

FINDING THE POSITIVE IN A POSITIVE DRUG TEST:

HOW NARROWING THE DEFINITION OF AN INDIVIDUALIZED PRE-EMPLOYMENT ASSESSMENT UNDER THE ADA CAN ENCOURAGE RECOVERY FROM OPIOID DEPENDENCE

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I. INTRODUCTION

A “national emergency” that is “destroying families and shattering communities all across the country.”¹ That is how the last two Presidents of the United States refer to the nation’s prescription drug addiction problem.² Despite their political differences, Presidents Trump and Obama have found a common enemy in opioid abuse.

The issue has united members of both presidents’ parties in a scramble to legislate away what the Department of Health and Human Services declared a “public health emergency” in 2017.³ As midterm elections approached in the fall of 2018, members of Congress agreed on a 653-page bill to address prescription drug dependency.⁴ Just two days after the bill passed committee, the House of Representatives approved the mix of criminal and health reform measures.⁵ While many legislators were pleased with the expansion of inpatient treatment programs, some advisors from the medical field worry not enough of the federal budget was allocated

¹ Julie Hirschfeld Davis, *Trump Declares Opioid Crisis a ‘Health Emergency’ but Requests No Funds*, N.Y. TIMES, Oct. 26, 2017, <https://www.nytimes.com/2017/10/26/us/politics/trump-opioid-crisis.html>; Kathleen Hennessey, *Obama says U.S. will tackle prescription drug and heroin abuse*, PBS NEWS HOUR, Oct. 21, 2015, <https://www.pbs.org/newshour/politics/obama-announce-plans-fight-heroin-use>.

² *Id.*

³ U.S. DEP’T OF HEALTH AND HUM. SERV., DETERMINATION THAT A PUBLIC HEALTH EMERGENCY EXISTS (2017).

⁴ Jessica Hill, *In Rare Bipartisan Accord, House and Senate Reach Compromise on Opioid Bill*, N.Y. TIMES, Sept. 26, 2018, <https://www.nytimes.com/2018/09/26/health/opioid-bill-congress.html>.

⁵ *Id.*

to help the uninsured or Medicare beneficiaries access medical care.⁶ The movement to address addiction extends to state legislatures as well: from 2016 to 2017, more than 30 states considered at least 130 bills related to the prescription of opioids.⁷

Because legislation that is focused on limiting the prescription of opioids invites more push back from the pharmaceutical industry, many federal and state measures focus on access to treatment options.⁸ While Medication Assisted Treatment (MAT) is not the most widely-accessible treatment option, studies have shown it decreases opioid use, opioid-related overdose deaths, criminal activity, and infectious disease transmission.⁹ In MAT, health professionals prescribe one of several FDA-approved medications that have essentially the same effect as opioids but are less addictive.¹⁰ The medications do not result in a high, but rather reduce cravings and withdrawal, creating a more realistic path to recovery.¹¹

⁶ *Id.*

⁷ Prescribing Policies: States Confront Opioid Overdose Epidemic, Nat'l Conf. of State Legs. (Apr. 5, 2018), <http://www.ncsl.org/research/health/prescribing-policies-states-confront-opioid-overdose-epidemic.aspx>.

⁸ Allison Petersen, Sharon C. Peters, Mary Holloway Richard & Anna Whites, *State Legislative Responses to the Opioid Crisis: Leading Examples*, 11 J. Health & Life Sci. L. 30, 38 (2018).

⁹ *Effective Treatments for Opioid Addiction*, Nat'l Inst. on Drug Abuse, <https://www.drugabuse.gov/publications/effective-treatments-opioid-addiction/effective-treatments-opioid-addiction> (last updated Nov. 2016).

¹⁰ *Id.*

¹¹ *Id.*

However, the similarities between these FDA-approved medications and highly addictive opioids that make MAT effective are also creating challenges for patients. When patients apply for a job, some employers require a pre-employment drug screening.¹² Often, the drug screening shows a positive result¹³. Even though the positive result comes from medications legally prescribed to the applicant through their recovery program, some employers have revoked employment offers or terminated existing employment pursuant to company drug policies.¹⁴ Recovering from drug addiction is a disability protected by the Americans with Disabilities Act (ADA).¹⁵ Thus, according to the EEOC, employers who terminate employment or an offer of employment on the grounds of a drug test affected by MAT are engaging in disability discrimination.¹⁶ There is, however, a defense for employers concerned about hiring prescription drug users to work in safety-sensitive positions.¹⁷ An individual is not qualified for ADA protection when, if hired, he or she would pose a direct threat to

¹² Letter from Joon H. Kim, United States Attorney for the Southern District of New York, to the New York State Office of the Attorney General (Oct. 3, 2017), <https://lac.org/wp-content/uploads/2018/02/DOJ-SDNY-ltr-to-OCA-10.3.17.pdf>.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ U.S. Commission on Civil Rights, *Sharing the Dream: Is the ADA Accommodating All?* (2000).

¹⁶ Press Release, EEOC, *EEOC Sues Randstad for Disability Discrimination* (Nov. 3, 2015), <https://www.eeoc.gov/eeoc/newsroom/release/11-3-15a.cfm>.

¹⁷ 42 U.S.C.A. § 12101(b)(2) (West, Westlaw through Pub. L. No. 115-231).

health or safety in the workplace that could not be remedied through a reasonable accommodation.¹⁸

This note will address the disparities in the way courts have analyzed the direct threat exception to ADA protection, and why a uniform application of the exception is crucial to both employers and those in recovery. Part I examines how opioids have devolved from an effective pain management tool to a national enemy. This section will answer common questions about why opioids are so addictive and why doctors prescribe them in the first place. It also addresses the scope of the ADA and the direct threat exception used to justify a decision not to hire a prescription drug user, as well as the effort of ADA enforcement agencies to call attention to illegal hiring practices involving MAT.

Part II includes an analysis of several ADA employment discrimination cases implicating MAT. The cases demonstrate the widely varied standards courts have to define the “individualized assessment” required as proof for employers raising a defense to a discrimination claim.

Part III proposes a uniform standard by which to judge the individualized assessment. It explains why establishing a more specific standard, requiring an examination by a medical professional as part of the direct threat analysis, serves public

¹⁸ 29 C.F.R. § 1630.2(r) (2012).

policy interests. Further, it predicts how the outcome of a pending EEOC case could give employers further guidance with regard to the timing of the individualized assessment. This section concludes by encouraging employers to reform their drug screening policies, with specific practice pointers. These methods will achieve the goal of balancing employers' right to enforce drug-free workplace policies with the protections granted by the ADA.

II. BACKGROUND

A. The history of clinical opioid use

Although the use of opioid medications in America has skyrocketed over the past 15 years, opioids are by no means a novel way to relieve pain.¹⁹ In fact, the 21st Century rise in addiction and overdose rates is not the first epidemic the United States has experienced.²⁰ The 1840s saw a rise in the prescription of opium and morphine to treat a wide range of conditions causing chronic pain.²¹ The medications were used to treat everything from hangovers to soldiers' war injuries.²² By the 1890s, the nationwide opioid supply was capable of supporting five addicted individuals for every 1,000 citizens.²³

¹⁹ Andrew Kolodny et al., *The Prescription Opioid and Heroin Crisis: A Public Health Approach to an Epidemic of Addiction*, 36 Ann. Rev. Pub. Health 559-74 (Mar. 2015).

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ The most common profile of an opioid-addicted patient at this time was a white woman with a chronic condition (but often the doctors themselves also had an addiction to the opioids they prescribed). *Id.*

At this time, the rapid spread of addiction was attributed to the minimal understanding of chronic pain and the lack of alternative treatments. Despite medical advancements over the past century, the addiction problem persists.²⁴ The medical field now understands a major contributing factor to the addictive power of opioids is not how often doctors prescribe them but the chemical makeup of the drug.²⁵

The term “opioid” is used to describe a class of drugs used primarily to reduce pain.²⁶ The term encompasses illegal drugs like heroin, approved but rarely prescribed substances like fentanyl, and commonly prescribed medications like oxycodone.²⁷ When any of these opioids travel through the bloodstream, the chemicals attach to receptors on brain cells.²⁸ This reaction triggers the same biochemical feeling of pleasure that promotes engaging in basic life functions such as eating and sex.²⁹ Chronic use results in structural and functional changes in parts of the brain that control impulse, reward, and motivation.³⁰ Further, other areas of the brain create memories around the release of dopamine during opioid use,

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Opioid Basics*, Ctrs. For Disease Control and Prevention, <https://www.cdc.gov/drugoverdose/opioids/index.html> (last updated Aug. 24, 2017).

²⁷ *Id.*

²⁸ Thomas R. Kosten, M.D. and Tony P. George, M.D., *The Neurobiology of Opioid Dependence: Implications for Treatment*, *Sci. Prac. Persp.* 13-20 (July 2002).

²⁹ *Id.*

³⁰ Kolodny, *supra* note 19.

resulting in a craving for the drug when a person encounters people or situations that bring up those memories.³¹

What makes opioids so addictive is not only the biochemical positive reinforcement but the negative reinforcement that happens when the pleasure reaction in the neurons wears off.³² The alterations to dopamine reception created by escalating opioid use mean the brain may function more normally when opioids are in the system than when they are not.³³ Clinical researchers say that makes the difficulty of withdrawal one of the most significant factors driving opioid dependence.³⁴

B. The spread of addiction to epidemic status

The addictive chemical nature of opioids was exacerbated by several external factors at the end of the 20th Century, leading to the “epidemic” as it exists in 2018. In the 1990s, pharmaceutical companies made an effort to assure doctors that their patients would not become addicted to prescribed opioid pain relievers.³⁵ Specifically, researchers point to the introduction of OxyContin, an extended-release form of oxycodone, as a major contributor to the acceleration of opioid prescriptions after 1995.³⁶ By the time the

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *What is the U.S. Opioid Epidemic?*, U.S. Dep’t of Health and Human Servs., <https://www.hhs.gov/opioids/about-the-epidemic/index.html> (last updated Sept. 19, 2018).

³⁶ Kolodny, *supra* note 19.

medical community recognized the highly addictive capacity of these medications, both prescription and non-prescription opioids were already widely misused.³⁷

Between prescriptions and illegal uses, opioid-related overdoses killed more than 130 people in the U.S. every day from 2016 to 2017.³⁸ The death rate is rising among both men and women, all races, and adults of nearly all ages.³⁹ Opioid abuse has also contributed to a rise in related diseases.⁴⁰

The epidemic has not only affected public health but also has left its mark on the nation's economic health. The Centers for Disease Control and Prevention estimates that prescription opioid misuse alone costs the United States \$78.5 billion a year.⁴¹ Those expenditures are attributed to the costs of healthcare, lost productivity, addiction treatment, and criminal justice involvement.⁴²

³⁷ In fact, about a quarter of patients who are prescribed opioids for chronic pain misuse them. That behavior often leads to abuse of illegal drugs- about 80 percent of people who use heroin first misused prescription opioids. *Opioid Overdose Crisis*, Nat'l Inst. on Drug Abuse, <https://www.drugabuse.gov/drugs-abuse/opioids/opioid-overdose-crisis#one> (last updated Mar. 2018).

³⁸ *What is the U.S. Opioid Epidemic?*, *supra* note 35.

³⁹ *Opioid Overdose: Data Overview*, Ctrs. For Disease Control and Prevention, <https://www.cdc.gov/drugoverdose/data/index.html> (last updated July 18, 2017).

⁴⁰ See, e.g., *Dramatic Increases in Maternal Opioid Use and Neonatal Abstinence Syndrome*, Nat'l Inst. on Drug Abuse, <https://www.drugabuse.gov/related-topics/trends-statistics/infographics/dramatic-increases-in-maternal-opioid-use-neonatal-abstinence-syndrome> (last updated Sept. 2015); *Opioid Overdose Crisis*, *supra* note 37.

⁴¹ *Opioid Overdose Crisis*, *supra* note 37.

⁴² *Id.*

C. Legislative response to the opioid epidemic

The rising cost of treating and prosecuting addictive behaviors as well as increasing overdose death rates have prompted action from municipal, state, and federal legislators. While Congress has made several attempts to combat the opioid crisis, President Trump signed the most far-reaching legislation into law in 2018.⁴³ The SUPPORT for Patients and Communities Act combines 58 bills aimed at addiction prevention and treatment.⁴⁴ It makes changes to state and federal Medicaid programs, including requiring coverage for services provided by certified opioid treatment programs.⁴⁵ The Act also increases the maximum number of patients that providers may initially treat with MAT.⁴⁶ The funding for the sweeping package is supported by a \$4 billion appropriation to opioid crisis relief efforts in the 2018 omnibus spending bill.⁴⁷ In a rare showing of overwhelming bipartisan support, both chambers passed the Act in a 396-14 vote.⁴⁸

⁴³ Marianna Sotomayor, *Trump signs sweeping opioid bill with vow to end 'scourge' of drug addiction*, NBC NEWS, Oct. 24, 2018, <https://www.nbcnews.com/politics/congress/trump-signs-sweeping-opioid-bill-vow-end-scourge-drug-addiction-n923976>.

⁴⁴ Ashley Killough & Phil Mattingly, *House approves massive opioids legislation*, CNN, June 22, 2018, <https://www.cnn.com/2018/06/22/politics/house-opioids-bill/index.html>.

⁴⁵ SUPPORT for Patients and Communities Act, H.R. 6, 115th Cong. (2018).

⁴⁶ *Id.*

⁴⁷ Killough & Mattingly, *supra* note 44.

⁴⁸ *Id.* While some legislators continued to express concerns that Republican promises to cut Medicare and Medicaid would increase opioid death rates, President Trump was confident the SUPPORT Act would “at least make an

Individual states have also made efforts to address the opioid epidemic, with much of the legislation focused on prescribing practices of pain medication.⁴⁹ The first limitations were proposed in 2016, and by the end of that year, seven states had enacted requirements for physicians prescribing opioids.⁵⁰ According to the National Conference of State Legislatures, that number rose to 28 states by early 2018.⁵¹ These prescribing policies typically limit first-time opioid prescriptions, most commonly to a supply lasting only seven days.⁵² Many of these laws are based on guidelines promulgated by the Center for Disease Control and Prevention (CDC) in 2016.⁵³ Beyond initial prescription, states have also addressed prescription drug monitoring programs, pain clinic regulation, and access to naloxone (medication used to reverse an overdose) in opioid legislation.⁵⁴

extremely big dent in this terrible, terrible problem.” Marianna Sotomayor, *supra* note 43.

⁴⁹ *Prescribing Policies: States Confront Opioid Overdose Epidemic*, Nat’l Conf. of State Legs. (Apr. 5, 2018), <http://www.ncsl.org/research/health/prescribing-policies-states-confront-opioid-overdose-epidemic.aspx>.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ In general, the guidelines recommend lowering dosage recommendations and providing specific recommendations regarding monitoring and discontinuation. Allison Petersen, Sharon C. Peters, Mary Holloway Richard & Anna Whites, *State Legislative Responses to the Opioid Crisis: Leading Examples*, 11 J. Health & Life Sci. L. 30, 38 (2018).

⁵⁴ *Prescribing Policies: States Confront Opioid Overdose Epidemic*, *supra* note 49.

Tennessee has taken a comprehensive approach to address the opioid epidemic through its “TN Together” initiative. The Tennessee Department of Health recorded 1,776 overdose deaths statewide in 2017.⁵⁵ The Department attributes over two-thirds of those deaths to opioids.⁵⁶ State lawmakers have worked to exercise more control over prescribing practices through the Prescription Safety Act of 2016.⁵⁷ The Act enhanced the Controlled Substance Monitoring Database Program, which providers are required to consult before issuing opioid prescriptions.⁵⁸ Tennessee amended these guidelines in 2018, requiring database checks every six months throughout treatment.⁵⁹ However, some states have gone further than Tennessee in controlling prescription practices, authorizing departments of health, or even regulatory boards to set their own opioid prescription limits.⁶⁰ Overall, more than 30 states considered at least 130 bills related to opioid prescribing in 2016 and 2017.⁶¹

⁵⁵ TN TOGETHER: ENDING THE OPIOID CRISIS, <https://www.tn.gov/opioids> (last visited Oct. 6, 2018).

⁵⁶ *Id.*

⁵⁷ Brad Sayles & Kelly L. Frey, *Addressing the Opioid Epidemic in Our School Systems*, Nashville Bar Journal, August/September 2018, at 7.

⁵⁸ *Id.*

⁵⁹ H.B. 1831, 110th Gen. Assemb., Reg. Sess. (Tenn. 2018).

⁶⁰ *Prescribing Policies: States Confront Opioid Overdose Epidemic*, *supra* note 49.

⁶¹ *Id.*

D. Protections granted by the Americans with Disabilities Act

In 1990, Congress implemented the Americans with Disabilities Act (ADA) to provide “clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.”⁶² Critically, the ADA creates a cause of action for protected individuals when employers discriminate against them on the basis of their disability.⁶³ The Act defines disability as “(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.”⁶⁴ In addition to the ADA’s definition, enforcing agencies such as the Department of Justice and the Department of Transportation have issued their own regulations as to who is entitled to protection under the Act.⁶⁵ The term disability is interpreted broadly, as are the “major life activities” affected by an impairment.⁶⁶

⁶² 42 U.S.C.A. § 12101(b)(2) (West, Westlaw through Pub. L. No. 115-231).

⁶³ U.S. Dept. of Justice, Civil Rights Division, Opioid Use Disorders and the Americans with Disabilities Act: Eliminating Discriminatory Barriers to Treatment and Recovery (April 15, 2018), https://6ae8bbf0cbc766a02526-db9b3cfd1a1d7334c57f016ab97d9d02.ssl.cf2.rackcdn.com/asam_cb218186bdb13ed3a2427fd90e1e7316.pdf.

⁶⁴ 42 U.S.C.A. § 12102(1) (West, Westlaw through Pub. L. No. 115-231).

⁶⁵ NTS Am. Jur. 2d *Americans with Disabilities Act* § 2 (2018).

⁶⁶ U.S. Dept. of Justice, Civil Rights Division, Opioid Use Disorders and the Americans with Disabilities Act: Eliminating Discriminatory Barriers to Treatment and Recovery (April 15, 2018), https://6ae8bbf0cbc766a02526-db9b3cfd1a1d7334c57f016ab97d9d02.ssl.cf2.rackcdn.com/asam_cb218186bdb13ed3a2427fd90e1e7316.pdf.

Although protection is liberally granted by the ADA due to the broad interpretation of the disability classification, it does have limits. The Act's protections do *not* apply to individuals who are currently engaging in the use of illegal drugs.⁶⁷ A drug is illegal when its possession or distribution is prohibited by the Controlled Substances Act.⁶⁸ Protection is also excluded from those using legally prescribed drugs in an illegal manner.⁶⁹ In the context of employment, "currently engaging" does not require that illegal drug use has occurred in a matter of days or weeks preceding the employment action in question.⁷⁰ Instead, it is sufficient the illegal drug use occurred recently enough to give the employer reason to believe the individual is actively engaged in such conduct.⁷¹

While drug abuse is not a protected disability as defined by the ADA, there is a distinction between ongoing use and addiction.⁷² Addiction is a protected disability under the Act, as long as an individual is not currently using the drugs illegally.⁷³ More specifically, these protections only apply to those who are or were *addicted* to illegal substances, as opposed to those who were casual users.⁷⁴ Thus, the ADA applies to those who have

⁶⁷ NTS Am. Jur. 2d *Americans with Disabilities Act* § 5 (2018).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ U.S. COMMISSION ON CIVIL RIGHTS, SHARING THE DREAM: IS THE ADA ACCOMMODATING ALL? (2000), <https://www.usccr.gov/pubs/ada/ch4.htm>.

successfully completed a supervised drug rehabilitation program, are participating in such a program, or are mistakenly regarded as using drugs illegally.⁷⁵

The ADA requirements apply to employers in both the public and private sectors.⁷⁶ Public sector employers are limited by the Fourth Amendment, which generally restricts drug testing to those suspected of current drug use or individuals whose position is “safety-sensitive.”⁷⁷ Still, the decisions employers make based on those tests are largely unregulated by common law or statute.⁷⁸ The Supreme Court bolstered that freedom in *Skinner v. Railway Labor Executives’ Association*, the seminal case on employer drug testing.⁷⁹ There, the Court held mandatory drug and alcohol tests were reasonable under the Fourth Amendment in industries subject to government regulation, like the railroad in *Skinner*.⁸⁰ The Court reasoned that even without a warrant or reasonable suspicion of employee impairment, drug testing served a compelling

⁷⁵ U.S. DEPT. OF JUSTICE CIVIL RIGHTS DIVISION, OPIOID USE DISORDERS AND THE AMERICANS WITH DISABILITIES ACT: ELIMINATING DISCRIMINATORY BARRIERS TO TREATMENT AND RECOVERY (2018), https://6ae8bbf0cbc766a02526-db9b3cfd1a1d7334c57f016ab97d9d02.ssl.cf2.rackcdn.com/asam_cb218186bdb13ed3a2427fd90e1e7316.pdf.

⁷⁶ *Id.*

⁷⁷ Stacy Hickox, *It's Time to Rein in Employer Drug Testing*, 11 Harv. L. & Pol'y Rev. 419, 420 (2017).

⁷⁸ *Id.*

⁷⁹ See *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989).

⁸⁰ *Id.* at 628.

government interest that outweighed employees' privacy concerns.⁸¹

In the private sector, only employers with 15 or more employees are subject to ADA requirements.⁸² Courts have consistently protected private sector employers' right to investigate, by inquiry or drug test, the drug use of employees.⁸³ In the hiring context, employers may inquire about past or present drug use.⁸⁴ However, employers may not use that information to exclude the individual, unless they have a reason to do so unrelated to the disability and that legitimate job criterion cannot be met with reasonable accommodation.⁸⁵ The ADA does not place any restrictions on employers' right to require drug tests for prospective or current employees. However, "[i]f a person is excluded from a job because the employer erroneously "regarded" him or her to be a drug abuser, currently using drugs illegally, and a drug test revealed the presence of a lawfully prescribed drug, the employer would be liable under the ADA."⁸⁶

If an applicant or employee believes he or she is entitled to ADA protection and an employer has not complied with the requirements of the Act, the individual may file a complaint with

⁸¹ *Id.*

⁸² U.S. DEPT. OF JUSTICE CIVIL RIGHTS DIVISION, *supra* note 75.

⁸³ Stacy Hickox, *supra* note 77, at 420.

⁸⁴ U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 74.

⁸⁵ *Id.*

⁸⁶ *Id.*

the Department of Justice or another enforcing agency such as the Equal Employment Opportunity Commission (EEOC).⁸⁷

Individuals can resolve these complaints through either the ADA mediation program, an investigation by a United States Attorney's Office, or litigation.⁸⁸

Several affirmative defenses are available to employers facing discrimination claims under the ADA.⁸⁹ This paper will primarily address the "direct threat" defense, which precludes an individual from qualifying for ADA protection if he or she would "pose a direct threat to the health or safety of other individuals in the workplace."⁹⁰ The defense only applies if the threat cannot be eliminated or reduced by reasonable accommodation.⁹¹ Whether or not an individual poses a direct threat is a fact-specific analysis that requires "an individualized assessment of the individual's present ability to safely perform the essential functions of the job."⁹²

⁸⁷ U.S. DEPT. OF JUSTICE CIVIL RIGHTS DIVISION, *supra* note 75.

⁸⁸ U.S. Dept. of Justice Civil Rights Division, *How to File an ADA Complaint with the U.S. Department of Justice*, https://www.ada.gov/filing_complaint.htm#5 (last visited Oct. 7, 2018).

⁸⁹ Samuel Brown Petsonk & Anne Marie Lofaso, *Working for Recovery: How the Americans with Disabilities Act & State Human Rights Laws Can Facilitate Successful Rehab. for Alcoholics & Drug Addicts*, 120 W. Va. L. Rev. 891, 914 (2018).

⁹⁰ 42 U.S.C.A. § 12113(b) (West, Westlaw through Pub. L. No. 115-281).

⁹¹ 29 C.F.R. § 1630.2(r) (2012).

⁹² See argument *infra* Section III.A.

E. The Department of Justice intervention and concerns about MAT

One United States Attorney's Office has addressed concerns about employers' discrimination against applicants who are enrolled in an MAT program.⁹³ A 2017 letter to the New York State Attorney General urged state courts to become more familiar with the protections guaranteed to individuals in recovery by the ADA.⁹⁴ In the letter, the United States Attorney Joon Kim asserts the ADA prohibits state courts from "(1) denying the MAT participant the benefits of their services, programs, or activities; (2) excluding the MAT participant from their services, programs, or activities; or (3) otherwise subjecting the MAT participant to discrimination, by reason of her disability."⁹⁵

While Kim's letter points out that the number of contexts in which these protections apply is far-reaching, he offers the example of family court proceedings.⁹⁶ If a court provides certain services to parents seeking custody of a child, Kim advises, the court may not deny those services to otherwise eligible parents who are receiving MAT.⁹⁷ The ADA does not require public entities to provide its services to individuals who pose a "direct

⁹³ Letter from Joon H. Kim, United States Attorney for the Southern District of New York, to the New York State Office of the Attorney General (Oct. 3, 2017), <https://lac.org/wp-content/uploads/2018/02/DOJ-SDNY-ltr-to-OCA-10.3.17.pdf>.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

threat to the health or safety of others.”⁹⁸ However, Kim cautions that courts may not presume that individuals receiving MAT are a “direct threat” based on assumptions that MAT participants are likely to relapse to using illegal drugs or are likely to be associated with crime.⁹⁹ State courts’ enforcement of ADA protections has important implications, Kim says, because judicial decisions may reinforce a stigma that MAT “replaces one addiction with another” and therefore deter addicted individuals from seeking a treatment that has proven effective.¹⁰⁰

However, there are some circumstances in which an applicant may not be fit for employment during prescribed MAT. As employers may point out, despite being less addictive and lower risk than traditional opioids, MAT can present some side effects.¹⁰¹ Incorrect dosages can result in fatigue, confusion, attention issues, vision problems, or loss of coordination.¹⁰² These possible effects have raised concerns about the ability of MAT patients to safely perform certain jobs, including those that involve operating heavy machinery or frequent driving.¹⁰³

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ Addiction Treatment Forum, *Methadone & Mental Functioning* (2002), http://www.atforum.com/documents/english/Methadone_and_Mental_Functioning.pdf.

¹⁰² *Id.*

¹⁰³ *See, e.g.,* State v. Schories, 827 N.W.2d 659, 669 (Iowa 2013), as corrected (Feb. 25, 2013) (opining prescription drug use could be a defense to a DUI prosecution, although it likely would be unsuccessful in that particular case).

Due to these possible MAT effects, an employer may be able to legally terminate employment or decline to offer employment based on a finding that the applicant or employee exhibits those symptoms and they would prevent him or her from performing the job or would pose a direct threat to safety.¹⁰⁴

III. Analysis

A. MAT discrimination suits filed by the EEOC

In recent years, multiple ADA enforcement agencies have taken steps to address discrimination against opioid-addicted individuals seeking treatment through MAT.¹⁰⁵ While the EEOC has fully litigated some of these cases, many have settled after the filing of the initial complaint.¹⁰⁶

i. *EEOC v. Randstad*

In November 2015, the EEOC filed suit against a Maryland temporary labor agency, which the EEOC claimed had discriminated against a prospective employee based on her

because the driver there was not complying with his doctor's prescribed use of methadone).

¹⁰⁴ Joanne Bush et al., *Confronting The Opioid Emergency In The Workplace*, <https://www.jonesday.com/files/Publication/8c5e74cd-4e9d-4b6a-8692-53a1e77b93f7/Presentation/PublicationAttachment/5b2d29a5-b659-4c88-a8f7-54c50435e19c/Confronting%20The%20Opioid%20Emergency%20In%20The%20Workplace%20-%20Law360.pdf>.

¹⁰⁵ Joon H. Kim, *supra* note 93.

¹⁰⁶ See, e.g., Press Release, EEOC, *Foothills Child Development Center Agrees to Settle EEOC Disability Discrimination Lawsuit* (May 15, 2018), <https://www.eeoc.gov/eeoc/newsroom/release/5-15-18.cfm>; Press Release, EEOC, *Volvo Group North America To Pay \$70,000 To Settle EEOC Disability Discrimination Suit* (Jan. 19, 2018), <https://www.eeoc.gov/eeoc/newsroom/release/1-19-18a.cfm>.

participation in a MAT program.¹⁰⁷ The prospective employee, April Cox, was recovering from a 19-year heroin addiction.¹⁰⁸ She sought treatment at a rehabilitation center, where she was prescribed methadone as well as monthly counseling.¹⁰⁹ As part of the program, she also underwent regular urine testing.¹¹⁰ During her treatment, Ms. Cox worked as a package handler on various assignments through a temporary labor agency.¹¹¹

In 2015, four years after Ms. Cox had used any illegal drugs, she applied for a job through Randstad, a different temporary labor agency.¹¹² Randstad's site manager interviewed Ms. Cox, told her she had sufficient experience to continue the hiring process, and requested a drug screening in the form of a urine sample.¹¹³ When Ms. Cox immediately disclosed her prescribed methadone use, the manager took the urine sample cup back, saying "I'm sure we don't hire people on methadone, but I will contact my supervisor."¹¹⁴ According to the complaint, Randstad did not respond to several attempts by Ms. Cox to follow up, until the next month, when the manager told Ms. Cox she

¹⁰⁷ Press Release, EEOC, *EEOC Sues Randstad for Disability Discrimination* (Nov. 3, 2015), <https://www.eeoc.gov/eeoc/newsroom/release/11-3-15a.cfm> [hereinafter *Randstad Suit*].

¹⁰⁸ Compl. at ¶ 13, *EEOC v. Randstad*, No. 15CV03354, 2015 WL 13666335 (D.Md. Nov. 3, 2015).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

would not be hired due to her methadone use.¹¹⁵ The EEOC alleged that Randstad violated federal law when it denied Ms. Cox employment “based on unwarranted or speculative fears or biases about her disability or her medically supervised drug rehabilitation.”¹¹⁶

After first attempting to reach a settlement through its pre-litigation conciliation process, the EEOC filed suit on behalf of Ms. Cox.¹¹⁷ Just over three months later, the parties settled.¹¹⁸ Randstad agreed to pay \$50,000 to Ms. Cox and signed a consent decree promising to comply with the ADA going forward.¹¹⁹ The consent decree requires Randstad to ensure employees in hiring roles do not reject applicants due to MAT status, provide ADA training to employees, and regularly report to the EEOC on its compliance with the settlement terms.¹²⁰

ii. *EEOC v. Hussey Cooper*

An earlier Pennsylvania case also involved an applicant enrolled in an MAT program, but seemed to present a more tenable defense for the employer.¹²¹ In *EEOC v. Hussey Cooper Ltd.*, the

¹¹⁵ *Id.*

¹¹⁶ *Randstad Suit*, supra note 106.

¹¹⁷ Press Release, EEOC, *Randstad Will Pay \$50,000 to Settle EEOC Disability Discrimination Lawsuit* (Feb. 8, 2016), <https://www.eeoc.gov/eeoc/newsroom/release/2-8-16a.cfm>.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ See *EEOC v. Hussey Copper Ltd.*, 696 F. Supp. 2d 505 (W.D. Pa. 2010).

defendant operated a mill for the fabrication of copper products.¹²² Donald Teaford applied to work as a laborer in the mill, a position that would involve working around “moving molten metal, cranes, rolling mills, acid and lead baths, forklift trucks, coils of copper traveling above and knives used to cut copper.”¹²³ Laborers must rotate through various production jobs in the mill before bidding on a permanent position, and Hussey Cooper considered all of the production jobs “safety-sensitive.”¹²⁴ The company made an offer of employment to Mr. Teaford, conditional upon his successful completion of a background check, physical exam, and drug test.¹²⁵ The physical exam included a drug screening in the form of a urine sample, which in Mr. Teaford’s case, tested positive for methadone.¹²⁶

Hussey Cooper contracted with an occupational medicine facility to conduct and review the results of these tests.¹²⁷ Mr. Teaford explained his history of opiate dependency and enrollment in a supervised treatment program to the facility’s medical director.¹²⁸ The medical director did not examine Mr. Teaford himself but did reach out to Mr. Teaford’s physicians and the

¹²² *Id.* at 507.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 508.

¹²⁷ *Id.*

¹²⁸ *Id.*

methadone clinic to confirm his treatment plan.¹²⁹ The medical director ultimately advised Hussey Cooper that Mr. Teaford should be denied any safety-sensitive position due to his medication.¹³⁰ Hussey Cooper's safety supervisor determined that the company could make no reasonable accommodation for Mr. Teaford and rescinded his conditional offer of employment.¹³¹

In June 2008, the EEOC filed a discrimination action against Hussey Cooper on behalf of Mr. Teaford.¹³² In a September 2009 motion for summary judgment, Hussey Cooper claimed its actions were not discriminatory as a matter of law because even if Mr. Teaford qualified for ADA protection, he “would present a direct threat to the health or safety of others if he were allowed to work in the mill.”¹³³ The EEOC's expert, a certified member of the American Society of Addiction Medicine, testified that the “direct threat” exception did not apply to Mr. Teaford.¹³⁴ The expert cited fact sheets published by the federal government, which stated that “controlled methadone usage ‘does not impair cognitive functions’ and ‘has no adverse side effects on mental capability, intelligence, or employability . . .’”¹³⁵

¹²⁹ *Id.* at 509.

¹³⁰ *Id.* at 510.

¹³¹ *Id.* at 512.

¹³² *Id.* at 514.

¹³³ *Id.* at 519.

¹³⁴ *Id.* at 513.

¹³⁵ *Id.*

The United States District Court for the Western District of Pennsylvania denied Hussey Cooper's motion for summary judgment.¹³⁶ The court reasoned the medical director's "individualized assessment" of Mr. Teaford was not sufficient to determine that he would pose a direct threat by working in the mill as a matter of law.¹³⁷ The parties then tried the case in front of a jury but reached a settlement agreement after the third day of trial.¹³⁸ Hussey Cooper agreed to pay \$85,000 in monetary relief to Mr. Teaford and hire him as a mason utility laborer.¹³⁹ The five-year consent decree also enjoined Hussey Copper from engaging in any employment practice that discriminates based on disability.¹⁴⁰

iii. EEOC v. Steel Painters, LLC.

Based on courts' broad interpretation of the ADA pre-offer protections in the foregoing cases, it seems the EEOC should be successful in more recent suits on behalf of similarly-situated plaintiffs. However, less clear is the scope of ADA protections for individuals recovering from addiction who, instead of being denied work based on *pre-employment* screening, are hired and then later *fired* based on drug test results.

¹³⁶ *Id.* at 521.

¹³⁷ *Id.*

¹³⁸ Press Release, EEOC, *Hussey Copper To Pay \$85,000 To Settle EEOC Disability Discrimination Lawsuit* (February 11, 2011), <https://www.eeoc.gov/eeoc/newsroom/release/2-11-11.cfm>.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

In 2018, the EEOC filed a complaint against a Texas-based painting company that fired an employee who was participating in an opioid treatment program.¹⁴¹ Matthew Kimball became dependent on opioid pain medication following a shoulder injury in 2012.¹⁴² He sought treatment through a supervised methadone program and had been undergoing monthly counseling and drug testing for three years when he was hired to work as a painter for the defendant, Steel Painters.¹⁴³ He took a drug test a few days before he began working, and then worked a full week for Steel Painters.¹⁴⁴ At the start of his second week of work, Mr. Kimball was removed from his job site when his drug screening results came back positive.¹⁴⁵ Despite Mr. Kimball producing his methadone prescription information and offering to take a physical examination so that the defendant's doctor could clear him to work, Steel Painters issued a termination notice, noting they would not recommend Mr. Kimball for rehire.¹⁴⁶

The EEOC has asked the Eastern District of Texas to grant a permanent injunction prohibiting Steel Painters from engaging in any future disability discrimination, back pay, and damages on

¹⁴¹ Complaint at ¶ 26, EEOC v. Steel Painters, LLC, No. 1:18-cv-00303, 2018 WL 3301664 (E.D.Tex. June 28, 2018).

¹⁴² *Id.* at ¶ 15.

¹⁴³ *Id.* at ¶ 16-17.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at ¶ 18.

¹⁴⁶ *Id.* at ¶ 20-23.

behalf of Mr. Kimball, and reinstatement to a “suitable position” at Steel Painters.¹⁴⁷ To avoid liability, Steel Painters must prove it lawfully terminated Mr. Kimball because he cannot perform the essential functions of the job, which would preclude him from protection as a “qualified individual” under the ADA.¹⁴⁸ If the court finds the ADA does apply to Mr. Kimball, the EEOC will likely be granted its requested injunctive, compensatory, and punitive relief. A “direct threat” defense asserted by Steel Painters would likely fail, since the *Hussey* court was hesitant to find that the defense applied in a copper mill setting, and a reasonable person would find painting is objectively less dangerous.¹⁴⁹

B. Discrimination cases involving medications comparable to MAT

Physicians’ capacity for prescribing MAT has increased steadily over the past decade, but the case law interpreting its effect on employability is still sparse.¹⁵⁰ However, employment discrimination cases involving prescription pain medication are instructive, as ADA protections apply uniformly to all legally prescribed medications, provided the substantially limiting

¹⁴⁷ Press Release, EEOC, *Steel Painters Sued by EEOC For Disability Discrimination* (June 29, 2018), <https://www.eeoc.gov/eeoc/newsroom/release/6-29-18a.cfm>.

¹⁴⁸ 29 C.F.R. § 1630.2(r) (2012).

¹⁴⁹ See *EEOC v. Hussey Copper Ltd.*, 696 F. Supp. 2d 505 (W.D. Pa. 2010).

¹⁵⁰ Christopher M. Jones et al., *National and State Treatment Need and Capacity for Opioid Agonist Medication-Assisted Treatment*, 105 Am. J. Pub. Health e55 (2015).

disability still exists when the mitigating factors of the prescription are considered.¹⁵¹ As such, the following cases examine the way courts have treated prescription medication in the employment discrimination context for the sake of comparison.

i. Gaus v. Norfolk Southern

The biochemical similarities between opiates and MAT drugs like methadone¹⁵² also translate to legal similarities: whether illicit or legally prescribed, both types of drugs are subject to the same ADA analysis, provided a disability is implicated.¹⁵³ In *Gaus v. Norfolk Southern Railway Co.*, the plaintiff had worked as an electrician for the defendant for about five years before losing his job due to his use of prescription pain medication.¹⁵⁴

Mr. Gaus suffered from chronic pain in his joints, hip, back, and abdomen.¹⁵⁵ Norfolk Southern Railway (“NSR”) granted Mr. Gaus medical leave, and for the next nine months, Mr. Gaus underwent treatment for his various conditions.¹⁵⁶ When he attempted to return to work, his physician and the physician hired by NSR examined him.¹⁵⁷ Although both opined Mr. Gaus could

¹⁵¹ 45A Am. Jur. 2d Job Discrimination § 192 (2018).

¹⁵² *Effective Treatments for Opioid Addiction*, Nat’l Inst. on Drug Abuse, <https://www.drugabuse.gov/publications/effective-treatments-opioid-addiction/effective-treatments-opioid-addiction> (last updated Nov. 2016).

¹⁵³ 45A Am. Jur. 2d Job Discrimination § 192 (2018).

¹⁵⁴ *Gaus v. Norfolk S. Ry. Co.*, No. 09–1698, 2011 WL 4527359, at *7 (W.D. Pa. Sept. 28, 2011).

¹⁵⁵ *Id.* at *3.

¹⁵⁶ *Id.* at *2.

¹⁵⁷ *Id.* at *3.

return to work, the NSR medical department “felt that the medical evidence was insufficient and that it required more information.”¹⁵⁸ After reviewing the information provided by Mr. Gaus’ physicians, the NSR medical department decided he was not cleared to return to work as an electrician, calling it a “safety-sensitive position,” but cleared him to work in a sedentary position doing primarily clerical work.¹⁵⁹ The department based this finding on NSR’s medical guidelines.¹⁶⁰

Although NSR later cleared Mr. Gaus to return work as an electrician after further medical treatment,¹⁶¹ Mr. Gaus filed suit, claiming NSR discriminated against him by refusing to allow him to return to work due to his chronic pain medications.¹⁶² The United States District Court for the Western District of Pennsylvania denied NSR’s motion for summary judgment,¹⁶³ holding the company’s assessment of Mr. Gaus did not meet the requirements set forth by federal law.

The Equal Employment Opportunity Commission's interpretative guidance makes clear that 29 C.F.R. § 1630.2(r) (2011) does not

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at *4 (“Dr. Lina had two concerns at that time, based on the available medical evidence: (1) Gaus had not established a suitable record of control and stability of his chronic pain condition; and (2) Gaus' frequent narcotics use.”) (internal quotations omitted).

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at *9.

¹⁶² *Id.* at *12.

¹⁶³ The motion for summary judgment was denied only in part, as it related to the prescription pain medication and corresponding denial of clearance to return to work; it was granted as to Gaus’ earlier claims of discrimination, which are beyond the scope of this paper. *Id.* at *32.

require that the employer's physician personally examine the employee. What is required, however, is that the employer base its determination of a direct safety threat on objective evidence from physicians or other medical professionals who have observed or examined the employee, and/or direct input obtained from the employee.

Gaus v. Norfolk S. Ry. Co., No. 09–1698, 2011 WL 4527359, at *12 (W.D. Pa. Sept. 28, 2011).

The court reasoned that NSR's individualized assessment was insufficient because its physician relied on the fact that Mr. Gaus' medications fell outside NSR's company guidelines.¹⁶⁴ Specifically, the court pointed to NSR's failure to consider the lack of side effects Mr. Gaus experienced from his medications and disregard of the reports from his treating physicians.¹⁶⁵

ii. Carter v. McCreary Modern, Inc.

In contrast, another district court addressing the “direct threat” defense for safety-sensitive positions involving prescription pain medication held in favor of the defendant.¹⁶⁶ In *Carter v. McCreary Modern, Inc.*, the defendant furniture manufacturer (“McCreary”) retracted a conditional offer of employment, citing safety concerns associated with medication the plaintiff took for back pain.¹⁶⁷ Ms. Carter applied for a job as a hard-mark cutter,

¹⁶⁴ *Id.* at *27.

¹⁶⁵ *Id.*

¹⁶⁶ See *Carter v. McCreary Modern, Inc.*, No. 5:10–CV–014–RLV, 2011 WL 3444090 (W.D.N.C. Aug. 8, 2011), *aff'd*, 468 F. App'x 219 (4th Cir. 2012).

¹⁶⁷ *Carter v. McCreary Modern, Inc.*, No. 5:10–CV–014–RLV, 2011 WL 3444090, at *1 (W.D.N.C. Aug. 8, 2011).

which involves the use of a motorized knife.¹⁶⁸ She told McCreary's occupational nurse that she (Ms. Carter) "had no medical restrictions and could perform the essential functions of the cloth cutter position," but also disclosed her use of several pain medications for back pain.¹⁶⁹ Although Ms. Carter passed four exercises, a spine exam, and a grip test, her preliminary drug screening was positive, and McCreary retracted the employment offer.¹⁷⁰

On cross-motions for summary judgment, the Western District of North Carolina held McCreary's individualized assessment of Ms. Carter fulfilled the requirements of the ADA, and that its determination of her ability to safely perform the job of the hand-mark cutter was objectively reasonable.¹⁷¹ In granting McCreary's motion for summary judgment, the court reasoned that "[Ms. Carter's] use of opiates is of legitimate concern to an employer whose employees use a motorized knife."¹⁷² The court relied on Ms. Carter's medical records, in which she stated to her physician one year prior that "muscle relaxers make her sleepy,"

¹⁶⁸ *Id.* at *1, *5.

¹⁶⁹ *Id.* at *1 ("Plaintiff also disclosed that she took medications for her back pain, including hydrocodone, cyclobenzaprine, and acetaminophen, but only as needed and never when she was working.").

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at *5

¹⁷² *Id.*

holding McCreary was objectively reasonable in determining this made Ms. Carter unfit for that particular job.¹⁷³

IV. Argument

A. Raising the bar for the individualized assessment required by the ADA

Federal law establishes a clear exception to the protections of individual applicants under the ADA.¹⁷⁴ That the “direct threat” exception requires an individualized assessment of each applicant is well settled¹⁷⁵, but what that assessment looks like is incredibly fact-specific and varies based on each case.¹⁷⁶ This ambiguity creates uncertainty for both applicants and employers, especially in the area of blanket policies regarding legal prescription drug use.¹⁷⁷

The EEOC’s administrative guidance only requires that the analysis include a weighing of (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.¹⁷⁸ In weighing these factors (called the *Arline* factors after the Supreme Court case which the EEOC largely based its

¹⁷³ *Carter v. McCreary Modern, Inc.*, No. 5:10–CV–014–RLV, 2011 WL 3444090, at *1, *5 (W.D.N.C. Aug. 8, 2011).

¹⁷⁴ 29 C.F.R. § 1630.2(r) (2012).

¹⁷⁵ 42 Am. Jur. Proof of Facts 3d 1 (1997).

¹⁷⁶ Ann Hubbard, *Understanding and Implementing the ADA's Direct Threat Defense*, 95 Nw. U. L. Rev. 1279, 1307 (2001).

¹⁷⁷ Elisa Y. Lee, *An American Way of Life: Prescription Drug Use in the Modern ADA Workplace*, 45 Colum. J. L. Soc. Probs. 303, 336-37 (2011).

¹⁷⁸ 29 C.F.R. § 1630.2(r) (2011).

regulations on),¹⁷⁹ the employer must rely on “reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence.”¹⁸⁰ However, lower courts have discussed whether an employer’s direct threat determination should include an examination by the employer’s physician or occupational medicine professional.

The *Gaus* court specifically addressed this issue when the employer, in that case, raised as a defense the fact that its physician had examined the applicant.¹⁸¹ The court interpreted the EEOC’s guidance as *not* requiring a personal examination but held the employer’s actions still did not meet the individualized assessment requirements.¹⁸²

The *Gaus* court distinguished *Hussey*, an opinion that gave great weight to the need for an employer’s physician (or other health professional) to examine the applicant.¹⁸³ In that case, the fact that the medical director “did not meet with or personally examine [the applicant], but based his opinion on the nurse practitioner's evaluation and his knowledge gained from various literary sources about methadone” was of consequence.¹⁸⁴

¹⁷⁹ *Sch. Bd. of Nassau Cty., Fla. v. Arline*, 480 U.S. 273, 288 (1987).

¹⁸⁰ 29 C.F.R. § 1630.2(r) (2011).

¹⁸¹ *Gaus v. Norfolk S. Ry. Co.*, No. 09–1698, 2011 WL 4527359, at *28 (W.D. Pa. Sept. 28, 2011).

¹⁸² *Id.*

¹⁸³ *Id.* at *27.

¹⁸⁴ *Id.* (citing *EEOC v. Hussey Copper Ltd.*, 696 F. Supp. 2d 505, 518 (W.D. Pa. 2010)).

Similarly, the *Carter* court, which granted the employer's motion for summary judgment, relied on the testimony of the employer's occupational nurse, who examined the applicant herself.¹⁸⁵ Several circuit courts of appeals have also relied heavily on the existence of an examination at or near the time of the application for employment in upholding an employer's direct threat defense.¹⁸⁶ This evidence is important because it recognizes the fundamental purpose of the individualized assessment, which Justice Brennan opined was "protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of grantees as avoiding exposing others to significant health and safety risks."¹⁸⁷

If an employer's physician or nurse is to determine whether an applicant would pose a direct threat to workplace safety based on reviewing medical records, without personally examining the applicant, there is more room for prejudice, stereotypes, or unfounded fear to taint that medical opinion. This was exactly the

¹⁸⁵ *Carter v. McCreary Modern, Inc.*, No. 5:10-CV-014-RLV, 2011 WL 3444090, at *1 (W.D.N.C. Aug. 8, 2011).

¹⁸⁶ *E.g., Darnell v. Thermafiber, Inc.*, 417 F.3d 657, 660 (7th Cir. 2005) (holding an employer reasonably relied on the opinion of a physician who, despite not being familiar with the applicant's medical history, interviewed the applicant about his failure to regulate his glucose levels); *McGeshick v. Principi*, 357 F.3d 1146, 1151 (10th Cir. 2004) (holding an employer's decision not to hire a job applicant with Meniere's disease was proper because it was based on the advice of physicians who reviewed the applicant's medical records and treated him for his symptoms). The *McGeshick* plaintiff claimed discrimination under the Federal Rehabilitation Act, but the elements are identical to that of an ADA claim. *Henrietta D. v. Bloomberg*, 331 F.3d 261, 272 (2d Cir. 2003).

¹⁸⁷ *Sch. Bd. of Nassau Cty., Fla. v. Arline*, 480 U.S. 273, 287 (1987).

concern of the EEOC in filing the *Randstad* complaint, which claimed the employer based its decision not to hire solely on the positive result returned by the pre-employment drug screening.¹⁸⁸ By failing to conduct any further inquiry into the cause of the positive result, the plaintiff reasoned, the employer did not fulfill the individualized assessment required by federal law.¹⁸⁹

This type of knee-jerk decision and its destructive impact on MAT patients trying to find work can be remedied. Medical judgment is more likely to be “reasonable,” as is required by the EEOC’s administrative guidance,¹⁹⁰ if it includes a current physical examination *by the decision-maker*, not a remote contractor. These high standards for the requisite individualized assessment are particularly important when they implicate a disability with such stigma, as is the case with opioid dependence.¹⁹¹

B. Why timing may matter for employers using a safety exception to the ADA

Raising the standard for what qualifies under the direct threat exception may create concern that any defense employers have under the Act is effectively revoked. However, the outcome

¹⁸⁸ Complaint at ¶ 13, *EEOC v. Randstad*, No. 15CV03354, 2015 WL 13666335 (D.Md. Nov. 3, 2015).

¹⁸⁹ *Id.*

¹⁹⁰ 29 C.F.R. § 1630.2(r) (2011).

¹⁹¹ Karen McElrath & Herman Joseph, *Medication-Assisted Treatment (MAT) for Opioid Addiction: Introduction to the Special Issue*, 53 *Substance Use & Misuse* (SPECIAL ISSUE) 177 (2018).

of the *Steel Painters* case may provide a framework by which to strike a balance between applicant protection and an employer's right to ensure a safe workplace. The distinction, in that case, is that the worker had been hired, and was actually on the job for a week before the company received his positive drug test and terminated him.¹⁹² In contrast, many other ADA discrimination cases involving a drug screening are *pre-employment*.

Because the direct threat defense requires employers to show the existence of "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation,"¹⁹³ it follows that allowing an individual to begin work would provide clear evidence of whether or not the individual has met the test. In other words, termination based on an individualized assessment *during* employment, as opposed to *pre-employment*, allows a court to base an ADA ruling on more than mere speculation.

The *Steel Painters* employer did not raise such a defense in its answer to the worker's discrimination claim.¹⁹⁴ Nonetheless, a decision in favor of the company could set a precedent, giving

¹⁹² Complaint at ¶ 17, *EEOC v. Steel Painters, LLC*, No. 1:18-cv-00303, 2018 WL 3301664 (E.D.Tex. June 28, 2018).

¹⁹³ 29 C.F.R. § 1630.2(r) (2012).

¹⁹⁴ Second Amended Answer By Steel Painters, LLC, f/k/a Steel Painters, Inc. at 6-8, *EEOC v. Steel Painters, LLC*, No. 1:18-cv-00303 (E.D.Tex. Nov. 2, 2018).

employers greater deference in decision-making after hiring a protected individual.

C. A call for specificity in panels used for pre-employment drug screenings

Notwithstanding concerns about employers abusing drug screenings to discriminate against disabled applicants, the ability to conduct screenings before and during employment is an important part of the American workforce. Empirical data has shown that the implementation of regular testing programs significantly reduces drug abuse in worker populations subject to such testing.¹⁹⁵

However, the *type* of test utilized by an employer can mean the difference between legally protecting safety through a drug-free workplace policy, and illegally discriminating against a job applicant. Federal agencies conducting drug testing are subject to standardized procedures established by the Substance Abuse and Mental Health Services Administration (SAMHSA, a division of the Department of Health and Human Services).¹⁹⁶ The procedures

¹⁹⁵ Quest Diagnostics' Drug Testing Index summarizes more than seven million urine drug test results from both the general U.S. workforce and federally mandated safety-sensitive workforce (which includes pilots, bus drivers, and nuclear power plant operators). Since the Drug Testing Index was first published in 1989, the U.S. workforce has sustained a constant decline in positive urine drug test results. Press Release, Quest Diagnostics, *Cocaine Use Among U.S. Workers Declines Sharply in 2008, According to Quest Diagnostics Drug Testing Index™* (May 6, 2009), <http://newsroom.questdiagnostics.com/press-releases?item=94599&mobile=No>.

¹⁹⁶ *Workplace Drug Testing*, Drug & Alcohol Testing Industry Association, <http://www.datia.org/datia-resources/27-credentialing/cpc-and-cpct/931-workplace-drug-testing.html> (last visited Oct. 27, 2018).

require the test, most commonly a urine sample, to identify five illicit drugs: amphetamines, THC, cocaine, opiates, and phencyclidine.¹⁹⁷

This typical five-panel opiate immunoassay (antibodies designed to bind with a specific drug) only detects morphine, codeine, and heroin.¹⁹⁸ Thus, federal agencies and federally-regulated employers in the private sector applying this five-panel immunoassay will typically not be impacted in their employment decisions by MAT using methadone or buprenorphine.¹⁹⁹ However, the legal issue arises for private employers, most of which are not restricted to this five-panel test and may choose to administer an eight or ten-panel test that can identify additional substances.²⁰⁰ The typical ten-panel test can identify synthetic opiates such as fentanyl and methadone.²⁰¹ Thus, while more panels present the opportunity for more specific results, they may also open the door to confusion absent a proper analysis. In fact, one study of clinicians analyzing standard urine drug tests revealed: “the majority were not aware of morphine as a common metabolite of codeine, which may lead to false accusations of illicit

¹⁹⁷ *Id.*

¹⁹⁸ *Appropriate Use of Drug Testing in Clinical Addiction Medicine*, Am. Soc’y of Addiction Med. 1, 21 (2017), [https://www.asam.org/docs/default-source/quality-science/appropriate_use_of_drug_testing_in_clinical-1-\(7\).pdf?sfvrsn=2](https://www.asam.org/docs/default-source/quality-science/appropriate_use_of_drug_testing_in_clinical-1-(7).pdf?sfvrsn=2).

¹⁹⁹ *Workplace Drug Testing*, *supra* note 195.

²⁰⁰ *Id.*

²⁰¹ *Id.*

opiate use.”²⁰² Blood testing presents similar challenges; however, research shows certain methods separate structural isomers in the blood, effectively differentiating between illicit and legal opioids.²⁰³

While biochemistry is implicated in the important distinctions between drug tests, employers do not need to have scientific training to avoid ADA liability in hiring practices. Compliance while maintaining testing programs is simply a matter of communication with the drug testing lab. Although private employers are not required to follow the SAHMSA regulations required of federal agencies, it is advisable for them to do so. However, if employers opt for a test with ten or more panels, they should inquire as to whether the test indicate if a reaction with methodone or another synthetic opiate immunoassay causes any positive results.

Even if the laboratory is unable to distinguish the immunoassay that triggered the positive result, the positive result itself gives the employer cause to conduct an inquiry into (1) whether the drug is legally prescribed, and (2) whether any interference with the essential functions of the job can be mitigated

²⁰² Christopher J. Keary et al., *Toxicologic Testing for Opiates: Understanding False-Positive and False-Negative Test Results*, 14 *Primary Care Companion for CNS Disorders* 4 (2012).

²⁰³ Marianne Skov-Skov Bergh et al., *Addressing the Fentanyl Epidemic by Multiplex UHPLC-MS/MS Analysis of Whole Blood* (2018).

through reasonable accommodations.²⁰⁴ If the answer to either inquiry is “yes,” the ADA prohibits the employer from terminating or declining to hire the employee or applicant, respectively.²⁰⁵

Further, the timing of a drug test can impact its legality.²⁰⁶

During the hiring process, drug testing is only designed for employers to determine whether an applicant is using drugs and whether such use is legal.²⁰⁷ At that stage, an employer may ask the applicant if they have a legal prescription for methadone or buprenorphine, but may not ask the reason for the prescription, as such information “could reveal disability-related information the employer is not permitted to ask about before a job offer.”²⁰⁸

Conversely, after an offer of employment has been made or during employment, the employer may ask why the need for a methadone or buprenorphine prescription if there is a “business necessity” for such information.²⁰⁹ Should the need arise to solicit more information about an employee or applicant’s drug use, it is

²⁰⁴ Joanne Bush et al., *Confronting The Opioid Emergency In The Workplace*, <https://www.jonesday.com/files/Publication/8c5e74cd-4e9d-4b6a-8692-53a1e77b93f7/Presentation/PublicationAttachment/5b2d29a5-b659-4c88-a8f7-54c50435e19c/Confronting%20The%20Opioid%20Emergency%20In%20The%20Workplace%20-%20Law360.pdf>.

²⁰⁵ 29 C.F.R. § 1630.9 (2011).

²⁰⁶ *Questions and Answers from Webinar: Medication Assisted Treatment: Special Anti-Discrimination Issues* (2009), https://www.samhsa.gov/sites/default/files/partnersforrecovery/docs/QA_Medication-Assisted_Treatment_Anti-Discrimination.pdf.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

advisable to delegate any inquiries resulting from a drug screening to a designated medical review officer.²¹⁰

V. Conclusion

Drug testing reform can only go so far to ensure individuals recovering from opioid dependency are granted equal access to employment. A large part of the challenge faced by those in recovery is attributed to the stigma associated with their illness: though MAT patients may not feel “disabled,” they must often identify as such to fall under the umbrella of protections granted by the ADA.²¹¹ The hiring policies instituted by employers are an important part of alleviating that stigma while preserving equal access.

Still, employers face uncertainty in navigating whether an individual enrolled in an MAT program may be qualified to safely perform a job. The aforementioned case law shows a variety of practices that have been deemed acceptable individualized assessments by courts. To remedy this lack of uniformity, the EEOC should promulgate more specific administrative guidance in this area of the ADA. In particular, regulations requiring an

²¹⁰ Baker Donelson, *On Drugs and at Work: Keeping Your Work Force Safe and ADA-Compliant in the Opioid Epidemic* (Aug. 14, 2017), <http://www.jdsupra.com/legalnews/on-drugs-and-at-work-keeping-your-work-52848/>.

²¹¹ Alison Knopf, *Methadone Patients Don't Feel "Disabled," But They Do Have a Protected "Disability" Under the ADA*, Addiction Treatment Forum (June 18, 2018), <http://atforum.com/2018/06/methadone-patients-dont-feel-disabled-but-they-do-have-a-protected-disability-under-the-ada/>.

individualized assessment to include an examination by the employer's physician or nurse will best serve the interests of public health. Courts can play a role in encouraging the passage of such regulations by holding assessments, based only on a remote review of medical records, or speculation based on an individual's history of opioid dependence, are insufficient for defending a discrimination claim.

Additionally, research on the effectiveness of MAT programs should contribute to abating the stigma associated with those in recovery. According to the National Institute of Drug Abuse, individuals who participate in methadone maintenance treatment face the likelihood of becoming and remaining employed.²¹² This positive empirical data may reassure hiring managers that employability is not affected by enrollment in MAT programs.

Ensuring individuals in recovery have equal access to employment is crucial to addressing the crisis that is opioid addiction in the United States. Although employment policies are only a piece of the proverbial puzzle, they are an important piece. As one scholar put it, "[p]rivate employers represent an indispensable source of payors for patient services to support recovery and drug treatment, and the provision of reasonable

²¹² National Institute of Drug Abuse, *Methadone Research Web Guide*, Part B-24 (2011), <https://www.drugabuse.gov/sites/default/files/pdf/partb.pdf>.

accommodations provides a mechanism for accessing those payors.”²¹³ Working in conjunction with jurists, legislators, and healthcare providers, employers can maximize that indispensable role to expand access to MAT and in so, doing slow the spiral of opioid dependence nationwide.

²¹³ Samuel Brown Petsonk & Anne Marie Lofaso, *Working for Recovery: How the Americans with Disabilities Act & State Human Rights Laws Can Facilitate Successful Rehab. for Alcoholics & Drug Addicts*, 120 W. Va. L. Rev. 891, 914 (2018).