

Drug Abuser Lacks ADA Protection Despite Completion of Rehabilitation Program

2 min read

Jun 1, 2011

In 2004, an employee sales representative voluntarily entered an outpatient drug rehabilitation program with his employer's knowledge. In June 2005, the employee was asked to submit to a drug test, which he failed. As a result, the employer terminated the sales representative's employment, but informed the employee that he could return if he "got himself clean." In July 2005, the employee entered an inpatient drug rehabilitation program. During the intake process for the program, the employee tested positive for cocaine and marijuana. The employee completed the program on August 4, 2005, at which time his rehabilitation counselor described his recovery prognosis as "guarded." The next day, the employee contacted his former employer about returning to work. The employer informed him that he could return, but only to a position in which he would receive less compensation than his former sales job and that the employee could not service the same accounts he had prior to his discharge. The employee refused the conditions placed on his reinstatement and sued the employer contending that the refusal to reinstate him to his former position constitutes disability discrimination based on his drug addiction in violation of the Americans with Disabilities Act (ADA). The U.S. Court of Appeals for the Tenth Circuit ruled that "an individual is currently engaging in the illegal use of drugs if the 'drug use was sufficiently recent to justify the employer's reasonable belief that the drug abuse remained an ongoing problem.'" The court declined to adopt a bright-line rule that 30 days of being drug-free is *per se* insufficient for a former drug abuser to qualify for ADA protection. But it found that the employer reasonably considered the employee a current user based on his recent history of drug use and his guarded prognosis for recovery. Consequently, the court held that the employee was not protected under the ADA's safe harbor provision for recovering drug addicts who are no longer abusing drugs. Employers should be mindful that although participating in or completing a drug treatment program may bring an individual within the safe harbor provisions, and therefore, the protection of the ADA, an individual must also be no longer engaging in drug use for a sufficient period of time to demonstrate to the employer that the drug use is no longer an ongoing problem.

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