domenici spoke directly about stereotypes regarding mental illness:

Think back in all our lives when we used terminology like "schizophrenia" or "that is schizophrenic." We all perceive some idea in our minds about people who have those kinds of ailments. It turns out that more times than not, we are wrong in or [sic] perception of their abilities . . . [C]learly the time has come when they deserve an unbiased evaluation of their capability based upon the disease rather than some subjective disability attached to just the use of the name.

135 CONG. REC. S10,779 (daily ed. Sept. 7, 1989) (statement of Sen. Domenici).

129. While employers are obligated to accommodate the needs of mentally disabled employees, they need not, of course, become a provider of mental health services. The EEOC guidelines specifically excuse employers from making accommodations that are "primarily for the personal benefit of the individual with a disability," such as a wheelchair, eyeglasses, or a prosthetic limb. 56 Fed. Reg. 35,739, 35,747 (1991) (to be codified at 29 C.F.R. app. § 1630.9). Presumably this same rationale applies to mental health treatment. Nor need employers create sheltered workshops or supported employment. *Id.* See *supra* notes 30-31 and accompanying text discussing undue hardship. Nonetheless, the literature on sheltered workshops and other forms of supported employment can help employers in identifying reasonable accommodations they should make under the ADA. See generally Jane L. Dulay & Mary Steicher, *Transitional Employment for the Chronically Mentally Ill*, 2 *OCCUP. THER. IN MENTAL HEALTH* 65 (1982).

types of accommodations when consulting with mentally disabled employees or applicants:

1. designing an environment that contains minimal levels of distraction,¹³⁰
2. distributing work evenly over time in order to reduce stress,¹³¹
3. limiting the number of people with whom the employee must interact,¹³²
4. providing appropriate levels and methods of supervision¹³³ and detailed feedback regarding work performance,¹³⁴
5. providing appropriately-structured training for the development of new or remedial skills,¹³⁵

130. GROSSMAN, *supra* note 16, at 56. Grossman suggests, for example, moving the employee to a more isolated work area in order to reduce noise levels and other sources of distraction. *Id.*

131. *Id.* at 57.

132. *Id.*

133. *Id.* Depending on the employee, the appropriate level of supervision may be "close, moderate, or minimal" and provided in a permissive or firm manner. Grossman suggests that clearly-delineated lines of authority will reduce ambiguity and uncertainty. *Id.*

134. Supervisors may need to assist mentally disabled employees in modifying a specific inappropriate behavior or in improving concentration through coaching and graduated, structured practice. See, e.g., Patrice T. English, *The Use of Isolation Time-Out with a Disabled Adult in a Regular Work Setting: A Case Study*, J. REHAB., Jul.-Sept. 1987, at 67 (analyzing the use of isolation time out to modify employee's inappropriate laughter); David W. Foy et al., *Modeled Assertion in a Case of Explosive Rages*, 6 J. BEHAV. THER. & EXPER. PSYCHIATRY 135 (1975) (analyzing the use of assertiveness training in treating individual who expressed hostility in an abusive manner); Kim T. Mueser et al., *Social Skills Training for Job Maintenance in a Psychiatric Patient*, 33 J. COUNS. PSYCHOL. 360 (1986) (describing the successful use of social skills training); Frank R. Rusch & Bruce M. Menchetti, *Increasing Compliant Work Behaviors in a Non-Sheltered Work Setting*, 19 MENTAL RETARD. 107 (1981) (noting a drastic increase in compliant behavior following practice and warnings); Fraser N. Watts, *Modification of the Employment Handicaps of Psychiatric Patients by Behavioral Methods*, 30 AM. J. OCCUP. THER. 487 (1976) (recommending behavior modifications methods such as behavioral training incentives and behavioral counseling). Supervisors could also improve mentally disabled employees' productivity through incentives and reduce their anxiety through "graded exposure to anxiety-evoking cues." Watts, *supra*, at 489.

135. GROSSMAN, *supra* note 16, at 55-56. One author recommends accommodations in the training process itself. For mentally retarded employees, the trainer should break instructions down into small steps; practice each before moving on; communicate in concrete terms; provide alternate, simplified means for accomplishing a task; provide positive reinforcement; avoid technical jargon; use teams to foster self-help; and remain within the employees' attention spans. WEISGERBER, *supra* note 109, at 237-38. For mentally ill employees, Weisgerber recommends the following accommodations: avoid-

6. offering flexible hours to accommodate therapy sessions or medication-induced drowsiness,¹³⁶
7. restructuring the individual's job duties to reduce stress and optimize performance levels,¹³⁷
8. reassigning the employees to vacant positions if they cannot perform the essential functions of their current job with reasonable accommodation,¹³⁸
9. providing sick leave, administrative leave, and leave without pay as needed,¹³⁹
10. offering leave of absence for treatment,¹⁴⁰
11. referring the individual for counseling at an in-house employee assistance program¹⁴¹ or some outside agency,¹⁴²

ing distracting environments; utilizing positive reinforcement; remaining within the employees' attention spans; avoiding frustrating tasks or approaching them gradually; and avoiding deadlines or rush jobs. *Id.* at 238.

136. TECHNICAL ASSISTANCE MANUAL, *supra* note 17, at III-22-23.

137. GROSSMAN, *supra* note 16, at 57. The author recommends that the employer assign either repetitious or diverse tasks, whichever the individual finds less stressful. *Id.* Job restructuring is one of the reasonable accommodations specifically listed in the ADA. 42 U.S.C. § 12111(9). The EEOC's interpretive guidelines explain: "An employer or other covered entity may restructure a job by reallocating or redistributing nonessential, marginal job functions." 56 Fed. Reg. 35,739, 35,744 (1991) (to be codified at 29 C.F.R. app. § 1630.2(o)).

138. The ADA interpretive guidelines list reassignment to a vacant position as a last resort accommodation for an employee. 56 Fed. Reg. at 35,744 (to be codified at 29 C.F.R. app. § 1630.2(o)). Job applicants cannot request reassignment to a position for which they are not qualified. *Id.*

139. The EEOC's interpretive guidelines to the ADA note: "[O]ther accommodations could include permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment . . ." *Id.* The ADA does not require, however, employers to give extra paid leave to disabled employees. S. REP. NO. 116, *supra* note 28, at 31.

140. *See* 56 Fed. Reg. at 35,744 (to be codified at 29 C.F.R. app. § 1630.2(o)).

141. Employers establish employee assistance programs (EAPs) to address employees' personal problems, either through in-house counseling or information and referral services. WALTER E. SCANLON, ALCOHOLISM AND DRUG ABUSE IN THE WORKPLACE: EMPLOYEE ASSISTANCE PROGRAMS 17 (1986). There are about 5,500 EAPs in this country. Maria Roberts-DeGennaro, *The Case Management Model in Employee Assistance Programs*, 1 EMPLOYEE ASSISTANCE Q. 63, 63 (1986). Approximately 26 million workers in private industry and 10 million in the public sector have access to EAPs. INSTITUTE OF MEDICINE, TREATING DRUG PROBLEMS: VOL. I 121-22 (1990).

142. *See, e.g., Doe v. New York Univ.* 666 F.2d 761, 766-67 (2d Cir. 1981) (medical school revoked its demand that plaintiff withdraw from school, contingent upon her successful completion of psychotherapy). Employer-initiated referrals are especially effective for depressed employees and substance abusers who seldom seek treatment

12. applying progressive discipline,¹⁴³ or
13. educating colleagues and supervisors about the nature of mental disabilities and how to assist a mentally disabled co-worker with functioning on the job.¹⁴⁴

An employer need not make any accommodation that would cause it undue hardship.¹⁴⁵ A finding of undue hardship depends on the cost of the accommodation, the size and financial stability of the business, the financial resources of any "parent" organization, the employer's type of operation, and the impact of the accommodation on the employer's workforce.¹⁴⁶ While a serious adverse impact on other employees constitutes a good defense,¹⁴⁷ generalized claims of poor morale,¹⁴⁸ absenteeism, or safety problems¹⁴⁹ do not suffice. If an employer cannot afford to accommodate the employee's needs after considering alternate sources of funding, the employer must still give the employee the option of financing his or her own accommodation.¹⁵⁰

themselves. Keith McClellan, *Early Intervention into Addictive and Mental Health Disorders*, 5 EMPLOYEE ASSISTANCE Q. 71, 74 (1990).

143. See, e.g., *Schmidt v. Bell*, 33 Fair Empl. Prac. Cas. (BNA) 839, 840-42 (E.D. Pa. Sept. 9, 1983) (plaintiff received numerous warnings and written reports; employer retracted her notice of termination, contingent upon compliance with specified conditions).

144. See TECHNICAL ASSISTANCE MANUAL, *supra* note 17, at III-15 (employer cannot claim undue hardship based on poor morale of coworkers; instead, employer should provide "awareness training").

145. EEOC regulations provide that employers may assert undue hardship as a defense to an accommodation demand. 56 Fed. Reg. 35,734, 35,737 (1991) (to be codified at 29 C.F.R. § 1630.9(a)). See *supra* note 30 for the ADA definition of undue hardship.

146. 42 U.S.C. § 12111(10)(B). The EEOC's interpretive guidelines note that undue hardship encompasses more than financial circumstances. "Undue hardship" refers to any accommodation that would be unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business." 56 Fed. Reg. at 35,744 (to be codified at 29 C.F.R. app. § 1630.2(p)). See *supra* notes 30-31 and accompanying text for further discussion of undue hardship under the ADA.

147. 56 Fed. Reg. at 35,752 (to be codified at 29 C.F.R. app. § 1630.15(d)) (employer may show that the "provision of a particular accommodation would be unduly disruptive to its other employees or to the functioning of its business.").

148. *Id.* Rehabilitation Act cases reach a similar result. See, e.g., *Callicotte v. Carlucci*, 698 F. Supp. 944, 951 (D.D.C. 1988) (finding that "serious morale problems" among plaintiff's colleagues did not excuse the federal employer from accommodating his depression and alcoholism).

149. 56 Fed. Reg. at 35,745 (to be codified at 29 C.F.R. app. § 1630.2(r)); S. REP. NO. 116, *supra* note 28, at 28. One study showed vague fears of increased absenteeism and accidents to be unfounded. Wolfe, *Disability is No Hardship for du Pont* (1973), cited in S. REP. NO. 116, at 29.

150. 56 Fed. Reg. at 35,745 (to be codified at 29 C.F.R. app. § 1630.2(p)). The

The Department of Labor¹⁵¹ sponsored a study of reasonable accommodations¹⁵² provided by federal contractors under section 503 of the Rehabilitation Act. According to the study, most accommodations for mentally disabled employees cost little. Seventy percent of the accommodations provided to mentally retarded persons and fifty percent of those afforded mentally ill individuals cost nothing.¹⁵³ Only sixteen percent of accommodations provided to mentally retarded employees and twenty-two percent of accommodations made for mentally ill employees cost over \$500.¹⁵⁴ The study overlooked, however, the potentially high cost of extended leaves of absence due to mental disorders.¹⁵⁵ Prolonged absences could eventually amount to undue hardship for many employers.

Ultimately, the ADA requires that the employer engage the disabled employee in an informal, interactive process¹⁵⁶ to decide whether rea-

EEOC interpretive guidelines recommend that employers seek funding from state vocational rehabilitation agencies or claim federal, state, or local tax deductions or credits. *Id.*

151. Frederick C. Collignon, *The Role of Reasonable Accommodation in Employing Disabled Persons in Private Industry*, in *DISABILITY AND THE LABOR MARKET* 196, 197 (Monroe Berkowitz & M. Anne Hill eds., 1986) (citing *BERKELEY PLANNING ASSOCIATES, A STUDY OF ACCOMMODATIONS PROVIDED TO HANDICAPPED EMPLOYEES BY FEDERAL CONTRACTORS: FINAL REPORT* (U.S. Dep't of Labor, Employment Standards Administration 1982)).

152. The study enumerated, but unfortunately did not define, the following accommodations by federal contractors:

removed barrier; adjusted work environment; adjusted table, desk; other rearrangement; relocated work site; modified phone, typewriter; microfilm, dictaphone; other special equipment; job transportation or mobility; reassigned tasks; modified work hours; other modification of work procedure; assigned aides, reader; additional training; oriented co-workers, supervisors; transferred to another job; other accommodation.

Id. at 220-23 (citing *BERKELEY PLANNING ASSOCIATES*).

153. *Id.* at 224.

154. *Id.* at 224-25.

155. Provided an employee uses only accrued leave or takes leave without pay, the employer theoretically loses nothing if it can hire a temporary replacement to perform the disabled employee's duties. If the employer cannot hire a temporary substitute, however, it may lose a great deal in terms of lost productivity.

156. The applicable regulation is permissive in nature: "To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability . . ." 56 Fed. Reg. 35,734, 35,736 (1991) (to be codified at 29 C.F.R. § 1630.2(o)(3)). The EEOC's interpretive guidelines, however, indicate that an employer should negotiate with the employee unless the appropriate accommodation is "so obvious" that conferring would serve no purpose. *Id.* at 35,748 (to be codified at 29 C.F.R. app. § 1630.9).

sonable accommodations are feasible or would constitute undue hardship on the employer. Even if the requested accommodations would constitute an undue hardship, employers should negotiate the matter and document their decisions.

D. *Case Illustrations*

The following case studies illustrate the types of problems employers may encounter among mentally disabled employees and recommend resolutions that comply with the ADA.

Case #1. James Darnell experienced his first symptoms of schizophrenia¹⁵⁷ at age twenty-five, after he completed a masters degree in computer science. Darnell was hospitalized numerous times during the last ten years for the treatment of delusions and self-mutilating behavior. He now effectively controls his disorder with antipsychotic medications. He has been out of the hospital for over two years, though he continues to receive outpatient therapy. During the past ten years, Darnell has worked sporadically as a sales agent for a computer company. Seeking a more challenging position, he has applied for a programmer position with the Midwest Software Corporation. Midwest's hiring partner is impressed with Darnell's education and intelligent demeanor but is concerned about the gaps in his work history. Darnell explains that he had health problems requiring extended treatment but anticipates no difficulty in performing the programmer's job. The hiring partner asks, "What kinds of health problems have you had?" Upon learning that Darnell suffers from schizophrenia, the partner decides that Midwest should reject him, because he presents too many risks to himself, his co-workers, and to Midwest's productivity.

While Midwest's concerns with Darnell's spotty work history are legitimate, the company has crossed the fine line between permissible and impermissible inquiries. The ADA flatly prohibits employers from asking job applicants about any current or past disability prior to a conditional job offer.¹⁵⁸ The hiring partner could have asked Darnell

157. See *supra* note 73 for the definition of schizophrenia.

158. 42 U.S.C. § 12112(d)(4)(A). Once an employer has extended a conditional job offer, it may require the applicant to submit to a medical examination or an inquiry if all applicants in that job category are required to do so. *Id.* § 12112(d)(3); TECHNICAL ASSISTANCE MANUAL, *supra* note 17, at VI-1. Unlike medical exams and inquiries which an employer may require of current employees, exams and questioning of conditionally-accepted applicants need not be "job-related and consistent with business necessity." 42 U.S.C. § 12112(d)(4)(A); TECHNICAL ASSISTANCE MANUAL, at VI-1 (noting

whether he was able to comply with Midwest's attendance requirements.¹⁵⁹ He probably could have inquired whether Darnell had any problems that would affect his competence and productivity as a programmer and his ability to work with colleagues on a team.¹⁶⁰ Nevertheless, the partner could not have asked Darnell to submit to a psychological test unless all job applicants were required to take the same test.¹⁶¹ Midwest could have rejected Darnell on the basis of his inconsistent work record alone.¹⁶² It could not reject him, however, on the basis of his schizophrenia, unless he presented a direct threat to the health and safety of others¹⁶³ or the illness prevented him from

that an employer may make inquiries about previous injuries and workers compensation claims). However, if an employer withdraws its offer based on such an exam or inquiry, its reasons for rejecting the applicant "must be job-related and necessary for the business." TECHNICAL ASSISTANCE MANUAL, at VI-1.

159. The ADA provides: "A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions." 42 U.S.C. § 12112(d)(4)(B). See also TECHNICAL ASSISTANCE MANUAL, *supra* note 17, at V-9 ("An employer may ask questions to determine whether an applicant can perform specific job functions.").

160. 42 U.S.C. § 12112(d)(4)(B). But see Barbara Berish Brown, *Reasonable Accommodation, Undue Hardship, and Employer Defenses Under the ADA*, in EMPLOYER COMPLIANCE WITH THE AMERICANS WITH DISABILITIES ACT 91, 104-05 (Alan M. Koral & Bruce McLanahan eds., 1990) ("Even a question that asks 'do you have any physical or mental conditions that would prevent you from performing your job functions?' cannot be asked.").

161. 42 U.S.C. § 12112(d)(3). In contrast, an employer may require a current employee to submit to a medical exam if it "is shown to be job-related and consistent with business necessity." *Id.* § 12112(d)(4)(A).

162. The ADA provides: "No covered entity shall discriminate against a qualified individual with a disability because of the disability . . ." *Id.* § 12112(a). Accordingly, an employer taking adverse actions for reasons other than disability would not violate the Act. As in many employment discrimination cases, ascertaining the employer's motivation can be far from easy. See *supra* notes 35-39 and accompanying text for a discussion of the *McDonnell Douglas* burden of proof designed to ferret out an employer's invidious motive.

163. An employer claiming that the disabled applicant would create risks in the workplace must meet a heavy burden:

An employer . . . is not permitted to deny an employment opportunity to an individual with a disability merely because of a slightly increased risk. The risk can only be considered when it poses a significant risk, i.e., high probability, of substantial harm; a speculative or remote risk is insufficient For individuals with mental or emotional disabilities, the employer must identify the specific behavior on the part of the individual that would pose the direct threat Such consideration must rely on objective, factual evidence—not on subjective perceptions, irrational fears, patronizing attitudes, or stereotypes—about the nature or effect of a particular disability

56 Fed. Reg. 35,739, 35,745 (1991) (to be codified at 29 C.F.R. app. § 1630.2(r)).

performing the essential functions of the position with or without reasonable accommodation.¹⁶⁴

Case #2. For the past twelve years, Carla Macklin has had a successful career as a producer for Albright Advertising Company. She has earned outstanding performance appraisals and has established strong, lasting customer relationships. She is quiet, pleasant, and somewhat self-effacing. Macklin has managed her recurring, moderate mood swings with medication and therapy and has seldom missed work.

During the past month, however, Macklin's behavior has changed dramatically. She worked fifteen hour days without breaks. On one occasion she proposed an outlandish, exorbitant advertising campaign to a customer. When he declined her offer she shouted angrily, "You don't know what an opportunity you're passing up!" Worst of all, without authorization, she "borrowed" \$5,000 from one of her customer's accounts to develop an elaborate, yet unapproved, TV commercial. Albright fired Macklin for antagonizing customers and using their funds without authorization.

Macklin's therapist convinced her to enter the hospital, where she was treated successfully for a manic episode.¹⁶⁵ She left the hospital with medication and a good prognosis, but without a job to which to return.

Albright can argue that it terminated Macklin because of her misconduct rather than because of her manic condition.¹⁶⁶ When, as here, an employee's disability causes her to engage in misconduct, such a distinction is tenuous. Congress specified in the ADA that employers may hold alcoholics and drug users to the same standards of conduct as other employees, even if their misconduct stems from their disabilities.¹⁶⁷ The absence of any parallel provision for mentally disabled individuals suggests that Congress intended employers to attempt to

164. An employer cannot reject a disabled individual as unqualified for employment because of his disability without first investigating whether the applicant could perform the essential functions of the position with or without reasonable accommodation. 42 U.S.C. § 12111(8). Furthermore, the employer must negotiate with the job applicant regarding feasible accommodations. 56 Fed. Reg. at 35,736 (to be codified at 29 C.F.R. § 1630.2(o)(3)).

165. See *supra* note 74 for the definition of a manic episode.

166. Recall that an employer violates the ADA only if it takes adverse action "because of" a plaintiff's disability. 42 U.S.C. § 12112(a). See *supra* notes 52-54 and accompanying text describing this element of plaintiff's prima facie case.

167. 42 U.S.C. § 12114(c)(4) (1992). See *infra* note 215 and accompanying text for discussion of the language and implications of this provision.

accommodate mentally ill employees before firing them for misconduct. Some Senators criticized the ADA for requiring accommodation in this type of scenario.¹⁶⁸

Even if a court found that Albright fired Macklin because of her mental disorder, the employer could still claim that Macklin was no longer qualified for her position.¹⁶⁹ Under the Rehabilitation Act, as interpreted by the Supreme Court in *Southeastern Community College v. Davis*,¹⁷⁰ Macklin probably would have lost. By antagonizing and taking advantage of her clients, Macklin demonstrated that she was not otherwise qualified for a producer position in spite of her handicap.¹⁷¹ Under the ADA, however, Albright probably could not have dismissed Macklin before negotiating with her over reasonable accommodations that could enable her to perform her essential duties as producer.¹⁷² Reasonable accommodation might have included a brief leave of absence while Macklin obtained inpatient treatment. Alternatively, Albright could have suspended her temporarily and offered her another chance to improve her conduct. Albright might still prevail by proving

168. Senator Humphrey, for example, made the following remarks:

While the committee report gives examples of clear-cut accommodations for the [physically] disabled, it studiously avoids the more bizarre accommodation requirements imposed by the bill. What are employers expected to do to accommodate alcoholics, the mentally retarded, or persons with neurotic or psychotic disorders?

This Senator has no idea, and I doubt that other Senators do either.

135 CONG. REC. S10,783 (daily ed. Sept. 7, 1989) (statement of Sen. Humphrey). Senator Rudman spoke along the same lines: "I have difficulty with the notion that a psychiatric diagnosis of the cause of improper behavior should affect the legal rights of an employer to take such behavior into account . . ." 135 CONG. REC. S10,796 (daily ed. Sept. 7, 1989) (statement of Sen. Rudman).

169. The ADA does not protect disabled employees who cannot perform the essential functions of their position with or without reasonable accommodation. 42 U.S.C. § 12111(8). See *supra* notes 26-28 and accompanying text discussing this qualification element of plaintiff's case.

170. 442 U.S. 397, 406 (1979).

171. See *id.* For discussion of *Davis* and the Court's holding, see *supra* notes 55-57 and accompanying text.

172. The ADA defines qualified disabled individuals as those who can perform the essential functions of their position *with or without reasonable accommodation*. 42 U.S.C. § 12111(8) (emphasis added). The EEOC regulations and interpretive guidelines require the employer to confer informally with the disabled employee about reasonable accommodation. 56 Fed. Reg. 35,734, 35,736 (1991) (to be codified at 29 C.F.R. § 1630.2(o)(3)) and 56 Fed. Reg. at 35,748 (to be codified at 29 C.F.R. app. § 1630.9). *But see Voss, supra* note 16, at 940-42 (urging courts to distinguish misconduct from the underlying disability and to permit adverse action based on the former).

that any accommodations would have caused it undue hardship,¹⁷³ particularly if lucrative clients pulled out of the firm after Macklin's misbehavior.¹⁷⁴ Even so, Albright should have conferred with Macklin over these options and built a record to use in court.

III. REASONABLE ACCOMMODATION OF PSYCHOACTIVE SUBSTANCE USE DISORDERS UNDER THE REHABILITATION ACT AND THE ADA

A. *Scope of the Problem*

Estimates of the prevalence of psychoactive substance use disorders¹⁷⁵ vary because researchers apply different definitions of drug and alcohol use and abuse.¹⁷⁶ Depending on the criteria researchers use, between 5 and 15 percent of the United States' population has a drinking problem.¹⁷⁷ One study estimates that 5.5 to 5.8 percent of the population abuses or is or has been dependent on drugs.¹⁷⁸ Eighteen

173. 42 U.S.C. § 12111(10) and 56 Fed. Reg. at 35,737 (to be codified at 29 C.F.R. § 1630.9(a)).

174. See *supra* note 30 and accompanying text for a description of the factors that enter into the determination of an undue hardship. In reality, the larger and wealthier the employer, the less likely it will prevail on this defense.

175. See *supra* note 13 for the American Psychiatric Association's definition of psychoactive substance use disorder.

176. M. Susan Ridgely et al., *Chronic Mentally Ill Young Adults with Substance Abuse Problems: A Review of the Relevant Literature and Creation of a Research Agenda* 11 (Nov. 1986) (unpublished manuscript from University of Maryland School of Medicine)(citing D. Hasin et al., *Alcohol and Drug Abuse in Patients with Affective Syndromes*, 26 COMP. PSYCHIATRY 283 (1985)).

177. BANTA & TENNANT, *supra* note 13, at 105 (finding that between 5 and 10% of the population are problem drinkers, depending on rigidity of the criteria); BUREAU OF NATIONAL AFFAIRS SPECIAL REPORT, *ALCOHOL AND DRUGS IN THE WORKPLACE: COSTS, CONTROLS, AND CONTROVERSIES* 13 (1986) (surveying scope of alcohol abuse); MICHAEL D. NEWCOMB, *DRUG USE IN THE WORKPLACE: RISK FACTORS FOR DISRUPTIVE SUBSTANCE USE AMONG YOUNG ADULTS* 6 (1988) (citing 1980 study that 10% of the workforce have drug and alcohol problems); SCANLON, *supra* note 141, at 2 (citing study finding the rate of alcoholism among workforce to be 10%); W. SMITH, *A PROFILE OF HEALTH AND DISEASES IN AMERICA* (1989), cited in CARSON & BUTCHER, *supra* note 127, at 296 (finding that 7% of adults aged 18 or older are problem drinkers); Gary F. Kohut & Virginia T. Geurin, *Attitudes of Personnel Managers Toward Substance Abuse Policies*, 21 J. DRUG ISSUES 493, 493 (1991) (noting that at least 10% of population is afflicted with alcoholism or drug abuse); Lee N. Robins et al., *Lifetime Prevalence of Specific Psychiatric Disorders in Three Sites*, 41 ARCH. GEN. PSYCHIATRY 949, 952 (1984) (setting figure at 11% to 16%).

178. Robins et al., *supra* note 177, at 952. The Institute of Medicine recently reported that of an estimated 14.5 million Americans over age 12 who use illegal drugs,

percent of Americans in their early twenties report using alcohol at work or school one to five times during the past six months; close to 17 percent use marijuana and 12 percent use hard drugs as frequently.¹⁷⁹ Mentally ill individuals abuse substances at perhaps twice the rate of the general population; up to 50 percent of psychiatrically disabled persons under age forty abuse psychoactive substances.¹⁸⁰ Unemployment rates among alcoholics and drug addicts range from 10 to 37 percent.¹⁸¹ Drug users who do work report lower than average incomes.¹⁸² Estimates place the cost of alcohol and drug abuse to the nation at up to \$100 billion annually in lost productivity and medical expenditures.¹⁸³

B. *Treatment of Psychoactive Substance Use Disorders Under the ADA and the Rehabilitation Act*

Neither the original Rehabilitation Act nor its legislative history addressed alcohol or drug abusers.¹⁸⁴ Later, the Attorney General¹⁸⁵ and several district courts¹⁸⁶ determined that the Rehabilitation Act did

1.5 million clearly need treatment, and 3.1 million probably need treatment. INSTITUTE OF MEDICINE, *supra* note 141, at 79-80 (citing NATIONAL INSTITUTE ON DRUG ABUSE, NATIONAL HOUSEHOLD SURVEY ON DRUG ABUSE: POPULATION ESTIMATES 1988 (1989)).

179. NEWCOMB, *supra* note 177, at 35.

180. Vivian B. Brown et al., *The Dual Crisis: Mental Illness and Substance Abuse*, 44 AM. PSYCHOL. 565, 566 (1989).

181. INSTITUTE OF MEDICINE, *supra* note 141, at 80 (stating that 10% of the estimated 4.6 million Americans who have a clear or a probable need for drug treatment are unemployed); Rebecca M. Renwick & Marta Krywonis, *Personal and Environmental Factors Related to Employment: Implications for Substance Abuse Intervention*, 58 J. REHAB. 23 (1992) (noting the mean rate of unemployment amongst substance abuse clients to be 37%).

182. INSTITUTE OF MEDICINE, *supra* note 141, at 80 (noting that of the estimated 4.6 million individuals who have a clear or probable need for drug treatment, 32% earn less than \$9,000 per year, and 38% earn between \$9,000 and \$20,000).

183. NEWCOMB, *supra* note 177, at 6 (citing NATIONAL INSTITUTE OF DRUG ABUSE, CONSENSUS SUMMARY: INTERDISCIPLINARY APPROACHES TO THE PROBLEM OF DRUG ABUSE IN THE WORKPLACE (1986) (estimating the cost to be \$100 billion annually)); TIA SCHNEIDER DENENBERG & R.V. DENENBERG, ALCOHOL AND DRUGS: ISSUES IN THE WORKPLACE v (1983) (same).

184. Henderson, *supra* note 16, at 727.

185. Rehabilitation Act of 1973—Coverage of Alcoholics and Drug Addicts, 43 Op. Att'y Gen. No. 12, at 3 (1976).

186. *See, e.g.,* Whitaker v. Board of Higher Educ. of City of New York, 461 F. Supp. 99, 106 n.7 (E.D.N.Y. 1978) (suggesting in dictum that defendant would have no grounds upon which to challenge plaintiff's classification of alcoholism as a handicap);

protect drug and alcohol abusers. Following employer lobbying efforts,¹⁸⁷ Congress amended the Rehabilitation Act in 1978 to exclude from the definition of handicapped individuals drug or alcohol users who could not perform their duties safely or effectively.¹⁸⁸ Several judges have read the 1978 amendment as restricting Rehabilitation Act coverage to alcoholics and drug addicts who no longer use substances.¹⁸⁹ Most courts, however, have assumed that current substance users can maintain handicap claims so long as they can perform their jobs safely and effectively.¹⁹⁰ The Second Circuit,¹⁹¹ for example, upheld the discharge of a heroin-addicted police officer, not because of his current heroin use, but because such use rendered him unfit for duty. Having found that the plaintiff did not fall within the definition of a handicapped individual under the 1978 amendment, the court made no further inquiry.¹⁹²

Drug addicts and alcoholics must make out the same *prima facie*

Davis v. Bucher, 451 F. Supp. 791, 795-96 (E.D. Pa. 1978)(concluding that drug addiction fits within the definition of handicapped).

187. Henderson, *supra* note 16, at 728.

188. See *supra* note 62 for the text of the 1978 amendment. Note that the amendment did not alter the affirmative action obligation of federal agencies under § 501, and at least two courts have held that federal agencies cannot automatically take adverse action against plaintiffs who would be denied protection under the amendment. Crewe v. U.S. Office of Personnel Management, 834 F.2d 140, 143 (8th Cir. 1987) (although alcoholic employee could maintain an action against her federal employer under § 501 despite her impaired job performance, she failed to present any evidence of feasible accommodation); Whitlock v. Donovan, 598 F. Supp. 126, 129-31 (D.D.C. 1984) (alcoholic employee with excessive absences prevailed against the Department of Labor even though a federal grantee or contractor could have fired him for inability to perform his job), *aff'd*, 790 F.2d 964 (D.C. Cir. 1986).

189. See, e.g., Nisperos v. Buck, 720 F. Supp. 1424, 1427 (N.D. Cal. 1989) ("The legislative history of the Act supports the contention that only current drug or alcohol abusers are excluded from the Act's protection."), *aff'd sub nom.* Nisperos v. McNary, 936 F.2d 579 (9th Cir. 1991); Burka v. New York City Transit Auth., 680 F. Supp. 590, 597 (S.D.N.Y. 1988)(holding that "section 504 protects only those otherwise qualified drug abusers who have been or are being rehabilitated").

190. See, e.g., Copeland v. Philadelphia Police Dep't, 840 F.2d 1139 (3d Cir. 1988) (assuming police officer who used marijuana was handicapped, he failed to show he was otherwise qualified for a law enforcement position), *cert. denied*, 490 U.S. 1004 (1989); Simpson v. Reynolds Metals Co., 629 F.2d 1226 (7th Cir. 1980) (Rehabilitation Act protects current substance users, but plaintiff had no private right of action under § 503); McCleod v. City of Detroit, 39 Fair Empl. Prac. Cas. (BNA) 225 (E.D. Mich. 1985) (assuming marijuana use qualifies as impairment, plaintiff failed to establish a substantial limitation on a major life activity).

191. Heron v. McGuire, 803 F.2d 67, 68-69 (2d Cir. 1986).

192. *Id.*

case¹⁹³ under the Rehabilitation Act as mentally ill individuals. Courts have assumed without much discussion that alcoholism¹⁹⁴ and drug abuse¹⁹⁵ constitute impairments under the Rehabilitation Act. In most cases, the courts have accepted plaintiffs' claims that their impairments substantially limit one or more major life activities.¹⁹⁶ However, one court ruled against applicants who were rejected for firefighter positions due to positive drug tests because they failed to show that their marijuana use substantially limited their abilities to work outside the fire department.¹⁹⁷

Courts that have reached the "otherwise qualified" element of the prima facie case have ruled almost uniformly against plaintiffs with substance use disorders. For instance, marijuana users have failed to convince judges of their qualifications for law enforcement¹⁹⁸ or public safety¹⁹⁹ jobs. Not surprisingly, one court declined to find an alcoholic plaintiff qualified for his postal worker position after he attempted to

193. See *supra* notes 34-47 and accompanying text for a review of a plaintiff's prima facie case under the Rehabilitation Act.

194. See, e.g., *Rodgers v. Lehman*, 869 F.2d 253, 258 (4th Cir. 1989) ("[A]lcoholism is a handicapping condition"); *Crewe v. U.S. Office of Personnel Management*, 834 F.2d 140, 141 (8th Cir. 1987) ("There can be little doubt that alcoholism is a handicap"); *Simpson v. Reynolds Metals Co.*, 629 F.2d 1226, 1231 n.8 (7th Cir. 1980) (stating that individuals with current or prior alcohol or drug abuse histories qualify as handicapped); *Callicotte v. Carlucci*, 698 F. Supp. 944, 949 n.4 (D.D.C. 1988) ("There is simply no dispute that plaintiff's alcoholism is a handicap for purposes of the Act."); *Whitlock v. Donovan*, 598 F. Supp. 126, 129 (D.D.C. 1984) ("[A]lcoholism is a handicapping condition"), *aff'd*, 790 F.2d 964 (D.C. Cir. 1986).

195. See, e.g., *Heron v. McGuire*, 803 F.2d 67, 68-69 (2d Cir. 1986) (finding police officer was not a "handicapped individual" because his heroin addiction rendered him unfit for police work without addressing whether such an addiction qualifies as an impairment); *Nisperos v. Buck*, 720 F. Supp. 1424, 1427 (N.D. Cal. 1989) (finding that former cocaine addict demonstrated that employer regarded him as impaired), *aff'd sub nom.* *Nisperos v. McNary*, 936 F.2d 579 (9th Cir. 1991).

196. Implicit in the holdings of many courts that conclude substance abusers are "handicapped" is a finding of substantial limitation. See, e.g., *Rodgers v. Lehman*, 869 F.2d 253, 258 (4th Cir. 1989); *Crewe v. U.S. Office of Personnel Management*, 834 F.2d 140, 141 (8th Cir. 1987); *Callicotte v. Carlucci*, 698 F. Supp. 944 (D.D.C. 1988).

197. *McCleod v. City of Detroit*, 39 Fair Empl. Prac. Cas. (BNA) 225, 228 (E.D. Mich. 1985).

198. See *Copeland v. Philadelphia Police Dep't*, 840 F.2d 1139, 1148-49 (3d Cir. 1988) (police officer who used illegal drugs was not otherwise qualified because he violated the very laws he is supposed to enforce), *cert. denied*, 490 U.S. 1004 (1989).

199. *McCleod*, 39 Fair Empl. Prac. Cas. (BNA) at 228 (finding that even if plaintiffs were substantially limited by their marijuana use, they were not otherwise qualified for firefighter positions because they jeopardized the public safety).

kill his wife and himself while intoxicated.²⁰⁰ Another court upheld the discharge of a Special Agent with the Bureau of Alcohol, Tobacco, and Firearms after he pleaded guilty to vehicular homicide and driving under the influence of alcohol.²⁰¹ Under less egregious facts, the Eighth Circuit upheld a district court's finding that an alcoholic job applicant was unqualified because she did not promote the efficiency of the civil service.²⁰² One court did find that a government attorney was otherwise qualified for his position, because he performed his job well and no longer used cocaine.²⁰³

Some alcoholic employees suing their federal agency employers²⁰⁴ have bypassed the problematic "otherwise qualified" inquiry by joining their Rehabilitation claims with claims under the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970 (Alcohol Rehabilitation Act).²⁰⁵ The Alcohol Rehabilitation Act requires federal agencies to establish alcoholism treatment programs for their employees.²⁰⁶ The statute on its face does

200. Richardson v. U.S. Postal Serv., 613 F. Supp. 1213, 1216 (D.D.C. 1985) (employee's acts were a violation of Code of Ethical Conduct for Postal Employees).

201. Wilber v. Brady, 780 F. Supp. 837 (D.D.C. 1992). The court explained: A disabled individual cannot be "otherwise qualified" for a position if he commits misconduct which would disqualify an individual who did not fall under the protection of the statute [The Rehabilitation Act] is not designed to insulate [disabled persons] from disciplinary actions which would be taken against any employee regardless of his status.
Id. at 840.

202. Crewe v. U.S. Office of Personnel Management, 834 F.2d 140, 142 (8th Cir. 1987). See also Taub v. Frank, 957 F.2d 8, 10 (1st Cir. 1992) (postal worker fired for possession of heroin with intent to distribute was not otherwise qualified, because employer could make no accommodations without sacrificing the integrity of the Postal Service).

203. Nisperos v. Buck, 720 F. Supp. 1424, 1427-28 (N.D. Cal. 1989), *aff'd sub nom.* Nisperos v. McNary, 936 F.2d 579 (9th Cir. 1991).

204. See, e.g., Burchell v. Dep't of Army, 679 F. Supp. 1393 (D.S.C. 1988) (Department of Army employee), *aff'd in relev. part sub nom.* Rodgers v. Lehman, 869 F.2d 253 (4th Cir. 1989); Whitlock v. Donovan, 598 F. Supp. 126 (D.D.C. 1984) (Department of Labor employee), *aff'd*, 790 F.2d 964 (D.C. Cir. 1986).

205. Act of Dec. 31, 1970, Pub. L. No. 91-616, tit. II, § 201, 84 Stat. 1849, *as amended by* Act of Jan. 2, 1980, Pub. L. No. 96-180, §§ 6(a), (b)(1), (b)(2)(B), 93 Stat. 1302, 1303, *repealed by* Act of Oct. 27, 1986, Pub. L. No. 99-570, tit. VI, § 6004(a), 100 Stat. 3207-159 (1986).

206. Before its repeal in 1986, the relevant portion of the Alcohol Rehabilitation Act provided:

The Office of Personnel Management shall be responsible for developing and maintaining, in cooperation with the Secretary and with other Federal agencies and departments . . . appropriate prevention, treatment, and rehabilitation programs

not prohibit agencies from discharging alcoholic employees for poor performance.²⁰⁷ The legislative history clarifies, however, Congress' intent that Federal agencies permit alcoholics to retain their positions until they refuse or fail to complete treatment.²⁰⁸ The Alcohol Rehabilitation Act essentially requires federal employers to accommodate employees' alcoholism even if they are not otherwise qualified for their positions.

The Americans with Disabilities Act departs from the Rehabilitation Act's treatment of substance use disorders in two respects. First, the ADA excludes current users of illegal drugs²⁰⁹ from the definitions of "individual with a disability"²¹⁰ and "qualified individual with a disa-

and services for alcohol abuse and alcoholism among Federal civilian employees, consistent with the purposes of this Act. Such agencies and departments are encouraged to extend, to the extent feasible, these programs and services to the families of alcoholic employees and to employees who have family members who are alcoholics

The Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970, Pub. L. No. 91-616, tit. II, § 201, 84 Stat. 1849 (1970). On the same date Congress repealed the above provision, it enacted a new statute imposing similar duties on federal agencies: "The head of each Executive agency shall, in a manner consistent with the guidelines prescribed under subsection (b) of this section and applicable provisions of law, establish appropriate prevention, treatment, and rehabilitation programs and services for drug abuse and alcohol abuse for employees in or under such agency." Pub. L. No. 99-570, tit. VI, § 6004(a), 100 Stat. 3207-159 (1986) (codified at 5 U.S.C. § 7904 (1988)).

207. One portion of the original Alcohol Rehabilitation Act, which was not repealed, states: "[t]his section shall not be construed to prohibit the dismissal from employment of a Federal civilian employee who cannot function properly in his employment." 42 U.S.C. § 290dd-1(c) (1988).

208. The Senate Report explained:

The committee expects that the alcoholic employee, like any other employee suffering from a disease, will now be provided with an opportunity for treatment instead of being summarily discharged. Government employees with alcohol problems should be dismissed only if they have refused to accept adequate and appropriate treatment offered to them, and have subsequently failed to function properly in their positions

S. REP. NO. 1069, 91st Cong., 2d Sess. 20 (1970).

209. "The term 'illegal use of drugs' means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act [21 U.S.C. § 812]. Such term does not include the use of a drug taken under supervision by a licensed health care professional" 42 U.S.C. § 12111(6)(A).

210. The ADA provides: "For purposes of this chapter, the term 'individual with a disability' does not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use." 42 U.S.C. § 12210(a). Current use of drugs means use "that has occurred recently enough to indicate that the

bility.”²¹¹ The ADA amended the Rehabilitation Act to exclude current drug users as well.²¹² Congress wanted to avoid creating a disability law that would undermine the Administration’s war on drugs.²¹³ Drug addicts therefore can maintain a cause of action based on their addiction²¹⁴ only if they no longer use drugs, even off-duty.

Second, the ADA allows employers to hold alcoholics and drug addicts to the same standards of performance and conduct as those imposed upon non-disabled employees.²¹⁵ If recovering alcoholics or

individual is actively engaged in such conduct.” 56 Fed. Reg. 35,739, 35,745-46 (1991) (to be codified at 29 C.F.R. app. § 1630.3(a)-(c)).

Congress clarified, however, that recovering addicts who no longer use drugs can claim the protection of the ADA:

Nothing in [§ 12210(a)] shall be construed to exclude as an individual with a disability an individual who—

(1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(3) is erroneously regarded as engaging in such use, but is not engaging in such use

42 U.S.C. § 12210(b).

211. The statute provides: “[T]he term ‘qualified individual with a disability’ shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.” 42 U.S.C. § 12114(a).

212. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, tit. V, § 512, 104 Stat. 377 (1990) (codified at 29 U.S.C. § 706(8)). The Rehabilitation Act now provides in relevant part: “[T]he term ‘individual with handicaps’ does not include an individual who is currently engaging in the illegal use of drugs, when a covered entity acts on the basis of such use.” *Id.* § 706(8)(C)(i).

213. Senator Danforth made the following remarks during Floor debates:

Today, we are experiencing the societal consequences of Congress’ earlier ambivalence toward “a little illegal drug use.” Today, we understand that illegal drug use simply cannot be tolerated. [The ADA] must clearly reflect the current attitude that President Bush aptly noted in his address on Tuesday: “our Nation has zero tolerance” for illegal drug use. This provision makes it clear that an employer has the right to insist that his employees are drug free at all times.

135 CONG. REC. S10,796-97 (daily ed. Sept. 7, 1989) (statement of Sen. Danforth). Senator Helms, who sponsored the amendment excluding current drug users from coverage, made similar remarks: “[T]he war on drugs will be lost if those who abuse drugs are allowed to hide behind laws designed to help those who are seriously handicapped.” 135 CONG. REC. S10,775 (daily ed. Sept. 7, 1989) (statement of Sen. Helms).

214. Note that a drug addict comes within the ADA’s coverage if the employer takes adverse action based on some other qualifying disability. H.R. REP. NO. 485, *supra* note 28, at 77. See also 135 CONG. REC. S10,775 (daily ed. Sept. 7, 1989) (statement of Sen. Kennedy).

215. Specifically, the ADA provides:

drug users fail to conform their behavior to the required standards because of their disability, employers may take adverse action without considering reasonable accommodations. In contrast, mentally ill employees who perform poorly or violate work rules due to their disability may request accommodations such as training or leniency.²¹⁶ Aside from the above-noted differences, ADA plaintiffs with substance use disorders can expect courts to follow Rehabilitation Act precedent.²¹⁷

C. *How Should Employers Accommodate Individuals With Substance Use Disorders?*

Alcoholics and drug-addicted employees may exhibit the following symptoms: impaired work performance,²¹⁸ absenteeism,²¹⁹ tardi-

A covered entity

.....

(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

.....

42 U.S.C. § 12114(c).

216. See *supra* notes 135 and 167-68 and accompanying text discussing accommodations for mentally disabled individuals.

217. One author vociferously objects to the application of Rehabilitation Act standards to ADA cases. Voss, *supra* note 16, at 907-10. She notes that § 501 and § 503 of the Rehabilitation Act seek to make model employers of federal agencies and contractors. *Id.* at 907-08. In § 504, she asserts, Congress premised liability on a quid pro quo theory: in exchange for federal funds, grantees are expected to maintain exemplary employment policies. *Id.* at 909. The ADA, in contrast, applies to private employers engaged in interstate commerce, regardless of any connection to the federal government. Extension of Rehabilitation Act standards to the ADA would be inappropriate, Voss believes. *Id.* at 910-11. While this argument is persuasive, it overlooks the fact that Congress specifically expressed its intent that Rehabilitation Act principles guide the courts in ADA cases. See *supra* note 48 and accompanying text noting how the two Acts are interrelated.

218. A chemically dependent employee may show poor judgment, make frequent mistakes, have trouble concentrating, miss deadlines, experience trouble with complex situations, or produce an uneven quality or quantity of work. BANTA & TENNANT, *supra* note 13, at 48-49, 109. For additional examples of work performance problems stemming from substance abuse problems, see *Crewe v. U.S. Office of Personnel Management*, 834 F.2d 140, 141 (8th Cir. 1987) (plaintiff's drinking problem interfered with her work); *Callicotte v. Carlucci*, 698 F. Supp. 944, 945 (D.D.C. 1988) (alcoholic employee reprimanded for insubordination and failure to complete assignments).

219. BANTA & TENNANT, *supra* note 13, at 48-49. Drug addicts have twice as many lengthy absences, seven times as many sick days, and three times as many tardy days as other employees. *Id.* at 23. Alcoholics are absent more than twice as often as other employees. *Id.* Many Rehabilitation Act cases focus on problems of absenteeism

ness,²²⁰ poor attitudes about work,²²¹ or strained relationships with co-workers.²²² Substance abusers may display physiological symptoms²²³ such as inappropriate euphoria, altered perception and judgment, impaired cognitive and motor functioning, confusion, slurred speech, or excessive weariness, as well as psychological symptoms²²⁴ such as mood swings, depression, irritability, anxiety, suspicion, or social isolation. Alcoholics or addicts may also cause or be involved with an excessive number of accidents²²⁵ and engage in off-duty misconduct.²²⁶

among chemically dependent employees. *See, e.g.,* Fong v. U.S. Dep't of Treasury, 705 F. Supp. 41, 42 (D.D.C. 1989) (alcoholic employee took hundreds of hours of leave, some without authorization); Callicotte v. Carlucci, 698 F. Supp. 944, 945-46 (D.D.C. 1988) (alcoholic employee reprimanded for repeated absences); Burchell v. Dep't of Army, 679 F. Supp. 1393, 1395 (D.S.C. 1988) (alcoholic employee frequently absent without leave), *aff'd in relev. part sub nom. Rodgers v. Lehman*, 869 F.2d 253 (4th Cir. 1989); Whitlock v. Donovan, 598 F. Supp. 126, 134 (D.D.C. 1984) (alcoholic employee had hundreds of hours of unscheduled leave).

220. BANTA & TENNANT, *supra* note 13, at 48-49 (listing tardiness among other signs and symptoms of substance abuse); Patricia Owen & Jerry Spicer, *When an Alcoholic Employee Returns to Work: The Problems for Supervisors and Employees*, 1 EMPLOYEE ASSISTANCE Q., Summer 1986, at 67, 71 (same).

221. BANTA & TENNANT, *supra* note 13, at 48-49 (listing a number of changes in attitude a drug abuser may exhibit); Owen & Spicer, *supra* note 220, at 71 (same).

222. BANTA & TENNANT, *supra* note 13, at 48-49, 109. For example, substance abusers may overreact to real or imagined criticism and may try to avoid their supervisors or peers. *Id.* at 49. Colleagues may complain about the addict's moods or treatment of others. *Id.* *See also* Burchell v. Dep't of Army, 679 F. Supp. at 1396 (alcoholic employee displayed hostility toward supervisor).

223. BANTA & TENNANT, *supra* note 13, at 48-49; J. MICHAEL WALSH & STEPHEN C. YOHAY, *DRUG AND ALCOHOL ABUSE IN THE WORKPLACE: A GUIDE TO THE ISSUES 20* (1987) (stating that the effects of drugs vary considerably). *See also* Nisperos v. Buck, 720 F. Supp. 1424, 1425-26 (N.D. Cal. 1989) (cocaine user experienced paranoid delusions and fired a gunshot at an imaginary intruder), *aff'd sub nom. Nisperos v. McNary*, 936 F.2d 579 (9th Cir. 1991).

224. BANTA & TENNANT, *supra* note 13, at 48-49; DSM-III-R, *supra* note 12, at 178 (associated features of cocaine dependence) and 175 (associated features of amphetamine dependence); WALSH & YOHAY, *supra* note 223, at 20-22.

225. BANTA & TENNANT, *supra* note 13, at 48-49, 109. Up to 40% of industrial fatalities and 47% of industrial injuries are alcohol-related. BUREAU OF NATIONAL AFFAIRS, *supra* note 177, at 7.

226. *See, e.g.,* Taub v. Frank, 957 F.2d 8 (1st Cir. 1992) (postal worker arrested for possession of heroin with intent to distribute); Crewe v. U.S. Office of Personnel Management, 834 F.2d 140, 141 (8th Cir. 1987) (alcoholic pleaded guilty to five alcohol-related driving offenses); Wilber v. Brady, 780 F. Supp. 837 (D.D.C. 1992) (special agent pleaded guilty to vehicular homicide caused by driving under the influence of alcohol); Nisperos v. Buck, 720 F. Supp. 1424, 1426 (N.D. Cal. 1989) (government attorney terminated after arrest for being under the influence of cocaine and for possession of narcotic paraphernalia), *aff'd sub nom. Nisperos v. McNary*, 936 F.2d 579 (9th

Even after successful completion of treatment, former substance abusers may encounter ignorance or intolerance from colleagues or supervisors.²²⁷

The ADA excuses employers from accommodating any current user of illegal drugs²²⁸ and it limits their obligation to accommodate alcoholics and drug addicts who no longer use illegal substances.²²⁹ Although the ADA does not require employers to provide treatment for alcoholics and drug addicts,²³⁰ the legislative history reveals Congress' hope that private employers will emulate the federal government and give substance abusers opportunities for rehabilitation.²³¹ Citing federal personnel guidelines, the Fourth Circuit in *Rodgers v. Lehman*²³² prescribed the following accommodations for alcoholic em-

Cir. 1991); *Burchell v. Dep't of Army*, 679 F. Supp. 1393, 1395 (D.S.C. 1988) (alcoholic employee convicted three times of drunk driving), *aff'd in relev. part sub nom. Rodgers v. Lehman*, 869 F.2d 253 (4th Cir. 1989).

227. *Owen & Spicer*, *supra* note 220, at 70-73. Researchers found that supervisors and colleagues of recovering alcoholics lacked knowledge regarding the nature of alcoholism, how closely alcoholics must be supervised, and what to expect from them. *Id.* at 73. Supervisors expressed concern over possible relapse. *Id.* at 72. Alcoholics returning to work after treatment felt that their co-workers no longer trusted them. *Id.* at 70. See also *SCANLON*, *supra* note 141, at 38-39 (citing examples of stigmatizing stereotypes that impede recovery from alcoholism or drug addiction).

228. 42 U.S.C. §§ 12114(a), 12210(a). See *supra* notes 209-214 and accompanying text for discussion of these provisions.

229. 42 U.S.C. § 12114(c)(4). See *supra* note 215 and accompanying text for an explanation of this provision. Note that former drug addicts may still suffer from current impairments. For instance, some addicts develop "Post Drug Impairment Syndrome," which is characterized by permanent changes in brain chemistry due to excessive use of alcohol or drugs. *BANTA & TENNANT*, *supra* note 13, at 45-46.

230. The Senate Report provided:

The reasonable accommodation provision in section 102(b)(5) of this title does not affirmatively require that a covered entity must provide a rehabilitation program or an opportunity for rehabilitation for any job applicant who is a drug addict or alcoholic or for any current employee who is a drug addict or alcoholic

S. REP. NO. 116, *supra* note 28, at 41-42. *Accord* 135 CONG. REC. S10,777 (daily ed. Sept. 7, 1989) (statements of Sen. Coats and Sen. Harkin).

231. The Senate Report elaborated:

Although the provision of a rehabilitation program or an opportunity for rehabilitation of a drug addict or alcoholic is not required by this title, the Committee strongly encourages covered entities to follow the lead of the Federal government and many private employers, consistent with the policy embedded in the Drug Free Workplace Act, to offer such rehabilitation programs or provide an opportunity for rehabilitation.

S. REP. NO. 116, *supra* note 28, at 42.

232. 869 F.2d 253, 259 (4th Cir. 1989).

ployees, which are equally applicable to former drug addicts:

1. Conduct an interview with the employee to discuss inadequate work performance and available treatment services.
2. If the employee refuses assistance and continues to perform poorly, offer a “firm choice” between treatment or discipline.
3. Offer the employee an opportunity to participate in an outpatient treatment program for a reasonable amount of time. If drinking continues, impose progressive discipline for job-related misconduct.
4. If the employee leaves treatment, continues to drink, or engages in job-related misconduct, grant him or her accrued or unpaid leave to undergo inpatient treatment before resorting to discharge.²³³
5. If the employee relapses after successful treatment and work performance thereafter declines, a decision to discharge will be presumed reasonable.²³⁴

In addition, although not mentioned by the *Rodgers* court, employers should educate supervisors and co-workers about alcoholism and drug addiction so as to ease a recovering employee’s transition back into the workplace.²³⁵ Upon closer observation, the accommodations suggested by the *Rodgers* court parallel the “Constructive Confrontation” model used by many employee assistance programs to combat substance abuse in industry.²³⁶

233. The employer would not have to grant an extended leave of absence if the employee’s absence would create an undue hardship. *Id.*

234. *Id.* The court stated that “only in a rare case, such as where a recovering alcoholic has had a single relapse after a prolonged period of abstinence, can this presumption be rebutted.” *Id.*

235. SCANLON, *supra* note 141, at 38-39 (noting that stereotypes and misconceptions about alcoholics and drug abusers act as barriers in the workplace); *see supra* note 228 and accompanying text; WALSH & YOHAY, *supra* note 223, at 110-11 (stating that supervisors and coworkers can be vital as networks during and after treatment). *See also supra* note 227 and accompanying text noting the ignorance and intolerance of employees.

236. SCANLON, *supra* note 141, at 32-33. A supervisor constructively confronts a chemically dependent employee by:

1. recognizing a “pattern of deteriorating work performance”;
2. documenting the performance problems;
3. imposing progressive discipline (“informed verbal warnings, corrective interviews, work suspensions, and/or termination”);
4. referring the employee for treatment with the firm’s employee assistance program;
5. reintegrating the recovered employee into the workforce.

Id. Supervisors are often reluctant to confront their employees about substance abuse

Based on the stringent obligations imposed by the Alcohol Rehabilitation Act,²³⁷ courts have required federal agencies to conform strictly with their personnel guidelines. For example, one court permitted an alcoholic to reapply for the dangerous position of boiler plant operator with the Army even after he had three convictions for drunk driving; took numerous absences without leave, forcing his colleagues to work overtime; cursed at a supervisor while intoxicated; and dropped out of his first treatment program.²³⁸ The Army counseled and reprimanded the plaintiff on numerous occasions and revoked a four-day suspension contingent upon his completion of a short-term treatment program.²³⁹ Holding that the Army's patience and tolerance did not discharge its duty to accommodate reasonably the plaintiff's handicap, the court emphasized the Army's failure to inform the employee of available counseling services, apply progressive discipline after he left treatment, offer extended leave, and consider him for disability retirement, all of which are mandated by the personnel directive.²⁴⁰

In another case, the Department of Labor attempted to accommodate an alcoholic employee by various means.²⁴¹ The agency referred the plaintiff for counseling, warned him about his protracted absences, and reduced a suspension to a reprimand contingent upon his participation in an agency treatment program.²⁴² Before discharging him, the Department also ordered two fitness-for-duty exams, granted him annual leave for short-term treatment, offered him a transfer to a less stressful job, and adjusted his hours.²⁴³ The court applauded the agency for its compassion and patience, but found for the plaintiff because the agency failed to offer him an extended leave without pay for treatment.²⁴⁴

problems because they may be sympathetic, may identify with the employee's problems, may drink or use drugs themselves, or may be afraid of hurting a friendship. *Id.* at 35-36. Supervisors can minimize some of this awkwardness by focusing on the subordinate's performance problems rather than the drinking per se. *Id.*

237. See *supra* notes 205-08 and accompanying text discussing the language and far-reaching implications of the Alcohol Rehabilitation Act.

238. *Burchell v. Dep't of Army*, 679 F. Supp. 1393, 1395-97 (D.S.C. 1988), *aff'd in relev. part sub nom. Rodgers v. Lehman*, 869 F.2d 253 (4th Cir. 1989).

239. *Id.* at 1396.

240. *Id.* at 1402.

241. *Whitlock v. Donovan*, 598 F. Supp. 126 (D.D.C. 1984).

242. *Id.* at 134-35.

243. *Id.* at 135-36.

244. *Id.* at 136-37. *But cf. Fuller v. Frank*, 916 F.2d 558, 562 (9th Cir. 1991) (af-

It is unlikely that a court would impose such a rigorous accommodation duty on private employers that have no affirmative action obligations.²⁴⁵ In fact, the ADA specifically eases an employer's duty to accommodate alcoholics and drug users.²⁴⁶ Nonetheless, employers do have some accommodation obligations under the ADA,²⁴⁷ and the Alcohol Rehabilitation Act cases suggest some examples. Whether a given accommodation amounts to an undue hardship depends on its cost in relation to the employer's business and the extent to which it disrupts other employees in the performance of their duties.²⁴⁸

D. Case Studies

The following case studies explore the application of the ADA to individuals with psychoactive substance use disorders.

Case #3. William Cooper applied for and was offered a research assistant position at Franklin College. The College retracted its offer after Cooper tested positive for marijuana use during his mandatory physical exam. Cooper insists that he smokes marijuana only on the weekends. He also asserts that, as a research assistant, he poses no risks to anyone in the workplace. The College's personnel director responds that, regardless of the

firing summary judgment for the Postal Service, for it had attempted unsuccessfully to accommodate an alcoholic and cocaine abuser by providing three referrals to an employee assistance program, leave without pay for treatment, and progressive discipline).

245. See Voss, *supra* note 16, at 910-11 (suggesting that courts should not apply Rehabilitation Act standards to ADA claims, because Congress could not have intended to hold private employers to the strict standards governing federal agencies, contractors, and grantees).

246. 42 U.S.C. § 12114(c)(4) (employer may hold alcoholics and drug users to the same standards of performance and conduct as other employees, even if unsatisfactory performance or behavior stems from alcohol or drug use). See *supra* note 215 and accompanying text discussing this provision.

247. Logically, some alcoholics and recovering addicts must be able to prevail, or their inclusion in the ADA's coverage would mean nothing. Furthermore, the EEOC's interpretive guidelines clarify: "Individuals disabled by alcoholism are entitled to the same protections accorded other individuals with disabilities under this part." 56 Fed. Reg. 35,739, 35,752 (1991) (to be codified at 29 C.F.R. app. § 1630.16(b)). One author points to the "logical conundrum" created by the ADA: "[O]ne cannot easily reconcile the notions of providing reasonable accommodation of a condition that impairs the ability to work and of holding an employee to a uniform standard of performance" Voss, *supra* note 16, at 916.

248. 42 U.S.C. § 12111(10); 56 Fed. Reg. at 35,736 (to be codified at 29 C.F.R. § 1630.2(p)). See *supra* notes 30-31 and accompanying text for further discussion of the undue hardship defense.

severity of Cooper's drug problem, the College flatly refuses to hire drug users for any position.

Franklin College acted legally when it revoked its employment offer to Cooper. Even if Cooper has an impairment that substantially limits one or more of his major life activities, the ADA excludes him from coverage because he currently uses illegal drugs.²⁴⁹ The case might turn out differently if Cooper abused alcohol instead of marijuana. Alcoholics come within the protection of the ADA even if they currently engage in off-duty drinking.²⁵⁰ If Cooper could establish the disability of alcoholism, he then would need to show that he is qualified²⁵¹ for the research assistant position with or without reasonable accommodation for his alcoholism. If Cooper made out his *prima facie* case, Franklin College might argue that all alcoholics pose a risk of harm to others in the workplace.²⁵² This generalization, however, would probably fail.²⁵³ To prevail, the College would have to present medical evidence that Cooper himself endangers his colleagues through his

249. See 42 U.S.C. §§ 12114(a), 12210(a). Sponsors of the ADA explained: "[N]o one who currently uses illegal drugs is entitled to any employment protections under the ADA, regardless of whether that person is a casual user of drugs or an addict and regardless of whether his or her illegal drug use has any adverse impact on job performance." 135 CONG. REC. S10,777 (daily ed. Sept. 7, 1989) (statement of Sen. Harkin).

250. The statute excludes only an employee or applicant "who is currently engaging in the illegal use of drugs . . ." 42 U.S.C. §§ 12114(a), 12210(a). The illegal "use of drugs" refers to "the possession or distribution of which is unlawful under the Controlled Substances Act." *Id.* § 12111(6)(A). The EEOC's guidelines clarify that "[i]ndividuals disabled by alcoholism are entitled to the same protections accorded other individuals with disabilities . . ." 56 Fed. Reg. at 35,752 (to be codified at 29 C.F.R. app. § 1630.16(b)).

251. Qualified individuals with a disability are those who can perform the essential functions of their positions with or without reasonable accommodation. 42 U.S.C. § 12111(8). Cooper would have to show that his off-duty drinking does not impair his work performance. He might also have to show that his off-duty drinking would not disgrace Franklin College. See 135 CONG. REC. S10,782 (daily ed. Sept. 7, 1989) (statement of Sen. Harkin) ("Obviously, if a person works for someone and they are out getting drunk every night, that reflects also upon the employer's workplace").

252. Recall that an employer may impose as a qualification standard the requirement that its employees not pose a direct threat to the health or safety of others. 42 U.S.C. § 12113(a)-(b). See *supra* notes 104-05 and accompanying text for discussion of the direct threat standard.

253. To maintain a direct threat defense, an employer must adduce medical analysis or other objective evidence of the specific risks posed by the plaintiff. "Generalized fears about risks" do not suffice. 56 Fed. Reg. at 35,745 (to be codified at 29 C.F.R. app. § 1630.2(r)). See *supra* notes 104-05 and accompanying text for further discussion of the sufficiency of evidence supporting a direct threat defense.

drinking problem.²⁵⁴

Case #4. Diane Gifford, an admitted alcoholic, works as a legal secretary at a large law firm. Gifford never comes to work under the influence of alcohol and maintains a respectable attendance record. Every night, however, she rushes home from the office to begin a heavy drinking binge.

One afternoon a senior partner asks Gifford to stay late and help her prepare for trial. Gifford reluctantly agrees. As the evening wears on, she becomes increasingly anxious and irritable because she has not been able to consume any alcohol. Finally Gifford tells the partner, "I can't stand this pressure anymore, I have to go home." The partner fires her for insubordination. Gifford contends that her alcoholism prevents her from working during the evening hours and that the firm should have accommodated her.

The ADA gives conflicting guidance as to how to deal with this scenario. Gifford almost certainly can demonstrate that she suffers from the disability of alcoholism. She may well prove that she can perform the essential functions of her position with accommodation. For example, if overtime constitutes an essential function of her job, perhaps she can perform her overtime on weekends or early in the morning. Alternatively, maybe she can share overtime responsibilities with another secretary. Even if Gifford makes out her *prima facie* case, the law firm still may prevail because the ADA allows employers to impose the same performance and behavior standards on alcohol and drug abusers as on non-disabled employees.²⁵⁵ This provision seems to immunize the firm from having to accommodate Gifford's disability in any way and, furthermore, acts to contradict the EEOC's mandate that employers treat alcoholics like all other disabled individuals.²⁵⁶ Though the provision's scope seems broad, perhaps Congress merely intended to excuse employers from accommodating substance abusers who are under the influence at work.²⁵⁷ Courts will have difficulty interpreting

254. See 56 Fed. Reg. at 35,745 (to be codified at 29 C.F.R. app. § 1630.2(r)).

255. 42 U.S.C. § 12114(c)(4). See *supra* note 215 and accompanying text for further discussion of this provision.

256. 56 Fed. Reg. at 35,752 (to be codified at 29 C.F.R. app. § 1630.16(b)).

257. The language of the provision itself supports this interpretation:
A covered entity—

.....

(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

the scanty legislative history so as to answer that question.²⁵⁸

IV. CONCLUSION

The Americans with Disabilities Act finally extends to disabled individuals the civil rights protections that were accorded other minority groups decades ago. Notwithstanding vocal protests from some commentators,²⁵⁹ the ADA reasonably requires employers to accommodate the needs of disabled employees and job applicants unless accommodation would result in undue hardship.

While Congress gave expansive protection to the physically disabled, it sought to limit coverage of mental disabilities and substance use disorders. For purely political reasons, the ADA excludes from coverage individuals with non-physiological sexual disorders, certain conduct disorders, and those who currently use illegal substances. In addition, the ADA permits employers to impose on drug addicts and alcoholics the same performance and behavior standards governing all employees, even if their noncompliance results solely from their disabilities. Whether substance abusers can ever prevail under the statute thus remains uncertain.

Both Congress and the EEOC paid little heed to the accommodation

performance or behavior is related to the drug use or alcoholism of such employee

42 U.S.C. § 12114(c)(4) (emphasis added). On the other hand, alcoholism and drug addiction can cause performance or behavior problems even in the absence of on-duty intoxication. The American Psychiatric Association explains:

Repeated episodes of Psychoactive Substance-Induced Intoxication are almost invariably present in Psychoactive Substance Abuse or Dependence, although for some substances it is possible to develop dependence without ever exhibiting frank intoxication (e.g., alcohol)

Personality disturbance and disturbances of mood are often present . . . Anxiety or depression associated with Borderline Personality Disorder may be intensified

. . . .
In chronic abuse or dependence, mood lability and suspiciousness, both of which can contribute to violent behavior, are common.
DSM-III-R, *supra* note 12, at 171.

258. See, e.g., H.R. REP. NO. 485, *supra* note 28, at 78; S. REP. NO. 116, *supra* note 28, at 40-41; and 135 CONG. REC. S10,777 (daily ed. Sept. 7, 1989) (statements of ADA sponsor Sen. Harkin) (all summarizing but not explaining the provision at issue).

259. See, e.g., Thomas H. Barnard, *The Americans with Disabilities Act: Nightmare for Employers and Dream for Lawyers?*, 64 ST. JOHN'S L. REV. 229 (1990) (discussing the Act's burdens on employers and the likelihood of increased litigation); Eileen P. Kelly & Robert J. Alberts, *Americans with Disabilities Act: Undue Hardship for Private Sector Employers?*, 41 LAB. L.J. 675 (1990) (discussing the increased cost of compliance for employers).

needs of individuals with mental illnesses and substance use disorders. Based on a review of the psychiatric and substance abuse literature, as well as precedents under the Rehabilitation Act, this Note proposes potential accommodations for persons with psychiatric and substance use problems. The actual contours of an employer's obligation toward mentally ill persons, alcoholics, and drug addicts will emerge slowly as litigants wind their way through the courts.

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