



ALFA International
THE GLOBAL LEGAL NETWORK

2022 Insurance & Professional Liability Seminar June 22-24, 2022

PROMOTING MENTAL HEALTH AND WELL-BEING IN YOUR ORGANIZATION AND TRIAGING WHEN CRISIS OCCURS

*Mitigating Professional Malpractice Risks: Legal And Ethical Challenges Of
Mental Health And Substance Abuse Issues*

Christine L. Mast

Moderator

HAWKINS PARNELL & YOUNG, LLP

Atlanta, Georgia

cmast@hpylaw.com

Jaki K. Samuelson

WHITFIELD & EDDY LAW

Des Moines, Iowa

Samuelson@whitfieldlaw.com

Breshauna Perkins

HAWKINS PARNELL & YOUNG, LLP

Atlanta, Georgia

bperkins@hpylaw.com

INTRODUCTION

Everyone knows it exists, some choose to ignore it, but what exactly can we do about it? It is no secret that mental health and substance abuse issues are prevalent among professionals. These issues present many risks for professional liability insurers and employers. The most obvious way to mitigate the risks associated with mental health and substance abuse is to eliminate or reduce the number of professionals suffering from these issues. However, insurers and employers face many obstacles when it comes to mitigating these risks. They often find themselves asking: what questions can we ask to ensure an employee is not suffering from mental health or substance abuse issues; is there an ethical duty to report; and does the ethical duty to report violate the law?

This paper examines the prevalence of mental health and substance abuse issues among doctors, lawyers, and nurses and ways to navigate the inherent conflict between professional/ethical duties to report and the ADA.

MENTAL HEALTH AND SUBSTANCE ABUSE ISSUES IN THE WORKPLACE

ATTORNEYS

It's 10:00 am and you've just adjourned a client briefing. You notice Larry Lawyer has missed yet another briefing. To no one's surprise, Larry Lawyer gets to the office around noon and appears to be impaired. His appearance is disheveled, his eyes are glassy, and he's having trouble keeping his balance. You remember he received several complaints from clients due to missed hearings and deadlines. You dread dealing with this situation, and honestly don't know how. You do not want Larry Lawyer to get in trouble and you did not exactly see him drinking, but you believe you have an ethical duty to report. What do you do?

It is no secret that substance abuse and mental health issues are prevalent in the legal field. Attorneys in the United States engage in higher rates of hazardous drinking that are consistent with alcohol disorders at a higher rate than other professionals.¹ A study of 12,825 licensed employed attorneys conducted by the American Bar Association ("ABA") and the Hazelden Betty Ford Foundation revealed 20.6% of the respondents indicated drinking levels consistent with problematic drinking, 28% reported mild or high levels of anxiety, and 11.5% reported suicidal thoughts at some point of their career.²

The study illuminates how lawyers are suffering from alcohol abuse and mental health issues. Lawyers also report excessive alcohol use at higher rates in comparison to the general population.³ The National Health Interview Survey conducted by the U.S. Centers for Disease Control and Prevention based a survey on random individuals selected from 35,000 households and found that 11% of lawyers reported excess consumption of alcohol compared to 10% of all respondents reporting excess alcohol consumption.⁴ Although mental health issues are prevalent among practicing attorneys, the study indicated that lawyers suffer from mental illness at lower rates than the general population.⁵

¹ Aebra Coe, *The Legal Industry Has A Drinking Problem, Study Says*, [The Legal Industry Has A Drinking Problem, Study Says - Law360](#) (last visited May 6, 2022).

² National Research on Lawyer Impairment, [The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys - Infographic \(americanbar.org\)](#) (last visited May 6, 2022).

³ Debra Cassens Weiss, *Conventional wisdom is wrong about lawyers' mental health, but the comparative drinking rate is 'extraordinary,' study says*, [Conventional wisdom is wrong about lawyers' mental health, but comparative drinking rate is 'extraordinary,' study says \(abajournal.com\)](#) (last visited May 7, 2022).

⁴ *Id.*

⁵ *Id.*

Several factors could contribute to substance abuse and mental health issues in the legal profession. One of the biggest factors contributing to the decline in lawyer wellness is burnout. Bloomberg Law's Attorney Workload and Hours surveyed 621 lawyers which revealed that 52% of lawyers experienced burnout.⁶ Disrupted sleep, anxiety, inability to disconnect from work, and increased workload were listed as main factors contributing to burnout.⁷ It is no surprise that substance abuse and mental health issues amongst lawyers can cause potential ethical and competency issues in the attorney-client relationship and affect the productivity and quality of work of attorneys. Lawyers are required to adhere to ethical and professional obligations. Substance abuse and mental health issues could threaten a lawyer's ethical obligations to his clients which, in turn, could negatively impact the profitability of law firms. For example, lawyers are required to provide competent representation to a client.⁸ Moreover, lawyers are required to exercise reasonable diligence and promptness while representing clients.⁹ A lawyer's ability to represent clients competently and diligently may be called into question if a lawyer is suffering from substance abuse or experiencing mental health issues such as anxiety and depression. Moreover, an attorney should decline representation if the attorney's mental or physical condition materially impairs his or her ability to provide competent representation.¹⁰ Attorneys may not be aware of or want to disclose that they are suffering from substance abuse or mental health issues due to fear of judgment or loss of opportunities. This puts clients at risk of incompetent representation. Unfortunately, lawyers unaware of or in denial of their substance abuse or mental health issues still have the same obligation to decline or terminate representation under the ABA Model Rules.¹¹

Based on this conflict, management is often faced with difficult questions on whether they are obligated to report an attorney they believe is not competent to adequately represent clients and what type of proof or information regarding the lawyer's wellbeing is required before they report. These issues may trigger additional obligations to managing attorneys and firm management to report attorney misconduct posing risks to the client's interest. More specifically, partners, managers, and supervisory lawyers must make reasonable efforts to ensure that measures are in place reasonably assuring that their lawyers abide by the Professional Rules of Conduct.¹² Additionally, lawyers can be responsible for another lawyer's violation of the rules of professional conduct if:

- (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
- (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices or has direct supervisory authority over the other lawyer and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.¹³

Thus, firms have ethical obligations to protect their client's interests and establish proper preventative measures and procedures to prevent lawyer misconduct.¹⁴ Lawyer's with knowledge of another lawyer's violation of the

⁶ Bloomberg Law Attorney Workload and Hours Survey, [Attorney Workload and Hours Survey | Bloomberg Law](#) (last visited May 7, 2022).

⁷ *Id.*

⁸ ABA Model Rules of Professional Conduct Rule 1.1.

⁹ ABA Model Rules of Professional Conduct Rule 1.3.

¹⁰ ABA Model Rules of Professional Conduct Rule 1.16.

¹¹ ABA Model Rules of Professional Conduct Opinion 03-429.

¹² ABA Model Rules of Professional Conduct Rule 5.1(a).

¹³ ABA Model Rules of Professional Conduct Rule 5.1(c).

¹⁴ ABA Model Rules of Professional Conduct Opinion 03-429.

Rules of Professional Conduct that raises a question of the lawyer's honesty, trustworthiness, or fitness have a duty to report to the appropriate authority.¹⁵ But how much knowledge is required to trigger a duty to report? The ABA issued a formal opinion on this issue and stated

A lawyer need not act on rumors or conflicting reports about a lawyer. Moreover, knowing that another lawyer is drinking heavily or is evidencing impairment in social settings is not enough to trigger a duty to report under Rule 8.3. *A lawyer must know that the condition is materially impairing the affected lawyer's representation of clients.*¹⁶

Therefore, the lawyer does not have a duty to report issues of substance abuse or mental health issues that are not affecting the lawyer's representation of the client or are based on rumors and observations in social settings. This put lawyers and law firms in an intricate position to figure out what implicates cause for disclosure. There is no bright-line answer to this issue; however, lawyers and firm management should act reasonably with the protection of the clients' interests at the forefront when assessing whether an attorney can provide competent representation and whether there is a duty to report.

DOCTORS AND NURSES

Mental health and substance abuse issues are also prevalent in the medical profession. An estimated 10-15% of doctors will suffer from substance abuse at some point in their careers.¹⁷

Alarming, the vast majority of anesthesiologists with substance abuse issues are addicted to opioids.¹⁸ Studies have shown that over 40% of the anesthesiologists enrolled in Physician Health Programs were suffering from IV drug use issues, while only 10% were enrolled due to alcohol abuse.¹⁹ The high incidence of drug abuse among anesthesiologists is credited to their high exposure to addictive drugs, stressful work environment, and the ease of diverting drugs for personal use.²⁰ Surgeons have relatively low rates of substance abuse excluding alcohol and tobacco compared to other specialties.²¹ A study of alcohol and substance abuse among surgeons in the United States revealed 25.6% of female surgeons had alcohol abuse or dependence problems compared to 13.9% of male surgeons.²² Although lower than other specialties, substance and alcohol abuse among surgeons is still higher than the 6.2% of the U.S. population with alcohol and substance abuse.²³

¹⁵ ABA Model Rules of Professional Conduct Rule 8.3.

¹⁶ ABA Model Rules of Professional Conduct Opinion 03-431. (Emphasis added).

¹⁷ Michael Kaliszewski, *Substance Abuse in Doctors According to Physician Specialty*, [Substance Abuse in Doctors According to Physician Specialty \(americanaddictioncenters.org\)](https://www.americanaddictioncenters.org) (last visited May 6, 2022).

¹⁸ *Id.*

¹⁹ Gregory E Skipper, Michael D Campbell, Robert L Dupont, *Anesthesiologists with substance use disorders: a 5-year outcome study from 16 state physician health programs*, [Anesthesiologists with substance use disorders: a 5-year outcome study from 16 state physician health programs - PubMed \(nih.gov\)](https://pubmed.ncbi.nlm.nih.gov/35484848/) (last visited May 6, 2022).

²⁰ Gold, M.S., Byars, J.A., & Frost-Pineda, K. (2004). Occupational exposure and addictions for physicians: case studies and theoretical implications. *Psychiatric Clinics of North America*, 27(4), 745-53.

²¹ Hughes, P.H., Storr, C.L., Brandenburg, N.A., Baldwin, D.C., Anthony, J.C., & Sheehan, D.V. (1999). Physician substance use by medical specialty. *Journal of Addictive Diseases*, 18(2), 23-37.

²² Oreskovich MR, Kaups KL, Balch CM, Hanks JB, Satele D, Sloan J, et al. (2012). Prevalence of alcohol use disorders among American surgeons. *Archives of Surgery*, 147(2), 168-174.

²³ National Institute on Alcohol Abuse and Alcoholism. (2019). *Alcohol Facts and Statistics*.

Psychiatrists are more prone to stress, burnout, and suicide.²⁴ Moreover, Emergency Medicine Physicians account for 3% of physicians but account for 7-18% of physicians enrolled in Physician Health Programs for substance abuse management.²⁵ A study of Emergency Medical Physicians treated by a Physician Health Program revealed nearly half were treated for alcohol abuse and 38% for opiates.²⁶ Additionally, Emergency Medicine Physicians experience a 60% burnout rate which is the highest rate among physicians.²⁷

While many physicians struggle with substance abuse, mental health issues are also common among doctors. A study found that 20% of medical residents met the criteria for depression while 74% met the criteria for burnout.²⁸ Male doctors have suicide rates as much as 40% higher than the general population, and female doctors up to 130% higher.²⁹ Residents with depression were 6.2 times more likely to make medication errors than non-depressed residents.³⁰ Therefore, it is clear that substance abuse and mental illness issues among doctors can pose a significant threat to patient safety and doctor competency.

Doctors are also governed by rules of professional ethics. To preserve the quality of their performance, physicians have a responsibility to maintain their health and wellness, broadly construed as preventing or treating acute or chronic diseases, including mental illness, disabilities, and occupational stress.³¹ Physicians who become aware of or strongly suspect that a colleague's conduct threatens patient welfare or otherwise appears to violate ethical or legal standards should:

- (a) Report the conduct to appropriate clinical authorities in the first instance so that the possible impact on patient welfare can be assessed and remedial action taken. This should include notifying the peer review body of the hospital, or the local or state medical society when the physician of concern does not have hospital privileges.
- (b) Report directly to the state licensing board when the conduct in question poses an immediate threat to the health and safety of patients or violates state licensing provisions.
- (c) Report to a higher authority if the conduct continues unchanged despite initial reporting.
- (d) Protect the privacy of any patients who may be involved to the greatest extent possible, consistent with due process.

²⁴ Fothergill, A., Edwards, D., & Burnard, P. (2004). Stress, burnout, coping and stress management in psychiatrists: findings from a systematic review. *International Journal of Social Psychiatry*, 50(1), 54-65.

²⁵ McLellan, A.T., Skipper, G.S., Campbell, M., & DuPont, R.L. (2008). Five year outcomes in a cohort study of physicians treated for substance use disorders in the United States. *BMJ*, 337, a2038.

²⁶ Rose, J.S., Campbell, M., & Skipper, G. (2014). Prognosis for Emergency Physician with substance abuse recovery: 5-year outcome study. *Western Journal of Emergency Medicine*, 15(1), 20-25.

²⁷ Shanafelt, T.D., Boone, S., Tan, L., Dyrbye, L.N., Sotile, W., Satele, D., ... & , Oreskovich, M.R. (2012). Burnout and satisfaction with work-life balance among US physicians relative to the general US population. *Archives of Internal Medicine*, 172(18), 1377-1385.

²⁸ Molly C. Kalmoe, Matthew B. Chapman, Jessica A. Gold and Andrea M. Giedinghagen, *Physician Suicide: A Call to Action*, [Physician Suicide: A Call to Action - PMC \(nih.gov\)](#) (last visited May 6, 2022).

²⁹ *Id.*

³⁰ *Id.*

³¹ Code of Medical Ethics Opinion 9.3.1.

(e) Report the suspected violation to appropriate authorities.

Physicians who receive reports of alleged incompetent or unethical conduct should:

(f) Evaluate the reported information critically and objectively.

(g) Hold the matter in confidence until it is resolved.

(h) Ensure that identified deficiencies are remedied or reported to other appropriate authorities for action.

(i) Notify the reporting physician when appropriate action has been taken, except in cases of anonymous reporting.³²

Therefore, Physicians also have a professional duty to report conduct that violates legal or ethical standards.

Lastly, substance abuse is an issue in the nursing field. The American Nurses Association estimates that 10% to 20% of nurses have substance abuse problems, and 6% to 8% of registered nurses are impaired due to drug and alcohol abuse.³³ Nurses are also under an ethical and professional obligation to report a colleague's suspected drug use.³⁴

CONFLICT BETWEEN ETHICAL AND PROFESSIONAL OBLIGATIONS AND THE LAW

DISABILITY-RELATED INQUIRIES

When an ethical or professional obligation is triggered based on an employee's inability to fulfill their responsibilities due to substance abuse and mental health issues, employers and insurers may be reluctant to inquire about or report due to concerns of violating privacy laws or Title I of the Americans with Disabilities Act ("ADA"). The ADA limits an employer's ability to make disability-related inquiries or require medical examinations at three stages: pre-offer, post-offer, and during employment.³⁵ Specifically, the ADA provides that

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability unless such examination or inquiry is shown to be job-related and consistent with business necessity.³⁶

Thus, employers suspecting that employees may be putting client and patient interests at risk due to mental health and substance abuse issues should be careful with inquiring about an employee's medical condition to avoid violating the ADA.

³² Code of Medical Ethics Opinion 9.4.2

³³ J Griffith, *Substance abuse disorders in nurses*, [Substance abuse disorders in nurses - PubMed \(nih.gov\)](https://pubmed.ncbi.nlm.nih.gov/) (last visited May 6, 2022).

³⁴ Substance Use Disorder in Nursing, [SUD Brochure 2014.pdf \(ncsbn.org\)](https://www.ncsbn.org/SUD_Brochure_2014.pdf) (last visited May 6, 2022).

³⁵ 42 U.S.C. § 12112(d)(4)(A).

³⁶ *Id.*

The EEOC has guided what employers can ask based on the stage of a person's employment.³⁷ For example, before an offer of employment, the ADA prohibits all disability-related inquiries and medical examinations, even if they are related to the job.³⁸ After a job offer is made but before an applicant begins, an employer may make disability-related inquiries and conduct medical examinations, regardless of whether they are related to the job, as long as it does so for all entering employees in the same job category employment.³⁹ Lastly, after employment begins, an employer may make disability-related inquiries and require medical examinations only if they are job-related and consistent with business necessity.⁴⁰

A disability inquiry or medical examination may be job-related or a business necessity "when an employer has a reasonable belief, based on objective evidence, that: (1) an employee's ability to perform essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat due to a medical condition."⁴¹ Therefore, inquiries related to substance abuse and mental health issues may be permissible under the ADA if related to a job-related business necessity such as patient safety and competent representation. However, employers must keep the information obtained from a disability inquiry confidential. The ADA requires employers to treat any medical information obtained from a disability-related inquiry or medical examination, as well as medical information voluntarily disclosed by an employee, as a confidential medical record.⁴² Employers may share such information only in limited circumstances with supervisors, managers, first aid and safety personnel, and government officials investigating compliance with the ADA.⁴³ The EEOC has provided acceptable questions to ask for disability inquiries. "Disability inquiry" is defined as a question (or series of questions) that is likely to elicit information about a disability.⁴⁴ The EEOC states the following questions are prohibited under the ADA

- asking an employee whether s/he has (or ever had) a disability or how s/he became disabled or inquiring about the nature or severity of an employee's disability;
- asking an employee to provide medical documentation regarding his/her disability;
- asking an employee's co-worker, family member, doctor, or another person about an employee's disability;
- asking about an employee's genetic information;
- asking about an employee's prior workers' compensation history;
- asking an employee whether s/he currently is taking any prescription drugs or medications, whether s/he has taken any such drugs or medications in the past, or monitoring an employee's taking of such drugs or medications; and,

³⁷ Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the ADA, https://www.eeoc.gov/laws/guidance/enforcement-guidance-disability-related-inquiries-and-medical-examinations-employees#N_40 (last visited May 6, 2022).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² 42 U.S.C. §§12112(d)(3)(B), (4)(C)(1994); 29 C.F.R. §1630.14(b)(1)(1998)

⁴³ *Id.*

⁴⁴ Preemployment Questions and Medical Examinations, *supra* note 2, at 4, 8 FEP at 405:7192

- asking an employee a broad question about his/her impairments that is likely to elicit information about a disability (e.g., What impairments do you have?).⁴⁵

The EEOC also provided a list of questions that are not considered a disability inquiry and therefore permitted under the ADA which includes:

- asking generally about an employee's wellbeing (e.g., How are you?), asking an employee who looks tired or ill if s/he is feeling okay, asking an employee who is sneezing or coughing whether s/he has a cold or allergies, or asking how an employee is doing following the death of a loved one or the end of a marriage/relationship;
- asking an employee about non-disability-related impairments (e.g., How did you break your leg?);
- asking an employee whether s/he can perform job functions;
- **asking an employee whether s/he has been drinking;**
- **asking an employee about his/her current illegal use of drugs;**
- asking a pregnant employee how she is feeling or when her baby is due; and,
- asking an employee to provide the name and telephone number of a person to contact in case of a medical emergency.⁴⁶

Based on the EEOC's guidance, employers may ask an employee whether they have been drinking or questions about an employee's current illegal drug use to ascertain whether a professional or ethical obligation is triggered due to the employee's mental health or substance abuse issues.

QUALIFIED DISABILITIES

If an employee is suffering from substance abuse and mental health issues to the extent that it is affecting their ethical duties for patient care and safety or client representation, employers may be faced with the challenge of how to resolve these issues. Employers must be careful when making decisions such as termination, demotion, and refusal to hire based on a person's known mental health and substance abuse issues. These measures may subject employers to ADA discrimination lawsuits if the employee's mental health and substance abuse issues are qualified disabilities under the ADA. The ADA prohibits discrimination against employees with a qualified disability based on disability.⁴⁷ The ADA defines a "disability" for purposes of the statute as an impairment that substantially limits an individual's life activities.⁴⁸ However, employers are only liable for known or perceived

⁴⁵ Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the ADA, [Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the ADA | U.S. Equal Employment Opportunity Commission \(eoc.gov\)](https://www.eeoc.gov/eeoc/policydocs/enforcement-guidance-disability-related-inquiries-and-medical-examinations-employees-under-the-ada) (last visited May 6, 2022).

⁴⁶ *Id.*

⁴⁷ 42 U.S.C.S. § 12112(a).

⁴⁸ 29 CFR § 1630.2(g).

disabilities.⁴⁹ ADA protections for drug abuse are based on an employee's current or former use of illegal drugs. An employee currently engaging in the use of illegal drugs does not have a qualified disability under the ADA.⁵⁰ Therefore, employers may inquire about or make a hiring or firing decision based on an employee's current illegal drug use. However, employers must be careful because there is a fine line between what courts consider "current use" which is unprotected and previous use which is protected under the ADA. The ADA provides a safeguard for recovering addicts 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;⁵¹

Thus, employees who are recovering addicts not currently engaged in the use of illegal drugs are protected under the ADA. Courts have provided mixed opinions on what is considered "currently engaged" under the ADA but have generally interpreted the provision as requiring a sustained period of abstinence from drug use for at least several months.⁵² For example, in *Shafer v. Preston Mem'l Hosp. Corp.*, a nurse was terminated from a hospital after she disclosed that she was addicted to narcotics when approached by a personnel director about her irregularities in handling narcotics.⁵³ The nurse subsequently filed suit against the hospital alleging that her addiction was a disability protected under the ADA.⁵⁴ The Fourth Circuit held that the nurse's addiction was not a disability under the ADA because the nurse was currently addicted to narcotics at the time of her termination although she had gone through rehabilitation.⁵⁵ Specifically, the nurse argued that although she admitted at the time that she was confronted by personnel to illegally using and stealing drugs during the weeks and months before her discharge, she was not under the current use of drugs while the hospital placed her on medical leave to participate in a drug rehabilitation program and ultimately decided to fire her.⁵⁶ The court used the definition of "current use" used in the EEOC's Technical Assistance Manual for the ADA which expressly states

"Current" drug use means that the illegal use of drugs occurred recently enough to justify an employer's reasonable belief that involvement with drugs is an ongoing problem. It is not limited to the day of use, or

⁴⁹ *Williams v. FedEx Corp. Servs.*, 849 F.3d 889,898 (10th Cir. 2017)(citing *EEOC v. C.R. Eng., Inc.*, 644 F.3d 1028, 1049 (10th Cir. 2011); *Ainsworth v. Indep. Sch. Dist. No. 3*, 232 F. App'x 765, 771 (10th Cir. 2007) (unpublished).

⁵⁰ 42 U.S.C. § 12114(a).

⁵¹ *Id.*

⁵² *Salley v. Circuit City Stores, Inc.*, 160 F.3d 977 (3d Cir. 1998) (citing *Collings v. Longview Fibre Co.*, 63 F.3d 828, 833 (9th Cir. 1995) (finding periodic use of drugs during weeks and months prior to discharge as current use); *Baustian v. Louisiana*, 910 F. Supp. 274 (E.D.La. 1996) (finding seven-week period of abstinence insufficient); *United States v. Southern Management Corp.*, 955 F.2d 914 (4th Cir. 1992) (holding that under identical language in the Fair Housing Act, one-year abstinence was not current use); *Herman v. City of Allentown*, 985 F. Supp. 569 (E.D.Pa. 1997) (holding nine-month abstinence is not current use)).

⁵³ *Shafer v. Preston Mem'l Hosp. Corp.*, 107 F.3d 274 (4th Cir. 1997).

⁵⁴ *Id.*

⁵⁵ *Id.* at 281.

⁵⁶ *Id.* at 278.

recent weeks or days, in terms of an employment action. It is determined on a case-by-case basis.⁵⁷

The Fourth Circuit further stated that the statute only protects people who have refrained from using drugs for some time.⁵⁸ Moreover, the court also specified that “an employee who admits to recent drug use only after being caught and confronted, like an employee who fails a drug test, cannot avoid being fired by immediately entering drug rehabilitation and claiming that he now is in rehabilitation and is no longer using drugs illegally.”⁵⁹

Additionally, in *Wormly v. Arkla, Inc.*, an employee filed a suit against their employer alleging ADA discrimination for being terminated after engaging in a rehabilitation program for the second time.⁶⁰ The employee was not illegally using drugs at the time of his termination, however, the employer learned that the employee violated the terms of a Conditional Reinstatement Agreement that the employee signed after completing the first rehabilitation program.⁶¹ The court held that the employee’s drug use before the second rehabilitation program was “current use” under the ADA because the drug use was sufficiently recent to justify an employer’s reasonable belief that it was an ongoing problem rather than a problem that was in the past.⁶² Therefore, it is apparent there is no clear bright-line rule, and employers must exercise great judgment and discretion when terminating employees suffering from substance abuse.

The ADA also affords protections for employees suffering from alcohol abuse. Alcohol is undoubtedly an impairment and satisfies the first prong of the disability inquiry under the ADA.⁶³ However, courts have generally refused to recognize alcoholism as a per se disability under the ADA.⁶⁴ In *Bailey v. Georgia-Pacific Corp.*, an employee was terminated while in jail for operating a vehicle under the influence.⁶⁵ The employee filed suit against his employer alleging discrimination under the ADA on the basis that his alcoholism was a qualified disability.⁶⁶ The court disagreed and held that the employee’s alcoholism was not a disability under the ADA because he failed to prove that alcoholism substantially limited his ability to work.⁶⁷ The court explained that the employee must prove that he is significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities, and isolated impairments were not enough to establish that alcoholism substantially limited his ability to work.⁶⁸ Thus, employers considering terminating employees based on alcoholism can do so as long as the employee suffered isolated impairments and was not so substantial that it limits the employee’s ability to work a broad range or class of jobs.

Lastly, employees suffering from known mental illness are protected under the ADA so long as the illness

⁵⁷ *Id.* at 280.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Wormley v. Arkla, Inc.*, 871 F. Supp. 1079, 1081 (E.D. Ark. 1994).

⁶¹ *Id.*

⁶² *Id.* at 1084.

⁶³ See *Evans v. Fed. Express Corp.*, 133 F.3d 137, 139 (1st Cir. 1998); see also *Reg’l Econ. Cmty. Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 46 (2d Cir. 2002), cert. denied, 154 L. Ed. 2d 16, 123 S. Ct. 74, 2002 U.S. LEXIS 5497 (Oct 7, 2002) (No. 01-1624); *Miners v. Cargill Communications, Inc.*, 113 F.3d 820, 823 n.5 (8th Cir. 1997); *Office of the Senate Sergeant at Arms v. Office of Senate Fair Employment Practices*, 95 F.3d 1102, 1105 (Fed. Cir. 1996).

⁶⁴ See *Reg’l Econ. Cmty. Action Program*, 294 F.3d at 47; *Burch v. Coca-Cola Co.*, 119 F.3d 305, 316-17 (5th Cir. 1997).

⁶⁵ *Bailey v. Ga.-Pacific Corp.*, 306 F.3d 1162 (1st Cir. 2002).

⁶⁶ *Id.*

⁶⁷ *Id.* at 1169.

⁶⁸ *Id.* at 1168 (citing 29 C.F. R. § 1630.2(j)(3)(i)).

substantially limited the employee's major life activities. The main mental illnesses associated with professionals are anxiety and depression. Although depression and anxiety can constitute a disability under the ADA, the key inquiry is whether the anxiety or depression limits the employee's substantial life activities.⁶⁹ Courts have consistently examined this issue. For example, in *Guadamuz v. Entercom Miami LLC*, an employee filed an ADA discrimination suit against her employer based on her disabilities of anxiety and depression.⁷⁰ However, the court held that the employee's anxiety and depression did not constitute a disability under the ADA because the employee failed to present evidence that her anxiety and depression affected her ability to work.⁷¹

Therefore, when dealing with employees with depression and anxiety, employers must determine whether or not the employee's mental health substantially limits the employee's ability to work most jobs at the place of business. Employers must act with great caution when deciding whether to terminate an employee based on professional and ethical concerns due to an employee suffering from mental illness or substance abuse issues. The main objective is to consider whether the employee's behavior is isolated or whether it is so substantial that it interferes with the employee's ability to work a majority of the time.

ADDRESSING EMPLOYEES WITH THESE ISSUES IN THE WORKPLACE

It is clear that there are many things to take into consideration when dealing with professionals with substance abuse and mental health issues. There is a direct conflict between the ethical duties to report and inquire about professionals suffering from these issues and their protections under the ADA. One of the best things employers can do when dealing with employee substance abuse and mental health issues is to focus on job performance. Focusing on job performance instead of speculating and inquiring about why an employee may be suffering from mental health issues or drug abuse can help mitigate liability for "ADA-forbidden inquiries".⁷²

If employers do not have concrete evidence of an employee suffering from substance abuse or mental health issues that are negatively impacting patients or clients, employers should steer away from asking questions regarding these issues. Instead, if employers notice that the employee's job performance has declined or has violated company policies, an employer can generally take disciplinary actions for these issues so long as they legitimately exist. While it is not unlawful for an employer to make medical inquiries based on legitimate business reasons, disciplinary actions based on an employee's performance provide better protection from ADA violations than inquiring about an employee's health.

Moreover, keeping managers and supervisors astute on signs of substance abuse and mental health issues, as well as legally permissible inquiries and behaviors can help reduce issues that employers with ethical and professional obligations may face. Lastly, staying informed on federal and state laws on employee privacy, disability, and drug-testing laws can help ensure that your business is not violating laws when faced with these issues.

KEY TAKEAWAYS

- Substance abuse and mental health issues are prevalent among many professionals such as doctors, lawyers, and nurses;

⁶⁹ 29 C.F. R. § 1630.2(j)(3)(i)

⁷⁰ *Guadamuz v. Entercom Miami LLC*, No. 17-22617-CIV, 2019 U.S. Dist. LEXIS 15678 (S.D. Fla. Jan. 29, 2019).

⁷¹ *Id.* at 13.

⁷² 5 Tips For Employers Worried About Worker Substance Abuse, [5 Tips For Employers Worried About Worker Substance Abuse - Law360](#) (last visited May 6, 2022).

Promoting Mental Health and Well-Being in Your Organization and Triaging When Crisis Occurs



- Many professionals are ethically and professionally obligated to report issues of substance abuse and mental health issues that negatively impact patient care or client representation;
- Inquiries and disciplinary actions associated with ethical and professional duties reports may violate the ADA if not done properly;
- The ADA allows employers to inquire about a disability if there is a legitimate business necessity such as the employee is unable to perform basic job functions or the employee poses a direct threat to the business;
- Anxiety, depression, and substance abuse may be ADA qualified disabilities if they substantially limit an employee's ability to work;
- Focusing on employee performance is the best way to avoid potential ADA violations.