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by Stephen E. Trimboli, Esq.

When Does "Current" Drug Use Become "Former" Drug Use?

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Case Study: When Does "Current" Drug Use Become "Former" Drug Use?

by Stephen E. Trimboli, Esq.

One of the more difficult issues for employers dealing with drug use in the workplace is distinguishing between employees "currently engaged" in the illegal use of drugs and those who are no longer so engaging. The federal American with Disabilities Act (ADA) does not protect individuals who are "currently engaged in the illegal use of drugs," but extends protection to employees who have been rehabilitated and are "no longer engaging in such use." The line between an employee who is "currently engaged" in drug use and those who are "no longer engaging in such use" is often unclear. The case of *Mauerhan v. Wagner Corporation*, decided April 19, 2011, by the Tenth United States Court of Appeals, illustrates the difficulties employers may face when confronted with this issue.

was offered re-employment at a lower paying position and was told that he could no longer service the accounts he had serviced prior to his discharge. The plaintiff declined to accept the new position and sued Wagner for disability discrimination under the ADA. The plaintiff subsequently swore in court papers that he had remained drug-free since entering in-patient rehabilitation.

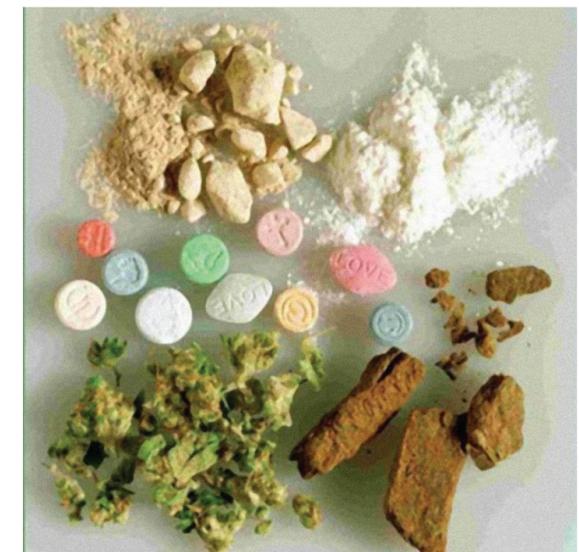
At the trial level, the plaintiff argued that Wagner had violated the ADA by not offering to reinstate him at his former position, claiming that Wagner had discriminated against him based on what he claimed to be his former drug use. Wagner contended that the plaintiff was still a current drug user within the meaning of the ADA when he asked to re-hired. The trial court agreed

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FACTS OF THE CASE

The plaintiff had worked as a sales representative for Wagner Corporation from 1994 until June 2005. The plaintiff had voluntarily participated in an out-patient drug rehabilitation program in 2004, with Wagner's knowledge and acquiescence. On June 20, 2005, the plaintiff was asked to submit to a drug test. He admitted that he would likely test positive for drugs but agreed to submit to the test anyway. He was fired immediately after producing a positive result. However, a supervisor advised him that he could be re-employed if he became fully rehabilitated. The plaintiff then entered an in-patient drug rehabilitation program on July 6, 2005; his entrance examination revealed positive test results for cocaine and marijuana. He completed the program on August 4, 2005, with his rehabilitation counselor issuing a report describing his prognosis at discharge as "guarded."

The day after he completed the program, the plaintiff contacted Wagner and asked for re-employment. He



with Wagner, holding that one month of abstaining from drugs was too short a period of time to be deemed “former” drug use. The trial court then dismissed the case, and the plaintiff appealed.

ANALYSIS OF COURT DECISION

On appeal, the Mauerhan Court was required to determine whether, at the time he was denied re-employment in his former position, the plaintiff was still a “current” drug user, or had become a person no longer engaged in drug use who was entitled to ADA protection. Although the Court rejected the notion that one month of sobriety was insufficient per se under the ADA, it nonetheless upheld the trial court’s dismissal of the plaintiff’s complaint.

There is no bright line standard for when an individual is no longer currently using drugs. Under the ADA, “current drug use” means that the employee’s use was “sufficiently recent to justify the employer’s reasonable belief that the drug abuse remained an ongoing problem.” ADA protections apply only to persons who have “refrained from using drugs for a significant period of time,” and not to “periodic or ongoing [drug] activity . . . that has not permanently ended.” The issue is not solely one of the number of days or weeks that have passed since the employee last used illegal drugs. Nor is mere participation in a rehabilitation program sufficient. Employers are entitled to seek “reasonable assurances that no illegal use of drugs is occurring or has occurred recently enough so that continual use [remains] a real and ongoing problem.”

Consistent with this reasoning, the Mauerhan Court rejected Wagner’s argument that an individual could never qualify for ADA protection after only thirty drug-free days. “No formula can determine if an individual qualifies” for ADA protection. “Instead, an individual’s eligibility [for ADA protection] must be determined on a case-by-case basis, examining whether the circumstances of the plaintiff’s drug use and recovery justify a reasonable belief that drug use is no longer a problem.” The Court explained:

Rather than focusing solely on the timing of the employee’s drug use, courts should consider whether an employer could reasonably conclude that the employee’s substance abuse prohibited the employee from performing the essential job duties . . . Among the factors that should be considered will be the severity of the employee’s addiction and the relapse rates for whatever drugs were used . . . Additionally, a court may examine “the level of responsibility entrusted to the employee; the employer’s applicable job and performance requirements; the level of competence ordinarily required to adequately perform the task in question; and the employee’s past performance records.[Citations omitted.]

Turning the specific facts, the Court noted that at the time
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There is a New Office in Town:

The Family and Community Relations Office at the New Jersey Department of Education

by Dr. Felecia Nace, Office of Family and Community Relations, New Jersey Department of Education

The New Jersey Department of Education has taken a bold new approach to how it relates to and connects with New Jersey families. The Family and Community Relations Office is a newly created Office at the New Jersey Department of Education, opening its doors last year, and offering a variety of services to families. Through our web page at www.NJFamilies.com, our “help desk,” and our public outreach, we help families better understand their educational rights and responsibilities, as well as the options and opportunities that are available to their children. Our mission is to help families ensure that every child in New Jersey is college and career ready, regardless of their economic circumstances.

The “help desk” can be reached at 609-633-7318, and has been established to help New Jersey families navigate their local school system.

When should you call the helpline? Families can call the help desk when they have a question they do not believe has been satisfactorily answered at the school or school district level. The Office of Family and Community Relations always encourages families to first try to work with their child’s school and exhaust all possibilities within the school district, trying everything from speaking to the classroom teacher to communicating with the Superintendent of schools. After a family has tried unsuccessfully to communicate their questions and concerns to the school district, they may need guidance in getting the answers they seek. That’s when calling the New Jersey Department of Education helpline will be useful. One of the first questions that we might ask is: “What have you done to seek answers to your questions in your school district?” So, be prepared to tell us what steps you have already taken.

The help desk connects families with specific Offices at the Department of Education to help clarify questions regarding a variety of topics such as Special Education, School Choice, New Jersey Core Curriculum Content Standards, and much more.

Another means of communicating with our Office is through email. You can email your questions and queries to parents@doe.state.nj.us. We try our best to provide families with a reasonable turnaround time for responses to their questions.

The Office of Family and Community Relations also accepts invitations to speak at family and community events. For example, you can request our presence at one of your PTA or PTO meetings or you can request our presence at a local church to speak to families regarding services that The Office of Family and Community Relations has to offer. You can make a request for our Office to speak at an event through our website: www.NJFamilies.com. Just go to our website and then click on “ask.”

To view the complete article, visit www.DrugFreeNJ.org

he re-applied for employment, the plaintiff’s prognosis was “guarded.” In addition, Wagner provided testimony from an addiction specialist that three months of treatment would be necessary for someone in plaintiff’s position to reach a threshold of significant improvement. Even the plaintiff himself conceded that “anyone coming fresh out of the rehab is guarded.” Because plaintiff had not rebutted any of this evidence, the Mauerhan Court concluded that the plaintiff could not prove that at the time he applied for re-employment, Wagner was unreasonable in believing that the plaintiff’s drug use remained “current.” The Court therefore affirmed the dismissal of the complaint.

Significantly, the Mauerhan Court warned, “Nothing in our decision prevents an employer from terminating an individual for drug-related misconduct . . . Unsatisfactory conduct caused by alcoholism and illegal drug use does not receive protection under the ADA.”

DISCUSSION

As the Mauerhan case illustrates, distinguishing between “current” and “former” drug use is not an easy task. Yet it is a dilemma that employers frequently face. A common employee response to a positive drug test is to enroll immediately in a thirty-day treatment program, proclaim themselves “cured,” and excuse their failed drug test (or other drug-related misconduct) as allegedly being the unfortunate product of their allegedly now-former addiction. How should an employer respond?

First and foremost, as Mauerhan emphasized, the law provides no protection for actual misconduct related to, or caused by, drug use or alcoholism. Substance addiction is no defense to poor performance, excessive absenteeism, work rule violations, or improper workplace behavior. An employer lawfully may hold a substance-abusing employee to the same standards to which it holds other employees, even if the unsatisfactory performance or behavior is related to the substance abuse. An employer lawfully may discipline and terminate the employee for such behavior.

But what if the employer seeks to impose discipline for the drug use itself, as opposed to misconduct caused by or related to the drug use? As Mauerhan illustrates, merely completing a rehabilitation program, or merely refraining from drug use for thirty days, is not sufficient to convert one from an unprotected “current” drug user to a protected “former” drug user. An employer is entitled to “reasonable assurances” that drug use has permanently ended. The factors cited by the Court in Mauerhan are a useful summary of the information the employer should demand. How long has the employee actually refrained from drug use? What is the

employee’s prognosis? What substances was the employee abusing, and how severe was the employee’s addiction? What are the relapse rates for the substances the employee abused? What was the employee’s drug use history, and what were the circumstances of the employee’s abuse? Is this an individual with a long history of recreational drug use, or someone who became addicted to pain-killing medication originally prescribed by a doctor for legitimate purposes? And is the employee complying with the post-rehabilitation instructions and recommendations he was given?

And as the Mauerhan case illustrates, it is also appropriate for the employer to consider the nature of the employee’s employment. What level of responsibility was entrusted to the employee? What are the employee’s job and performance requirements? What is the employee’s past performance record? What level of competence, judgment, independence and trust is expected of the employee? To what extent does the employee function under close supervision, and to what extent must the employer trust the employee to function unsupervised? Finally, what harm may the employee cause to himself or others if he performs his functions while impaired?

A qualified substance abuse professional can assist an employer in addressing these considerations. Organizations such as Drugs Don’t Work in NJ can also offer useful resources.

And as always, the advice of competent legal counsel should be sought when attempting to navigate these potentially treacherous waters.

About the Author

Stephen E. Trimboli, Esq., Mr. Trimboli has been recognized as a New Jersey Super Lawyer, and was named as an Employment Law Super Lawyer in 2008. He was the recipient of the 1996 County Service Award from the New Jersey Association of Counties; the 1994 Pace Setter Award from the National Public Employer Labor Relations Association, and the 1999 Paul Gallien Award from the National Council on Alcoholism and Drug Dependence, North Jersey Area.

Mr. Trimboli is admitted to practice in New Jersey, the District of Columbia, the New Jersey Federal District Court, the Second and Third Circuit Court of Appeals, and the United States Supreme Court.

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