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Chemically Dependent Employees and the ADA in the Medical Profession: Does Patient Safety Exempt Hospital Employers from Compliance under the Direct Threat and/or the Business Necessity Exceptions

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CHEMICALLY DEPENDENT EMPLOYEES AND THE ADA IN THE MEDICAL PROFESSION: DOES PATIENT SAFETY EXEMPT HOSPITAL EMPLOYERS FROM COMPLIANCE UNDER THE DIRECT THREAT AND/OR THE BUSINESS NECESSITY EXCEPTIONS?

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I. INTRODUCTION

The Americans with Disabilities Act of 1990 (ADA)[1] and the North Dakota Human Rights Act (NDHRA)[2] deal with an employee's right to be protected from discriminatory employment actions based on disability, and the employer's responsibilities to a disabled employee.[3] Exactly what those rights and responsibilities are, however, is far less than clear. What makes matters less certain is when third party rights and safety issues are at stake, such as a hospital employer dealing with physician or nurse employees who have disabilities that may affect their ability to adequately care for patients.

The definitions and requirements of the ADA[4] and NDHRA[5] are similar in their discussions of the responsibilities of employers in the workplace, as they both seek to accomplish the same goal of precluding employment discrimination against qualified workers with disabilities.[6] As the ADA is federal legislation and the rights afforded under NDHRA are derived from the state, a litigant in North Dakota can initiate an action under both the ADA and the NDHRA. The ADA is more expansive and highly regulated as opposed to the NDHRA and is more developed through case law. Despite the numerous judicial opinions issued in interpreting these pieces of legislation, they remain confusing to most employers and often most lawyers trying to assist employers in complying with these laws.

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1. 42 U.S.C. §§ 12101-12213 (2000).

2. N.D. CENT. CODE ch. 14-02.4 (2004).

3. 42 U.S.C. §§ 12101-12117; N.D. CENT. CODE ch. 14-02.4. Additionally, the Rehabilitation Act of 1973 is applicable to federal employers and employers who receive federal funding. 29 U.S.C. §§ 701-796(l) (2000). For purposes of this article, the Rehabilitation Act is not discussed.

4. 42 U.S.C. § 12111.

5. N.D. CENT. CODE § 14-02.4-02.

6. 42 U.S.C. §§ 12101-12117; N.D. CENT. CODE ch. 14-02.4.

This article discusses the impact the ADA has on disability discrimination cases in the medical arena, specifically disabilities derived from chemical dependency. An employee with a chemical dependency disability presents unique problems to an employer such as a hospital, where doctors and nurses recovering from a drug addiction have access to narcotic medication and patient safety is of the highest priority. This article will address what types of chemical dependency rise to the level of a "disability" as defined and covered by the ADA, those types of chemical dependency that are specifically excluded from coverage, the responsibilities of the employer in reasonably accommodating a disabled chemically dependent employee, and when reasonable accommodation is precluded due to "direct threat," "business necessity," and/or "undue hardship."

A. AMERICANS WITH DISABILITIES ACT

The ADA is federal legislation that was enacted to prohibit employers from discriminating against job applicants and employees on the basis of disability.[7] It applies to employers who have fifteen or more employees working for twenty or more weeks during the current calendar year.[8] The ADA protects employees who are "qualified individuals with disabilities" capable of performing the "essential functions" of the job in question with or without "reasonable accommodation", from discrimination by the employer.[9] What these phrases mean in the context of the ADA, for employees with chemical dependency, and for employers in safety-sensitive areas such as health care facilities, is explored in this article.

The ADA protects individuals who (1) have physical or mental impairment that substantially limits one or more major life activities of the individual, (2) have a record of such impairment, or (3) are regarded as having an impairment, even if the employee does not actually have such an impairment.[10] Alcoholism is recognized as a disability under the ADA, although it appears to be somewhat of a second-class disability and not afforded quite the same level of protection as other disabilities.[11]

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7. 42 U.S.C. §§ 12101-12117.

8. *Id.* § 12111(5)(A).

9. *Id.* § 12111(8).

10. *Id.* § 12102(2).

11. *See id.* § 12114(c)(1) (authorizing an employer to prohibit alcohol consumption in the workplace and require its employees not to be under the influence at work); *id.* § 12114(c)(4) (indicating job performance and qualification standards for alcoholic employees are the same as other employees, even if any unsatisfactory performance or behavior is related to the alcoholism.)

B. NORTH DAKOTA HUMAN RIGHTS ACT

In North Dakota, the NDHRA makes it an illegal, discriminatory practice to fail or refuse to hire or to discharge or accord adverse or unequal treatment to someone with a "physical or mental disability."[12] Disability is defined as "a physical or mental impairment that substantially limits one or more major life activities, a record of this impairment, or being regarded as having this impairment."[13] NDHRA does not address whether chemical dependency is covered nor does its accompanying case law.[14]

Similar to the ADA, the NDHRA requires reasonable accommodation except when doing so would (1) unduly disrupt or interfere with the employer's normal operations, (2) threaten the health or safety of the individual with a disability or others, (3) contradict a business necessity of the employer, or (4) impose undue hardship on the employer, based on the size of the employer's business, the type of business, the financial resources of the employer, and the estimated cost and extent of the accommodation.[15] Under the NDHRA, it is not a discriminatory practice to fail or refuse to hire or discharge based on physical or mental disability, if it is "a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . ."[16]

II. TYPES OF CHEMICAL DEPENDENCY THAT QUALIFY AS A "DISABILITY" UNDER THE ADA

Although persons afflicted with alcoholism or recovering from other drug abuse are generally covered by the ADA, an employee's chemical use or abuse must still rise to the level of a "disability" as defined under the ADA.[17] This means that the person must be substantially limited in a major life activity due to chemical dependency.[18] Further, different types of chemical dependency are treated differently under the law.

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12. N.D. CENT. CODE § 14-02.4-03 (2004).

13. *Id.* § 14-02.4-02(4).

14. *Id.* §§ 14-02.4-01 to 14-02.4-23; *see also* Soentgen v. Quain & Ramstad Clinic, 467 N.W.2d 73, 81 (N.D. 1991) (assuming *arguendo* that "if alcoholism and drug addiction are handicaps" under the NDHRA, the hospital had a bona fide occupational qualification regarding patient safety that the alcoholic doctor could not meet).

15. N.D. CENT. CODE § 14-02.4-02(15).

16. *Id.* § 14-02.4-08.

17. *See* Nancy J. Wolf, *Chemical Dependency—Accommodation Under the ADA, in* UPPER MIDWEST EMPLOYMENT LAW INSTITUTE HANDBOOK, 1, 3 n.6 (2004) (citing EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EEOC TECHNICAL ASSISTANCE MANUAL § 2.2 (1992); McCleod v. City of Detroit, 39 Fair Empl. Prac. Cas. (BNA) 225, 229 (E.D. Mich. 1985) (holding protections extend only to those chemical users meeting the definition of a disabled person)).

18. 29 C.F.R. § 1630.2(g) (2004); *see also infra* Part II.D.

A. ALCOHOLISM IS A RECOGNIZED IMPAIRMENT THAT MAY BE A DISABILITY

Alcoholism is a recognized impairment under the ADA.[19] Mere impairment, however, is insufficient for coverage under the ADA.[20] A claimant suffering from alcoholism must "demonstrate that his impairment substantially limits one or more of his major life activities."[21] What exactly this means is no easy task for an employer to determine. An employee who has previously received treatment or gone through rehabilitation would most certainly qualify as he would have a record of impairment, which automatically triggers coverage under the ADA.[22] Rehabilitation may include in-patient or outpatient treatment, as well as somewhat regular attendance at Alcoholics Anonymous meetings.

B. ILLEGAL DRUG USE MAY OR MAY NOT BE A DISABILITY

Illegal drug use is specifically exempted from ADA coverage.[23] This includes illegal drugs,[24] as well as the illegal use of legal drugs such as abusing prescription medication.[25] Therefore, an employee who is illegally abusing drugs presently is not covered by the ADA.

However, an employee who was dependent on either prescription or illegal drugs is covered by the ADA if he is not presently using and has been, or is presently, in a drug treatment program.[26] Further, such an employee would be entitled to ADA coverage if rehabilitated (with or without treatment) and no longer abusing drugs.[27]

C. AN EMPLOYEE "REGARDED AS" HAVING A CHEMICAL DEPENDENCY DISABILITY IS COVERED BY THE ADA

If an employee is suspected of having a drug or alcohol problem, the ADA will apply and an employer could be liable for any discriminatory

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19. 42 U.S.C. §§ 12111, 12114 (2000).

20. Sullivan v. Neiman Marcus Group, Inc., 358 F.3d 110, 114 (1st Cir. 2004).

21. *Id.* at 114-15.

22. 42 U.S.C. § 12102(2)(B) (2000).

23. 29 C.F.R. § 1630.3(a)(2) (2004).

24. 21 U.S.C. § 812 (2000); *see also* 29 C.F.R. § 1630.3(a)(1) (defining "controlled substance").

25. *See Wolf, supra* note 17, at 2 n.4 (stating "[t]he law refers to 'illegal *use*' of drugs—*not* to 'use of illegal *drugs*.' Thus, the drug may be *legal*, but if an employee is *using* it illegally (e.g. without a prescription), the employee is not protected by the ADA and is not eligible for reasonable accommodations.").

26. 29 C.F.R. § 1630.3(b).

27. *Id.*

treatment of the employee as a result.[28] For example, if an employer believes an employee is an alcoholic and terminates him because of that, it is an ADA violation even though the employee was not actually an alcoholic. The reasoning is based on the fact that the employer terminated the employee for a discriminatory reason, even though it did not actually exist.

D. A VALID CHEMICAL DEPENDENCY QUALIFIES AS A DISABILITY WHEN IT SUBSTANTIALLY AFFECTS A "MAJOR LIFE ACTIVITY"

As mentioned, an employee with an alcohol or drug impairment must be substantially limited in a major life activity to trigger coverage under the ADA.[29] What constitutes a major life activity is something that is continuously being defined by the courts.[30] Traditionally, major life activities are construed to be those of "central importance to daily life," such as seeing, hearing, speaking, breathing, performing manual tasks, lifting, and reaching.[31]

The United States Supreme Court has not yet recognized work as a major life activity.[32] The Eighth Circuit, however, eludes that working may be deemed a major life activity.[33] In *Moysis v. DTG Datanet,*[34] a worker suffered a brain injury that impaired his concentration and short-term memory and necessitated routine.[35] The Eighth Circuit concluded this need, along with his concentration, memory, and interaction problems, were activities that involved "the *major life activities* of learning *and working*."[36] As work may be the main, or only, activity substantially affected by chemical dependency (such as going to work impaired or being continuously tardy due to hangovers), whether work is recognized as a "major life activity" is an important consideration.

An employer may, however, hold an alcoholic employee to the same qualification standards for job performance and behavior as other employees, even if the unsatisfactory performance is related to the alcoholism.[37] As the Court of Appeals for the First Circuit points out, arguing that job performance deficiencies are evidence that alcoholism substantially impairs

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28. *See id.*
29. *See supra* Part II.A.
30. *E.g.,* Sullivan v. Neiman Marcus Group, Inc., 358 F.3d 110, 115 (1st Cir. 2000).
31. Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 195 (2002).
32. *Sullivan,* 358 F.3d at 115.
33. Moysis v. DTG Datanet, 278 F.3d 819, 825 (8th Cir. 2002).
34. 278 F.3d 819 (8th Cir. 2002).
35. *Moysis,* 278 F.3d at 822.
36. *Id.* at 824 (quoting Emerson v. N. States Power Co., 256 F.3d 506, 511, 512 (7th Cir. 2001)) (emphasis added).
37. 42 U.S.C. § 12114(c) (2004).

one's ability to work may actually demonstrate that the worker cannot meet the legitimate requirements of the job and is therefore not entitled to ADA coverage.[38]

III. REASONABLE ACCOMMODATION OF A CHEMICAL DEPENDENCY DISABILITY

Generally, the main reasonable accommodation of a chemically dependent employee would be a leave of absence or modified work schedule for treatment of the addiction. The employer is not required to hold the dependent employee to lower work performance standards as other similarly-situated employees as a reasonable accommodation.[39]

A. NO REASONABLE ACCOMMODATION IS REQUIRED IF A DIRECT THREAT EXISTS

Although impaired, a person is not a "qualified individual with a disability" under the ADA if they pose a direct threat.[40] In the case of hospitals, clinics, or other care giving facilities, this "direct threat" would be to the health and safety of the patients. "Direct threat" is defined as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation."[41]

Certainly in the case of hospitals, clinics, or other care giving facilities, a direct threat to patient safety exists when a treating nurse or physician is under the influence of drugs and/or alcohol. In the medical context, the risk this poses to patients appears to be enough to satisfy the direct threat exemption of the ADA.[42] In *Bekker v. Humana Health Plan, Inc.*[43] from the Seventh Circuit, patients and co-workers complained of Dr. Bekker smelling of alcohol while at work.[44] Dr. Bekker had previously been treated for "problematic alcohol usage" but not abuse.[45] Dr. Bekker had complied with the recommended treatment and then resumed social drinking.[46] After reviewing patient complaints and speaking with co-workers, the employer concluded that Dr. Bekker posed a risk to patients

38. Sullivan v. Neiman Marcus Group, Inc., 358 F.3d 110, 115-16 (1st Cir. 2000).
39. 42 U.S.C. § 12114(c)(4).
40. *Id.* § 12111(3).
41. *Id.*
42. Bekker v. Humana Health Plan, Inc., 229 F.3d 662, 670-72 (7th Cir. 2000); Judice v. Hosp. Serv. Dist. No. 1, 919 F. Supp. 978, 984 (E.D. La. 1996); Altman v. N.Y. City Health & Hosps. Corp., 903 F. Supp. 503, 508, 513 (S.D.N.Y. 1995).
43. 229 F.3d 662 (7th Cir. 2000).
44. *Bekker*, 229 F.3d at 665.
45. *Id.*
46. *Id.*

and therefore terminated her.[47] No urine or other alcohol or drug tests were conducted prior to this decision although the court noted that testing is the only conclusive means to determine whether Dr. Bekker was actually under the influence of alcohol while at work.[48] The court went on, however, to find that the employer was reasonable in its termination of Dr. Bekker as based on the numerous reports of alcohol odor; ample evidence therefore existed to show that Dr. Bekker was a direct threat to patient safety.[49] The burden therefore shifted to Dr. Bekker to show that she was not a direct threat,[50] and the court concluded that she failed to do so.[51] Basically, the employer's argument was that a non-alcoholic employee would have been fired for smelling of alcohol on the job, and so there was no discrimination.[52] There was no discussion by the court as to whether the employer's knowledge of Dr. Bekker's prior treatment caused them to be unreasonably paranoid, resulting in disparate treatment.[53]

A similar safety-sensitive position case was *Martin v. Barnesville Exempted Village School District Board of Education*.[54] The Sixth Circuit held that a senior union worker, otherwise qualified for an elementary bus driver position, was not discriminated against when denied the job because three years earlier he had been observed drinking beer on the job as a custodian at the school.[55] The court found that the worker presented a serious risk and the school was not obligated to run the risk of an accident that would injure children.[56] From the facts as stated in this case, the worker was observed drinking on the job once as a custodian, and he worked for the school district as a bus driver for seven years prior to his job as a custodian apparently without incident.[57] There was no discussion by the court of whether the worker posed a "direct threat" under the magic

47. *Id.* at 667.

48. *Id.* at 668.

49. *Id.*

50. *Id.* at 672 (describing the burden shifting standard of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)). *McDonnell Douglas* established that the employee has the initial burden of demonstrating a prima facie case of discrimination. *Id.* If that is accomplished, the burden then shifts to the employer to demonstrate that they had a legitimate, nondiscriminatory or retaliatory reason for the employment action. *Id.* If the employer establishes a legitimate reason, the employee must then establish that this reason is merely a pretext for discrimination. *Id.*

51. *Id.* at 673.

52. *Id.*

53. *Id.*

54. 209 F.3d 931 (6th Cir. 2000).

55. *Martin*, 209 F.3d at 932-33.

56. *Id.* at 934.

57. *Id.* at 932, 934. Due to a union settlement with the school district, the employee was able to keep his job as long as he went through chemical dependency treatment. *Id.* at 934. The employee was therefore covered under the ADA as having a "record of impairment." *Id.*

ADA language,[58] even though prior case law warned that "mere assertion of such a threat will not do: this determination must be based on 'an individualized assessment of the individual's *present ability* to safely perform the essential functions' of the position."[59] Rather, the court simply stated that "the ADA does not protect plaintiff from his own bad judgment in drinking on the job."[60] This is an interesting comment if one considers alcoholism a disease, which is how it is recognized under the ADA, rather than simply bad judgment. Specifically in cases of other jurisdictions that have addressed direct threat in the medical profession, a direct threat has been found to exist excusing the employer from liability for discrimination, although in those cases the physician employees made numerous rehabilitation attempts and were presently abusing alcohol at the time of their termination.[61]

B. NO REASONABLE ACCOMMODATION IS REQUIRED IF A BUSINESS NECESSITY PRECLUDES IT

An employer may screen out or otherwise deny a job to an individual with a disability if consistent with that employer's business necessity.[62] Safety of third parties is, of course, a business necessity of hospitals and other care facilities. The question, then, is whether a hospital employer must show that a particular employee with a chemical dependency disability is an actual direct threat to avoid ADA liability, or if the hospital can simply preclude such employees from certain positions based on the business necessity of safety.

This question of direct threat versus safety as a business necessity was presented to the Fifth Circuit by a non-medical but safety-sensitive employer.[63] In *EEOC v. Exxon Corp.*,[64] the corporation had a policy that precluded all employees who had ever undergone substance abuse treatment from certain safety-sensitive positions that had little supervision.[65] The policy was adopted after the 1989 *Exxon Valdez* oil spill and resulted in the

58. *Id.* (holding that the school had "articulated a legitimate, non-discriminatory reason for its actions" and plaintiff had not demonstrated that this stated reason is a pretext for any unlawful discrimination).

59. Judice v. Hosp. Serv. Dist. No. 1, 919 F. Supp. 978, 982 (E.D. La. 1996) (emphasis added).

60. Martin v. Barnesville Exempted Vill. Sch. Dist. Bd. of Educ., 209 F.3d 931, 934 (6th Cir. 2000).

61. Judice, 919 F. Supp. at 978; Altman v. N.Y. City Health & Hosps. Corp., 903 F. Supp. 503, 513 (S.D.N.Y. 1995).

62. 42 U.S.C. § 12112(b)(6) (2004).

63. EEOC v. Exxon Corp., 203 F.3d 871, 872 (5th Cir. 2000).

64. 203 F.3d 871 (5th Cir. 2000).

65. *Exxon*, 203 F.3d at 872.

demotion of some employees who had been in safety-sensitive positions prior to the new policy and who were apparently working without incident.[66] Exxon argued that it need not show each and every employee with a substance abuse past posed a direct threat to the safety of the corporation, but that safety was a business necessity that justified the screening out of such individuals for those jobs.[67] Exxon cited the damages, including punitive and criminal sanctions, environmental concerns, and tort liability, that would be incurred if an employee had a relapse on the job and caused an accident.[68]

The Fifth Circuit Court of Appeals agreed with Exxon and held that direct threat alone was not the only defense for precluding an employee disabled by substance abuse from a certain position.[69] While a direct threat analysis would apply to an individual employee, "business necessity addresses whether the qualification standard can be justified as an across-the-board requirement."[70] Some considerations an employer should analyze when evaluating business necessity of such a policy are the "magnitude of possible harm and the probability of occurrence."[71] "The acceptable probability of an incident will vary with the potential hazard posed by the particular position."[72] Thus, in a hospital setting, situations that may justify such a policy would include dangerous situations caused by an employee under the influence, such as over or under medicating a patient, or causing injury with medical tools during procedures (such as intubation, catheritization, or surgery).

A similar rationale was applied by the North Dakota Supreme Court in *Soentgen v. Quain & Ramstad Clinic, P.C.*[73] In *Soentgen*, the NDHRA was at issue, rather than the ADA.[74] A doctor was suspected of smelling of alcohol while at work, and there were other work-qualification concerns.[75] While only assuming *arguendo* that alcoholism was covered by the NDHRA and that Soentgen was otherwise a qualified worker with a disability, the court stated that the clinic's action in terminating her was nonetheless justified based on "a bona fide occupational qualification

66. *Id.*
67. *Id.* at 873.
68. *Id.*
69. *Id.* at 875.
70. *Id.* (citing 29 C.F.R. § 1630.2(r) (2004)).
71. *Id.*
72. *Id.*
73. 467 N.W.2d 73, 73 (N.D. 1991).
74. *Soentgen*, 467 N.W.2d at 73.
75. *Id.* at 76. Patient care and lack of training were also raised as concerns. *Id.*

reasonably necessary" for a physician.[76] An analysis of this discussion suggests that the "'bona fide occupational qualification reasonably necessary' for a physician" would be sobriety, and because Soentgen was under the influence of alcohol on the job, there was no discrimination.[77]

Additionally, as was the case in *Soentgen*, if an employee is actually under the influence at work, the employer need not worry about the ADA, nor presumably the NDHRA. The ADA does not protect workers who are under the influence at work, and the worker could therefore simply be terminated for violation of company policy.[78] Again, however, this puts the employer in the untenable position of having to wait until a worker comes to work under the influence and patient safety has already been compromised or worse, an accident has already occurred.

There is no guidance found in *Soentgen* that suggests how the North Dakota Supreme Court would apply the NDHRA to a policy, such as that found in *Exxon*, wherein all physicians, nurses, or other health care workers with little supervision and who have substance abuse pasts would be precluded from employment. *Exxon*, after all, was not that expansive and involved only "safety sensitive" jobs such as those in its transportation department.[79] There were apparently other positions available for workers displaced by the policy, though not necessarily comparable.[80] In a hospital, however, a physician or nurse unable to treat patients would most likely be precluded from employment altogether.

A case out of the United States District Court for the District of Kansas suggests such an expansive policy would be unacceptable, wherein an individualized assessment of the exact job requirements and the applicant in question was required.[81] That case, however, is sufficient in factual and legal distinction to leave room for argument.[82]

In *Wallace v. Veterans Administration, et al.*,[83] a registered nurse (RN) was precluded from a position in the intensive care unit as she was a recovering drug addict, and her personal physician had placed work restrictions upon her as a result, prohibiting her from accessing or administering narcotic medication to patients.[84] The employer believed that narcotic

76. *Id.* at 81.

77. *Id.*

78. *See id.* (assuming the employer has a Drug and Alcohol Free Workplace policy).

79. EEOC v. Exxon Corp., 203 F.3d 871, 872 (5th Cir. 2000).

80. *Id.* at 871. The facts specifically use the word "demoted," which could indicate less pay, a lower status, or both. *Id.* at 872.

81. Wallace v. Veterans Admin., 683 F. Supp. 758, 766 (D. Kan. 1988).

82. *Id.*

83. 683 F. Supp. 758 (D. Kan. 1988).

84. *Wallace*, 683 F. Supp at 760.

administration was an essential function of the position and did not hire her.[85] The applicant sued under the Rehabilitation Act,[86] which is similar in its requirements to the ADA,[87] and applied to the position due to the hospital's federal status.[88] The court ruled in favor of the applicant, holding that because only approximately two percent of an RN's work involved narcotic administration, finding someone else to administer narcotics for this particular applicant was not an unreasonable accommodation.[89] The court's holding was based solely on whether or not the applicant was able to perform the essential job functions with or without a reasonable accommodation.[90] The hospital's position that patient care would be compromised was discussed only in the context of the applicant's narcotic administration restriction.[91] There was no discussion of a potential for relapse by the applicant, resulting in a concern for patient safety in the context of safety as a business necessity.[92]

C. NO REASONABLE ACCOMMODATION IS NECESSARY IF AN UNDUE HARDSHIP EXISTS

An employer is likewise not required to accommodate a disabled employee if undue hardship exists.[93] For example, the amount of time, energy, and expense that would be involved with monitoring a physician, nurse, or other health care worker, who was a relapse concern, would be taken into consideration when determining a hospital's or employer's responsibilities under the ADA.[94] Such considerations may include the type of practice, patient access, drug access, and responsibility of the particular employee in supervision of others.[95] Of the cases analyzed, this argument is the least mentioned by courts in their discussion of ADA accommodation

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85. *Id.* at 759.

86. 29 U.S.C. §§ 701-718 (2000).

87. The Rehabilitation Act provides coverage for an "individual with a disability," defined as "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. § 705(20)(A)-(B) (2000). Alcoholism and drug addiction are recognized under the Rehabilitation Act. *See* Tinch v. Walters, 765 F.2d 599, 604 (6th Cir. 1985).

88. *Wallace*, 683 F. Supp. at 760.

89. *Id.* at 765-66 (rejecting the hospital's argument that such accommodation would be unduly burdensome, result in hiring of additional staff, and compromise staff morale and patient care).

90. *Id.* at 766.

91. *Id.*

92. *Id.*

93. Altman v. N.Y. City Health & Hosps. Corp., 903 F. Supp. 503, 511 (S.D.N.Y. 1995).

94. *Id.*

95. *Id.*

of employees with chemical dependency disabilities.[96] Direct threat and the safety qualification of business necessity are raised most often by employers and, consequently, discussed most often by the courts.[97]

IV. CONCLUSION

While an employer's responsibilities and an employee's rights under the ADA have been developed through case law, they are, unfortunately, still not clear regarding safety-sensitive positions and at what point the safety of a third party takes priority over accommodating an employee with a chemical dependency disability. Chemical dependency disabilities enjoy less protection than other disabilities under the ADA, and policies prohibiting such workers from safety-sensitive positions have been upheld as a business necessity in other circuits. Certainly the business necessity exemption applied in *Exxon*, if applied more broadly, would be a more preemptive measure for employers, but would also have a more discriminatory effect on employees. Whether such an expansive policy of prohibiting all workers with chemical dependencies from treating patients would be accepted remains to be seen. Therefore, until the ADA and NDHRA are clarified through either further legislation or judicial interpretation, hospitals and employers remain in the untenable position of weighing the risk of tort liability for accidents resulting from a relapsed employee versus the risk of discrimination liability under the ADA and possibly the NDHRA.

96. Although if utilized, the employer must adequately consider feasible accommodations, and they cannot merely offer undue hardship as a justification without objective evidence. *See* Wallace v. Veterans Admin., 683 F. Supp. 758, 766 (D. Kan. 1988) (stating contentions of an inability to accommodate should be supported with objective evidence, and not merely speculation).

97. *See supra* Part III.A-B.