

10th Circuit: Employee Fresh out of Drug Rehab Not Protected by ADA Safe Harbor

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An employee terminated after testing positive for illegal drugs has no Americans with Disabilities Act (ADA) claim based on his former employer's subsequent decision not to reinstate him even though the employee had completed a one-month inpatient rehabilitation program, the 10th U.S. Circuit Court of Appeals held.

While working as a sales representative for the employer, the employee voluntarily entered into an outpatient drug rehabilitation program. The following year, the employer asked the employee to take a drug test. Although he admitted that he would test positive for illegal drugs, the employee submitted to the test. He was fired that day for violating the employer's drug policy, but was told by one of his superiors that he could return if he could get clean.

Following his termination, the employee entered an inpatient drug rehabilitation program. He completed the 30-day program and a report issued by his rehabilitation counselor described the employee's recovery prognosis at discharge as "guarded." The day after he completed the program, the employee contacted the employer and asked to return to work.

In response, the employer told him that he could return to work, but that he would not return to the job he had prior to his discharge. The employee refused to accept these new terms and declined the offer.

The employee then sued the employer, claiming that it discriminated against him on the basis of his history of drug use in violation of the ADA.

The district court granted summary judgment for the employer and found the employee was not protected under the ADA because he was a "current" drug user at the time he sought re-employment. The 10th Circuit affirmed, but declined to adopt a "bright line" rule that 30 days of sobriety is "per se insufficient" to qualify for ADA protection.

The 10th Circuit held that, under the ADA "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 employee argued that he qualified for the "safe harbor" of the ADA because he had completed the 30-day inpatient rehabilitation program and was no longer using drugs at the time he reapplied for his job. The 10th Circuit explained that whether an individual is eligible for the safe harbor must be determined on a case-by-case basis.

The employer presented evidence that, at the time the employee reapplied his recovery prognosis was described as "guarded." In addition, the employer provided testimony by an addiction specialist that approximately three months of treatment would be necessary for an addict like the employee to reach a "threshold of significant improvement" in his addiction.

Under the factual circumstances presented by this case, the court held that it was not

unreasonable for the employer to conclude that it was not clear that the employee had resolved his drug problem. Although 30 days without using drugs may in some cases be sufficient for an employee to gain the protection of the ADA, in this case it was not, the 10th Circuit concluded.

Mauerhan v. Wagner Corp., 10th Cir., No. 09-4179 (April 19, 2011).

Professional Pointer: While the court's decision was favorable to the employer in this case, it offers no clear guidelines which permit one to readily determine whether an individual qualifies or does not qualify for protection under the ADA's safe harbor for former drug users. Clearly, the longer an individual refrains from drug use, the more likely he or she will qualify for ADA protection. In close cases, however, an employer would be well-advised to consult with and obtain opinions from qualified professionals (drug counselors or psychologists and psychiatrists who have expertise with drug addict rehabilitation issues) concerning the question of whether a particular individual should or should not be considered as a person with a current drug abuse issue, as opposed to a recovering addict.

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Editor's Note: This article should not be construed as legal advice.

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