

**Maze Runners:**  
**Employees Who Need Opiates *and* ADA Protection**

**I. INTRODUCTION**

In 2020 alone, United States physicians dispensed over 140 million opiate prescriptions.<sup>1</sup> That is more than enough to provide one prescription for each household in the nation.<sup>2</sup> This high prescription volume comes on the heels of an era marked by aggressive prescription opiate marketing<sup>3</sup> and the resulting birth of pill mills.<sup>4</sup> Unfortunately, persons living with disabilities bear a disproportionate share of that drug use.<sup>5</sup> It is estimated that nearly *half* of all persons with

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<sup>1</sup> *U.S. Opioid Dispensing Rate Maps*, CDC, <https://www.cdc.gov/drugoverdose/rxrate-maps/index.html> (last visited Oct. 24, 2022).

<sup>2</sup> *Quick Facts: United States*, UNITED STATES CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/HSD410220> (last visited Oct. 24, 2022) (reporting 122,354,219 households in the United States, based on the five-year estimate for 2016-2020).

<sup>3</sup> Art Van Zee, *The Promotion and Marketing of OxyContin: Commercial Triumph, Public Health Tragedy*, 99 HEALTH POL'Y & ETHICS 221, 221-23 (2009); see also Georgetown Behavioral Health Institute, *The Origin and Causes of the Opioid Epidemic*, GEORGETOWNBEHAVIORAL.COM (Aug. 14, 2018), <https://www.georgetownbehavioral.com/blog/origin-and-causes-of-opioid-epidemic> (“Drug companies have aggressively marketed their opioid products, such as Purdue Pharma, [as] non-habit inducing and moderate, despite there being little to no research to back up these claims.”).

<sup>4</sup> See generally Rigg et al., *Prescription Drug Abuse & Diversion: Role of the Pain Clinic*, 40 J. DRUG ISSUES 681 (2010) (describing the role of pill mills and pain clinics in facilitating the abuse of prescription opiates).

<sup>5</sup> Sharon Reif et al., *Substance Use and Misuse Patterns and Disability Status in the 2020 US National Alcohol Survey: A Contributing Role for Chronic Pain*, 15 DISABILITY AND HEALTH J. 1, 6 (2022) (“Disability was . . . associated with higher odds of . . . any past-year drug use, prescription drug misuse, and other drug use when adjusting for sociodemographic, clinical, physical and mental health characteristics.”); Chelsea L. Richard et al., *Are Pregnant Women with Disability Prescribed Opioids More and at Higher Dosages than Those Without Disability? A Retrospective Cohort Study of South Carolina Medicaid Beneficiaries*, 15 DISABILITY AND HEALTH J. 1, 3 (2022).

disabilities use prescription opiates.<sup>6</sup> Higher rates of chronic pain account for a portion of this disparity, as do mental health conditions.<sup>7</sup>

Further cementing the overlap between opiate use and disabilities are barriers to treatment for substance abuse.<sup>8</sup> Persons living with disabilities are faced with the same social stigma which commonly hinders people from seeking help for substance use disorders. However, disabilities can compound this reticence by creating additional impediments to treatment, especially for persons with sensory or mobility impairments.<sup>9</sup>

Opiate use, whether prescribed or not, can present major employment problems for persons living with a disability. Fortunately, in 1990, Congress passed the Americans with Disabilities Act (ADA), which “enshrined in law a social promise of equality and inclusion into all facets of life.”<sup>10</sup> Within the ADA framework, Title I specifically addressed disability discrimination in the workplace. The legislative intent was to provide “a broad scope of protection” for employees with disabilities.<sup>11</sup> In reality, that broad protection was incrementally narrowed in a series of United States Supreme Court decisions.<sup>12</sup>

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<sup>6</sup> Young-Rock Hong et al., *Opioid Use Behaviors Among People with Disability in the United States: An Analysis of the National Survey on Drug Use and Health*, 17 J. ADDICTION MEDICINE e27 (2023).

<sup>7</sup> Reif et al., *supra* note 5; Emily Ledingham et al., *Perspectives of Adults with Disabilities and Opioid Misuse: Qualitative Findings Illuminating Experiences with Stigma and Substance Use Treatment*, 15 DISABILITY AND HEALTH J. 1, 5 (2022).

<sup>8</sup> Ledingham et al., *supra* note 7; Reif et al., *supra* note 5, at 7; S. Collings et al., *Improving Treatment for People with Cognitive Impairment and Substance Misuse Issues: Lessons from an Inclusive Residential Treatment Program Pilot in Australia*, 15 DISABILITY AND HEALTH J. 1, 6 (2022).

<sup>9</sup> Ledingham et al., *supra* note 7.

<sup>10</sup> Lawrence O. Gostin, Opinion, *The Americans with Disabilities Act at 25: The Highest Expression of American Values*, 313 J. AM. MED. ASS’N 2231, 2231 (2015).

<sup>11</sup> ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

<sup>12</sup> *Id.*; see also *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999); *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002).

In 2008, Congress remedied the weakened ADA by passing the ADA Amendments Act (ADAAA).<sup>13</sup> In weighing whether an individual has a disability, that definition was “construed in favor of broad coverage . . . to the maximum extent permitted . . . .”<sup>14</sup> As a result, plaintiff-employees can more easily assert a legally recognized disability status.<sup>15</sup>

Defendant-employers have responded by moving the lawsuit battleground to the issue of a disabled employee’s qualification for the position.<sup>16</sup> A major weapon at their disposal is an ADA carve-out that refuses to recognize as qualified “any employee who is currently engaging in the illegal use of drugs.”<sup>17</sup> This exception is particularly impactful in light of the opiate epidemic. As mentioned above, physicians disproportionately prescribe opiates to disabled patients, thus greatly increasing their exposure to one of the most addictive prescription drugs.<sup>18</sup> And once an addiction manifests, prescription opiates have effectively “tenderized the terrain” for illegal substances, such as heroin, which are more accessible for over-use.<sup>19</sup>

This Article will explore ways in which opiate use, whether legal or illegal, presents unique complications for employees’ ADA claims. Part II begins with an overview of the Americans with Disabilities Act and how it functions to protect employees with disabilities from discriminatory workplace actions. This Part also discusses the prevalence of opiate use among persons with disabilities, which can undermine an employee’s Title I ADA protection. Part III analyzes the

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<sup>13</sup> STEPHEN F. BEFORT & NICOLE BUONOCORE PORTER, *DISABILITY LAW: CASES AND MATERIALS* 20 (2d ed. 2021).

<sup>14</sup> 42 U.S.C. § 12102(4)(A).

<sup>15</sup> Stephen F. Befort, *An Empirical Analysis of Case Outcomes Under the ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027, 2067 (2013).

<sup>16</sup> *Id.*

<sup>17</sup> 42 U.S.C. § 12114(a).

<sup>18</sup> Stefanie Sandler Billette, *5 Commonly Abused Prescription Drugs*, WEBMD CONNECT TO CARE, <https://www.webmd.com/connect-to-care/addiction-treatment-recovery/prescription/commonly-abused-prescription-drugs> (last visited Oct. 26, 2022).

<sup>19</sup> See SAM QUINONES, *DREAMLAND* 165–66 (2015).

complex legal intersection of opiate use in the context of disability discrimination and identifies areas that successfully or insufficiently address facets of that intersection. Specifically, Part III will examine special considerations for each element of a basic ADA discrimination or failure-to-accommodate claim when opiate use is involved.

The overall goal of this Article is to foster a more nuanced understanding of the challenging legal maze encountered by employees with disabilities and their important allies in the battle against the opiate epidemic, including employers, attorneys, and judges. In this way, the workplace may become more inclusive of those who rely on prescription opiates as pain management, and more supportive of those who are fighting substance abuse disorders.

## **II. BACKGROUND**

Title I of the Americans with Disabilities Act (ADA) affords employees (and prospective employees) with disabilities a suite of protections against employment discrimination. More specifically, the ADA prohibits employers from “discriminat[ing] against a qualified individual on the basis of a disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”<sup>20</sup>

### *A. ADA Discrimination*

To assert an ADA discrimination claim, the employee typically must establish three elements. First, the employee must show that she has a recognized disability.<sup>21</sup> Second, the employee must be qualified to perform the essential functions of that job.<sup>22</sup> Finally, the plaintiff

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<sup>20</sup> 42 U.S.C. § 12112(a).

<sup>21</sup> 42 U.S.C. § 12102(1).

<sup>22</sup> 42 U.S.C. § 12111(8).

must allege she suffered a cognizable adverse employment action because of the disability.<sup>23</sup> Each of these three elements will be discussed in turn.

The ADA defines “disability” in three ways: “(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment . . . .”<sup>24</sup> Furthermore, “major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.”<sup>25</sup>

In 2008, the Americans with Disabilities Act Amendments Act (ADAAA) expanded the definition of major life activity to include major bodily functions such as “the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.”<sup>26</sup> As a result, the government has since recognized conditions such as substance use disorder (SUD)—and opiate use disorder (OUD) more specifically—as a disability protected under the ADA.<sup>27</sup> OUD is defined as a “chronic brain disease characterized by continuing opioid use despite harmful consequences.”<sup>28</sup>

The second requirement for an ADA-related employment claim is that the plaintiff be qualified for the position at issue. This means that a person with a disability must be someone “who, with or without reasonable accommodation, can perform the essential functions of the

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<sup>23</sup> 42 U.S.C. § 12112(b).

<sup>24</sup> 42 U.S.C. § 12102(1).

<sup>25</sup> 42 U.S.C. § 12102(2)(A).

<sup>26</sup> 42 U.S.C. § 12102(2)(B).

<sup>27</sup> U.S. DEP’T OF JUSTICE CIV. RTS. DIV., THE AMERICANS WITH DISABILITIES ACT AND THE OPIOID CRISIS: COMBATING DISCRIMINATION AGAINST PEOPLE IN TREATMENT OR RECOVERY 1–2 (2022) [hereinafter THE ADA AND THE OPIOID CRISIS].

<sup>28</sup> *Fact Sheet: Opioid Use Disorder*, YALEMEDICINE, <https://www.yalemedicine.org/conditions/opioid-use-disorder> (last visited Oct. 25, 2022).

employment position that such individual holds or desires.”<sup>29</sup> Essential functions are the fundamental duties or responsibilities for a given position, and are typically defined by the employer such as in written job descriptions.

The final element of a *prima facie* case of employment disability discrimination requires a showing that the plaintiff suffered an adverse employment action on the basis of the impairment. Such actions may include: failure to provide reasonable accommodations;<sup>30</sup> termination from the position;<sup>31</sup> refusal to hire;<sup>32</sup> or denial of a promotion.<sup>33</sup>

Importantly, opiate use—which implicates nearly half of all persons with disabilities<sup>34</sup>—greatly complicates the above ADA analysis.

#### *B. ADA and Substance Use*

If opiate use progresses to OUD, an individual is at serious risk of losing ADA protections. Section 12114 states: “a 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.”<sup>35</sup> Under this provision, even *prescription* opiates, if not used in conformity with a valid prescription, can undermine an otherwise legitimate disability discrimination claim under the ADA.<sup>36</sup>

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<sup>29</sup> 42 U.S.C. § 12102(8).

<sup>30</sup> 42 U.S.C. § 12112(b)(5)(A).

<sup>31</sup> 42 U.S.C. § 12112(b)(1).

<sup>32</sup> 42 U.S.C. § 12112(b)(6).

<sup>33</sup> 42 U.S.C. § 12112(b)(5)(B).

<sup>34</sup> *See supra* text accompanying notes 1–9.

<sup>35</sup> 42 U.S.C. § 12114(a).

<sup>36</sup> *See, e.g., Shirley v. Precision Castparts Corp.*, 726 F.3d 675, 678 (2013) (“This exclusion applies not just to the use of illegal street drugs, but also to the illegal misuse of pain-killing drugs controlled by prescription.”); *Sloan v. Repacorp, Inc.*, 310 F.Supp. 3d 891, 896 n.4 (2018) (“Illegal use of drugs refers both to the use of unlawful drugs, such as cocaine, and to the unlawful use of prescription drugs.” (quoting 29 C.F.R. § Pt. 1630, App.)).

ADA regulations provide little guidance as to what defines “current”—and therefore disqualifying—opiate use. The ADA Practice and Compliance Manual describes “currently engaging” to mean the “drug use was sufficiently recent to justify the employer’s reasonable belief that drug abuse remains an ongoing problem.”<sup>37</sup> Federal circuit courts differ in their interpretations, and this split is further exacerbated by a safe harbor provision which makes concessions for employees who have “successfully completed” or are now “participating in a supervised rehabilitation program and [are] no longer engaging in such use.”<sup>38</sup>

Rather than establish a bright-line rule, courts tend to weigh several factors in assessing “current” illegal drug use. The length of time since the last instance of substance use is only one factor.<sup>39</sup> Other factors include: successful completion of a treatment program;<sup>40</sup> the duration of the treatment program;<sup>41</sup> voluntary versus involuntary admission;<sup>42</sup> instances of relapse;<sup>43</sup> and evidence of the employer’s belief that drug use persisted.<sup>44</sup>

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<sup>37</sup> 2 Americans with Disabilities: Practice and Compliance Manual § 7:114 (2022).

<sup>38</sup> 42 U.S.C. § 12114(b).

<sup>39</sup> *See, e.g.*, *Mauerhan v. Wagner Corp.*, 649 F.3d 1180, 1189 (2011) (“Although thirty days without using drugs may in some cases be sufficient for an employee to gain the protection of the ADA, the record before us shows that in this case it was not.”); *Clark v. Jackson Hospital & Clinic, Inc.*, No. 2:12-CV-836-WKW, 2013 WL 5347450, at \*6 (M.D. Ala. Sept. 23, 2013) (“[C]ases . . . are all over the map of how much time must pass after cessation and rehabilitation before one is no longer “currently engaging.”). *But see* *Quinones v. Univ. of P.R.*, No. 14-1331, 2015 WL 631327, at \*5 (D. P.R. Feb. 13, 2015) (finding that drug cessation for “little over three months” was insufficient to establish “a sufficiently long period of time so as to fall under the ADA’s safe harbor provision”).

<sup>40</sup> *See, e.g.*, *Mauerhan*, 649 F.3d at 1187 (“[P]articipating in or completing a drug treatment program will bring an individual closer to qualifying for the safe harbor . . .”).

<sup>41</sup> *See, e.g.*, *Clark*, 2013 WL 5347450, at \*6 (taking into account the plaintiff-employee’s twelve-week outpatient treatment in weighing whether to grant summary judgment).

<sup>42</sup> *See, e.g., id.* at \*6 (considering a nurse’s voluntary self-reporting of substance use).

<sup>43</sup> *See, e.g.*, *Shirley v. Precision Castparts Corp.*, 726 F.3d 675, 681 (2013) (“[Employee’s] continued use of Vicodin following detox ‘support[ed] a reasonable belief that continued drug use was still an on-going problem at the time [Employer] terminated his employment.’”).

<sup>44</sup> *See, e.g.*, *George v. Community Health Centers Inc.*, No. CIV-21-00464-PRW, 2022 WL 697787, at \*5 (W.D. Okla. March 8, 2022) (“No evidence presented by [Employer] indicates that

The ADA’s substance abuse and safe harbor provisions may appear to be minor sidenotes within an otherwise robust legislative protection. However, as the next section will discuss, the reality is that opiate use has the potential to detrimentally affect a large portion of employees with disabilities who rely on that ADA protection.

### *C. The Overlap of Disabilities and Opiates*

The U.S. Department of Health and Human Services distinguishes six discrete categories of disability status.<sup>45</sup> Those categories of impairment, and the associated percentage of the adult population affected, are: mobility, 13.7%; cognition, 10.8%; independent living, 6.8%; hearing, 5.9%; vision, 4.6%; and self-care, 3.7%.<sup>46</sup> Each disability type influences the likelihood of obtaining an opiate prescription, the need for long-term opiate use, the risk of developing OUD, and access to OUD treatment.

Chronic physical impairments often necessitate pain management.<sup>47</sup> Due largely to aggressive and misleading marketing strategies in the early 2000s,<sup>48</sup> opiates constitute the most prevalent pain-medicine prescriptions in the United States.<sup>49</sup> Therefore, the chronic pain associated

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it contemplated the issue of ongoing drug use or relapse post-rehabilitation treatment, or that it had any reasonable belief that [Employee] would be unable to perform her essential job duties moving forward. Indeed, by inviting [Employee] to reapply for her position, [Employer] indicated it had no fears that [Employee] was not fully rehabilitated or could not perform her duties.”).

<sup>45</sup> U.S. DEP’T OF HEALTH & HUM. SERVS., HHS IMPLEMENTATION GUIDANCE ON DATA COLLECTION STANDARDS FOR RACE, ETHNICITY, SEX, PRIMARY LANGUAGE, AND DISABILITY STATUS (2011).

<sup>46</sup> Catherine A. Okoro et al., *Prevalence of Disabilities and Health Care Access by Disability Status and Type Among Adults—United States, 2016*, 67 MORBIDITY AND MORTALITY WEEKLY REPORT 882, 882 (2018).

<sup>47</sup> Ledingham et al., *supra* note 7, at 3.

<sup>48</sup> See QUINONES, *supra* note 19, at 266–68 (describing the tactics used by Purdue Pharma to generate massive sales of OxyContin, often through deceptive “medical” information).

<sup>49</sup> See Craig Hales et al., *Prevalence of Prescription Pain Medication Use Among Adults: United States, 2015-2018*, 369 NCHS DATA BRIEF, June 2020, at 3–4.



with many mobility-based disabilities may greatly increase a person’s chances of being exposed to opiates.<sup>50</sup>

Exposure to prescription drugs is further compounded with every subsequent injury or surgery linked to that impairment.<sup>51</sup> Unfortunately, the inverse relationship is also true: substance use is linked to an increased likelihood for developing a disability.<sup>52</sup> Therefore, the disability-substance use connection very plausibly becomes a negative feedback loop, to the detriment of the affected individual.

Several factors may increase the risk of developing SUD once exposed to opiates and other controlled substances. For example, persons experiencing certain cognitive impairments—such as post-traumatic stress disorder, depression, and autism spectrum disorder—are more likely to develop SUD.<sup>53</sup> Lack of treatment is likewise an increased risk for many disability types. People with intellectual disabilities are “less likely to initiate and attend SUD treatment, ha[ve] shorter lengths of stay, and [are] more likely to drop out of treatment.”<sup>54</sup> Common barriers to treatment

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<sup>50</sup> See, e.g., Kathryn A. Paez et al., *People with Arthritis-Disability and Provider Experiences with Chronic Opioid Therapy: A Qualitative Inquiry*, 15 DISABILITY AND HEALTH J. 1, 1 (2022) (“Arthritis is the leading cause of disability and chronic pain . . . [accounting for] over half of all individuals receiving at least one opioid prescription in the United States.”).

<sup>51</sup> See *id.*

<sup>52</sup> Reif et al., *supra* note 5, at 2.

<sup>53</sup> Lynn R. Webster, *Risk Factors for Opioid-Use Disorder and Overdose*, 125 ANESTHESIA & ANALGESIA 1741, 1743 (2017); Anne M. Roux et al., *A National Profile of Substance Use Disorder Among Medicaid Enrollees on the Autism Spectrum or with Intellectual Disability*, 15 DISABILITY AND HEALTH J. 1, 5 (2022); YALEMEDICINE, *supra* note 28.

<sup>54</sup> Marc L. Copersino et al., *Clinical Utility of a Hybrid Secondary and Relapse Prevention Program in Adults with Mild Intellectual Disability or Borderline Intellectual Functioning in Community Residential and Day Habilitation Settings*, 15 DISABILITY AND HEALTH J. 1, 2 (2022) (citing Elspeth M. Slayter, *Disparities in Access to Substance Abuse Treatment Among People with Intellectual Disabilities and Serious Mental Illness*, 35 HEALTH & SOC. WORK 49 (2010)); see also Collings et al., *supra* note 8.

for those with physical disabilities, such as mobility or vision impairments, include “insufficient clinician training” and “a lack of physical accommodations.”<sup>55</sup>

Altogether, disabilities may increase a person’s likelihood of requiring an opiate prescription, increase the chances of developing OUD, and decrease the efficacy of addiction treatment.

### **III. Analysis**

Given the rampant stigma associated with substance use, it is unsurprising that both employers and the courts are reluctant to grant much leeway for the unique complications arising from opiate use. Ideally, legal ramifications should consider the social shame attached to even legal opiate use, as well as the neurological effect of opiates which may compromise an employee’s decision-making. Unlike most other job-related infractions, those linked to substance use—especially use that originally arose out of a valid pain medication prescription—call for a more nuanced response.

As laid out above, a typical ADA discrimination claim is comprised of three elements, each of which is heavily fact-dependent in its analysis of opiate-related cases. The plaintiff-employee must: (1) have a disability; (2) be otherwise qualified for the position, with or without accommodation; and (3) suffer an adverse employment action on the basis of that disability.<sup>56</sup> Each of these elements presents unique and thorny legal issues for an employee who has both a disability and uses opiates, even when such use does not result in OUD.

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<sup>55</sup> Ledingham et al., *supra* note 7.

<sup>56</sup> *See, e.g.,* Nunies v. Hie Holdings, Inc., 908 F.3d 428, 433 (2018); 20 AM. JUR. PROOF OF FACTS 3D 361 § 25 (2022).

*A. Establishing a Disability: How You Define the Problem Will Dictate How You Solve It*

U.S. courts have yet to unify an approach to analyzing cases at the intersection of a recognized disability and opiate use.<sup>57</sup> To review, the ADA provides three separate but related definitions for “disability”: an actual impairment that significantly limits a major life activity or bodily function; a record of such impairment; or being regarded as having such impairment.<sup>58</sup>

Each prong of the disability definition is distinct in its criteria and in the protections afforded to an employee with a disability. Therefore, courts must thoughtfully decide how to analyze an ADA claim involving prescription-opiate side effects adverse to employment requirements. Or, more accurately, plaintiff’s attorneys advocating for a Title I ADA discrimination claim must be deliberate in framing the interplay between the client’s underlying disability, any opiate-related side effects, and the client’s ability to perform the essential functions of the position at issue. In most situations, plaintiff-employees would likely be most benefited by alleging all three disability prongs (actual, record of, and regarded as).

*1. Disability Prongs 1 & 2: Actual Disability or Record of Impairment*

The legal analysis for an employee claiming OUD as a disability is arguably the most straightforward.<sup>59</sup> In such a situation, the chemical dependency profoundly affects the normal functioning of a person’s brain:

Drugs interfere with the way neurons send, receive, and process signals via neurotransmitters. Some drugs, such as . . . heroin, can activate neurons because their chemical structure mimics that of a natural neurotransmitter in the body. This allows the drugs to attach onto and activate the neurons. Although these drugs mimic the brain’s own chemicals, they don’t activate neurons in the same way as a

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<sup>57</sup> See generally Michelle A. Travis, *The Part and Parcel of Impairment Discrimination*, 17 EMP. RTS. & EMP. POL’Y J. 35 (2013).

<sup>58</sup> See *supra* note 24 and accompanying text.

<sup>59</sup> See THE ADA AND THE OPIOID CRISIS, *supra* note 27 (explaining that OUD is a recognized disability protected by the ADA, subject to certain exceptions).

natural neurotransmitter, and they lead to abnormal messages being sent through the network.

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Some drugs like opioids also disrupt other parts of the brain, such as the brain stem, which controls basic functions critical to life, including heart rate, breathing, and sleeping. This interference explains why overdoses can cause depressed breathing and death.<sup>60</sup>

Therefore, an addiction—such as OUD—is directly protected by the ADA under the first prong of the disability definition, as an *actual impairment* significantly limiting a major bodily function.<sup>61</sup> However, many plaintiffs still fail to assert this important ADAAA addition, and courts sometimes overlook it as well.<sup>62</sup>

One such case is Skinner v. City of Amsterdam, in which the court derived from *pre-ADAAA* cases the rule language for defining a disability.<sup>63</sup> The court found the plaintiff-employee’s substance abuse did not constitute a disability for the purposes of his ADA claims, specifically because Skinner failed to present evidence that the condition “substantially limited a major life activity.”<sup>64</sup> No mention was made of “major bodily functions.”

A similarly erroneous outcome is also found in Talmadge v. Stamford Hospital, in which the court cited a 1997 case in declaring, “[t]he Court is skeptical of whether the plaintiff has

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<sup>60</sup> NATIONAL INSTITUTE ON DRUG ABUSE, DRUGS, BRAINS, AND BEHAVIOR: THE SCIENCE OF ADDICTION 15-16 (2020).

<sup>61</sup> ADA COMPLIANCE GUIDE APPENDIX II § 36.104 (2016).

<sup>62</sup> Nicole Buonocore Porter, *Explaining “Not Disabled” Cases Ten Years After the ADAAA: A Story of Ignorance, Incompetence, and Possibly Animus*, 26 GEO. J. POVERTY L. & POL’Y 383, 400–02 (2019).

<sup>63</sup> *Skinner v. City of Amsterdam*, 834 F. Supp. 2d 317, \*326–27, \*330–31 (2010) (citing *Cody v. Cnty. Of Nassau*, 577 F. Supp. 2d 623 (2008), then *Divilio v. New York Dept. of Sanitation*, No. 00-CV-6724, 2006 WL 1662668 (E.D.N.Y. June 8, 2006)).

<sup>64</sup> *Id.* at \*331.

adequately demonstrated that his addiction substantially limited one or more of his major life activities.”<sup>65</sup> Again, the court did not mention any major bodily function.<sup>66</sup>

One important area in which the ADA is helpful in addressing OUD as a disability is by properly accounting for addiction as a disease to be managed, not cured.<sup>67</sup> This is accomplished through the second prong of the disability definition, which extends ADA protection to employees with a *record of* a significantly limiting impairment.

For example, in Hernandez v. Hughes Missile Systems Company, the plaintiff-employee overcame the employer’s motion for summary judgment by successfully establishing a disability based on the “record of” prong.<sup>68</sup> Hernandez had worked for Hughes Missile Systems for twenty-five years, throughout which time he battled an increasing alcohol and drug dependence.<sup>69</sup> Faced with termination due to his substance use, Hernandez instead elected to resign.<sup>70</sup> For over two years, Hernandez sought treatment for and successfully managed his substance use problems.<sup>71</sup> He then reapplied for his former position at Hughes Missile Systems but was rejected, ostensibly per

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<sup>65</sup> Talmadge v. Stamford Hosp., No. 3:11-cv-01239-WWE, 2013 WL 2405199, at \*6 (D. Conn. May 31, 2013) (citing Burch v. Coca-Cola Co., 119 F.3d 305 (5th Cir. 1997)).

<sup>66</sup> More recently, a 2022 case similarly failed to acknowledge the explicit “major bodily functions” provision for persons experiencing SUD. George v. Cmty. Health Ctrs. Inc., No. CIV-21-00464-PRW (W.D. Okla. Mar. 8, 2022). In that case, the plaintiff “got addicted to the pain medicine [she was] getting at pain management,” resulting in her voluntary enrollment in an inpatient treatment center. *Id.*, slip op. at 1. Fortunately, the judge found the employee had a qualified disability on other grounds, namely a substantial limitation on her ability to work. *Id.*, slip op. at 5.

<sup>67</sup> See NATIONAL INSTITUTE ON DRUG ABUSE, *supra* note 60, at 22 (“Like other chronic diseases such as heart disease or asthma, treatment for drug addiction usually isn’t a cure. But addiction can be managed successfully.”).

<sup>68</sup> Hernandez v. Hughes Missile Systems Company, 362 F.3d 564, 570 (9th Cir. 2004) (on remand from the Supreme Court’s decision in Raytheon Company v. Hernandez, 540 U.S. 44 (2003)).

<sup>69</sup> *Id.* at 566.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

company policy.<sup>72</sup> That unwritten company policy barred the “rehiring [of] former employees whose employment ended due to violations of company personnel conduct rules.”<sup>73</sup> Covered by the “record of” disability prong, Hernandez presented enough evidence of potentially discriminatory intent to proceed to trial.<sup>74</sup>

On the other hand, mere *use* of a controlled substance, not rising to the level of OUD, is typically not recognized as an actual impairment in and of itself.<sup>75</sup> In fact, the use of pain medication may actively undermine a plaintiff’s assertion of an “actual disability.”

In Goff v. Performance Contractors, Inc., the plaintiff-employee suffered a back injury that lead to surgery, a condition called “drop foot,” and an opiate prescription for pain management.<sup>76</sup> Goff nevertheless applied for the position of pipefitter with Performance Contractors, a large industrial construction company.<sup>77</sup> In assessing whether Goff was actually disabled (the first prong of the disability definition), the court relied on deposition testimony in which Goff averred that neither his drop foot nor his unresolved back injury impacted his daily life.<sup>78</sup> Thus, the court erroneously concluded that “no reasonable factfinder could determine that Goff is actually disabled within the meaning of the ADA.”<sup>79</sup>

Crucially, the Goff court failed to consider the ADAAA provision that states, “determination of whether an impairment substantially limits a major life activity shall be made

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<sup>72</sup> *Id.* at 566–67.

<sup>73</sup> *Id.* at 567.

<sup>74</sup> *Id.* at 570.

<sup>75</sup> *Daugherty v. Sajar Plastics, Inc.*, 544 F.3d 696, 704 (6th Cir. 2008) (explaining that, although opiate use precluded an employee from qualifying for a particular position, the potential for working other positions negated disability status).

<sup>76</sup> *Goff v. Performance Contractors, Inc.*, No. 18-0529-WS-MU, 2020 WL 1794967, at \*2 (S.D. Ala. Apr. 4, 2020).

<sup>77</sup> *Id.* at \*3.

<sup>78</sup> *Id.* at \*6.

<sup>79</sup> *Id.*

*without regard to the ameliorative effects of mitigating measures.*”<sup>80</sup> Without this provision, an employee’s opiate-related pain management could negate a disability status—and the accompanying protections—by masking the symptoms of that condition. However, that same prescription could very likely present its own problematic side effects, for which the employee could greatly benefit from ADA accommodations.<sup>81</sup>

Other courts have recognized this absurd contradiction and correctly considered the alleged disability as it would present *without* pain management.<sup>82</sup> One such example is Howard v. Norfolk Southern Corporation, in which a district court specifically considered whether a plaintiff-employee’s “pain substantially limits his daily activities *without pain medication*.”<sup>83</sup>

## 2. Disability Prong 3: Regarded as Impaired

Alternatively, plaintiff-employees have also sought to prevail in their ADA discrimination claims by asserting that their opiate use is “regarded as” a disability, per the third prong of the ADA’s disability definition.<sup>84</sup> This prong is established by a showing that the plaintiff-employee “has been subjected to an action prohibited under [Title I of the ADA] because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to

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<sup>80</sup> 42 U.S.C. § 12102(4)(E)(i) (emphasis added); *see also* Porter, *supra* note 62, at 404–05.

<sup>81</sup> *Cf.* DeBacker v. City of Moline, 78 F. Supp. 3d 916 (C.D. Ill. 2015) (depression managed with Zoloft); Weaving v. City of Hillsboro, 763 F.3d 1106 (9th Cir. 2014) (ADHD managed with medication and therapy).

<sup>82</sup> *See, e.g.*, Byrd v. Outokumpo Stainless USA, LLC, No. 20-0520-WS-M, 2022 WL 2134993, at \*2 (S.D. Ala. June 14, 2022) (“*Without mitigating measures*, this pain limits the plaintiff’s ability to bend, squat, and climb stairs and causes him to experience extreme difficulty sleeping.” (emphasis added)).

<sup>83</sup> Howard v. Norfolk Southern Corp., No. 2:17-cv-02163-RDP, 2020 WL 5569922, at \*13 (N.D. Ala. Sept. 17, 2020) (emphasis added).

<sup>84</sup> *See, e.g.*, Byrd, 2022 WL 2134993, at \*2, \*9; Hartmann v. Graham Packaging Company, No. 1:19-cv-488, 2022 WL 219385, at \*7 (S.D. Ohio Jan. 25, 2022).

limit a major life activity.”<sup>85</sup> This prong contains an important advantage and a couple significant disadvantages.

An advantage behind a “regarded as” disability is that, once established, such claim also supports a showing of discriminatory intent. In other words, “[t]he evidence tending to prove the ‘regarded as’ definition of disabled . . . often is duplicative of the evidence relevant to whether the defendant’s employment decision was based on the plaintiff’s perceived disability.”<sup>86</sup> As a reminder, a prima facie case for ADA discrimination requires a showing of three elements: disability; qualification for the position; and adverse action based on the disability.<sup>87</sup> Therefore, if a plaintiff-employee establishes the first element via a “regarded as” disability, that plaintiff has essentially proven the third element as well.

In Byrd v. Outokumpu Stainless USA, LLC, a prospective employee used indirect evidence to establish that the defendant-employer regarded Byrd’s opiate use as a disability and rescinded the job offer based on that assumption.<sup>88</sup> Byrd’s most compelling evidence to that effect was that, in lieu of an individualized assessment, the employer relied upon generalized assumptions about persons taking similar medications.<sup>89</sup> The federal district court determined, even without addressing additional evidence, “a properly functioning jury could determine that the defendant revoked the plaintiff’s job offer because it regarded him as disabled.”<sup>90</sup>

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<sup>85</sup> 42 U.S.C. § 12102(3)(A).

<sup>86</sup> *Byrd*, 2022 WL 2134993, at \*9 (quoting *Lewis v. City of Union City*, 934 F.3d 1169 (11th Cir. 2019)).

<sup>87</sup> *See supra* notes 21-23 and accompanying text.

<sup>88</sup> *Byrd*, 2022 WL 2134993, at \*10. In this case, the plaintiff applied for a plaster job position in a steel mill. *Id.* at \*1. The plaintiff already worked in that department through a third-party contractor company but sought direct employment with the steel mill. *Id.* During the hiring process, which included a physical examination and drug test, the steel mill company learned of the plaintiff’s opiate use and rescinded the job offer. *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*



However, an ADA discrimination claim based on a “regarded as” disability alone (without also establishing an actual disability, or a record of such), suffers from two major drawbacks. First, an employee is not entitled to reasonable accommodations for a condition that is merely *regarded as* a disability.<sup>91</sup> In other words, opiate use that is merely “regarded as” a disability is sufficient to assert an ADA employment discrimination claim but is insufficient for a failure-to-accommodate claim.<sup>92</sup>

The second drawback concerning “regarded-as” disability claims is that the perceived disability cannot be “transitory and minor.”<sup>93</sup> Transitory impairments are defined as lasting only six months or less; minor impairments are not statutorily defined.<sup>94</sup> The statute is generally understood to require the defendant-employer show the plaintiff-employee’s perceived disability is *both* transitory and minor, not simply one or the other, to fall outside the ADA’s protection.<sup>95</sup>

Courts have wrestled with properly defining what constitutes a “minor” impairment for the purposes of identifying “regarded-as” disabilities. While the statute does not explicitly define the

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<sup>91</sup> 42 U.S.C. § 12201(1)(h).

<sup>92</sup> See *Hartmann v. Graham Packaging Co., L.P.*, No. 1:19-cv-488, 2022 WL 219385, at \*6 n.6 (S.D. Ohio Jan. 25, 2022) (quoting *EEOC v. M.G.H. Family Health Ctr.*, 230 F. Supp. 3d 796, 811 (E.D. Mich. 2017)).

Some courts appear to conflate all discrimination claims without distinguishing between failure-to-accommodate claims and other adverse employment actions. For example, in *Howard v. Norfolk Southern Corp.*, the court found the plaintiff-employee satisfied only the regarded-as prong of the disability definition. No. 2:17-cv-02163-RDP, 2020 WL 5569922, at \*14 (N.D. Ala. Sept. 17, 2020). Furthermore, the plaintiff-employee alleged only a single claim against the employer: discrimination “by failing to accommodate his knee and back pain.” *Id.* at \*9. Per ADAAA provisions, the employer could have prevailed in its summary judgment motion because an employee is not entitled to accommodations for a perceived (regarded-as) disability. However, the court denied summary judgment and allowed the case to proceed. *Id.* at \*16.

<sup>93</sup> 42 U.S.C. § 12102(3)(B).

<sup>94</sup> *Id.*

<sup>95</sup> Gordon Good, Note, *The Americans with Disabilities Act: Short-Term Disabilities, Exceptions, and the Meaning of Minor*, 37 U. DAYTON L. REV. 99, 129–133 (2011); see also Cheryl L. Anderson, *No Disability If You Recover: How the ADA Shortchanges Short-Term Impairments*, SAN DIEGO L. REV. 63, 96–98 (2022).

term, it does provide a clue within a related provision. That is, the ADAAA broadened the definition of the “regarded-as” prong, requiring the plaintiff-employee only show discrimination based on “an actual or perceived physical or mental impairment *whether or not the impairment limits or is perceived to limit a major life activity.*”<sup>96</sup> Some courts have laid out a false dichotomy in which an impairment is either minor *or* limits a major life activity.<sup>97</sup> However, this is clearly in contrast with the statutory intent of the ADAAA. Thus, a perceived impairment can be regarded by the employer as more than a minor condition *even if* it does not appear to hinder major life activities.

Importantly, in assessing whether a perceived disability is minor, the court should also consider the mitigating measures of an impairment, which are “part and parcel of the impairment itself.”<sup>98</sup> An opiate prescription may be one such mitigating measure. Therefore, both the underlying condition *and* the side-effects of opiate use—such as drowsiness, bladder dysfunction, or nausea<sup>99</sup>—may be considered in establishing a perceived disability, and that such disability is not minor.<sup>100</sup>

#### *B. Otherwise Qualified: Opioid Users in the Workplace*

Once a person’s disability has been established, the second element of an ADA claim is that the person be qualified for the position: “The term ‘qualified individual’ means an individual who, with or without reasonable accommodation, can perform the essential functions of the

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<sup>96</sup> 42 U.S.C. § 12102(3)(A) (emphasis added).

<sup>97</sup> See Anderson, *supra* note 95, at 98–105.

<sup>98</sup> EEOC Final ADAAA Regulations, 76 Fed. Reg. at 16,978; see generally Michelle A. Travis, *The Part and Parcel of Impairment Discrimination*, 17 EMP. RTS. & EMP. POL’Y 35 (2013).

<sup>99</sup> Ramsin Benyamin et al., *Opioid Complications and Side Effects*, 11 PAIN PHYSICIAN J. S105, S109, S111, S116 (2008).

<sup>100</sup> See, e.g., Hartmann v. Graham Packaging Co., L.P., No. 1:19-cv-488, 2022 WL 219385, at \*7 (S.D. Ohio Jan. 25, 2022).

employment position that such individual holds or desires.”<sup>101</sup> As discussed above, illegal substance use—such as opiates taken outside of a prescribing physician’s directives—can negate a finding that the person is a qualified individual.<sup>102</sup>

### *1. Qualified Individual: Generally*

ADA regulations further define the term “qualified” to mean “the individual satisfies the requisite skill, experience, education and other job-related requirements of the employment position.”<sup>103</sup> Courts interpret this to require an individualized assessment of each *particular* ADA-covered employee in a *particular* job position and its related essential functions.<sup>104</sup>

Essential functions of a job are the “fundamental job duties” and not just “marginal functions of the position.”<sup>105</sup> Deference is given to the employer’s assessment of which functions are essential, especially when detailed in a written job description or when that function constitutes a large portion of the time spent in that position.<sup>106</sup>

### *2. Qualified Individual: Opiates and Safety Concerns*

In ADA cases involving opiate use, rather than simply identifying the essential functions themselves, the parties commonly disagree about whether the employee can safely perform those

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<sup>101</sup> 42 U.S.C. § 12111(8).

<sup>102</sup> See discussion *supra* Section II.C.

<sup>103</sup> 29 C.F.R. § 1630.2(m).

<sup>104</sup> See, e.g., *Byrd v. Outokumpo Stainless USA, LLC*, No. 20-0520-WS-M, 2022 WL 2134993, at \*10 (S.D. Ala. June 14, 2022) ([A]n employer . . . must point to *particularized facts* about the *specific person’s* condition to support its decision.”).

<sup>105</sup> 29 C.F.R. § 1630.2(n).

<sup>106</sup> *Id.*; 42 U.S.C. § 12111(8); see also *Goff v. Performance Contractors, Inc.*, No. 18-0529-WS-MU, 2020 WL 1794967, at \*3 (S.D. Ala. Apr. 4, 2020) (“These requirements were reinforced by [the employer’s] job description for the pipefitter position, documenting essential functions such as climbing ladders and scaffolds, and lifting 50 pounds.”); *id.* at \*8 (describing tasks performed “on a daily or almost-daily basis” as essential functions).

essential functions.<sup>107</sup> Two important terms commonly arise within this context: direct threat and safety-sensitive position. An individual may be deemed unqualified if she cannot carry out the essential functions without posing a “direct threat.” That is, an employee must be capable of more than simply completing a duty such as welding<sup>108</sup> or conducting a train.<sup>109</sup> Rather, that employee must do so without posing a “significant risk of substantial harm to the health or safety of the individual or others.”<sup>110</sup>

Direct-threat assertions are an affirmative defense, with the burden shifting to the employer to show that the employee cannot carry out the essential functions safely.<sup>111</sup> However, this assessment still requires an individualized inquiry and should consider the mitigating effects of any reasonable accommodations.<sup>112</sup> For cases involving opiates, an important consideration is that “an assessment based on the known *possible* side effects of a medication, as opposed to an

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<sup>107</sup> See, e.g., *Hartmann v. Graham Packaging Company*, No. 1:19-cv-488, 2022 WL 219385, at \*9 (S.D. Ohio Jan. 25, 2022) (“Specifically, [Employer] argues that [Employee’s] opioid regimen rendered him a risk to the ‘health and safety’ of others.”); *Rohr v. Union Pacific Railroad Co.*, No. 19-1114-JTM, 2020 WL 5802079, at \*16 (D. Kan. Sept. 29, 2020) (“[Employer] relied on . . . an expressly individualized assessment of [Employee’s] present ability to safely perform the essential functions of the job of Locomotive Engineer.”).

<sup>108</sup> E.g., *Breaux v. Bollinger Shipyards, LLC*, 2018 WL 3329059, at \*4 (E.D. La. July 5, 2018).

<sup>109</sup> *Rohr*, 2020 WL 5802079, at \*3.

<sup>110</sup> 29 C.F.R. § 1630.2(r).

<sup>111</sup> 42 U.S.C. § 12113 delineates the direct-threat defense:

(a) It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards . . . [that] 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.

(b) The term “qualification standards” may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

<sup>112</sup> *Id.*; see also *Hartmann v. Graham Packaging Company*, No. 1:19-cv-488, 2022 WL 219385, at \*10 (S.D. Ohio Jan. 25, 2022); *Howard*, 2020 WL 5569922, at \*14; *Byrd v. Outokumpo Stainless USA, LLC*, No. 20-0520-WS-M, 2022 WL 2134993, at \*3 (S.D. Ala. June 14, 2022).

individualized inquiry into a patient's present ability to perform his job functions, is insufficient.”<sup>113</sup>

Employers’ direct-threat defenses within opiate-related ADA cases often arise within the context of safety-sensitive positions. Safety-sensitive positions include “law enforcement, national security, public health or safety, or other functions requiring a high degree of public trust.”<sup>114</sup> Such positions are frequently bound by guidelines and regulations restricting the use of controlled substances.<sup>115</sup>

When an ADA-covered employee is known to be taking (lawful, prescription) opiates, an appropriate individualized assessment “may include input from the individual with the disability, the experience of the individual with a disability in similar positions, and opinions of medical doctors, rehabilitation counselors, or physical therapists who have expertise in the disability involved and/or direct knowledge of the individual with the disability.”<sup>116</sup>

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<sup>113</sup> *Howard v. Norfolk Southern Corp.*, No. 2:17-cv-02163-RDP, 2020 WL 5569922, at \*14 (N.D. Ala. Sept. 17, 2020) (quoting *Pollard v. Drummond Co.*, no. 2:12-CV-03948-MHH, 2015 WL 5306084, at \*7 (N.D. Ala. Sept. 10, 2015)) (emphasis added).

<sup>114</sup> Mia C. Hazle et al., *Buprenorphine in Safety-Sensitive Positions*, 48 AM. J. DRUG & ALCOHOL ABUSE 255, 256 (2022) (quoting Exec. Order No. 12,564, 5 U.S.C. § 7301(7)(d)(5) (1986)).

<sup>115</sup> *See, e.g., Howard*, 2020 WL 5569922, at \*15 (train conductor subject to “medical guidelines” prohibiting “employees in safety-sensitive and/or non-sedentary positions’ taking ‘short-acting medications that may cause sedation, weakness, fatigue, confusion, dizziness[,] and similar side effects ... while at work or within 6 hours ... of reporting to work.’”); *Woodruff v. Ohio Dep’t of Transp.*, No. 1:18-cv-853, 2022 WL 889260, at \*4 (S.D. Ohio Mar. 25, 2022) (commercial driver subject to 49 C.F.R. § 382.213(b): “No driver shall report for duty or remain on duty requiring the performance of safety-sensitive functions when the driver uses any non-Schedule I drug or substance . . . .”); *Goff v. Performance Contractors, Inc.*, No. 18-0529-WS-MU, 2020 WL 1794967, at \*3 n.6 (S.D. Ala. Apr. 4, 2020) (pipefitter subject to occupational guidelines cautioning that “[a]cute or chronic opioid use is not recommended for patients who perform safety-sensitive jobs”).

<sup>116</sup> *EEOC v. Hussey*, 696 F. Supp. 2d 505, 520 (W.D. Pa. 2010) (quoting 29 C.F.R. Pt. 1630, App.).

In Breaux v. Bollinger Shipyards, LLC, a Fifth Circuit district court considered a welder's long work safety record as evidence that his prescription opiate use did not pose a direct threat per se.<sup>117</sup> In that case, the ADA-protected employee was subject to a company policy barring all safety-sensitive position workers from taking controlled substances, including the plaintiff-employee's prescription.<sup>118</sup> However, contrary to company policy, the plaintiff-employee failed to disclose his lawful opiate use to his employer for several years.<sup>119</sup> Upon later learning of the prescription, the employer "considered the safety risks, considered the recommendation made by Family Medical and [the doctor], and determined that Plaintiff's drug use posed a direct threat."<sup>120</sup> The plaintiff-employee was "released from work," and could only return to that position if he ceased his opiate use.<sup>121</sup>

The Breaux court clarified that the employer's safety policy concerning opiates was still subject to the individual assessment requirement.<sup>122</sup> The court further laid out the following factors to be considered when weighing a direct threat issue: "(1) The duration of the risk; (2) The nature and severity of the potential harm; (3) The likelihood that the potential harm will occur; and (4) The imminence of the potential harm."<sup>123</sup> Applying those factors, the court reasoned that the plaintiff-employee's years of incident-free work history—coupled with a physician's release to resume working without restrictions—were sufficient to overcome summary judgment for the

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<sup>117</sup> Breaux v. Bollinger Shipyards, LLC, No. 16-2331, 2018 WL 3329059, at \*16 (E.D. La. Jul. 5, 2018).

<sup>118</sup> *Id.* at \*1.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at \*6.

<sup>121</sup> *Id.* at \*2.

<sup>122</sup> *Id.* at \*13.

<sup>123</sup> *Id.* (quoting 29 C.F.R. § 1630.2(r)); *see also* EEOC v. Hussey, 696 F. Supp. 2d 505, 519 (W.D. Pa. 2010) (quoting 29 C.F.R. § 1630.2(r)).

employer.<sup>124</sup> In other words, a reasonable jury could find that the specific dosage of *that* narcotic for *that* employee in *that* position did not present a direct threat and thus was not a valid defense against disability discrimination.

In contrast, a federal district court found in Woodruff v. Ohio Department of Transportation that an employee's failure to adhere to federal safety requirements for his safety-sensitive position was sufficient to disqualify him from that position.<sup>125</sup> The court, citing EEOC guidelines, pointed out that noncompliance with federal law strongly weighed in favor of the employer's direct threat assertion.<sup>126</sup> Such decisions underscore the idea that, even with individualized assessments, "the ADA's recognized goal of ending disability discrimination must be balanced against the health and safety risks that a disability sometimes poses to others."

### *C. Adverse Employment Action*

The final element of an ADA discrimination claim is an adverse employment action.<sup>127</sup> The ADA itself lays out at least seven generalized employer actions that may constitute discriminatory action, including the denial of: employment benefits,<sup>128</sup> job opportunities,<sup>129</sup> or reasonable accommodations.<sup>130</sup> In cases involving opiate use—like most other ADA discrimination cases—the third prong typically hinges upon whether the adverse action was

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<sup>124</sup> *Id.*

<sup>125</sup> Woodruff v. Ohio Dep't of Transp., No. 1:18-cv-853, 2022 WL 889260, at \*4 (S.D. Ohio Mar. 25, 2022).

<sup>126</sup> *Id.* at \*6.

<sup>127</sup> *See* 42 U.S.C. § 12112(a); Shirley v. Precision Castparts Corp., 726 F.3d 675, 680 (2013); Howard v. Norfolk Southern Corp., No. 2:17-cv-02163-RDP, 2020 WL 5569922, at \*11 (N.D. Ala. Sept. 17, 2020); Woodruff, 2022 WL 889260, at \*4.

<sup>128</sup> 42 U.S.C. § 12112(b)(4).

<sup>129</sup> 42 U.S.C. § 12112(b)(5)(B).

<sup>130</sup> 42 U.S.C. § 12112(b)(5)(A).

conducted in a discriminatory manner.<sup>131</sup> The plaintiff-employee may establish discriminatory intent by either direct or circumstantial evidence.<sup>132</sup>

Unlike most other adverse employment actions, an employer’s failure to provide reasonable accommodations presents more complex legal considerations. As one may assume based on the previous paragraph, some courts analyze the denial of accommodations within the context of an adverse employment action (the third element of an ADA discrimination claim).<sup>133</sup> Other courts, however, consider ADA failure-to-accommodate claims as distinct from ADA discrimination claims.<sup>134</sup> The latter scenario involves a myriad of complex issues resulting in circuit splits, but those issues are not unique to claims involving opiate use.<sup>135</sup> In either scenario, the plaintiff-employee “must usually request an accommodation to commence an interactive process that considers that possibility.”<sup>136</sup> However, that person may be “excused from doing so

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<sup>131</sup> BEFORT, *supra* note 13, at 89–90.

<sup>132</sup> *Id.*

<sup>133</sup> *See, e.g.*, Poole-Ward v. Affiliates for Womens Health PA, 329 F.R.D. 156, 165 (S.D. Tex. 2018); Hartmann v. Graham Packaging Company, No. 1:19-cv-488, 2022 WL 219385, at \*9 (S.D. Ohio Jan. 25, 2022) (analyzing the lack of accommodation within the second—qualified individual—prong); Byrd v. Outokumpo Stainless USA, LLC, No. 20-0520-WS-M, 2022 WL 2134993, at \*10 (S.D. Ala. June 14, 2022) (“[A]n employer’s failure to reasonably accommodate a disabled individual *itself* constitutes discrimination under the ADA . . . .” (quoting Holly v. Clairson Industries, LLC, 492 F.3d 1247, 1262 (11th Cir. 2007))).

<sup>134</sup> *See, e.g.*, Devico v. Genesis Healthcare, LLC, No. 17-7556, 2019 WL 6318636, at \*5 (D. N.J. Nov. 26, 2019); Breaux v. Bollinger Shipyards, LLC, No. 16-2331, 2018 WL 3329059, at \*3 (E.D. La. Jul. 5, 2018); Cannon v. Jacobs Field Servs. N. Am., Inc., 813 F.3d 586, 594 (5th Cir. 2016); Woodruff v. Ohio Dep’t of Transp., No. 1:18-cv-853, 2022 WL 889260, at \*3 (S.D. Ohio Mar. 25, 2022); Blazek v. City of Lakewood, 576 Fed. Appx. 512, 513 (6th Cir. 2014).

<sup>135</sup> A detailed survey of failure-to-accommodate claims among the federal circuit courts goes beyond the scope of this Article. For a more comprehensive analysis of the issue see Nicole Buonocore Porter’s *Adverse Employment Actions in Failure-to-Accommodate Claims: Much Ado About Nothing*. 95 N.Y.U. L. Rev. Online 1 (2020), <https://www.nyulawreview.org/online-features/adverse-employment-actions-in-failure-to-accommodate-claims-much-ado-about-nothing/>.

<sup>136</sup> *Cannon*, 813 F.3d at 595.



in a situation . . . in which the employer was unquestionably aware of the disability and had received a report from its own doctor recommending accommodations.”<sup>137</sup>

Reasonable accommodations can be in the form of “[m]odifications or adjustments” to “the work environment,” “job application process,” or other terms “that enable a covered entity’s employee with a disability to enjoy equal benefits and privileges of employment.”<sup>138</sup> Like qualification assessments,<sup>139</sup> reasonable accommodations may be extremely fact-dependent and unique to each employee-employer relationship. However, an employer does not have to provide an accommodation when doing so would result in the employer’s undue hardship.<sup>140</sup> Such determinations can be evaluated on the basis of several factors:

(1) the accommodation's nature and cost; (2) the financial resources of the facility providing the accommodation and the accommodation's impact upon facility operations; (3) the employer's overall financial resources; and (4) the type of employer operation.<sup>141</sup>

#### *1. Reasonable accommodations for OUD*

For persons dealing with OUD, reasonable accommodations are often focused on addiction treatment and the support of ongoing efforts to maintain sobriety.<sup>142</sup> For example, such accommodations “might include adjustments to the work schedule to allow the employee to attend drug treatment or counseling or to participate in a 12-step or peer support group. Or it may include

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<sup>137</sup> *Id.*

<sup>138</sup> 29 C.F.R. § 1630.2(o)(1).

<sup>139</sup> See discussion *supra* Section III.B.

<sup>140</sup> 42 U.S.C. § 12112(b)(5)(A).

<sup>141</sup> Jamie Campisi, Comment, *The Opioid Crisis in the Workplace: What Employers Must Do to Ensure Anti-Discrimination Compliance and to Support Their Employees*, 50 SETON HALL L. REV. 559, 570 (2019) (citing 42 U.S.C. § 12111(10)(B)).

<sup>142</sup> *Id.* at 569 (“For example, adjusting work hours to allow an employee no longer engaging in current illegal drug use to seek treatment and rehabilitative services could constitute a reasonable accommodation.”).

flexibility in taking sick or accrued or unpaid leave in order to enter or re-enter addiction treatment following a relapse.”<sup>143</sup>

In one case, an employer afforded the plaintiff-employee “several months of job-protected leave in order to allow Plaintiff time ‘to wean himself off of Suboxone[, taken to combat OUD,] so that he would be eligible for his job as a welder.’”<sup>144</sup> In another case, the employer declined to extend a “Last Chance Agreement,” in which “the employee agrees to certain conditions (such as [abstaining from illicit opiate use]) in exchange for being allowed to return to work after committing a fireable offense.”<sup>145</sup>

The Job Accommodation Network (a federally funded organization offering free consultations to employers and employees regarding Title I accommodations) provides a plethora of common accommodations—and several creative ideas—for employees managing OUD.<sup>146</sup> Suggestions include: devices to aid attentiveness and concentration (such as noise canceling headsets); job coaching; strategies to reduce fatigue (such as periodic rest breaks); and mental health support animals.

## *2. Reasonable accommodations for prescription opiate users*

Persons taking legally prescribed opiates likewise have unique needs, such as mitigating certain side effects of the narcotic. Another reasonable accommodation may be to “depart from

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<sup>143</sup> Ryan Kaczka, *Are Employees with a Substance Use Disorder Protected by the ADA?*, ACCESSIBILITY.COM (Dec. 1, 2020), <https://www.accessibility.com/blog/are-employees-with-a-substance-use-disorder-protected-by-the-ada>.

<sup>144</sup> *Breaux v. Bollinger Shipyards, LLC*, No. 16-2331, 2018 WL 3329059, at \*2 (E.D. La. Jul. 5, 2018).

<sup>145</sup> *Blazek v. City of Lakewood*, 576 Fed. Appx. 512, 515 (6th Cir. 2014).

<sup>146</sup> JOB ACCOMMODATION NETWORK, ACCOMMODATION AND COMPLIANCE SERIES: EMPLOYEES WITH DRUG ADDICTION 5–10 (2022).

[the employer’s] blanket drug policy,” which is often originally geared towards identifying and punishing *illicit* drug use.<sup>147</sup>

For example, the Byrd court found the plaintiff-employee’s request for a second medical evaluation to be a reasonable accommodation as part of the job application process.<sup>148</sup> In that case, the plaintiff-employee underwent the standard medical exam and drug test, which he was required to pass to qualify for the caster job position.<sup>149</sup> Through this stage of the hiring process, the defendant-employer learned of the prospective employee’s opiate prescription and rescinded the job offer.<sup>150</sup> In response, the plaintiff-employee requested an additional medical evaluation in order to “demonstrate he could safely perform the essential functions of the position.”<sup>151</sup> The court agreed that such request was reasonable.<sup>152</sup>

Again, the Job Accommodation Network provides creative solutions for accommodating employees taking prescription opiates, such as employees with chronic pain.<sup>153</sup> Suggestions include tools for mitigating opiate side effects such as fatigue (e.g., sleep-alerting devices, simulated skylights, and windows), bladder dysfunction (e.g., toileting aids, modified break schedules), and stress intolerance (e.g., anxiety apps, environmental sound machines).<sup>154</sup>

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<sup>147</sup> Benjamin E. Widener, *Opioid Accommodation: Overview, Case Study and Recommendations*, N.J. L.J., Aug. 10, 2018, <https://www.law.com/njlawjournal/2018/08/10/opioid-accommodation-overview-case-study-and-recommendations/> (citing *Stewart v. Snohomish County PUD No. 1*, 262 F. Supp. 3d 1089 (W.D. Wash. 2017)).

<sup>148</sup> *Byrd v. Outokumpo Stainless USA, LLC*, No. 20-0520-WS-M, 2022 WL 2134993, at \*12 (S.D. Ala. June 14, 2022).

<sup>149</sup> *Id.* at \*1.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at \*11.

<sup>152</sup> *Id.* at \*12.

<sup>153</sup> JOB ACCOMMODATION NETWORK, ACCOMMODATION AND COMPLIANCE SERIES: EMPLOYEES WITH CHRONIC PAIN 4–10 (2022).

<sup>154</sup> *Id.*

#### **IV. Conclusion**

Opiate use, whether in the context of an OUD or a valid prescription, can quickly turn an ADA claim into a mind-bending legal maze with life-changing implications for employees. Each element of a plaintiff-employee's prima facie case is rife with its own twists and turns. Importantly, attorneys for plaintiff-employees must first carefully frame the nature of the client's disability to assure the client falls within the ADA protections. The attorney must then thread the needle to secure that disability status without compromising a finding that the employee is qualified for the position at issue. Finally, all potential adverse employment actions should be considered, based on the client's situation. This should include actions the employer failed to take, such as granting reasonable accommodations that may have afforded the plaintiff-employee equal opportunities in the workplace.

The ongoing national opiate crisis, coupled with a litigation labyrinth, calls for increased understanding and creative solutions on the part of both employers and courts. Only then can legal processes provide the robust protections needed by numerous persons with disabilities, including the assurance of employment in conjunction with pain management, and support in overcoming opiate use disorder.