

# The ADA, FMLA, and the Illegal Use of Prescription Drugs at Work

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# UPDATE

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In Cooperation with the Governor's Council on Alcoholism & Drug Abuse and the New Jersey Department of Human Services

Update No. 70

Winter 2014

## The ADA, FMLA, and the Illegal Use of Prescription Drugs at Work

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A recent decision of the United States Court of Appeals for the Fifth Circuit provides insight into the Americans with Disability Act (ADA) and the Family Medical Leave Act (FMLA) as to employees misusing prescription drugs in the workplace.

*In Shirley v. Precision Castparts Corp., 726 F.3d 675 (5th Cir. 2013), the plaintiff requested medical leave to treat his addiction to prescription painkillers. The employer maintained a drug-free workplace policy that provided that any employee with a drug problem who rejected treatment, or who leaves the treatment program prior to being properly discharged, would be terminated.*

Shirley was granted leave to enroll in a rehabilitation facility for treatment. However, he requested discharge from the facility against the recommendation of the treating physician and returned to work. The employer notified Shirley that the early discharge was ground for termination under the drug-free policy, but permitted Shirley additional leave to re-enter the rehabilitation program for a second time. Upon re-entering the program, Shirley tested positive for painkillers, but insisted that he was only taking them in prescription doses. After detoxing in the program, he again requested discharge before completing the entire treatment program. Consequently, the employer terminated him for failure to complete the treatment program. Shirley then bought suit under both the ADA and FMLA.



On appeal, the Fifth Circuit addressed issues pertaining to the ADA, FMLA, and drug use. The ADA prohibits employers from discriminating against qualified individuals on the basis of a disability. A qualified individual is one who can perform the essential functions of the position with or without reasonable accommodations. However, the ADA excludes from the definition of qualified individual any person "currently engaged in the illegal use of drugs" at the time of the adverse employment decision that is made "on the basis of such use." The "illegal use of drugs" under the ADA includes the use of illegal street drugs as well as the illegal misuse of prescription and over-the-counter drugs. Further, the term "currently" includes drug use that is sufficiently recent to support an employer's reasonable belief that the drug abuse may be an ongoing problem. Courts have recognized that drug use in the weeks or even months prior to the adverse action may be characterized as "currently engaging."

However, the ADA also recognizes that employees engaged in illegal drug use may take steps to recover, and provides for safe harbors for former users who have sought appropriate treatment. Under this safe harbor provision, a former drug user will be entitled to ADA protection if the employee:

- (1) 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;
- (2) is participating in a supervised rehabilitation program and is no longer engaged in such use; or
- (3) is erroneously regarded as engaging in such use, but is not engaging in such use.

Thus, former drug users who meet the requirements of the safe harbor provision will not be restricted in their ability to succeed on an ADA claim, because they will be classified as qualified individuals.

The Court then rejected Shirley's ADA claim, finding that he was fired for failing to complete the drug treatment program as required by the employer, rendering him not a qualified individual because his drug use was current at the time of his termination. The Court also rejected Shirley's argument that he was a qualified individual under the ADA safe harbor provision, because the provision only applies to individuals that have been drug-free for a significant period of time.

The provisions do not apply to those individuals who have simply entered into a rehabilitation program before the adverse employment action is taken.

*...former drug users who meet the requirements of the safe harbor provision will not be restricted in their ability to succeed on an ADA claim, because they will be classified as qualified individuals.*

Additionally, an employee's leave to attend a rehabilitation program may also give rise to reinstatement rights under FMLA. The FMLA guarantees eligible employees up to twelve weeks of leave during any twelve-month period for family and personal medical issues. It also provides for a right to return



to work after a qualified absence into a position that the employee would have held but for the leave. If an employer denies reinstatement following a leave, it bears the burden of showing that an employee was not entitled to the position to which he seeks reinstatement. In such cases, the employer's prerogative to terminate an employee for legitimate reasons supersedes the employee's right to reinstatement.

In *Shirley*, the Court found that the plaintiff failed to present sufficient evidence to establish that the employer's stated for firing him was pretextual. Instead, Shirley was denied reinstatement for a legitimate reason -- his refusal to continue his FMLA leave for the purpose of completing the rehabilitation program.

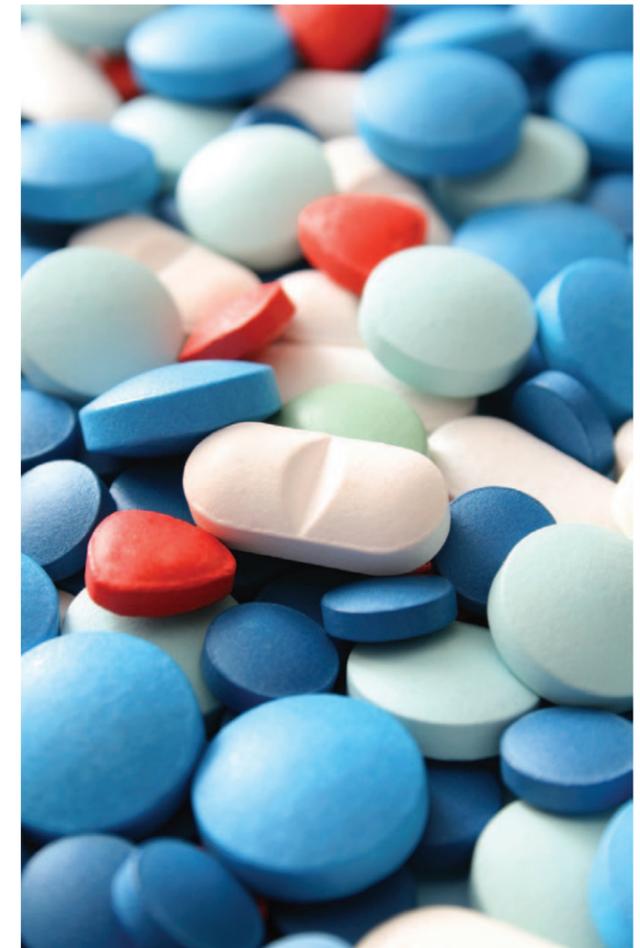
The *Shirley* decision demonstrates that employers may terminate an employee who is currently engaged in illegal drug use on the basis of that drug use. This includes the illegal use of prescription and over-the-counter drugs as well as the use of illegal street drugs. However, if the employee has completed a rehabilitation program or is currently attending one, the employer must determine whether the employee is protected under the ADA safe harbor provision. This determination must be made on a case-by-case basis, and entails examining the circumstances of the drug use and recovery to determine if the drug use is no longer a problem. If this analysis supports a reasonable belief that drug use

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is no longer a problem, then the individual is entitled to protection under the ADA.

To aid this analysis, employers should adopt workplace policies that are designed to ensure that individuals who have completed or are enrolled in a rehabilitation program are no longer engaged in illegal drug use. If the employer determines that the employee is currently engaging in illegal drug use or does not fall under the ADA safeguards because drug use may still pose a problem, then the employee's termination will not result in reinstatement rights under the FMLA. The employer's right to terminate the employee for legitimate drug-use related reasons will trump the employee's reinstatement rights under the FMLA.

As always, advice of competent counsel should be sought for any specific issue involving drug use in the workplace.



## About the Authors

**Stephen E. Trimboli, Esq.** has been recognized as a New Jersey Super Lawyer, and was named as an Employment Law Super Lawyer in 2008. He was the recipient of the 1996 County Service Award from the New Jersey Association of Counties; the 1994 Pace Setter Award from the National Public Employer Labor Relations Association, and the 1999 Paul Gallien Award from the National Council on Alcoholism and Drug Dependence, North Jersey Area.

Mr. Trimboli is admitted to practice in New Jersey, the District of Columbia, the New Jersey Federal District Court, the Second and Third Circuit Court of Appeals, and the United States Supreme Court.

**Jinkal Pujara** joined Trimboli & Prusinowski as an associate in 2013. She is a 2010 graduate of Rutgers University, where she earned her B.A. magna cum laude, in Labor Studies and Employment Relations as well as Psychology. She attended Seton Hall Law School, where she was the President of the Employment Law Forum and a member on the Appellate Advocacy Moot Court Board. Ms. Pujara graduated with the ABA-BNA Award for Excellence in the Study of Labor and Employment Law and was also the recipient of the Charles A. Sullivan Endowed Scholarship Award.

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