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SUBSTANCE USE AS A SECOND-CLASS DISABILITY: A SURVEY OF THE ADA'S DISARMAMENT OF INDIVIDUALS IN RECOVERY

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ABSTRACT

The Americans with Disabilities Act and Fair Housing Act are landmark statutes that afford essential protections to individuals with disabilities in the foundational areas of everyday life. Despite their recognition of substance use disorders as disabilities, these statutes deny protection to individuals who are either in active use or in the early stages of their recovery. This Article explores the dangers posed by the "current use exception" and surveys the case law to determine the extent of the harms done to individuals with disabilities who seek to vindicate the rights purportedly guaranteed to them by the Americans with Disabilities Act and Fair Housing Act. The sum total of these cases paints a grim picture of the present legal conception of substance use disorders not as diseases, but as moral failings. Further, it counsels in favor of changing the laws to more equitably address the realities of substance use disorders and recovery.

INTRODUCTION

"[I]t is clear from both the text of the ADA and its legislative history that Congress intended to treat drug addiction differently from other impairments and disabilities."[1]

In March of 2011, Doctor Quinones voluntarily admitted herself to an alcohol rehabilitation program.[2] Upon completion of the program that July, she returned to the workforce with new prescriptions for several medications.[3] She subsequently entered a residency program with the University of Puerto Rico.[4] However, Doctor Quinones developed a dependence on her prescription medications.[5] Eventually, her dependence progressed into a substance use disorder which affected her job performance.[6] In May 2012, Doctor Quinones sought recovery through abstinence from her prescription medications, active participation in Alcoholics and Narcotics Anonymous, and the aid of a behavioral therapist.[7] Despite her active efforts to sustain her recovery, that September the University terminated her employment in the residency program.[8] In response, she requested reinstatement and a reasonable accommodation pursuant to the Americans with Disabilities Act of 1990 (ADA).[9]

The reinstatement hearings took place in November, roughly seven months after she began her recovery from misuse of prescription drugs, and over a year and a half since she began her abstinence from alcohol.[10] Nonetheless, the University felt that her drug use was recent enough to present an ongoing issue.[11] Doctor Quinones was

1. Quinones v. Univ. of P.R., No. 14-1331 (JAG), 2015 WL 631327, at *5 (D.P.R. Feb. 13, 2015).
2. *Id.* at *1.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.* at *1, *6. By this time, Doctor Quinones had been abstinent from alcohol for over a year. *Id.* at *1.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*

officially barred from employment in the program in April 2013.[12] She sued the University in federal court for discriminating on the basis of her substance use disorder.[13] At the summary judgment phase, the court agreed with the University's conclusions, finding that at the time of her initial termination Doctor Quinones was still a current user of illicit drugs.[14] Thus, she was not protected by the ADA.[15] Doctor Quinones' story is not unique. It is, however, illustrative of one of the most glaring maladies infecting our civil rights laws: substance use disorders are second-class disabilities.

Stigma against individuals with substance use disorders is pervasive. Its effects can be felt in virtually every facet of American public and professional life.[16] The stigma is so culturally ingrained that it has embedded itself in the statute purporting to protect the rights of individuals with disabilities. The ADA takes several steps to distinguish substance use disorders from all other disabilities.[17] Most notably, section 12114(a) excludes individuals with substance use disorders from the definition of disabled, even when they are actively experiencing a symptom of their disease.[18] This exclusion (the "current use exception") categorically denies protection to anyone "currently engaging in the illegal use of drugs."[19]

The court's conclusion in *Quinones*, which declined to protect an individual with seven months of sustained abstinence from illicit drug use and who had sought rehabilitative counseling, precisely illustrates the legal barrier faced by millions of Americans with substance use disorders. Substance use disorders have been declared quasi-disabilities by Congress, the courts, and the regulatory agencies charged with

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12. *Id.*

13. *Id.* at *1.

14. *Id.* at *7.

15. *Id.*

16. Even those counted among the "highly educated" professional class, such as doctors and lawyers, have shown to be heavily biased by anti-substance use disorder stigma. *See, e.g.*, Jason B. Luoma et al., *Stigma Predicts Residential Treatment Length for Substance Use Disorder*, 40 AM. J. DRUG & ALCOHOL ABUSE 206, 209 (2014) ("The stigmatizing attitudes of the public and healthcare professionals serve as barriers to seeking treatment and affect treatment outcomes among users of illicit drugs, and, in the SUD area, stigma has been shown to be related to treatment delay or avoidance.") (internal citation omitted); Patrick R. Krill et al., *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10 J. ADDICTION MED. 46, 52 (2016) (advocating for increased education to combat the "pervasive stigma surrounding substance use disorders and mental health concerns" among lawyers and judges).

17. *See* 42 U.S.C. § 12114 (2009).

18. *Id.* Substance use disorders are chronic diseases of the brain. Symptoms include decreased executive functioning, increased stress levels, excruciating physical withdrawal, and relapse. *See* Thomas R. Kosten & Tony P. George, *The Neurobiology of Opioid Dependence: Implications for Treatment*, 1 SCI. PRACT. PERSP. 13 (2002).

19. § 12114(a). Additionally, this definition creates an extraordinarily narrow definition of recovery. A person must maintain complete abstinence, free of any tapered use or relapse, for months in order to qualify. The construction also raises significant questions about the definition of abstinence. Is a person who is in abstinence-based recovery for opioid use disorder a current user if he or she smokes marijuana? Despite the various substance use disorders that have individual designations in the DSM-V, the legislation, regulations, and technical guidance are silent on whether a person qualifying as an individual with a substance use disorder needs to be abstinent from all illegal drug use, or abstinent only from the substances for which they have a diagnosed substance use disorder. This question will almost certainly require an answer soon, especially given the rise in treatment with medical marijuana. However, the issue is beyond the scope of this article.

defining and enforcing the terms of much of our federal and state civil rights legislation.[20] Paradoxically, the closer one gets to experiencing the symptoms of a substance use disorder, the smaller one's chances of successfully vindicating one's rights under the ADA.[21] The "current use exception," as interpreted by the Equal Employment Opportunity Commission (EEOC), the Department of Justice (DOJ), and the courts, means that any person with a substance use disorder, no matter the duration of their abstinence, is one relapse away from losing any protection from discrimination on the basis of their disability.[22] In fact, under the ADA, were that person to relapse, she would legally lose her status as disabled altogether.[23]

This article endeavors to articulate the breadth of damage caused by the "current use exception" and proposes strategies which could eliminate or mitigate that damage. Part I discusses the practical implications of the ADA's relegation of substance use disorders to second-class status. Part II begins by introducing the key provisions of the ADA. This introduction requires a close parsing of the text's isolation of substance use disorders from other disabilities. Part II then surveys the case law rising from discrimination on the basis of disability in employment, public services, programs, activities, and housing. Finally, Part III proposes statutory and regulatory emendations that could either eliminate the issues rising from the exception altogether, or, at least mitigate damage through the proposition of a new jurisprudential framework.

Scant scholarship addresses the "current use exception." Even fewer articles, notes, or comments survey the case law in a way that outlines the legal realities faced by employees and tenants who have experienced discrimination. Nor does the case law frame the "current use exception" within a broader cultural context grounded in stigma. This article shows that the ADA's treatment of substance use disorders is a glaring symptom of a pervasive and anachronistic misconception of the nature of the disease. Until the second-class status is lifted from substance use disorders, millions will continue to suffer discrimination without the possibility of legal recourse.

I. SUBSTANCE USE DISORDERS AS SECOND-CLASS DISABILITIES UNDER THE ADA

The ADA excludes millions of individuals with disabilities from protection every year. This exclusion can result in joblessness, homelessness, and death.[24] To

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20. *See id.*; *see also* 28 C.F.R. § 35.104 (2019) (Department of Justice regulations excluding individuals currently engaging in the illegal use of drugs from the definition of "[i]ndividual with a disability"); U.S. Equal Emp. Opportunity Comm'n, EEOC-M1A, A TECHNICAL ASSISTANCE ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT § 8.3 (1992) [hereinafter EEOC Technical Assistance Manual]. This article will use language consistent with current medically accepted practice.

21. *See* Am. Psychiatric Ass'n., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 481 (5th ed. 2013). Other words or phrases such as addiction or substance abuse disorder may be used in quotations and references to other works. However, for the purposes of this article, they will refer to the same conditions: substance use disorders.

22. *See, e.g.*, Salley v. Cir. City Stores, Inc., 160 F.3d 977, 978 (3d Cir. 1998) (determining that an employee who amassed over ten years of sustained abstinence was not a qualified individual with a disability after experiencing a relapse and was subsequently fired).

23. *See* § 12114.

24. *See* David J. Roelfs et al., *Losing Life and Livelihood: A Systematic Review and Meta-Analysis of Unemployment and All-Cause Mortality*, 72 SOC. SCI. & MED. 840, 847-48 (2011) (finding that the

understand how the exclusion manifests itself, one must analyze the way courts and regulators have defined the ADA's terms.[25] The ADA's protections for persons with disabilities extend only to "qualified individuals."[26] Qualified individuals are those who are "able to perform the essential functions of their job even if only with some accommodation to their disability."[27] Substance use disorders are recognized as disabilities under the ADA.[28] However, the ADA explicitly carves out an exception to the definition of "qualified individual" for those "currently engaging in the illegal use of drugs."[29] "Illegal use of drugs" refers to the use, possession, or distribution of substances deemed unlawful under the Controlled Substances Act.[30] No other disabilities under the ADA face any similar carve outs.[31]

The legal and cultural ramifications of a civil rights law purporting to protect individuals with disabilities while affirmatively sanctioning discrimination against a specific subset of those same individuals on the basis of their disability is difficult to quantify. However, the power of anti-substance use disorder stigma in American culture is well-documented.[32] Attitudinal biases against individuals in active use or in recovery hinders their ability to participate in, or benefit from, fundamental aspects of life such as employment, healthcare, or social services.[33] Further, these individuals frequently internalize stigma, dampening their willingness to pursue

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risk of death for unemployed persons was sixty-three percent higher than the risk of death for employed persons); *see also* Christopher S. Carpenter et al., *Economic Conditions, Illicit Drug Use, and Substance Use Disorders in the U.S.*, 52 J. HEALTH ECON. 63, 72 (2017) (finding "clear evidence that substance use disorders involving . . . analgesics[] and hallucinogens are [both] strongly countercyclical"); Lamberson v. Pennsylvania, 963 F. Supp. 2d 400, 402, 411 (M.D. Pa. 2013) (stating that during the pendency of litigation, a nurse challenging the suspension of her license as an alleged response to her treating her opioid use disorder with methadone maintenance therapy was found dead on the side of the road due to "mixed substance toxicity and hypothermia.").

25. *See infra* Part II.

26. § 12114(a).

27. Morgan v. Joint Admin. Bd., Ret. Plan of Pillsbury Co. & Am. Fed'n of Grain Millers, 268 F.3d 456, 457 (7th Cir. 2001).

28. *See, e.g.*, Makinen v. City of New York, 857 F.3d 491, 495 (2d Cir. 2017) (acknowledging that the ADA "treat[s] alcoholism as an impairment that can form the basis of a disability discrimination suit"); § 12114(b)(1)-(3); 28 C.F.R. § 36.105(b)(22) (2019) ("The phrase physical or mental impairment means . . . drug addiction, and alcoholism.").

29. § 12114(a); *see also* 28 C.F.R. § 36.104 (2019) (explaining that the "term 'individual with a disability' does not include an individual who is currently engaging in the illegal use of drugs.").

30. § 12111(6)(A). The term does not include "the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law." *Id.* Though this phrasing appears to exclude individuals participating in supervised rehabilitation programs, such participation does not automatically re-characterize the person as a qualified individual under the ADA. This result follows even if the person remains abstinent from any illegal substances during that period. *See* Mauerhan v. Wagner Corp., 649 F.3d 1180, 1185-86 (10th Cir. 2011); Zenor v. El Paso Healthcare Sys., Ltd., 176 F.3d 847, 858 (5th Cir. 1999).

31. *See, e.g.*, Bailey v. GaPac. Corp., 306 F.3d 1162, 1167 n.4 (1st Cir. 2002) ("While not specifically excluded from the ADA's protections, alcoholism is nevertheless treated differently than other impairments and disabilities.").

32. *See generally* Patrick F. Janulis, *Understanding Addiction Stigma: Examining Desired Social Distance Toward Addicted Individuals*, (June 2010) (M.S. thesis, DePaul University, College of Liberal Arts and Science).

33. *See* Yngvild Olsen & Joshua M. Sharfstein, *Confronting the Stigma of Opioid Use Disorder—and Its Treatment*, 311 J. AM. MED. ASS'N. 1393-94 (2014).

these activities and services.[34]

The chilling effect and resultant social stagnation can have a practical impact on the maintenance of stable recovery. The Substance Abuse and Mental Health Services Administration (SAMHSA) has articulated four key dimensions that support recovery: health, home, purpose, and community.[35] Two of these dimensions fall directly under the protection of federal civil rights legislation. The right to freedom from discrimination on the basis of disability in housing, or "home," is protected by the Fair Housing Act of 1968 (FHA).[36] Purpose, defined as "having the independence, income, and resources to participate in society,"[37] is protected by Titles I and II of the ADA.[38] If those protections are explicitly withheld from individuals experiencing the symptoms of their disability, the foundations of stable recovery are subject to the unaccountable whims of employers or landlords.[39]

A. What Does "Currently Engaging" Mean?

One useful signifier of the damage of the "current use exception" is the way in which courts have construed the phrase "currently engaging."[40] The phrase itself has no coherent or uniform definition. Nor is there a bright line rule that separates a current user from a qualified individual. As a result, courts tasked with defining the phrase on a case-by-case basis are in disarray.[41] Each circuit seems to be guided only by the desire to define the phrase more broadly than the rest.[42]

In the employment context, where the vast majority of these cases occur, the

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34. *See id.*

35. Substance Abuse and Mental Health Servs. Admin., Find Treatment, *Recovery and Recovery Support* (last updated Apr. 23, 2020), https://www.samhsa.gov/find-help/recovery [https://perma.cc/4XLE-E4MR] [hereinafter SAMHSA]. They are:

> 1. Health—overcoming or managing one's disease(s) or symptoms and making informed, healthy choices that support physical and emotional well-being.
> 2. Home—having a stable and safe place to live.
> 3. Purpose—conducting meaningful daily activities and having the independence, income, and resources to participate in society.
> 4. Community—having relationships and social networks that provide support, friendship, love, and hope.

36. 42 U.S.C. §§ 3601-19 (1968).

37. SAMHSA, *supra* note 35.

38. *See* 42 U.S.C. §§ 12111-34 (2009).

39. *See, e.g.*, André Q.C. Miguel et al., *Change in Employment Status and Cocaine Use Treatment Outcomes: A Secondary Analysis Across Six Clinical Trials*, 106 J. SUBSTANCE ABUSE TREATMENT 89 (2019) (finding that treatment outcomes for individuals who were addicted to cocaine were "significantly better for those employed versus unemployed at the end-of-treatment"); Marika Augutis et al., *The Meaning of Work: Perceptions of Employed Persons Attending Maintenance Treatment for Opiate Addiction*, 16 J. SOC. WORK PRACT. IN THE ADDICTIONS 385 (2016) (surveying 32 individuals with OUD and finding unanimous belief that work is an "indispensable tool for staying drug-free.").

40. *See* § 12114.

41. *See, e.g.*, Mauerhan v. Wagner Corp., 649 F.3d 1180, 1188 (10th Cir. 2011) ("an individual's eligibility for the safe harbor must be determined on a case-by-case basis, examining whether the circumstances of the plaintiff's drug use and recovery justify a reasonable belief that drug use is no longer a problem.").

42. *See infra* Part II(A).

EEOC has articulated the standard to guide the "current use" analysis.[43] In this analysis the court does not listen to the employee or the expert opinion of a medical professional.[44] Rather, the court looks to whether the use was recent enough to "justify the employer's reasonable belief that the employee's involvement with drugs is an ongoing problem."[45]

This framework highlights two fundamental issues with the "current use exception." First, it accepts as a given that the employer discriminated against the employee on the basis of his or her disability. The employer needs only to have reasonably believed that the person was not in sufficiently stable recovery. Second, it requires courts to make medical determinations. The firmness or stability of one's recovery is a deeply fact-intensive question. It can involve psychological analysis,[46] physical assessment,[47] even a chemical analysis of the individual's brain.[48] The question is not whether the employee was adequately performing the essential functions of the job. Rather, the EEOC guides the courts to ask the employer whether the employee's recovery was advanced enough that relapse was no longer a risk.[49]

Plaintiffs who faced discrimination in the workplace regularly suffer the same indignities before courts, expressed through their archaic articulations of the definition of recovery.[50] Despite the many hurdles and pitfalls facing plaintiffs in employment cases, there is little nuance once a judge feels that the defendant had a reasonable belief that the plaintiff was still using, or would use again.[51] Whether a person is a week sober or seven months sober, if the employer fears relapse, judges overwhelmingly defer to their concerns.[52] The bluntness with which judges discuss this subject may be best exemplified by one federal district court in Indiana: "The point is that it is perfectly permissible for an entity—an employer, a public housing authority, etc.—to take an adverse action against someone who is caught using

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43. *See* EEOC Technical Assistance Manual, *supra* note 20; Teahan v. Metro-N. Commuter R.R. Co., 951 F.2d 511, 520 (2d Cir. 1991).

44. *Id.*

45. Suarez v. Pa. Hosp. of Univ. of Pa. Health Sys., 2018 WL 6249711, at *6 (E.D. Pa. Nov. 29, 2018) (citing EEOC Technical Assistance Manual § 8.3). These cases are most often decided on summary judgment. If the facts must be viewed in the light most favorable to the nonmoving party, the EEOC's standard seems to muddy the waters.

46. *See* Ed Stevens et al., *Investigating Social Support and Network Relationships in Substance Use Disorder Recovery*, 36 SUBSTANCE ABUSE 396, 397 (2015) (discussing "key psychological constructs related to substance use disorder recovery.").

47. *See* Marsha E. Bates et al., *Short Term Neuropsychological Recovery in Substance Use Disordered*, 29 ALCOHOLISM: CLINICAL & EXPERIMENTAL RSCH. 367, 368 (2005) (discussing the physical health improvements which are observable during recovery).

48. *See generally* Gail Winger et al., *Behavioral Perspectives on the Neuroscience of Drug Addiction*, 84 J. EXPERIMENTAL ANALYSIS BEHAV. 667 (2005) (discussing the stages of neurochemical change during early recovery).

49. *See* EEOC Technical Assistance Manual, *supra* note 20; *see also* Zenor v. El Paso Healthcare Sys., Ltd., 176 F.3d 847, 858 (5th Cir. 1999).

50. *See infra* Part II.

51. For a more in-depth discussion of the difficulty of winning employment discrimination cases, *see, e.g.*, Michael Selmi, *Why are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 556 (2001).

52. *See infra* Part II.

drugs."[53]

II. SURVEY OF THE LAW

The ADA is divided into five titles.[54] However, the first three have the broadest impact. Title I protects qualified individuals with disabilities from discrimination in employment.[55] Title II prevents public—or governmental—entities from discriminating on the basis of disability in the provision of services, programs, or activities.[56] Title III prevents public accommodations, or private entities which open themselves up to the public, from discriminating on the basis of disability in the provision of "full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations."[57] Each title generally follows the same set of definitions. Thus, each has an implicit "current use exception."[58] This article primarily focuses on Titles I and II of the ADA and the Fair Housing Act.[59] These specific provisions are the battle grounds for the enforcement and protections of the civil rights of individuals with substance use disorders. The rights at issue under these statutes are essential to the maintenance of sustained and healthy recovery.[60] As such, the categorical denial of protections for those rights must be understood and reckoned with.

The confusion over how long an individual must remain abstinent before a court will validate his or her recovery lies within nearly every stage of the analysis. For example, courts largely agree that the most logical point to start counting the time for plaintiff's period of abstinence is at his or her most recent use.[61] However, courts vary on when to stop the clock.[62] In *Zenor v. El Paso Healthcare System, Ltd.*, the Fifth Circuit held that the clock stops upon the employee's notification of the adverse

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53. A.B. *ex rel.* Kehoe v. Hous. Auth. of S. Bend, No. 3:11 CV 163 PPS, 2012 WL 1877740, at *4 (N.D. Ind. May 18, 2012), *aff'd sub nom.* A.B. *ex rel.*, 498 F. App'x 620 (7th Cir. 2012).

54. 42 U.S.C. §§ 12101-12213.

55. *Id.* §§ 12111-12117.

56. *Id.* §§ 12131-12165.

57. *Id.* § 12182.

58. *See* 42 U.S.C. § 12210(c) (2018).

59. The bulk of case law involving the "current use exception" falls under Title I. However, Title II has also seen litigation revolving around the exception. *See infra* Part II(B). This article does not reach Titles III-V as they have been used in little to no relevant litigation.

60. *See supra* note 35 and accompanying text.

61. *See, e.g.*, Teahan v. Metro-N. Commuter R.R. Co., 951 F.2d 511, 518 (2d Cir. 1991).

62. *Compare Id.* ("we think the relevant time for assessment of Teahan's 'current' status is the time of his actual firing."), *and* Dauen v. Bd. of Fire & Police Comm'rs of City of Sterling, 656 N.E.2d 427, 431 (Ill. App. Ct. 3d Dist. 1995), *with* Zenor v. El Paso Healthcare Sys., Ltd., 176 F.3d 847, 855-56 (5th Cir. 1999) (holding the relevant time is when the employer notifies the individual that they are to be terminated, rather than the actual date of termination), Grimes v. U.S. Postal Serv., 872 F. Supp. 668, 674-75 (W.D. Mo. 1994), *aff'd*, 74 F.3d 1243 (8th Cir. 1996) (same), *and* Figueroa v. Fajardo, 1 F. Supp. 2d 117, 121 (D.P.R. 1998) (same). The claim in *Teahan* was discrimination on the basis of "handicap" brought under the Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §701 *et seq.* However, The ADA and Rehabilitation Act are analyzed using the same standards. Tyndall v. National Educ. Ctrs., Inc., 31 F.3d 209, 213 n.1 (4th Cir. 1994) ("the ADA expressly requires its provisions to be interpreted in a way that 'prevents imposition of inconsistent or conflicting standards for the same requirements' under the two statutes") (quoting 42 U.S.C. § 12117(b)).

employment action.[63] Thus, the measurement of the employee's period of abstinence is frozen in that moment. Under the Fifth Circuit's logic, if a person comes forward to an employer or landlord stating a desire to enter recovery, and the employer or landlord threatens adverse action, that is sufficient to close off the chance for recovery as a defense against discrimination.[64] Whether the employer or landlord goes through with the adverse action at that moment is immaterial. This stands in direct contrast to the Second Circuit's holding in *Teahan v. Metro-North. Commuter Railroad Co.*, in which the court held that the correct time to stop the clock is at the moment of termination.[65] The *Zenor* court acknowledged the Second Circuit's concern that its notification rule could "expose recovering substance abusers to retroactive punishment."[66] Rather than engage with those concerns, the Fifth Circuit simply waived them away.[67]

The Fifth Circuit, and the subsequent courts which have adopted its reasoning, avoid substantive textual analysis in their reading. The statute is clear that the definition of "qualified individual with a disability" should include someone who "has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use," or "is participating in a supervised rehabilitation program and is no longer engaging in such use."[68]

It is difficult to square the Fifth Circuit's decision with the text of the ADA. The court's analysis allows employers, landlords, or public entities even more latitude for adverse action, such that they can retroactively discriminate against someone after they have participated in a rehabilitation program.[69] Though this reading may be inconsistent with the text, its breadth is perfectly in line with the trends in current case law.[70]

The dozens of cases defining and applying the "current use exception" are often vastly disparate in their logic. However, judges, left with vague guidance, have applied an almost uniformly broad construction, thus achieving consistent results.[71] The tests articulated within the early foundational appellate court opinions, which define "current use," are nebulous and deferential to the biases of the trial judges.[72] Functionally, these tests create more ambiguities than they eliminate.[73] As discussed below, the information highlighted as central to the "current use" analysis under

63. *Zenor*, 176 F.3d at 856. This logic need not be limited to employment law. *See infra* Parts II(B)-(C).

64. *Zenor*, 176 F.3d at 856.

65. *Teahan*, 951 F.2d at 520.

66. *Zenor*, 176 F.3d at 854.

67. *See id.* at 855-56.

68. 42 U.S.C. § 12114(b)(1)-(2) (2009).

69. *See Zenor*, 176 F.3d at 854.

70. *See, e.g.*, Mauerhan v. Wagner Corp., 649 F.3d 1180, 1185-86 (10th Cir. 2011); Shirley v. Precision Castparts Corp., 726 F.3d 675, 680 (5th Cir. 2013).

71. Zsoldos v. Twp. of Manchester, No. 3:16-cv-2711-BRM-TJB, 2017 WL 77412, at *4 (D.N.J. Jan. 9, 2017) (stating that the ADA and its implementing regulations "instruct[] courts to interpret 'currently engaging' broadly rather than narrowly.") (citing 29 C.F.R. Pt. 1630, app. § 1630.3(a)-(c)). *See also infra* Parts II(A)-(C).

72. *See, e.g.*, Shafer v. Preston Mem'l Hosp. Corp., 107 F.3d 274, 278 (4th Cir. 1997) (defining "currently" as "a periodic or ongoing activity . . . that has not yet permanently ended").

73. *See infra* Part II(A)(1).

these various tests often misses the core of what it means to be in recovery, favoring length of time sober above all else. This poorly targeted analytical scrutiny is emblematic of the exception's fundamental issue: it empowers judges alone to decide whether the plaintiff's recovery is stable enough to earn his or her civil rights.

A. "Current Use" Under Title I of the ADA

Claims of discrimination under Title I of the ADA are analyzed through the burden-shifting framework articulated by the Supreme Court in *McDonnell Douglas Corp. v. Green*.[74] The process breaks down into three steps. First, the plaintiff must make out a prima facie case of discrimination.[75] To do so, a plaintiff must prove three things: (1) that she has a disability; (2) that she can perform the essential functions of her job with or without reasonable accommodation; and (3) her employer discriminated against her on the basis of that disability.[76] Once the plaintiff establishes a prima facie case, the burden shifts to the employer to "articulate a legitimate nondiscriminatory reason for its actions."[77] Finally, the burden shifts back to the plaintiff to prove by a preponderance of the evidence that the employer's stated reason was actually pretext for discrimination.[78] A successful claim must navigate this multi-layered and multi-step analytical framework just to get to a jury. As a result, many of these cases are dismissed before trial, heard only by a single judge.[79]

A more subtle, yet dangerous, substance use-specific distinction in the ADA is the provision distinguishing the disability itself from conduct related to the disability.[80] Excepting substance use disorders, "the ADA protects both the disability and the conduct caused by the disability."[81] However, section 12114(c) allows an employer to hold an employee with a substance use disorder to the same qualification standards for employment or job performance and behavior standards that are applied to other employees.[82] This is a categorical revocation of an essential ADA protection as "[e]mployers may respond to addiction-related misconduct in a way that they cannot respond to other disability-related misconduct," even if the

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74. Suarez v. Pa. Hosp. of Univ. of Pa. Health Sys., No. 18-1596, 2018 WL 6249711, at *5 (E.D. Pa. Nov. 29, 2018) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)).

75. *Id.* at *5.

76. Matthews v. Commonwealth Edison Co., 941 F. Supp. 721, 724 (N.D. Ill. 1996). This is the step where most plaintiffs come up against the current use exception. *See, e.g.*, *id.*

77. *Suarez*, 2018 WL 6249711, at *5.

78. *Id.*

79. *See, e.g.*, *id.*

80. *See* 42 U.S.C. § 12114(c)(4) (2009) (stating that an employer "may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee").

81. Nielsen v. Moroni Feed Co., 162 F.3d 604, 609 (10th Cir. 1998).

82. *See* EMP. DISCRIMINATION COORDINATOR, ANALYSIS OF FED. L., LIMITED PROTECTIONS FOR ILLEGAL DRUG USERS AND ALCOHOL ABUSERS UNDER THE ADA (1 Emp. Discrimination Coordinator Analysis of Fed. L., § 6:40 2020)*; see also* Burch v. Coca-Cola Co., 119 F.3d 305, 319 n.14 (5th Cir. 1997) (stating that the "ADA places employers under no obligation to accommodate misconduct that is product of employee's alcoholism . . . employers [may] hold alcoholic employees to same standard of conduct as nonalcoholic employees").

misconduct is related directly to the substance use disorder.[83]

As stated by the Tenth Circuit, "the disability v. disability-caused conduct dichotomy seems to be unique to alcoholism and drugs."[84] Put simply, when dealing with substance use disorders, "the ADA and Rehabilitation Act draw a distinction between 'having a disability' and 'disability-caused misconduct.'"[85] That distinction opens doors for employers to act on the basis of drug use, even if such use happened months ago, and was due to the compulsion associated with the effects that the substance use disorder may have had on the brain.[86] The unique distinction dividing substance use disorders and behaviors associated with them—such as relapse—is further proof that substance use disorders still carry the stigma of moral failure, even in the eyes of the ADA.[87]

1. Circuit Courts Defining the Boundaries of "Current Use" Under the ADA

Not many circuit courts have taken up the "current use" issue. However, there are several cases which directly address the viability of specific lengths of abstinence. None paints a rosy picture for an individual hoping to vindicate his or her rights. Some circuits have made passing references to the inadequacy of a specific length of time in dicta.[88] More still write approvingly of the foundational cases that rule directly on specific periods of time without making a strict ruling of their own. District courts in circuits without any controlling precedent frequently rely heavily on the lengthy abstinence requirements from these early cases, despite their age and hyper-narrow focus on the weeks or months that the plaintiff was abstinent.[89] The logical foundations for each case are useful for understanding how

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83. EMP. DISCRIMINATION COORDINATOR, *supra* note 82. Alcohol use disorder, or alcoholism as listed in the statute, and illegal substances are treated equally in this context. *See* § 12114(c)(4).

84. Den Hartog v. Wasatch Acad. 129 F.3d 1076, 1086, 1085-88 (10th Cir. 1997). *But see* Matthews v. Commonwealth Edison Co., 941 F. Supp. 721, 726 (N.D. Ill. 1996) (noting that the Second Circuit "rejects the sharp distinction between a handicapping condition on the one hand, and specific behavior on the other") (quoting Hogarth v. Thornburgh, 833 F. Supp. 1077, 1084 (S.D.N.Y. 1993) (internal quotation marks omitted)).

85. Dennis v. Fitzsimons, No. 18-CV-0128, 2019 WL 4201476, at *4 (D. Colo. Sept. 5, 2019).

86. *See* Baustian v. Louisiana, 910 F. Supp. 274, 276 (E.D. La. 1995) (holding that being drug free and participating in a rehabilitation program is insufficient to qualify as an individual with a disability); *see also Matthews*, 941 F. Supp. at 726 ("According to the Second Circuit, proof that the employer fired the plaintiff because of absences caused by his disability constituted evidence that the employer terminated him because of his disability.").

87. *See* Dovenmuehler v. St. Cloud Hosp., 509 F.3d 435, 440 (8th Cir. 2007) (holding that a nurse with a substance use disorder was not a qualified individual with a disability because the ADA did not protect her from the "consequences of illicit conduct explainable by her chemical dependence, such as diverting hospital drugs intended for patients to personal use"); Salley v. Cir. City Stores, Inc., 160 F.3d 977, 981 (3d Cir. 1998) (holding that no jury could find that the plaintiff was fired for his drug addiction rather than misconduct, whether or not the misconduct was caused by addiction); Maddox v. Univ. of Tenn., 62 F.3d 843 (6th Cir. 1995) (holding that "it strains logic to conclude that [workplace misconduct] could be protected under the Rehabilitation Act or the ADA merely because the actor has been diagnosed as an alcoholic and claims that such action was caused by his disability."); Collings v. Longview Fibre Co., 63 F.3d 828, 832 (9th Cir. 1995) (upholding the discharge of employees for drug-related misconduct in the workplace).

88. *See, e.g.*, Nader v. ABC Television, Inc., 150 F. App'x 54, 56 (2d Cir. 2005).

89. *See infra* Part II(A)(2). Of the directly relevant circuit cases, there are only two cases from this millennium. *See generally Mauerhan*, 649 F.3d 1180; Brown v. Lucky Stores, Inc., 246 F.3d 1182, 1186

district court cases have applied the "current use exception," despite the lack of a coherent definition or standard.

There are four particularly definitive—and thus, influential—cases which draw basic bright line rules declaring specific stretches of abstinence insufficient to qualify for the ADA's safe harbor.[90] Each of these cases explains that "current use" extends beyond the "weeks and months" prior to the adverse action—participation or completion of a rehabilitation program notwithstanding.[91] These cases have come to define the "current use" analysis and have been relied on by a significant number of other trial and appellate courts.[92]

Chronologically, the first appellate case to definitively declare a length of abstinence insufficient is *Shafer v. Preston Memorial Hospital Corp*.[93] The *Shafer* court faced the "current use exception" with some informative precedent from within its circuit in the housing context.[94] Despite the *United States v. Southern Management* ruling determining that individuals who had been drug-free for one year were not "current users" under the FHA, the *Shafer* court took a different approach under the ADA.[95] The court distinguished *Southern Management*, noting that it had only provided that abstinence for a year was sufficient for the safe harbor.[96] However, it reasoned that no precedent established that being drug-free for less than a year at the time of termination provides similar protection.[97] To make its determination, the court defined "currently" under the statute as "a periodic or ongoing activity in which a person engages (even if doing something else at the precise moment) that has not yet permanently ended."[98] Shafer herself had been participating in a drug rehabilitation program and abstinent from drug use for roughly a month at the time of her final termination.[99] Accordingly, the court determined that "an employee illegally using drugs in a periodic fashion during the weeks and

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(9th Cir. 2001); *see also* Shirley v. Precision Castparts Corp., 726 F.3d 675, 680 (5th Cir. 2013) (noting in dicta that the safe harbor only applies to "individuals who have been drug-free for a significant period of time," but not determining how long that needs to be) (quoting Zenor v. El Paso Healthcare Sys., Ltd., 176 F.3d 847, 857 (5th Cir. 1999)) (internal quotations omitted); *Brown*, 246 F.3d at 1186 (noting that "the 'safe harbor' provision applies only to employees who have refrained from using drugs for a significant period of time"). Further, the bulk of these foundational cases were decided before the ADA Amendments Act, which expanded eligibility as a qualified individual with a disability and excoriated the courts for their exclusionary readings of the ADA. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(6), 122 Stat. 3553 (restoring the intent and protections of the Americans with Disabilities Act of 1990, stating that "courts have incorrectly found . . . that people with a range of substantially limiting impairments are not people with disabilities").

90. *See Collings*, 63 F.3d at 833 (creating the "weeks and months" metric); *see also* Shafer v. Preston Mem'l Hosp. Corp., 107 F.3d 274, 280 (4th Cir. 1997); *Zenor*, 176 F.3d at 858; *Mauerhan*, 649 F.3d at 1186-87.

91. *See, e.g.*, *Shafer*, 107 F.3d at 277.

92. *See, e.g.*, Shirley v. Precision Castparts Corp., 726 F.3d 675, 681 (5th Cir. 2013); *see also infra* Part II(A)(2).

93. *Shafer*, 107 F.3d 274.

94. *See* United States v. S. Mgmt. Corp., 955 F.2d 914, 921 (4th Cir.1992).

95. *Id.* at 919–23 (internal quotation marks omitted).

96. *Shafer*, 107 F.3d at 277, n.4.

97. *Id.*

98. *Id.* at 278.

99. *Id.* at 275.

months prior to discharge" remained a "current user."[100] *Shafer* was not the first decision to use "weeks and months" as a floor for the required length of abstinence.[101] However, it was the first case to apply that metric against a specific length of time.

The next foundational "current use" circuit case is *Zenor v. El Paso Healthcare System, Ltd.*[102] The Fifth Circuit has played a central role in setting the standards for interpreting the exception.[103] *Zenor* involved a plaintiff who had five weeks of sustained abstinence, had completed the residential portion of his treatment program, and had self-reported his addiction to his employer.[104] The *Zenor* court was not persuaded by the plaintiff's period of abstinence and held that it was insufficient for protection.[105]

Somewhat recently the Fifth Circuit addressed the exception again, this time in *Shirley v. Precision Castparts Corp*.[106] In *Shirley*, the court reaffirmed that an individual could only qualify for the safe harbor after "weeks, or even months" of sustained abstinence.[107] Furthermore, the court seemed to narrow the viability of using one's participation in rehab as proof that they are no longer a "current user."[108] Together, the *Zenor* and *Shirley* courts' interpretations of the statutory language surrounding "current use" do considerable damage to plaintiffs trying to vindicate their rights as individuals with disabilities.

A slightly less-cited—though equally definitive holding—comes from the Ninth Circuit in *Brown v. Lucky Stores, Inc*.[109] Brown, a grocery store clerk, was arrested

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100. *Id.* at 278. The court's dismissal of the argument for a narrow construction of the "current use exception" is particularly telling. The court opined that such a construction meant, "an employee testing positive for drugs on Monday would not be 'currently engaging in the illegal use of drugs' under the statutes despite the fact that his positive test resulted from weekend drug use." *Id.* It declared such a result to be "'inconsistent with [public] policy and abhorrent to the sense of justice.'" *Id.* (quoting Sorrells v. United States, 287 U.S. 435, 449 (1932)).

101. *See* Collings v. Longview Fibre Co., 63 F.3d 828, 833 (9th Cir. 1995).

102. Zenor v. El Paso Healthcare Sys., Ltd., 176 F.3d 847 (5th Cir. 1999).

103. According to Westlaw, the *Zenor* court's pronouncements on the definition of current have been cited over 20 times across the circuits, including by district courts with controlling precedent from their own circuit courts. *See, e.g.*, Lyons v. Johns Hopkins Hosp., No. CCB-15-0232, 2016 WL 7188441, at *4 (D. Md. Dec. 12, 2016) (citing to the *Zenor* court's definition of "current"); Torello v. Sikorsky Aircraft Corp., No. 3:04CV848(WWE), 2006 WL 680508, at *3 (D. Conn. Mar. 14, 2006) (same).

104. *Zenor*, 176 F.3d at 857.

105. *Id.* at 858.

106. Shirley v. Precision Castparts Corp., 726 F.3d 675, 681 (5th Cir. 2013).

107. *Id*. at 679 n.11.

108. *See id.* at 680. The relevant passage reads, "many people continue to participate in drug treatment programs *long after* they have stopped using drugs illegally, and that such persons should be protected under the Act." *Id.* (quoting H.R. Rep. No. 101-596H, at 64 (1990) (Conf. Rep.)) (emphasis added). The court's use of this excerpt from the ADA's legislative history suggests that participation in rehab is unpersuasive without proof of abstinence for "a significant period of time." *Id.* (citation omitted). This assertion marks another significant departure from the plain meaning of the text, which explicitly protects individuals who are "participating in a supervised rehabilitation program and [are] no longer engaging in [illegal drug] use." 42 U.S.C. § 12114(b)(2) (2009). Unsurprisingly, there does not appear to be any case law denying summary judgment to an employer sued by a person who faced an adverse employment action while in, or recently following, the release from a rehabilitation program.

109. Brown v. Lucky Stores, Inc., 246 F.3d 1182 (9th Cir. 2001).

for driving under the influence and possession of methamphetamine.[110] As a result, Brown faced a short period of incarceration and "was required to attend round-the-clock rehabilitation."[111] Her arrest and rehab caused her to miss several days of work and she was subsequently fired.[112] The court found that her six days of abstinence were not "a sufficient length of time" to qualify for the safe harbor.[113] In so doing, the court announced a new test to determine whether to apply the safe harbor.[114] A person qualifies as disabled under the ADA only if he or she has "refrained from using drugs for a *significant* period of time."[115] The Ninth Circuit has not clarified the definition of "significant" beyond holding that a six-day period does not meet the requirement.

Finally, the most recent case to take a firm—though slightly more wavering—stance is *Mauerhan v. Wagner Corp*.[116] In *Mauerhan*, the plaintiff was fired for testing positive on a drug test.[117] Wagner, his employer, offered to rehire Mauerhan if he "could get clean."[118] Following the successful completion of a month-long inpatient rehab program Mauerhan requested to return to work.[119] He was offered a job but with cuts to his salary and diminished responsibilities.[120] He refused and brought a discrimination claim under the ADA.[121] Mauerhan appealed his loss on summary judgment, arguing in part that his status as a "current user" or qualified individual is dependent on a question of fact.[122] Had the court agreed, Mauerhan's claim could have gone to a trial with a full presentation of medical evidence and expert opinion. Neither the district court nor the Tenth Circuit agreed. Rather, the appellate court found that a record devoid of any substantive input from medical professionals was adequate to determine that Mauerhan was insufficiently sober to gain recognition as a person worthy of the ADA's protection.[123]

Though the above cases are arguably the most decisive on the matter, other circuits have addressed current use in dicta.[124] Some court have taken the frustrating path of announcing interpretive standards and tests but dodged a definitive ruling on a length of time.[125]

Ultimately, the foundational cases discussed above create three basic categories

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110. *Id.* at 1186.
111. *Id.*
112. *Id.*
113. *Id.* at 1188.
114. *Id*. at 1186
115. *Id.* (emphasis added).
116. Mauerhan v. Wagner Corp., 649 F.3d 1180, 1180 (10th Cir. 2011).
117. *Id.* at 1183.
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.* at 1185. The district court disagreed, holding that one month was an insufficient period of time as a matter of law. *Id.* at 1185-86. Mauerhan's argument was not novel—the Second Circuit held that one's status as a current user is a question of fact under the Rehabilitation Act. *See* Teahan v. Metro-N. Commuter R.R. Co., 951 F.2d 511, 520 (2d Cir. 1991).
123. *Id.* at 1189.
124. *See, e.g.*, Nader v. ABC Television, Inc., 150 F. App'x 54, 56 (2d Cir. 2005) (stating in dicta that three weeks was not a long enough period of abstinence to qualify for the safe harbor).
125. *See, e.g.*, *Mauerhan*, 649 F.3d at 1186.

of "current use" tests. The first test is whether "the drug use was sufficiently recent to justify the employer's reasonable belief that the drug abuse remained an ongoing problem."[126] Next is the "periodic or ongoing activity" test employed by the Fourth Circuit.[127] This test requires a reasonable belief that the plaintiff's active use "has not yet permanently ended."[128] The third and final test comes from the Ninth Circuit, which applies the safe harbor "only to employees who have refrained from using drugs for a significant period of time."[129] The three tests do not materially differ in how little clarity they provide. Rather, they are all different ways of saying the same thing: courts require extraordinary evidence to find that someone is stable enough in their recovery to merit protection, but virtually no evidence to definitively determine otherwise.

The culmination of appellate case law, though in short supply, reveals some basic assumptions one can make when evaluating a judicially acceptable period of abstinence. First, as the Fourth Circuit has declared in the FHA context—and which other courts have generally accepted in the ADA context—one year of abstinence is a sufficiently long time for safe harbor protection.[130] Employees in the early stages of recovery are far from guaranteed protections under the ADA. Furthermore, trial courts are left with an enormous range between the boundaries of what absolutely qualifies for the safe harbor and what absolutely designates someone a "current user." The closest one can come to a definitive statement on those boundaries is that six days is too short,[131] and one year is long enough.[132] Anything else is almost entirely at the discretion of how much evidence a trial judge is willing to consider at the summary judgment phase.

2. District Courts Applying the "Current Use Exception"

Despite the greater availability of relevant case law, the vague standards and boundaries set by the circuit courts have yielded equally murky results at the trial level. District courts have been given few guidelines and nearly boundless authority to decide what is and is not sufficiently stable recovery as a matter of law. With that authority, trial judges have run the gamut of stigma-informed factual conclusions

126. *Mauerhan*, 649 F.3d at 1187; *see, e.g.*, A.B. ex rel. Kehoe v. Hous. Auth. of South. Bend, 498 F. App'x 620, 622 (7th Cir. 2012); Greer v. Cleveland Clinic Health Sys.-E. Region, 503 F. App'x 422, 431 (6th Cir. 2012); Zenor v. El Paso Healthcare Sys., Ltd., 176 F.3d 847, 856 (5th Cir. 1999); *see also Teahan*, 951 F.2d at 520 (stating that the test is "whether the employee's substance abuse problem is severe and recent enough so that the employer is justified in believing that the employee is unable to perform the essential duties of his job.").

127. Shafer v. Preston Mem'l Hosp. Corp., 107 F.3d 274, 278 (4th Cir. 1997).

128. *Id.* This may be the most problematic test of the three. It asks the trial judge to step into the shoes of a clinician and assess the sustainability of an individual's recovery. Perplexingly, the *Shafer* court's own analysis would suggest that to make that assessment the trial judge need only consider the length of the individual's abstinence thus far. *See id.*

129. Brown v. Lucky Stores, Inc., 246 F.3d 1182, 1188 (9th Cir. 2001).

130. United States v. S. Mgmt. Corp., 955 F.2d 914, 921 (4th Cir.1992) (FHA); *Kehoe*, 2012 WL 1877740, at *5 (holding that defendant's admitted cocaine use three weeks prior excluded her from safe harbor provision protections).

131. *Brown*, 246 F.3d at 1188.

132. *S. Mgmt. Corp.*, 955 F.2d at 921.

presented in the language of legal determinations.[133] This section will survey the district court decisions applying the vague tests articulated by the various circuit courts.[134] The lack of a coherent set of standards which could help individuals advance beyond the summary judgment phase is obvious and alarming.

The most blatantly stigma-informed cases come from districts in New Jersey and Louisiana: *Smith v. Eastman Kodak Co.*[135] and *Lejeune v. Omni Energy Services. Corp.*[136] In both cases the courts held that individuals with roughly six months of sustained abstinence were still "current users" for the purposes of the ADA. Neither decision relies on medical evidence that supports the conclusion that the plaintiffs were unstable in their sobriety. Rather, the *Smith* court relied on the plaintiff's six months of abstinence and post-termination relapse to determine that he was currently using at the time he was fired.[137] Though methodologically inadequate, the *Smith* court can still be said to have provided an analysis to support its judgment. The *Lejeune* court was less forthcoming.

In *Lejeune*, the court laid out the barest possible factual pre-requisites to make a legal conclusion on the plaintiff's abstinence. It began with the plaintiff's cessation of illegal drug use on July 31, 2007, and concluded with his subsequent treatment for his opioid use disorder.[138] The court then explained that the plaintiff remained in treatment at the time of his firing on January 22, 2008.[139] Immediately thereafter, and without any other analysis or explanation, the court asserted that "his drug use is characterized as 'current'" and therefore he was "precluded from being a qualified person with a disability."[140] The court provided no further justification for its conclusions and granted summary judgment to the employer.[141] *Smith* and *Lejeune* stand out both for their bafflingly broad interpretation of the word "current" and their near complete lack of legal analysis justifying their conclusions. However, their inattention to medical evidence or expert opinion and their singular focus on the length of abstinence is representative of the general treatment of individuals in the early stages of recovery by courts.

Most cases are not as egregious in their consideration of timeframe or analytical dishonesty as *Smith* or *Lejeune*. However, the majority of courts do follow *Smith*

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133. *See, e.g.*, Lejeune v. Omni Energy Servs. Corp., No. 6:09-CV-0194, 2010 WL 378305(W.D. La. Jan. 29, 2010); Smith v. Eastman Kodak Co., No.95-4677, 1999 WL 33327051 (D.N.J. Oct. 7, 1999).

134. This section will exclude cases finding that the individual never attempted recovery. Despite the article's ultimate assertion that the "current use exception" is problematic to any individual at any stage of their substance use disorder, there are too many instances of uninterrupted use to survey here.

135. *Smith*, 1999 WL 33327051, at *4 ("Plaintiff admits to having used drugs within six months of his termination, a period which was 'sufficiently recent to justify [Kodak's] reasonable belief that it was an ongoing problem rather than a problem that was in the past.'") (quoting Wormley v. Arkla, Inc., 871 F. Supp. 1079, 1084 (E.D. Ark. 1994)).

136. *Lejeune*, 2010 WL 378305, at *9 (holding that six months of sustained sobriety was insufficient to qualify for the safe harbor.).

137. *Smith*, 1999 WL 33327051, at *4.

138. *Lejeune*, 2010 WL 378305, at *9. Plaintiff's treatment consisted of both doctor-prescribed and monitored suboxone, and participation in an outpatient treatment program. *Id.*

139. *Id.* The court noted that the plaintiff remained in treatment at least up to the time of his deposition for the case at bar. *Id.*

140. *Id.*

141. *Id.*

and *Lejeune* into the same methodological pitfalls by relying, above all else, on the length of time that the plaintiff was abstinent from drugs directly preceding the adverse employment action.[142] There are, however, outliers. For example, the court's reasoning in *Scott v. Beverly Enterprises-Kansas, Inc.* relies on facts beyond weeks and months, but simultaneously reveals a more stigma-informed logic.[143] The court found that a one-month period of abstinence was mooted by the fact that the plaintiff had relapsed after he was fired.[144] Not only does this ignore the nature of substance use disorders as chronic relapsing brain diseases, which are symptomatically responsive to the material conditions of one's life, it also grossly misinterprets the case law. The relevant time to determine whether someone is a current user for the purposes of the employment action is either at the time of the adverse action or when the employee is notified of the employer's intent to act.[145] Even partial reliance on the plaintiff's post-termination relapse is a complete deviation from precedent.

Undoubtedly, the weight of the case law favors employers. However, there are several examples of district courts straying from the pack. The diversions from the normal course of granting the defendants' judgment as a matter of law on the "current use exception" usually come in one of two forms. First, some courts refuse to rule as a matter of law that a specific length of time is insufficient to qualify for the safe harbor.[146] These rulings, while helpful, are not a guarantee that the case will go to trial. The second, and more common, form involves plaintiffs with longer periods of abstinence.[147] However unfaithful to the science of substance use disorders as it

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142. *See, e.g.*, Lyons v. Johns Hopkins Hosp., No. CCB-15-0232, 2016 WL 7188441, at *4 (D. Md. Dec. 12, 2016), *aff'd as modified*, 712 F. App'x 287 (4th Cir. 2018) (citing Shafer v. Preston Mem'l Hosp. Corp., 107 F.3d 274, 280 (4th Cir. 1997)) ("Four months is not such a lengthy period that Mr. Lyons cannot qualify as a current user."); Quigley v. Austeel Lemont Co., 79 F. Supp. 2d 941, 946 (N.D. Ill. 2000) (holding that plaintiff's in-patient recovery program lasting for ten days and being drug free for a total period of one month before employee was terminated did not qualify for the safe-harbor); Baustian v. Louisiana, 910 F. Supp. 274, 276 (E.D. La. 1995) (holding that seven weeks of sustained sobriety was insufficient to qualify for the safe harbor); McDaniel v. Miss. Baptist Med. Ctr., 877 F. Supp. 321, 327-28 (S.D. Miss. 1994) (holding that six weeks of sustained sobriety was insufficient to qualify for the safe harbor); Wormley v. Arkla, Inc., 871 F. Supp. 1079, 1080 (E.D. Ark. 1994) (firing an employee the day he was released from his rehabilitation program after roughly one month of abstinence).

143. Scott v. Beverly Enters. Kan., Inc., 968 F. Supp. 1430, 1440 (D. Kan. 1997) ("The undisputed evidence is that plaintiff periodically abused drugs during the weeks, months and years before and after his termination.").

144. *Id.*

145. *See, e.g.*, Teahan v. Metro-N. Commuter R.R. Co., 951 F.2d 511, 518 (2d Cir. 1991) (stating that the relevant period for the calculation of the length of abstinence ends upon the employee's actual termination); Zenor v. El Paso Healthcare Sys., Ltd., 176 F.3d 847, 855-56 (5th Cir. 1999) (stating that the relevant time for the calculation ends upon the employee's notice of termination).

146. *See, e.g.*, Suarez v. Pa. Hosp. of Univ. of Pa. Health Sys., No. 18-1596, 2018 WL 6249711, at *6 (E.D. Pa. Nov. 29, 2018) (holding that the determination of the plaintiff's status as a current user is a question of fact for the jury); Hoffman v. MCI WorldCom Commc'ns, Inc., 178 F. Supp. 2d 152, 156 (D. Conn. 2001) ("[A] month of abstinence while in a supervised rehabilitation program *may* qualify Hoffman for protection under the ADA . . . .") (emphasis added).

147. *See* Herman v. City of Allentown, 985 F. Supp. 569, 578 (E.D. Pa. 1997) (holding that a nine-month abstinence was not current use). *See also* Wallace v. Veterans Admin., 683 F. Supp. 758, 759-60, 765, 767 (D. Kan. 1988) (holding it was a violation of the Rehabilitation Act to refuse to hire a registered nurse who was in recovery and was otherwise qualified for an ICU position when she had

may be, there is a simple maxim favored by courts: the longer you are sober, the more stable you are in your recovery.[148]

A dramatically long period of abstinence that is denied safe harbor protection is not the only example of courts' failure to recognize substance use disorders as medical conditions. For example, *Suarez v. Pennsylvania Hospital of University of Pennsylvania Health System* provides a useful juxtaposition between an analysis that considers medical opinion versus a purely judicial construction of recovery.[149] Suarez was a registered nurse in recovery.[150] Despite her diagnosed opioid use disorder, she was prescribed oxycodone—a powerfully addictive pain killer and opioid—to treat her chronic back pain.[151] After more than three years of sustained abstinence, she relapsed.[152] Suarez eventually entered into, and subsequently completed, a month-long inpatient rehab program.[153] She was released with the program's recommendation that she return to work after a two-week transition period.[154] She was terminated roughly six months later for failure to agree to a reassignment.[155] On these facts, the court denied summary judgment to the hospital after relying heavily on the rehabilitation clinic's assessment of the stability of her recovery.[156] The court highlighted the short turn-over time between her admittance to the clinic and the clinic's recommendation that she return to work.[157]

The *Suarez* court stands out as uniquely receptive to medical opinion. The frequent citation to the clinic's evaluation that the plaintiff was ready to return to work in a clinical setting underscores why deference to medical opinion is essential. It was the medical evidence that moved the court not to dismiss Suarez as a current user.[158]

Recovery is idiosyncratic and strict adherence to rigid recovery-stage timelines

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completed a rehabilitation program, was no longer a current user, had been drug-free for over nine months, and had informed her prospective employer of her disability). *But see* Kelly v. N. Shore–Long Island Jewish Health Sys., 166 F. Supp. 3d 274, 286–87 (E.D. N.Y. 2016) (finding a plausible inference of discrimination when an employee who was three months sober was placed on administrative leave two hours after she informed her human resources manager and director that she was a recovering alcoholic).

148. Though some district courts may not even be convinced by one's length of abstinence. *See* Lejeune v. Omni Energy Servs. Corp., No. 6:09-CV-0194, 2010 WL 378305, at *9 (W.D. La. Jan. 29, 2010); Smith v. Eastman Kodak Co., No. 95-4677, 1999 WL 33327051, at *4 (D.N.J. Oct. 7, 1999).

149. *See Suarez*, 2018 WL 6249711, at *6. This case was brought against a state-run university hospital, thus would normally fall under Title II. However, the court does not address under which provision of the ADA the case was brought. Further, the court relies, in part, on the EEOC Title I guidance and Title I case law, while making no mention of the Department of Justice's regulations or guidance. *Id.* Thus, the case is included in the Title I section.

150. *Id.* at *1.

151. *Id.*

152. *Id.*

153. *Id*. at *3.

154. *Id*.

155. *Id.* at *4–5.

156. *Id*. at *6.

157. *Id*.

158. *See id.*

often mischaracterizes where someone may be in the process.[159] However, the calculus undertaken by the great majority of courts assessing whether someone is stable enough in their recovery to work is far too simple.[160] Medical opinion is a useful tool to guide lawyers and judges, who have no medical knowledge, through the individual's personal stages of recovery. It is crucial that any determination on a person's stability in their recovery is made with specific details of that recovery in mind, rather than simply relying on a number of weeks or months.[161] Anything less is an implicit determination that substance use disorders are more about choice than biology.

Ultimately, the vast majority of opinions interpreting section 12114 of the ADA cite no academic journal, no expert testimony, and no textual—statutory or regulatory—requirements for their determinations. Rather, courts have shown a preference for citing to one excerpt from the ADA's legislative history, which appears to support their shockingly, yet uniformly, broad construction of the term "currently."[162] With their focus on that single excerpt from the legislative history, courts seem to have overlooked another: "public policy affecting persons with disabilities recognize[s] that many of the problems faced by disabled people are not inevitable, but instead are the result of unfounded, outmoded stereotypes and

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159. *See* Brandon G. Bergman et al., "*The Age of Feeling in-Between": Addressing Challenges in the Treatment of Emerging Adults With Substance Use Disorders*, 23 COGNITIVE & BEHAV. PRAC. 270, 270-71 (2016).

160. *Cf.* Peter J. Cohen, *Vigilance and the Drug-dependent Anesthesiologist*, 110 ANESTHESIOLOGY 1422, 1422 (2009) (discussing the Medical Society of the District of Columbia's Physician Health Committee intervention for doctors who become drug-dependent). Dr. Cohen is careful to mention that this is not a one-size-fits-all solution. *Id.* However, if the doctor subject to the intervention participates in the recommended rehab program, they are immediately reinstated upon release, though subject to slightly more oversight. *Id.* The medical recognition of the complexity and idiosyncrasy of each individual's recovery is an overt rejection of the unfaltering trend in judicial construction and executive guidance regarding current use.

161. It seems only fair that judges adopt the spirit of the push against stereotypes that the ADA demands of employers, public entities, and public accommodations. *See* 28 C.F.R. § 36.208(b) (2019) (stating that "a public accommodation must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence.").

162. "The provision excluding an individual who engages in the illegal use of drugs from protection . . . is not intended to be limited to persons who use drugs on the day of, or within a matter of days or weeks before, the employment action in question. Rather the provision is intended to apply to a person whose illegal use of drugs occurred recently enough to justify a reasonable belief that a person's drug use is current." H.R. REP. NO. 101–596, at 64 (1990) (Conf. Rep.), *as reprinted in* 1990 U.S.C.C.A.N. 565, 573. This excerpt considers "days or weeks" when discussing the meaning of current use. *Id.*; *cf.* Shafer v. Preston Mem'l Hosp. Corp., 107 F.3d 274, 278 (4th Cir. 1997) ("[A]n employee illegally using drugs in a periodic fashion during the weeks and months prior to discharge is 'currently engaging in the illegal use of drugs.'"); Zenor v. El Paso Healthcare Sys., Ltd., 176 F.3d 847, 856 (5th Cir. 1999) ("[T]he characterization of 'currently engaging in the illegal use of drugs' is properly applied to persons who have used illegal drugs in the weeks and months preceding a negative employment action.") (quoting *Shafer*, 107 F.3d at 278). Nothing in the statute, regulations, technical assistance, or the legislative history uses the word "months." Rather, the "weeks and months" language first appears in *Collings*. 63 F.3d 828, 833 (9th Cir. 1995) (finding employees' use in "weeks and months" prior to discharge was current use), *cert. denied*, 516 U.S. 1048 (1996); *cf.* EEOC TECHNICAL ASSISTANCE MANUAL § 8.3, *supra* note 20, ("'Current' drug use . . . is not limited to the *day of use, or recent weeks or days*, in terms of an employment action.") (emphasis added). It is worth questioning whether the dicta buried in an opinion from 1995 should be the defining standard for current use across the country.

perceptions, and deeply imbedded prejudices toward people with disabilities."[163] Given that the latter provision gets to the core societal ill the ADA was meant to remedy, courts seem to run afoul of the statute's mandate nearly every time they interpret the "current use exception."

B. "Current Use" Under Title II of the ADA

Current use is litigated far less frequently under Title II than Title I.[164] Much of the Title II litigation involves public employment, leaving the analysis muddied with Title I and the Rehabilitation Act.[165] The few cases which expressly acknowledge that they come under Title II often rely on Title I precedent.[166] Accordingly, the vague guidance and emphasis on broad construction has yielded similar results for public entities as employers.[167] Courts continue to measure recovery purely in days, weeks, and months.[168] However, public employment is not the only context in which the current use exception could be implicated under Title II.

Individuals in recovery also face potential barriers to programs, services, and activities offered by public entities on the basis of their substance use disorder.[169] The most prevalent issue is the denial of rehabilitative services based on current use.[170] Under Title IV of the ADA, "Miscellaneous Provisions," and the DOJ's implementing regulations for Title II, no individual may be denied access to "health services, or services provided in connection with drug rehabilitation, on the basis of the current illegal use of drugs if the individual is otherwise entitled to such

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163. H.R. REP. NO. 101-485 (III), at 25 (1990)*; cf.* Wormley v. Arkla, Inc., 871 F. Supp. 1079, 1084 (E.D. Ark. 1994) (finding "further support" from a case involving a person who relapsed after attending a rehabilitation clinic that "entering a rehabilitation program does not immediately convert a 'current' user into a [sic] individual with a disability protected under the ADA") (citing Fuller v. Frank, 916 F.2d 558 (9th Cir.1990)).

164. Though the exception itself does not appear in Title II, "the provision is repeated in the 'Miscellaneous Provisions,' section making it applicable to the entire ADA." Lopez v. Corr. Med. Servs., No. 04-2155 (NLH), 2009 WL 1883915, at *12 (D.N.J. June 30, 2009), *aff'd sub nom*. Lopez v. Corr. Med. Servs., Inc., 499 F. App'x 142 (3d Cir. 2012).

165. Dauen v. Bd. of Fire & Police Comm'rs of City of Sterling, 656 N.E.2d 427, 492, n.2 (Ill. App. Ct. 3d Dist. 1995) ("Although claims of employment discrimination against public entities are properly brought under Title II of the ADA, such claims are to be evaluated under the standards set forth in Title I of the ADA and in the Rehabilitation Act of 1973.") (citing Ethridge v. Alabama, 860 F. Supp. 808 (M.D. Ala. 1994)); *see also* D'Amico v. City of New York, 132 F.3d 145, 150 (2d Cir. 1998) (holding that an employer may not take adverse action against an employee on the basis of a substance use disorder if the employee is in recovery and is otherwise qualified for the position).

166. *See, e.g.*, Quinones v. Univ. of P.R., No. 14-1331 (JAG), 2015 WL 631327, at *13 (D.P.R. Feb. 13, 2015) (relying on the reasoning of *Mauerhan*, *Brown*, *Shafer*, and *Zenor*).

167. *See, supra* text accompanying notes 1-11; *see also* Vedernikov v. W. Va. Univ., 55 F. Supp. 2d 518, 523 (N.D. W. Va. 1999) (finding that a resident in the state university hospital's Anesthesiology Residency Program was not a current usereven though there was a prognosis of being in "early full remission"). *But see* Montegue v. City of New Orleans, No. 95.2420, 1996 WL 531830, at *4 (E.D. La. Sept. 13, 1996) (stating that "the court ha[d] no reason to believe that [the plaintiff was] not a 'stable' former drug addict," because he had completed a certified substance use treatment program "more than one year prior to [] request[ing] reinstatement" to his former position).

168. *See Quinnones*, 2015 WL 631327, at *13.

169. *See* 42 U.S.C. § 12132 (2018).

170. *See generally* AM. JUR. 2D *Americans with Disabilities Act* § 6 (2020).

services."[171] However, a treatment program may expel or otherwise deny continued services to "individuals who engage in illegal use of drugs while they are in the program."[172]

The denial of rehabilitative services under Title II comes up frequently in the prison context.[173] However, the nature of people's presence in jails and prisons complicates the "current use" analysis. *Toney v. Goord* provides a glaring example of this "current use" analysis complication.[174] In evaluating whether a prison inmate with a long history of substance use was a current user, the court insisted that to qualify for the safe harbor the claimant must be "successfully rehabilitated."[175] In doing so, the court dismissed the individual's year of abstinence from intravenous heroin and cocaine use as due solely to his incarceration.[176] Thus, the court reasoned, he was simply an "addict" and could not be categorized as a person in recovery.[177] The court's insistence on "successful" rehabilitation as a key factor in determining an individual's status as a "current user" is both unfounded in precedent and completely contrary to the *very next subsection* of the statute.[178] The court ultimately opined that the length of the plaintiff's forced sobriety due to incarceration did not outweigh his multiple relapses as evidence that he was still a current user.[179] Under that logic, the court dismissed the individual's denial of a reasonable accommodation claim.[180] The accommodation at issue was a request for access to a substance use treatment program.[181]

C. Housing Discrimination Under the FHA, Rehabilitation Act, and the ADA

Along with the rights and liberties protected by the Rehabilitation Act and the ADA, Congress has recognized that housing is an area of significant risk for discrimination on the basis of disability. The FHA declares it unlawful to, among other things, refuse to sell or rent to, or evict someone on the basis of their

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171. 42 U.S.C. § 12210(c) (2018); 28 C.F.R. § 35.131(b)(1) (2019).

172. 28 C.F.R. § 35.131(b)(2) (2019).

173. *See, e.g.*, Thompson v. Davis, 295 F.3d 890, 895 (9th Cir. 2002) (Two inmates with substance use disorders brought an action seeking injunctive relief against state parole authority officials, asserting "that they have been denied parole release dates because of their substance abuse histories."); *see also* Smith v. Aroostook Cnty., 376 F. Supp. 3d 146, 160 (D. Me. 2019) (holding that Title II requires that a county jail continue treating an individual with opioid use disorder with her prescribed suboxone while incarcerated).

174. *See* Toney v. Goord, No. 04-CV-1174, 2006 WL 2496859, at *8 (N.D.N.Y. Aug. 28, 2006).

175. *Id.*

176. *See id.*

177. *Id.* ("Plaintiff has not plead that he is a recovering drug addict, only that he is a drug addict. Thus, Plaintiff is not a qualified individual with a disability within the purviews of 42 U.S.C. §§ 12114 and 12210." (internal citations omitted)).

178. *Compare id.* at *8 ("Plaintiff's insistence on admittance to a drug rehabilitation program belies the notion that he 'has been rehabilitated successfully. . .'"), *with* 42 U.S.C. § 12114(b)(2) (2009) ("Nothing in subsection (a) shall be construed to exclude as a qualified individual with a disability an individual who . . . is participating in a supervised rehabilitation program and is no longer engaging in such use.").

179. *Toney*, 2006 WL 2496859, at *8.

180. *Id.* at *9.

181. *Id.*

"handicap."[182] The FHA adopted the definition of handicap from the Rehabilitation Act,[183] which courts have consistently interpreted to cover "alcoholics" and individuals addicted to illegal drugs.[184] Further, the FHA implementing regulations, like those of the ADA, include in their definition for mental impairment "any mental or psychological disorder, such as . . . drug addiction (other than addiction caused by current, illegal use of a controlled substance) and alcoholism."[185] Despite explicit consideration in the legislative history and regulations, the FHA hardly provides a safe haven for individuals with substance use disorders.

As with the ADA, when determining the timeline for "current" illegal drug use under the FHA, courts have refused to set a bright-line rule. Some courts apply the employment-based current drug use analysis to housing.[186] For example, *Fowler v. Borough of Westville* adopted the current drug use analysis established by *Shafer*, which determined that current drug use need not be use "at the exact moment that an adverse employment action was taken."[187] Even by applying that analysis, the *Fowler* court found that an individual in recovery who had relapsed four months after the complaint was filed was not considered a "current drug user," thus qualifying as "handicapped" under the FHA.[188]

The consideration of treatment is necessarily different in housing as compared to employment. In both contexts, individuals who are abstinent and actively participating in treatment programs are—at least textually—qualified individuals, or individuals with a "handicap."[189] One important distinction that may serve to further insulate individuals under the FHA is that a major source of recovery treatment is residential-based care.[190] The strong connection between housing and recovery-care has helped some plaintiffs find success.[191] In *Southern Management*, the court held

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182. 42 U.S.C. § 3604(f)(1)(A)-(B) (1988). Despite the statute's use of "handicap," courts have typically interpreted the word interchangeably with "disability" under the ADA. *See* Pacific Shores Properties, LLC v. City of Newport Beach, 730 F.3d 1142, 1156 n.15 (9th Cir. 2013). For consistency, this article will continue to use "disability," including when discussing the protected class status under the FHA.

183. H.R. REP. NO. 100-711, at 22 (1988), *reprinted in* 1988 U.S.C.C.A.N 2173, 2183 (stating that "the Committee intends that the definition be interpreted consistent with regulations clarifying the meaning of the similar provision found in Section 504 of the Rehabilitation Act.").

184. *See, e.g.*, Sullivan v. City of Pittsburgh, 811 F.2d 171, 182 (3d Cir. 1987); Rogers v. Lehman, 869 F.2d 253, 258 (4th Cir. 1989); Tinch v. Walters, 765 F.2d 599, 603 (6th Cir. 1985); Simpson v. Reynolds Metals Co., 629 F.2d 1226, 1231 n.8 (7th Cir. 1980); Crewe v. U.S. Off. of Pers. Mgmt., 834 F.2d 140, 141 (8th Cir. 1987); Davis v. Burcher, 451 F. Supp. 791, 796-97 & n.4 (E.D. Pa. 1978).

185. 24 C.F.R. § 100.201(a)(2) (2020).

186. *See, e.g.*, Tracy P. v. Sarasota Cnty., No. 05-CV-927-T-27, 2007 WL 951740, at *5 (M.D. Fla. Mar. 28, 2007) (adopting the current use analysis from *Zenor* into the housing context).

187. Fowler v. Borough of Westville, 97 F. Supp. 2d 602, 608 (D.N.J. 2000) (citing Shafer v. Preston Mem'l Hosp. Corp., 107 F.3d 274, 278-80 (4th Cir. 1997)).

188. *Id.* at 609.

189. 29 U.S.C. § 794 (2016); 42 U.S.C. § 12114(b) (2018). *See also, Davis*, 451 F. Supp. at 796 (holding that people with histories of drug use "including present participants in methadone maintenance programs are 'handicapped individuals' within the meaning of the statutory and regulatory language" of the Rehabilitation Act).

190. *See* Rudolf H. Moos et al., *Outcomes of Four Treatment Approaches in Community Residential Programs for Patients with Substance Use Disorders*, 50 PSYCH. SERV. 1577, 1577 (1999).

191. *See, e.g.*, United States v. S. Mgmt. Corp., 955 F.2d 914, 921 (4th Cir.1992); *Fowler*, 97 F. Supp. 2d at 609 (finding plaintiff qualified for the safe harbor because there was "no evidence which

that individuals who abstained from drug use for one year were not excluded from the definition of "handicapped."[192] Despite their abstinence, the plaintiffs in the re-entry portion of a recovery program were denied access to housing because of their history of drug use.[193] The court found that "depriving such individuals of housing, or evicting them, would constitute irrational discrimination that may seriously jeopardize their continued recovery."[194] This holding has been cited dozens of times across circuits and in multiple contexts.[195] However, few have adopted its warning about jeopardizing recovery.

Courts have consistently moved the goal posts for recovery, as defined by the FHA and the ADA, notwithstanding the textual inclusion of individuals seeking recovery through participation in a rehabilitation program.[196] For example, in *A.B. v. Housing Authority of South Bend* the plaintiff was evicted three weeks after being arrested for cocaine possession on the grounds that her arrest violated a lease provision prohibiting drug-related criminal activity on the property.[197] Nine days before the eviction date, the plaintiff accepted a plea agreement that allowed her to withdraw her plea and move for a dismissal of her case if she successfully completed a substance-abuse program.[198] Despite participation in the substance use treatment program, the Housing Authority sought to enforce the eviction.[199] The plaintiff challenged the eviction alleging it was based on her disability of drug addiction, but the court determined that she did not qualify as an individual with a disability under the FHA, the ADA, or the Rehabilitation Act at the time of the eviction because she was deemed a "current user."[200]

The FHA is intended to eliminate discriminatory conduct, discriminatory impact, and the deeply embedded stigma held against marginalized groups.[201] Unfortunately, due to its treatment of substance use disorders as second-class disabilities, it falls short of this goal. Individuals with a history of substance misuse continue to be evicted or denied housing based on preconceived notions, stereotypes,

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link[ed the plaintiff] to illegal drug use reasonably contemporaneous with the alleged incidents of discrimination").

192. *S. Mgmt. Corp.*, 955 F.2d at 923.

193. *Id.* at 921.

194. *Id.*

195. *See, e.g.*, Salley v. Cir. City Stores, Inc., 160 F.3d 977, 980 (3d Cir. 1998) (discussing employment under Title I of the ADA); Quinones v. Univ. of P.R., No. 14-1331 (JAG), 2015 WL 631327, at *5 (D.P.R. Feb. 13, 2015) (discussing employment under Title II of the ADA); Tracy P. v. Sarasota Cnty., 2007 WL 951740, at *4 (M.D. Fla. Mar. 28, 2007) (discussing housing under the FHA).

196. *See, e.g.*, Zenor v. El Paso Healthcare Sys., Ltd., 176 F.3d 847, 857 (5th Cir. 1999); ("the mere fact that an employee has entered a rehabilitation program does not automatically bring that employee within the safe harbor's protection [which] applies only to individuals who have been drug-free for a significant period of time.").

197. A.B. v. Hous. Auth. of S. Bend, 498 F. App'x. 620, 621 (7th Cir. 2012).

198. *Id*.

199. *Id.*

200. *Id*. at 622-23.

201. *See* U.S. Dep't of Housing & Urban Dev., *Housing Discrimination Under the Fair Housing Act*, https://www.hud.gov/program_offices/fair_housing_equal_opp/fair_housing_act_overview [https://perma.cc/D7NB-QJNH] (last visited Oct. 29, 2020).

and stigma. This is contrary to Congress' intention.[202] Of course, Congress' own accumulated fears and prejudices have stood in the way of the FHA and ADA's stated purpose since the "current use exception" was first drafted.[203]

III. RECOMMENDATIONS

The continued lapse in protections for individuals with one or more substance use disorders is unconscionable. No other disability is subject to a bar on legal protections based on the experience of its symptoms. Substance use disorders are undeniably relegated to second-class status.

Several remedial measures are available through the political branches. Statutory emendation or notice and comment rulemaking are both viable means to, at the very least, mitigate the "current use exception's" harm. Amending the regulations or making alterations to technical assistance manuals can potentially narrow the presently over-broad construction of "current use" employed by courts nationwide. However, the "current use exception" is at the heart of the dimunution of substance use disorders relative to other disabilities. The only way to eliminate the "badge of shame" that those with substance use disorder diagnoses must wear is to amend the relevant statutes to meet the precept of equality and dignity undergirding the ADA itself.

A. Amend the Legislation

The ADA, FHA, and Rehabilitation Act represent significant advances for the rights of individuals with disabilities. The work done by the EEOC, DOJ, Department of Housing and Urban Development, and private attorneys in combatting discrimination in the essential dimensions of everyday life should not be overlooked or under appreciated. However, each statute has a fundamental flaw. Statutory treatment of substance use has fallen woefully behind the medical field's understanding of the disorder and its symptoms.[204] The relevant statutes' lack of accounting for the symptomatic nature of relapse, the idiosyncrasy of recovery, and the necessity of security in employment, housing, and medical care all point to the ADA and FHA's distance from a modern and informed view of substance use disorders.[205] The singular barrier standing between our civil rights laws and a sound perspective on substance use disorders is the "current use exception."

1. Strike the Exception from the Statute

The ADA was enacted to "assure equality of opportunity, full participation, independent living, and economic self-sufficiency" for individuals with

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202. *See* United States v. S. Mgmt. Corp., 955 F.2d 914, 923 (4th Cir.1992) ("[W]e believe that Congress intended to recognize that addiction is a disease from which, through rehabilitation efforts, a person may recover, and that an individual who makes the effort to recover should not be subject to housing discrimination based on society's 'accumulated fears and prejudices' associated with drug addiction.").

203. *See* Quinones v. Univ. of P.R., No. 14-1331 (JAG), 2015 WL 631327, at *5 (D.P.R. Feb. 13, 2015).

204. *See* Kosten & George, *supra* note 18, at 13.

205. *See id.*

disabilities,[206] after Congress recognized the "existence of unfair and unnecessary discrimination and prejudice."[207] The "current use exception" undercuts this goal. How can a statute purport to promote equality for individuals with disabilities when it explicitly recognizes that substance use disorders are disabilities, but singles out the individuals experiencing their symptoms, and directly excludes them from statutory protection? An individual with diabetes does not lose their disability status under the ADA simply for experiencing hypoglycemia.[208] It is difficult to imagine a world where a single hypoglycemic episode would open an individual with diabetes up to termination from her job and eviction from her apartment. However, that is the world that individuals with substance use disorders experience daily. The ADA cannot stand for equality while it perpetuates inequality. That inequality must be eliminated and the "current use exception" must be removed.

Abolishing the "current use exception" will assuredly be met with reservations from a broad swath of interests. First, the theoretical expediencies of a legislative solution come at the significant risk of inviting scrutiny to the ADA. Any change to the ADA would require reexamination of the targeted passage and reexamination of the statute as a whole. Many disability rights advocates would justifiably be concerned with the idea of subjecting the ADA to political scrutiny due to the risk that Congress may roll back other protections. However, the potential for losing ground through statutory emendation must be weighed against the practical and symbolic harms caused by singling out and abandoning a specific subset of people on the basis of their disability.

Additionally, employers will undoubtedly push back against removing the "current use exception." Employers may worry that individuals in active use will have free reign to bring illegal drugs onto their jobsites or come to work intoxicated. However, striking the "current use exception" would not eliminate employers' ability to prevent either and likely would not even affect an employer's ability to fire an employee with a substance use disorder who was arrested off-duty for drug possession.

Worries such as those outlined above would be misinformed for several reasons. First, eliminating the "current use exception" would have no bearing on the illegality of possession or consumption of illegal drugs. The ADA adopts the Controlled Substances Act's interpretation of illegal drugs.[209] An arrest for possession of a controlled substance, bringing a controlled substance to a jobsite, or showing up to work high could all be considered "disability-related conduct," thus falling under the protections of the ADA without being subject to the "current use exception."[210] However, employers are not required to accommodate individuals with disabilities if they pose an "undue hardship" or "direct threat" to themselves or others.[211] Second, doing away with the "current use exception" would not abrogate the

206. 42 U.S.C. § 12101(a)(7) (2009).
207. *Id.* § 12101(a)(8).
208. *See* 28 C.F.R. § 35 App. B (2019).
209. *See* 42 U.S.C. § 12111(6)(A)-(B) (2009).
210. *Cf.* Den Hartog v. Wasatch Acad. 129 F.3d 1076, 1087-88 (10th Cir. 1997).
211. 42 U.S.C. §§ 12111(10), 12113(b) (2009).

existence of the Drug Free Workplace Act's requirements and prohibitions.[212] Given the plethora of federal statutes punishing or disincentivizing the possession of illegal drugs, it is unlikely that an employer's ability to manage the workplace would be materially impeded by the emendation. Of course, changes to the statute—even less radical ones—would still greatly strengthen the ADA's protections for individuals with substance use disorders.

2. Treat Substance Use Disorders Involving Illegal Drugs the Same as Alcohol Use Disorder

Statutory hierarchies divide up and rank substance use disorders themselves based on the substance at issue.[213] "The [ADA] treats drug addiction and alcoholism differently."[214] For example, individuals with alcohol use disorder are subjected to significantly fewer inhibitions on their active use than other substance use disorders under the ADA.[215] An individual with alcohol use disorder is not "automatically excluded from ADA protection because of current use of alcohol."[216] Thus, the current use of alcohol is not necessarily disqualifying for an individual seeking protection.[217] Shifting the ADA's treatment of individuals with addictions to illegal drugs towards the paradigm presently in place for those with alcohol use disorder may go a long way toward mitigating the harm done by the "current use exception," while still maintaining an employer's ability to take action if the "current use" affects an employee's performance.

The legality of alcohol consumption notwithstanding, alcohol use disorder is still a second-class disability. Individuals with alcohol use disorder may theoretically be protected by the ADA while actively using, but functionally they are often equally susceptible to consequences for behavior in and out of the workplace as those using illegal drugs.[218] Treating dependence on an illegal drug the same as alcohol dependence is a significantly less radical approach than striking the exception altogether. Alcohol use disorder is still subject to the provision explicitly differentiating a disability from "disability-caused misconduct."[219] The significant difference that this switch would make is that the employer cannot act on the strict

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212. 41 U.S.C. § 8102(a)(1) (2018) (requiring that federal contractors and grantees provide a drug-free workplace).

213. Amy L. Hennen, *Protecting Addicts in the Employment Arena: Charting a Course Toward Tolerance*, 15 LAW & INEQ. 157, 174 (1997) ("[A]n addicted employee currently using alcohol has greater protection under the Acts than a similarly-situated addicted employee currently using illegal drugs.").

214. Mararri v. WCI Steel, Inc., 130 F.3d 1180, 1185 (6th Cir. 1997).

215. *Id.*

216. *Id*.

217. *Id.* (quoting Flynn v. Raytheon, 868 F. Supp. 383, 386 n.6 (D. Mass. 1994)) ("Congress did not exclude alcoholics from ADA protection as it did current illegal drug users.").

218. *See, e.g.*, Despears v. Milwaukee Cnty., 63 F.3d 635, 637 (7th Cir. 1995) (upholding the demotion of an employee with alcohol use disorder after he lost his driver's license from driving drunk).

219. Den Hartog v. Wasatch Acad. 129 F.3d 1076, 1087-88 (10th Cir. 1997) (citing 42 U.S.C. § 12114(c)(4)).

basis of "current use," such as firing someone for failing a drug test.[220] The strategy could provide a middle-ground which would help secure individuals with substance use disorders beyond alcohol in their employment and de-stigmatize certain substance use disorders by removing hierarchies, while leaving employers with much of their existing control.

3. Require Covered Entities to Provide a Last Chance Agreement to an Individual in Active Use Before Taking an Adverse Action

Finally, rather than make any substantive changes to the "current use exception," Congress could add a requirement that covered entities allow a person in active use the opportunity to seek rehabilitation and recovery before taking adverse action. This conciliation tool, known as a "last chance agreement," is already recognized in the EEOC's technical assistance manual.[221] Congress could amend the ADA to prevent employers from taking adverse action on the basis of a substance use disorder without first offering the chance for recovery, even if the person is currently using. This solution would not fundamentally alter the relationship between individuals with substance use disorders and their employers. The employer would still be able to act based on current use. However, giving employees a chance to seek treatment can provide the necessary cover to avoid discrimination that would otherwise go unchecked because of the "current use exception." Not only does this provide one extra step between an individual with a substance use disorder and potential unemployment or homelessness, it also encourages recovery where an unregulated employment action may not. Overall, although it does nothing to address the inherent inequity in the ADA's treatment of substance use disorders, a last chance agreement provision could help improve outcomes for individuals in active use.

B. Executive Action

If a legislative fix to the "current use exception" proves impossible, advocates should pursue regulatory solutions. Agencies have a significant influence in shaping the analytical framework around the "current use exception."[222] The EEOC's proffered timeline for measuring "current use" as a matter of "days or weeks" has done substantial damage to individuals seeking to prove that their recovery is

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220. *See* Kelly v. N. Shore–Long Island Jewish Health Sys., 166 F. Supp. 3d 274, 286–87 (E.D. N.Y. 2016) (concluding that firing an employee only hours after she revealed her alcohol use disorder was discriminatory).

221. U.S. Equal Emp. Opportunity Comm'n, Enforcement Guidance, The Americans with Disabilities Act: Applying Performance and Conduct Standards to Employees with Disabilities, 2008 WL 4786697, at *27 (Sept. 25, 2008) (citing Longen v. Waterous Co., 347 F.3d 685, 689 (8th Cir. 2003) ("[A] last chance agreement is valid where an employee receives something of value--e.g., employer does not terminate him for misconduct in exchange for the employee's voluntary agreement to refrain from using alcohol or drugs.").

222. Multiple courts have relied on EEOC guidance to define "currently engaging." *See, e.g.*, *Shafer*, 107 F.3d at 280 (citing EEOC Technical Assistance Manual, *supra* note 20; *see also* Zenor v. El Paso Healthcare Sys., Ltd., 176 F.3d 847, 856 (5th Cir. 1999); Suarez v. Pa. Hosp. of Univ. of Pa. Health Sys., No. 18-1596, 2018 WL 6249711, at *6 (E.D. Pa. Nov. 29, 2018).

stable.[223] If the goal is changing the treatment of individuals with substance use disorders under the ADA, change through the executive branch can induce preferable results in court and is less risky than a legislative fix.

There are three main avenues that regulatory and enforcement bodies can utilize to decrease the percentage of individuals who have faced wrongful discrimination but were denied legal recourse because they were not abstinent for a year at the time of the adverse action. They are: (1) revision of the regulations, (2) adjusting the technical assistance and interpretive guidance, and (3) active participation in litigation involving aggrieved individuals in recovery.

First, the EEOC and DOJ could consider revising their current regulations. Both the EEOC[224] and DOJ[225] are tasked with promulgating regulations implementing their respective titles of the ADA. Under EEOC guidance, "current use" means "the illegal use of drugs that has occurred recently enough to indicate that the individual is actively engaged in such conduct."[226] Courts have expressly relied on this definition in making their respective determinations on the plaintiff's recovery.[227] Even a slight addition, borrowing from elsewhere in the EEOC's Title I regulations, could go a long way in improving the standards by which recovery is judged.

When assessing whether an individual imposes a "direct threat" to the health and safety of himself or those around him, the EEOC regulations require that the determination rely on "reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence."[228] It is unclear why a similar evidentiary burden could not be adopted in the "current use" context. The amended regulations could read that "current use" means "the illegal use of drugs that has occurred recently enough to indicate that, based on reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence, the individual is actively engaged in such conduct." This would necessitate an individualized assessment based on objective medical evidence, unless the person is being physically caught in the act of using drugs. Not only would it require more than just a "reasonable belief," but it would reduce anti-substance use stigma by recognizing it as a medical condition.[229]

Second, the current EEOC guidance does little more to elucidate a workable definition of "current use" than the regulations.[230] The simplest solutions to the

223. Collings v. Longview Fibre Co., 63 F.3d 828, 833 (9th Cir. 1995) (citing EEOC regulations to determine that employees who were drug-free on the day of their discharge, but had been using illegal drugs in the weeks and months prior, were currently engaged in illegal drug use).

224. 42 U.S.C. § 12116 (2018).

225. 42 U.S.C. § 12134 (2018).

226. EEOC Technical Assistance Manual, *supra* note 20.

227. *See, e.g.*, Quinones v. Univ. of P.R., No. 14-1331 (JAG), 2015 WL 631327, at *4-5 (D.P.R. Feb. 13, 2015).

228. 29 C.F.R. § 1630.2(r) (2019). The determination must be made following an "individualized assessment of the individual's present ability to safely perform the essential functions of the job." *Id.*

229. Under the DOJ regulations, current use is "illegal use of drugs that occurred recently enough to justify a reasonable belief that a person's drug use is current or that continuing use is a real and ongoing problem." 28 C.F.R. § 36.104(3)(iii) (2019). The same provision from the direct threat analysis can be utilized for this definition as well.

230. EEOC Technical Assistance Manual, *supra* note 20 (reiterating the definition under the regulations and adding that current use "is not limited to the day of use, or recent weeks or days, in terms of an employment action.").

EEOC guidance are, first, to adopt the direct threat language from the regulations and eliminate the days or weeks metric. Focusing purely on lengths of time is harmful and reductive.[231] Adopting a standard which emphasizes an individualized inquiry through the lens of objective medical fact can inform whether someone's recovery is truly stable. The length of his or her period of abstinence may be informative, but it is not dispositive. This strategy could be criticized as doing little to actually clarify a workable standard for the exception. That may be true. Therefore, the proposed revisions to the guidance should be joined by strong EEOC and DOJ participation in litigation involving individuals with substance use disorders.

As it stands, individuals are required to file a complaint with the EEOC before they bring a claim of employment discrimination under Title I of the ADA.[232] The EEOC can choose to pursue the complaint or issue a right to sue letter, dismissing the agency's involvement in the case and allowing it to go forward privately. Emendation to the standards and regulations is not required. However, a new, narrower definition of "current" could embolden the EEOC to more vigorously pursue claims vindicating the rights of individuals in recovery. As of now, the EEOC participates in very few cases involving substance use disorders.[233] More zealous advocacy in this area can expand the number of individuals in recovery who qualify for the safe harbor by clarifying the EEOC's interpretation on its own guidance through application to the facts of a trial.

CONCLUSION

The ADA is fundamentally flawed. Though it provides some of the most comprehensive civil rights protections of any statute passed in the last fifty years, it still falls far short of its goal of promoting equality for all individuals with disabilities. It would offend most people's sense of justice to allow an employer to fire an individual with diabetes for a blood sugar spike, or a landlord to evict an individual with epilepsy after experiencing a seizure in their apartment. Yet, the ADA does not only allow for discrimination against individuals on the basis of their substance use disorders, the text implicitly encourages it.

A lapse in protection for individuals with substance use disorders who are currently engaging in the illegal use of drugs reflects the deeply ingrained stigma this country holds against people who suffer from the disease. There is clear medical consensus on addiction as a chronic brain disease, which has a strong influence over

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231. *See* Cohen, *supra* note 160, at 1422.

232. *See* Bonilla v. Muebles J.J. Alvarez, Inc., 194 F.3d 275, 277 (1st Cir. 1999) ("[T]he ADA mandates compliance with the administrative procedures specified in Title VII, and that, absent special circumstances, such compliance must occur before a federal court may entertain a suit that seeks recovery for an alleged violation of Title I of the ADA."). There is no administrative exhaustion requirement under Title II, even in public employment cases. *Quinones*, 2015 WL 631327, at *6. However, the DOJ is still empowered to bring suit against a public entity based on a violation of Title II. United States v. Florida, 938 F.3d 1221, 1244-45 (11th Cir. 2019).

233. *Cf.* EEOC v. Exxon Corp., 1 F. Supp. 2d 635 (N.D. Tex. 1998), *aff'd*, 202 F.3d 755 (5th Cir. 2000) (EEOC filing suit and claiming that the company's policy of barring rehabilitated substance abusers from safety-sensitive positions violated the Americans with Disabilities Act).

volition, executive functioning, and physical well-being.[234] However, even our disability rights laws treat substance use as a moral failing rather than a medical condition. The ADA's recognition of substance use disorders as disabilities were likely little comfort to the plaintiffs of *Smith*[235] and *Lejeune*.[236] If one can be written off as a "current user" who is unworthy of protections, despite having six months of sustained abstinence and a willingness to work, what good was the designation in the first place? Until this stigma is addressed and the "current use exception" is stricken from the United States Code, substance use disorders will remain second-class disabilities.

234. Kosten & George, *supra* note 18, at 13.

235. *See* Smith v. Eastman Kodak Co., No.95-4677, 1999 WL 33327051 (D.N.J. Oct. 7, 1999).

236. *See* Lejeune v. Omni Energy Servs. Corp., No. 6:09-CV-0194, 2010 WL 378305 (W.D. La. Jan. 29, 2010).