“Dealing with Drugs and Alcohol in the Workplace”

Labor and Employment Law Section Seminar

Nathan J. Overberg

Ahlers, Cooney, Dorweiler, Haynie, Smith & Allbee, P.C.

100 Court Avenue, Suite 600

Des Moines, Iowa 50309

Phone: 515-243-7611

E-mail: noverberg@ahlerslaw.com

Nathan J. Overberg is an Associate at the Ahlers Law Firm in Des Moines where he practices primarily in the area of employment law. He received his B.A. Summa Cum Laude in 1994 from Central College, Pella, Iowa, and his J.D. (with highest distinction) from the University of Iowa College of Law in 1997. While in law school he served as an Associate Editor for the Iowa Law Review, was a member of the National Moot Court Team, and was inducted as a member of the Order of the Coif. He was admitted to the Iowa Bar in 1997. Prior to joining the Firm, he served as law clerk to the Honorable Harold D. Vietor, Senior United States District Judge (1997-99).

I. Alcohol and Illegal Drug Use Under the Americans with Disabilities Act

A. Illegal Drug Use as a Disability

1. 42 U.S.C. 12114 - “Qualified Individual with a Disability”

a. For purposes of this subchapter, the term "qualified individual with a disability" shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

b. Rules of construction: Nothing in subsection (a) of this section shall be construed to exclude as a qualified individual with a disability an individual who -

(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 engaging in such use; or

(3) is erroneously regarded as engaging in such use, but is not engaging in such use;

except that it shall not be a violation of this chapter for a covered entity to adopt or administer reasonable policies or procedures, including, but not limited to, drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs.

2. Application of Statute

a. Recovered Addict not Automatically Covered.

(1) Record of Being an Addict - *Buckley v. Consolidated Edison Co.*, 127 F.3d 270, 272-73 (2nd Cir. 1997), vacated on other grounds at 155 F.3d 150.

(a) While former drug users are not *barred* from invoking the Act's protection under section 12114, they, like everyone else making a claim under the ADA, are required to demonstrate that they have a "disability" covered by the Act. They must, for example, show that they have an impairment that "substantially limits one or more . . . major life activities." *Id.* §§ 12102(2)(A). And the mere status of being a recovering alcohol or substance abuser does not, on its face, appear to amount to such a limitation.

(b) A plaintiff may also demonstrate a disability by proving that he has a "record of such an impairment." To qualify for coverage under this definition, the plaintiff must demonstrate that he was actually addicted to drugs or alcohol in the past, and that this addiction substantially limited one or more of his major life activities.

(2) Regarded as Being an Addict - *Zenor v. El Paso Healthcare Sys., Ltd.*, 176 F.3d 847 (5th Cir. 1999), and cases cited therein.

(a) A plaintiff's burden under the ADA is not satisfied merely by showing that the employer regarded him or her as a drug addict: the fact that a person is perceived to be a drug addict does not necessarily mean that person is perceived to be disabled under the ADA. The plaintiff must also show that the employer regarded the plaintiff's addiction as substantially limiting one of his or her major life activities.

(3) As the EEOC Interpretive Guidance explains: "It should be noted that this provision simply provides that certain individuals are not excluded from the definitions of "disability" and "qualified individual with a disability." Consequently, such individuals are still required to establish that they satisfy the requirements of these definitions in order to be protected by the ADA and this part. An individual erroneously regarded as illegally using drugs, for example, would have to show that he or she was regarded as a drug addict in order to demonstrate that he or she meets the definition of "disability" as defined in this part." 29 C.F.R. § 1630, App. 1630.3.

3. Current User vs. Former User

a. The status of drug users under the ADA bifurcates along the line of current and former drug abuse. Recovering addicts who have completed or are participating in a drug rehabilitation program (or have otherwise been rehabilitated) *and are no longer using drugs* are eligible for protection under the ADA if they can demonstrate that they have a disability as defined by the act. Thus, the first inquiry in evaluating a drug user's ADA claim is whether he was engaged in current use of illegal drugs at the time of his termination.

b. In its Interpretive Guidance, the EEOC draws the line between former and current illegal drug use as follows: “The term "currently engaging" is not intended to be limited to the use of 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 the illegal use of drugs that has occurred recently enough to indicate that the individual is actively engaged in such conduct.” 29 C.F.R. 1630 App. § 1630.3 (1996).

c. Courts have interpreted the provision as requiring a sustained period of abstinence from drug use for at least several months.

(1) *Zenor v. El Paso Healthcare Sys., Ltd.*, 176 F.3d 847 (5th Cir. 1999) (employee did not fall within safe harbor of section 12114 where the employee was only sober for five weeks, even though he had voluntarily admitted himself into rehabilitation);

(2) *Collings v. Longview Fibre Co.*, 63 F.3d 828, 833 (9th Cir. 1995) (finding periodic use of drugs during weeks and months prior to discharge as current use);

(3) *Baustian v. Louisiana*, 910 F. Supp. 274 (E.D.La. 1996) (finding seven-week period of abstinence insufficient);

(4) *Herman v. City of Allentown*, 985 F. Supp. 569 (E.D.Pa. 1997) (holding nine-month abstinence is not current use).

(5) *Shafer v. Preston Memorial Hosp. Corp.*, 107 F.3d 274 (4th Cir. 1997) (finding periodic use of drugs during weeks and months prior to discharge as current use);

(6) *Wormley v. Arkla, Inc.*, 871 F. Supp. 1079, 1080 (E.D.Ark. 1994) (defining current use as "sufficiently recent to justify an employer's reasonable belief that it was an ongoing problem rather than a problem that was in the past").

(7) *Smith v. Eastman Kodak Co.*, 1999 U.S. Dist. LEXIS 17506 (D.N.J. 1999), aff’d by 263 F.3d 159 (3rd Cir. 2001) (holding that drug use within six months of his termination was a period "sufficiently recent to justify [the employer’s] reasonable belief that it was an ongoing problem rather than a problem that was in the past.").

d. Employers are entitled to seek reasonable assurances that no illegal use of drugs is occurring or has occurred recently enough so that continuing use is a real and ongoing problem. The reasonable assurances that employers may ask applicants or employees to provide include evidence that the individual is participating in a drug treatment program and/or evidence, such as drug test results, to show that the individual is not currently engaging in the illegal use of drugs. 29 C.F.R. § 1630, App. 1630.3.

4. Definitions
    a. 42 U.S.C. 12111(6) - Illegal use of drugs
        (1) (A) The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act (21 U.S.C. 801 et seq.). Such 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.
        (2) (B) The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812).

B. Alcohol Abuse as a Disability

1. Individuals disabled by alcoholism are entitled to the same protections accorded to all other individuals with disabilities. 29 C.F.R. Part 1630 App. § 1630.16(b).

2. Current use of alcohol does not disqualify alcoholic from protection.

    a. “Thus, the plain language of § 12114(a) does not exclude alcoholics from ADA coverage because alcohol is not a "drug" within the meaning of the statute. The statute treats drug addiction and alcoholism differently, and an alcoholic is not automatically excluded from ADA protection because of current use of alcohol.” *Mararri v. WCI Steel*, 130 F.3d 1180 (6th Cir. 1997).

3. Alcoholic Must Still Satisfy Definition of Disability
    a. Neither the EEOC nor the courts have classified alcoholism as a per se disability. *See Burch v. Coca-Cola Co.*, 119 F.3d 305, 316-18 (11th Cir. 1997).
        (1) Holding that recovering alcoholic had not established that he had a disability under the ADA where he produced no evidence that his addiction had interfered with major life activities or that "the effects of his alcoholism-induced inebriation were qualitatively different than those achieved by an overindulging social drinker.”
        (2) Finding no evidence in legislative history that legislature intended to allow alcoholics to avoid rigors of disability definition.
        (3) Concluding the fact that alcoholism was serious to require treatment does not establish a record of disability. Need evidence that prior abuse of alcohol substantially impaired

major life activity.

C. Medical examinations and inquiries

1. In general - 42 U.S.C. § 12112(d);

a. The prohibition against discrimination * * * shall include medical examinations and inquiries.

b. Preemployment

(1) Except as provided [below], a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(2) A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

(a) 29 C.F.R. § 1630.14 - Acceptable pre-employment inquiry. A covered entity may make pre-employment inquiries into the ability of an applicant to perform job-related functions, and/or may ask an applicant to describe or to demonstrate how, with or without reasonable accommodation, the applicant will be able to perform job-related functions.

c. Employment entrance examination

(1) A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if -

(a) all entering employees are subjected to such an examination regardless of disability;

(b) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that -

i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

iii) government officials investigating

compliance with this chapter shall be provided relevant information on request; and

(c) the results of such examination are used only in accordance with this subchapter.

d. Examination and inquiry

(1) A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(2) A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

2. Special Rules For Drug Testing

a. 42 U.S.C. § 12114(d)

(1) In general - For purposes of this subchapter, a test to determine the illegal use of drugs shall not be considered a medical examination.

(2) Construction - Nothing in this subchapter shall be construed to encourage, prohibit, or authorize the conducting of drug testing for the illegal use of drugs by job applicants or employees or making employment decisions based on such test results.

b. 42 U.S.C. § 12114(b)

(1) It shall not be a violation of this chapter for a covered entity to adopt or administer reasonable policies or procedures, including, but not limited to, drug testing, designed to ensure that [a former substance abuser] is no longer engaging in the illegal use of drugs. 42 U.S.C. 12114(b).

c. 29 C.F.R. §1630.16

(1) “For purposes of this part, a test to determine the illegal use of drugs is not considered a medical examination. Thus, the administration of such drug tests by a covered entity to its

job applicants or employees is not a violation of § 1630.13 of this part. However, this part does not encourage, prohibit, or authorize a covered entity to conduct drug tests of job applicants or employees to determine the illegal use of drugs or to make employment decisions based on such test results."

d. 29 C.F.R. § 1630 App. 1630.16(c).

(1) "This provision reflects title I's neutrality toward testing for the illegal use of drugs. Such drug tests are neither encouraged, authorized nor prohibited. The results of such drug tests may be used as a basis for disciplinary action. Tests for the illegal use of drugs are not considered medical examinations for purposes of this part. If the results reveal information about an individual's medical condition beyond whether the individual is currently engaging in the illegal use of drugs, this additional information is to be treated as a confidential medical record. For example, if a test for the illegal use of drugs reveals the presence of a controlled substance that has been lawfully prescribed for a particular medical condition, this information is to be treated as a confidential medical record. See House Labor Report at 79; House Judiciary Report at 47."

e. Case Law

(1) *Buckley v. Consolidated Edison Co.*, 155 F.3d 150 (2nd Cir. 1998)

(a) We think it clear, however, that the more frequent testing of employees who have been identified as former substance abusers is not prohibited. As indicated above, the Act provides that "drug testing, designed to ensure that [a former substance abuser] is no longer engaging in the illegal use of drugs," "shall not be a violation of [the Act]." 42 U.S.C.§ 12114(b). And unlike other provisions of the Act governing certain other types of examinations, § 12114 does not provide that an employer cannot test former substance abusers for the illegal use of drugs without also testing those who have not been so identified. * * *

(b) Given the provisions of § 12114 indicating that an employer may lawfully test former substance abusers for the illegal use of drugs without testing other employees at all, we conclude that an employer does not discriminate in violation of the

ADA by administering tests for the illegal use of drugs to former substance abusers more frequently than it administers such tests to those not identified as former substance abusers.

D. Authority of Covered Entity with Respect to Drug and Alcohol-Related Conduct.

1. 42 U.S.C. § 12114; 29 C.F.R. 1630.16 - A covered entity -

   a. may prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;

   b. may require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;

   c. may require that employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 et seq.);

   d. 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

2. 29 C.F.R. § 1630 App. 1630.16(b) Regulation of Alcohol and Drug.

   a. This provision permits employers to establish or comply with certain standards regulating the use of drugs and alcohol in the workplace. It also allows employers to hold alcoholics and persons who engage in the illegal use of drugs to the same performance and conduct standards to which it holds all of its other employees. **Individuals disabled by alcoholism are entitled to the same protections accorded other individuals with disabilities under this part.** As noted above, individuals currently engaging in the illegal use of drugs are not individuals with disabilities for purposes of part 1630 when the employer acts on the basis of such use.

3. Accommodations

   a. Treatment

   b. Leave

   c. Firm choice between treatment and discipline. *See Office of Senate Sergeant at Arms v. Office of Senate Fair Employment Practices*, 95 F.3d 1102 (Fed. Cir. 1996).

   d. Fresh start not required (retroactive accommodation). *See Office of Senate Sergeant at Arms v. Office of Senate Fair Employment Practices*, 95 F.3d 1102 (Fed. Cir. 1996).

II. Alcohol and Illegal Drug Use Under the Rehabilitation Act

A. Drug Use as Handicap

1. Definitions -

a. 29 U.S.C. 705(10) - Drug and illegal use of drugs.

(1) The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812).

(2) The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act [21 USCS § 801 et seq.]. Such 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 [21 USCS § 801 et seq.] or other provisions of Federal law.

b. 29 U.S.C. § 705(20) Individual with a disability.

(1) 29 U.S.C. § 705(20)(C)

(a) In general - exclusion of individuals engaging in drug use. For purposes of title V [29 USCS § 791 et seq.], the term "individual with a disability" does not include an individual who is currently engaging in the illegal use of drugs, when a covered entity acts on the basis of such use.

(b) Exception for individuals no longer engaging in drug use. Nothing in clause (i) shall be construed to exclude as an individual with a disability an individual who –

i) 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;

ii) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

iii) is erroneously regarded as engaging in such use, but is not engaging in such use;

except that it shall not be a violation of this Act for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual

described in subclause (I) or (II) is no longer engaging in the illegal use of drugs.

2. Alcohol Abuse as Disability

a. Statutory Definition

(1) 29 U.S.C. § 705(20)(C)(v) - Employment; exclusion of alcoholics. For purposes of sections 503 and 504 [29 USCS § 793, 794] as such sections relate to employment, the term "individual with a disability" does not include any individual who is an alcoholic whose current use of alcohol prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol abuse, would constitute a direct threat to property or the safety of others.

b. Case Law

(1) *Williams v. Widnall*, 79 F.3d 1003, 1005-06 (10th Cir. 1996) (recognizing that former section 706(8)(C)(v) excludes certain alcoholics from the definition of a disabled person).

B. 29 U.S.C. §791(g)

1. Standards applicable to complaints. The standards used to determine whether this section has been violated in a complaint alleging nonaffirmative action employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment.

III. Alcohol and Illegal Drug Use Under the Iowa Civil Rights Act

A. The Iowa Supreme Court has concluded that alcoholism can be a disability under a municipal ordinance that parallels the Iowa Civil Rights Act - *Consolidated Freightways, Inc. v. Cedar Rapids Civil Rights Com.*, 366 N.W.2d 522 (Iowa 1985)

1. “So defined, it is clear that alcoholism can be a disability under the Cedar Rapids ordinance. * * *

Unlike the situation with transsexualism in *Sommers*, chronic alcoholism as defined in this opinion and in the record in this case is a physical or mental impairment that actually interferes with the individual's social or economic functioning in the community or interferes with the individual's self-control. By definition, alcoholism has an inherent propensity to interfere with major life activities. It exists separately from the perceptions of others. * * *

Whatever label is applied to the condition to be treated, the condition described in the definitions of chronic alcoholism and substance abuse plainly comes within the definition of "disability" in the Cedar Rapids ordinance. We therefore hold that alcoholism can constitute a protected disability under the ordinance. It is a substantial handicap, but if the alcoholic remains sober the disability should not prevent the individual from performing his or her job in a reasonably competent and satisfactory manner."

IV. Conduct vs. Status Distinction in Causation Analysis

A. ADA

1. Statutory Distinction

a. The ADA and its interpretive regulations specifically state 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.

42 U.S.C. § 12114(c)(4); *see also* 29 C.F.R. § 1630.16 (b)(4).

2. Case Law

a. Every court of law that has reviewed ADA claims involving alcohol-related conduct has concluded that firing an employee for conduct associated with the use of alcohol does not constitute disability discrimination, even if the employee is an alcoholic.

(1) *Salley v. Circuit City Stores, Inc.*, 160 F.3d 977, 981 (3rd Cir. 1998), the plaintiff alleged that he was discharged because of his alcohol and drug problem in violation of the ADA and the Pennsylvania Human Rights Act. The employer presented evidence that the plaintiff was in fact discharged because of his admitted drug- and alcohol-related conduct. The court of appeals affirmed the dismissal of the plaintiff's claims after concluding that no reasonable jury could conclude that the plaintiff was discharged for his disability rather than his drug- and alcohol-related conduct. See id.

(2) In *Mararri v. WCI Steel, Inc.*, 130 F.3d 1180, 1183 (6th Cir. 1997), the plaintiff alleged that he was discharged based upon his status as an alcoholic in violation of the ADA when he was terminated for violating a Last Chance

Agreement. The court of appeals rejected this claim and joined with the other courts which have noted the general rule that "while the ADA 'protects an individual's status as an alcoholic,' merely being an alcoholic does not insulate one from the consequences of one's actions." *See id.* at 1182-83 and cases cited therein. The court of appeals concluded that "the district court properly distinguished between [the plaintiff's] conduct (violating the terms of the L.C.A.) and his alcoholic condition. Thus, he was not terminated for being an alcoholic." *Id.* at 1185.

(3) *See also Pernice v. City of Chicago*, 237 F.3d 783 (7th Cir. 2001)(holding employee plead himself out of a case where he plead that he was terminated for possessing illegal drugs)*; Nielsen v. Moroni Feed Co.*, 162 F.3d 604, 608-09 (10th Cir. 1998) (recognizing that unsatisfactory conduct caused by alcoholism does not receive protection under the ADA); *Larson v. Koch Refining Co.*, 920 F. Supp. 1000, 1004 (D. Minn. 1995) (same).

B. Rehabilitation Act

1. Case Law

a. *Despears v. Milwaukee County*, 63 F.3d 635 (7th Cir. 1995). In *Despears*, the Seventh Circuit Court of Appeals confirmed that an employer's decision to demote a maintenance worker whose driver's license was revoked after he was convicted a fourth time of driving under the influence of alcohol did not constitute discrimination ***because of*** the employee's disability (alcoholism). Despears argued that alcoholism caused him to drive under the influence of alcohol; driving under the influence of alcohol caused him to lose his driver's license; losing his driver's license caused him to be demoted; therefore, alcoholism was the cause of his being demoted in violation of the Rehabilitation Act. In rejecting Despears' argument, the Court of Appeals concluded that to impose liability under the Rehabilitation Act under such circumstances would unmistakenly undermine the laws that regulate dangerous behavior. It would give alcoholics a privilege to avoid some of the normal sanctions for criminal activity. Thus, the court found that while it is true that the Rehabilitation Act requires the employer to make a reasonable accommodation of an employee's disability, it is not a reasonably required accommodation to overlook infractions of law.

b. *Maddox v. University of Tennessee*, 62 F.3d 843 (6th Cir. 1995). The Sixth Circuit held that employers subject to the Rehabilitation Act are permitted to discipline employees for egregious conduct, including off-duty drunk-driving, regardless of a disability of alcoholism. *See id.* (appropriate to discharge college football

coach for drunk driving even if he was an alcoholic).

c. *Newland v. Dalton*, 81 F.3d. 904 (9th Cir. 1996), the Ninth Circuit Court of Appeals found that a termination based on conduct rather than the disability itself is valid and does not violate the Rehabilitation Act, stating: "Alcoholism is a recognized handicap, * * * but the majority of courts have held that while the Rehabilitation Act protects employees from being fired solely because of their disability, they are still responsible for conduct which would otherwise result in their termination." *Id.* at 906.

d. *Williams v. Widnall*, 79 F.3d. 1003, 1007 (10th Cir. 1996), the Tenth Circuit Court of Appeals stated the following concerning section 791 of the Rehabilitation Act: "We cannot adopt an interpretation of the statute which would require an employer to accept egregious behavior by an alcoholic employee when that same behavior, exhibited by a nondisabled employee, would require termination. * * * We agree with the view that 'the Act does not protect alcoholics or drug addicts from the consequences of their misconduct.'" 1 F.3d. at 258. *See id.* at 1006-7 (extending the dichotomy to section 791 of the Rehabilitation Act, which is intended to make the federal government a model employer of the handicapped).

C. Iowa Civil Rights Act

1. No Case Law

2. Why Adopt Federal Approach?

a. Iowa Code section 216.6(1)(a) is Iowa's counterpart to the Americans with Disabilities Act, 42 U.S.C. § 12112(a), the federal law that prohibits discrimination in employment based on disability. *See Fuller v. Iowa Department of Human Services*, 576 N.W.2d 324, 329 (Iowa 1998). Thus, in considering a disability discrimination claim brought under Iowa Code chapter 216, Iowa courts look to the ADA and cases interpreting its language. *See id.*; *Bearshield v. John Morrell & Co.*, 570 N.W.2d 915, 918 (Iowa 1997); *see also Helfter v. United Parcel Service, Inc.*, 115 F.3d 613, 616 (8th Cir. 1997). Iowa courts are also guided by the underlying federal regulations established by the Equal Employment Opportunity Commission ("EEOC"), the agency responsible for enforcing the ADA, as well as interpretive guidance offered by that agency. *See Fuller*, 576 N.W.2d at 329-33 & n.3; *Bearshield*, 570 N.W.2d at 918; *Wheaton v. Ogden Newspapers, Inc.*, 66 F. Supp. 2d 1053, 1067 & n.2 (N.D. Iowa 1999). Finally, in interpreting and applying the ICRA's prohibition on disability discrimination, Iowa courts continue to rely on cases interpreting the Rehabilitation Act, 29 U.S.C. § 701-797(b), because of its similarities to both the ADA and the ICRA. *See Fuller*, 576 N.W.2d at 329; *see also Bearshield*, 570 N.W.2d at 918; *Boelman*

v. Manson State Bank, 522 N.W.2d 73, 79 (Iowa 1994). All of these sources routinely relied upon by Iowa courts support a conclusion that an employer may terminate an alcoholic employee for the consequences of his conduct even if the conduct is related to his alcoholism.

b. The Iowa Supreme Court has recently noted, in another employment context, that "the abuse of alcohol is not an excuse for misconduct." *See Dolan v. Civil Service Comm. of the City of Davenport*, 634 N.W.2d 657, 665 (Iowa 2001). In *Dolan*, a fireman was discharged by the city of Davenport for past and current misconduct, most of which was associated with the off-duty use or abuse of alcohol. *See id.* at 664. The final act which precipitated his termination occurred when Dolan wrecked his car, left the scene of the accident, was tracked down by police and resisted when they attempted to arrest him for OWI. *See id.* at 661. The City based its decision to terminate Dolan on the final act of misconduct, his extensive disciplinary history, and the belief that Dolan would likely lose his driver's license as a result of the OWI charge. Following his discharge, Dolan voluntarily sought and successfully completed substance abuse treatment. After the civil service commission upheld Dolan's discharge, the district court concluded that his misconduct did not warrant a discharge. In support of its conclusion, the district court noted that Dolan was "'a recovering alcoholic who has finally recognized the underlying cause of his off-duty misconduct.'" *Id.* at 661. On appeal, this Court reinstated the City's decision to discharge Dolan for his off-duty, alcohol-related misconduct. In determining that Dolan's discharge was warranted, this Court reviewed whether any extenuating circumstances mitigated the misconduct. *See id.* at 664. The Court expressly held that Dolan's prior alcohol abuse and his alleged recovery did not mitigate Dolan's misconduct. Instead, this Court expressly held that "the abuse of alcohol is not an excuse for misconduct." *See id.* at 665. Application of the conduct/status distinction would be a natural extension of the holding in *Dolan.*

c. The federal approach is better public policy. The courts that have adopted the majority rule refuse to treat an employee's alcoholism as a "get-out-of-jail-free-card." In other words, the courts are unwilling to allow an alcoholic to avoid those consequences of his conduct to which every other individual is made to suffer. As Judge Posner cogently explained in *Despears v. Milwaukee County*: To impose liability under the Americans with Disabilities Act or the Rehabilitation Act in [circumstances such as those in this case] would indirectly but unmistakably undermine the laws

that regulate dangerous behavior. It would give alcoholics and other diseased or disabled persons a privilege to avoid some of the normal sanctions for criminal activity. It would say to an alcoholic: We know it is more difficult for you to avoid committing the crime of drunk driving than it is for healthy people, and therefore we will lighten the sanction by letting you keep your job in circumstances where everyone else who engaged in the same criminal behavior would lose it. The refusal to excuse, or even alleviate punishment of, the disabled person who commits a crime under the influence as it were of his disability but not compelled by it and so not excused by it in the eyes of the criminal law is not "discrimination" against the disabled; it is a refusal to discriminate in their favor. *Id.* at 637.

3. Contrary Authority

a. *Teahan v. Metro-North Commuter R. Co.*, 951 F.2d 511 (2nd Cir. 1991). An alcoholic employee was terminated for excessive absenteeism. The district court granted the employer summary judgment based upon the employee's failure to show that he was terminated "because of " his disability as opposed to his absenteeism. *See id.* at 514. The court of appeals reversed, concluding that "if **the only reason** for his absenteeism was appellant's alcoholism," he may be able to prove he was fired "solely by reason of" his handicap. *See id.* at 515 (emphasis added). The court concluded that the employee's "contention that he was fired because he was an alcoholic presents a question of fact as to whether his excessive absenteeism was caused **solely** by his substance abuse." *Id.* at 515. Although whether absenteeism is caused solely by alcoholism may be a fact issue, the courts that have addressed the issue have concluded that driving while intoxicated and other illegal or egregious behavior is not, **as a matter of law**, caused **solely** by an individual's alcoholism. In *Despears*, for example, the court reasoned: * * * Despears alcoholism was not the only cause of his being convicted of drunk driving. Another cause was his decision to drive while drunk. * * * His disability concurred with a decision to drive while drunk to produce the loss of license and resulting demotion. The disability contributed to but did not compel the action that resulted in the demotion. *Despears*, 63 F.3d 636-37; *see also Maddox*, 62 F.3d at 848 (concluding that "while alcoholism might compel Maddox to drink, it did not compel him to operate a motor vehicle or engage in the other inappropriate conduct reported.").

b. *Boelman v. Manson State Bank*, 522 N.W.2d 73, 19, 81 (Iowa 1994). In *Boelman*, the employer purported to terminate the plaintiff for performance problems, i.e., the plaintiff, a vice

president of the bank, did not get along well with his staff or customers. *See Boelman*, 522 N.W.2d at 76-77. The district court dismissed the plaintiff's ICRA and Rehabilitation Act claims on multiple grounds, including that the plaintiff failed to show he was qualified for his position and failed to prove he was discharged "because of" his disability. *See id.* at 77. The Iowa Supreme Court affirmed the dismissal of the claims based upon the first ground – the plaintiff was not otherwise qualified for his position. Accordingly, the Court did not need to address the "because of" element. Nonetheless, the Iowa Supreme Court noted its disagreement with the trial court's analysis of the "because of" element. Interestingly, in addressing its disagreement with the district court's "because of" analysis, this Court applied a different analysis to the Rehabilitation Act claim than it applied to the ICRA claim. Only in its discussion of the Rehabilitation Act claim did the Court cite the *Teahan* decision for the proposition that an employer who fires an employee based on disability-related performance problems may be found to have terminated the employee "solely by reason of" the disability for purposes of section 504. *See Boelman*, 522 N.W.2d at 77.

(1) The Court did not cite, approvingly or otherwise, *Teahan* nor any proposition contained therein in its discussion of the ICRA claim. *See id.* at 77-78. Accordingly, *Boelman* is not "binding precedent" on the application of the conduct/status distinction under ICRA.

(2) Moreover, the disability at issue in *Boelman* was not drug abuse or alcoholism, but rather multiple sclerosis. In addition, the manifestation of the disability in *Boelman* was not criminal conduct or egregious behavior, but rather poor performance. Thus, as in *Teahan*, the important policy considerations discussed in the *Despears* decision were not at issue in *Boelman*.

(3) Finally, in *Boelman*, as in *Teahan*, there was an issue of fact as to whether the poor performance was caused solely by the disability.

V. Duty to Accommodate Alcohol or Drug-Related Conduct

A. Generally, the disability discrimination laws do not require an employer to accommodate the consequences of an alcoholic's misconduct. *See Salley v. Circuit City Stores, Inc.*, 160 F.3d 977, 981 (3rd Cir. 1998); *Den Hartog v. Wasatch Academy*, 129 F.3d 1076, 1086 (10th Cir. 1997); *Despears*, 63 F.3d. at 637 (recognizing that it is not a reasonably required accommodation to overlook infractions of law).

B. Although refusing to deviate from a disability-neutral policy may be found discriminatory in other circumstances, Congress and the courts have decided to

treat drug and alcohol addiction differently from other disabilities by ensuring that employers do not have to go through the accommodation process in these cases. *See Salley*, 160 F.3d at 981. Thus, the uniform application of a policy does not create an inference of discrimination. *See id.*; *see also Pernice v. City of Chicago*, 237 F.3d 783, 785 (7th Cir. 2001); *Burch v. Coca-Cola Co.*, 119 F.3d 305, 319 n.14 (5th Cir. 1997).

1. This principle was applied in *Leary v. Dalton*, 58 F.3d 748, 749 (1st Cir. 1995). In *Leary*, a former civilian employee of the Navy was removed from his position for "excessive unauthorized absence" after he was denied requested leave for the time that he spent in jail following his arrest for driving while intoxicated. *Id.* at 749. The former employee filed suit, alleging that he was an alcoholic and that the Navy violated the Rehabilitation Act by terminating him on the basis of his disability. *See id.* at 749-50. The court dismissed the former employee's claim as a matter of law. The court concluded that the employee was placed on unauthorized leave status, denied leave for incarceration, and discharged for excessive unauthorized absence, all in accordance with established Navy policies. *See id.* The court held that even if the Navy had been aware of the employee's alcoholism, it could reasonably apply its no-leave-for-incarceration policy to all of its employees, disabled and nondisabled alike, without violating the Rehabilitation Act. *See id.* at 754. The Rehabilitation Act "neither prevents employers from holding persons suffering from alcoholism to reasonable rules of conduct, nor protects alcoholics from the consequences of their own misconduct." *Id.* at 753.
2. An employee who does not come to work on a regular basis is not "qualified," and an employer is not obligated to accommodate absenteeism attributable to alcoholism. *See Smith v. Davis*, 248 F.3d 249 (3rd 2001).

VI. Alcohol and Drug Use As a "Serious Health Condition" Under the FMLA

A. Treatment vs. Current Use

1. Rule: Substance abuse may be a serious health condition if the conditions of this section are met. However, FMLA leave may only be taken for treatment for substance abuse by a health care provider or by a provider of health care services on referral by a health care provider. On the other hand, absence because of the employee's use of the substance, rather than for treatment, does not qualify for FMLA leave. 29 C.F.R. § 825.114(d).
    a. **"Health Care Provider"** A "health care provider" includes, but is not limited to, a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or a podiatrist, dentist, clinical psychologist, optometrist, or chiropractor (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice in the State and performing within the scope of his or her practice as defined under State law; or a nurse practitioner, nurse-

midwife or clinical social worker who is authorized to practice under State law and who is performing within the scope of his or her practice as defined under State law. A Christian Science practitioner is a health care provider to the extent defined under regulations issued by the U.S. Department of Labor. A Health Care Provider is also any health care provider from whom an employer or the employer's group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits.

2. Application of Rule
   a. *Sloop v. ABTCO, Inc.*, 178 F.3d 1285, full text at 1999 U.S. App. Lexis 8600 (4th Cir. 1999).
      (1) Affirming summary judgment for employer where employee was terminated due to absence from work caused by use or consumption of alcohol not treatment for alcoholism.
      (2) Rejecting argument that 29 C.F.R. § 825.114(d) conflicted with provisions of FMLA granting employee unpaid leave for treatment of his serious health condition. The court gave weight to Department of Labor's interpretation of "serious health condition" and noted that its interpretation with respect to alcoholism is consistent with other labor laws such as the ADA which protects the condition of alcoholism but not misconduct arising from the use of alcohol.
   b. *Chalimoniuk v. Interstate Brands Corp.*, 172 F. Supp. 2d 1055 (S.D. Ind. 2001)
      (1) If the plaintiff's absences were due to his substance abuse and not for treatment thereof, his absences would not be covered under the FMLA, permitting the employer to lawfully terminate his employment since the absences were not covered under the FMLA.
      (2) "An employee who fraudulently obtains FMLA leave from an employer is not protected by the FMLA's job restoration or maintenance of health benefits provisions." 29 C.F.R. §825.312(g).
   c. *Jeremy v. Northwest Ohio Development Center*, 33 F. Supp.2d 645 (N.D. Ohio 1999), aff'd by, 210 F.3d 372, 2000 U.S. App. LEXIS 6202 (6th Cir. Ohio 2000).
      (1) "While substance abuse may qualify as a serious health condition, FMLA leave "may only be taken for treatment for substance abuse by a health care provider or by a provider of health care services on referral by a health care provider. . . . Absence because of the employee's use of the

substance, rather than for treatment, does not qualify for FMLA leave." 29 C.F.R. §§ 825.114(d). Thus, plaintiff was entitled to leave for treatment of alcoholism, but not for periods of absence resulting from the use of alcohol."

(2) "A review of the facts discloses no instance when plaintiff requested a leave of absence for treatment of alcoholism. Any requests that he did make, both before and during his incarceration, were for periods of time he spent in jail. Incarceration for a DUI results from the use of alcohol and is clearly not treatment. See *Maddox v. University of Tennessee*, 62 F.3d 843 (6th Cir. 1995) ("while alcoholism might compel [a person] to drink, it [does] not compel him to operate a motor vehicle"). Therefore, defendant properly denied FMLA leave."

B. Employee Rights.

1. In general, the FMLA (29 U.S.C. § 2612-15)-
   a. entitles eligible employees to take up to twelve weeks of unpaid leave in qualifying situations
   b. entitles eligible employees the right to maintain health benefits and other employment-related benefits while on leave,
   c. entitles eligible employees to the right to be reinstated to their previous position or an equivalent position at the end of the leave.
   d. makes it unlawful for an employer to interfere with, restrain, or deny the exercise of any of these rights.
      (1) An employee may also take FMLA leave to care for an immediate family member who is receiving treatment for substance abuse. The employer may not take action against an employee who is providing care for an immediate family member receiving treatment for substance abuse. 29 C.F.R. 825.112(g).
   e. prohibits an employer from retaliating against an employee for engaging in activity protected by the FMLA.

C. Employer's Rights - 29 C.F.R. 825.112(g)

1. The employer may not take action against the employee because the employee has exercised his or her right to take FMLA leave for treatment. However, if the employer has an established policy, applied in a non-discriminatory manner that has been communicated to all employees, that provides under certain circumstances an employee may be terminated for substance abuse, pursuant to that policy the employee may be terminated whether or not the employee is presently taking FMLA leave.
   (1) Application of policy exception in *Smith v. Eastman Kodak Co.*, 1999 U.S. Dist. LEXIS 17506 (D.N.J. 1999), aff'd by 263 F.3d 159 (3rd Cir. 2001).

VII. Alcohol and Drug Use As "Misconduct" Under Iowa's Unemployment Compensation Act

A. A claimant is disqualified from unemployment benefits if the claimant has been discharged for misconduct. Iowa Code § 96.5(2).

1. Misconduct is a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision [is] limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute. Iowa Admin. Code r. 871-24.32(1)(a).

B. Failure to complete alcohol abuse treatment program pursuant to company policy is not misconduct disqualifying the employee from unemployment benefits if the employee could not afford to pay for the treatment. *Breithaupt v. Employment Appeal Board*, 453 N.W.2d 532 (Iowa Ct. App. 1990)

1. It is without question employers have the right to expect a drug-free workplace, and when an employer is required by statute to provide and employee with substance abuse treatment, then an employee's refusal to participated in the program should be regarded as willful disregard of an employer's interests.
2. HOWEVER, the court was not willing to find an employee has to jeopardize his family's financial security and use his entire earnings to seek substance abuse treatment. "Due to the Hobson's choice presented to [the employee] – apply all of your earnings toward substance abuse treatment or lose your job – we do not find misconduct in this case." Id. (cost for two days of treatment more than employee makes in two days).

C. Truck driver's refusal to undergo employer sponsored treatment for alcoholism which manifested itself only off duty constituted misconduct disqualifying him from unemployment benefits. *Reigelsberger v. Employment Appeal Board*, 500 N.W.2d 64 (Iowa 1993).

1. Without a substance abuse policy on the part of the employer, courts appear to require some type of on-the-job impairment or harm to the employer's interests before an employee's refusal to participate in treatment mandated by an employer will be held to constitute misconduct.
2. However, under the circumstances of this case, i.e where the employee had

an obvious drinking problem and his job involved driving a truck on the highway, his refusal to undergo treatment was misconduct even though the employer did not have a substance abuse policy, did not require treatment pursuant to the drug testing law, and the employee's problem did not manifest itself at work.

3. "It would be poor policy to prohibit an employer from requiring employees to face up to necessary treatment for alcoholism. Such a prohibition would discourage the hiring of persons with alcoholism."

D. Misconduct must be volitional. *Huntoon v. Iowa Dep't of Job Services*, 275 N.W.2d 445 (Iowa 1979)

1. Misconduct connotes volition. A failure in good performance which results from inability or incapacity is not volitional and is thus not misconduct.
2. Question is not whether alcoholism was voluntary but whether the conduct resulting in discharge was voluntary.
3. Conduct induced by alcoholism may or may not be voluntary in the law, depending upon the degree of impairment caused by the alcoholism. It is only when the impairment is sufficient to deprive the individual of the ability to abstain from the intoxication-caused work lapse that the individual does not incur the disqualification for misconduct.

E. Refusal to undergo treatment required by employer after positive drug test resulting from valid drug screening under Iowa drug testing law constitutes misconduct. *Anderson v. Warren Distrib. Co.*, 469 N.W.2d 687 (Iowa 1991).

1. The legislature enacted the drug testing law in response to a widespread belief that employers have the right to expect a drug-free work place and should be able to require employees to take steps to insure it..
2. Refusal to undergo substance abuse treatment as directed by his employer constitute insubordination and a wilful disregard of the employer's interests.
3. Employees decision not to participate in the employer's health benefit plan, which thereby increased his cost for inpatient treatment, is not a sufficient basis for permitting unemployment benefits.

VIII. Utilizing Iowa's Drug Testing Law

A. Use of Iowa's Drug Testing Law with Respect to Current Employees

1. *Drug or alcohol testing.* Employers may conduct drug or alcohol testing as provided in this subsection:
   a. Employers may conduct unannounced drug or alcohol testing of employees.
      (1) *"Unannounced drug or alcohol testing"* means testing for the purposes of detecting drugs or alcohol which is conducted on a periodic basis, without advance notice of the test to employees, other than employees whose duties include responsibility for administration of the employer's

drug or alcohol testing program, subject to testing prior to the day of testing, and without individualized suspicion. The selection of employees to be tested from the pool of employees subject to testing shall be done based on a neutral and objective selection process by an entity independent from the employer and shall be made by a computer-based random number generator that is matched with employees' social security numbers, payroll identification numbers, or other comparable identifying numbers in which each member of the employee population subject to testing has an equal chance of selection for initial testing, regardless of whether the employee has been selected or tested previously. The random selection process shall be conducted through a computer program that records each selection attempt by date, time, and employee number.

(2) Employee may be selected from any of the following pools of employees:

(a) The entire employee population at a particular work site of the employer except for employees who are not scheduled to be at work at the time the testing is conducted because of the status of the employees or who have been excused from work pursuant to the employer's work policy prior to the time the testing is announced to employees.

(b) The entire full-time active employee population at a particular work site except for employees who are not scheduled to be at work at the time the testing is to be conducted because of the status of the employee, or who have been excused from work pursuant to the employer's working policy.

(c) All employees at a particular work site who are in a pool of employees in a safety-sensitive position and who are scheduled to be at work at the time testing is conducted, other than employees who are not scheduled to be at work at the time the testing is to be conducted or who have been excused from work pursuant to the employer's work policy prior to the time the testing is announced to employees.

b. Employers may conduct drug or alcohol testing of employees

during, and after completion of, drug or alcohol rehabilitation.

c. Employers may conduct reasonable suspicion drug or alcohol testing.

(1) *"Reasonable suspicion drug or alcohol testing"* means drug or alcohol testing based upon evidence that an employee is using or has used alcohol or other drugs in violation of the employer's written policy drawn from specific objective and articulable facts and reasonable inferences drawn from those facts in light of experience. For purposes of this paragraph, facts and inferences may be based upon, but not limited to, any of the following:

(a) Observable phenomena while at work such as direct observation of alcohol or drug use or abuse or of the physical symptoms or manifestations of being impaired due to alcohol or other drug use.

(b) Abnormal conduct or erratic behavior while at work or a significant deterioration in work performance.

(c) A report of alcohol or other drug use provided by a reliable and credible source.

(d) Evidence that an individual has tampered with any drug or alcohol test during the individual's employment with the current employer.

(e) Evidence that an employee has caused an accident while at work which resulted in an injury to a person for which injury, if suffered by an employee, a record or report could be required under chapter 88, or resulted in damage to property, including to equipment, in an amount reasonably estimated at the time of the accident to exceed one thousand dollars.

(f) Evidence that an employee has manufactured, sold, distributed, solicited, possessed, used, or transferred drugs while working or while on the employer's premises or while operating the employer's vehicle, machinery, or equipment.

d. Employers may conduct drug or alcohol testing of prospective employees.

e. Employers may conduct drug or alcohol testing as required by federal law or regulation or by law enforcement.

f. Employers may conduct drug or alcohol testing in investigating accidents in the workplace in which the accident resulted in an

injury to a person for which injury, if suffered by an employee, a record or report could be required under chapter 88, or resulted in damage to property, including to equipment, in an amount reasonably estimated at the time of the accident to exceed one thousand dollars.

B. Written policy requirement.

1. Drug or alcohol testing or retesting by an employer shall be carried out within the terms of a written policy which has been provided to every employee subject to testing, and is available for review by employees and prospective employees. * * *

C. Disciplinary procedures.

1. Upon receipt of a confirmed positive drug or alcohol test result which indicates a violation of the employer's written policy, or upon the refusal of an employee or prospective employee to provide a testing sample, an employer may use that test result or test refusal as a valid basis for disciplinary or rehabilitative actions pursuant to the requirements of the employer's written policy and the requirements of this section, which may include, among other actions, the following:

a. A requirement that the employee enroll in an employer-provided or approved rehabilitation, treatment, or counseling program, which may include additional drug or alcohol testing, participation in and successful completion of which may be a condition of continued employment, and the costs of which may or may not be covered by the employer's health plan or policies

b. Suspension of the employee, with or without pay, for a designated period of time.

c. Termination of employment.

d. Refusal to hire a prospective employee.

e. Other adverse employment action in conformance with the employer's written policy and procedures, including any relevant collective bargaining agreement provisions.

f. Following a drug or alcohol test, but prior to receipt of the final results of the drug or alcohol test, an employer may suspend a current employee, with or without pay, pending the outcome of the test. An employee who has been suspended shall be reinstated by the employer, with back pay, and interest on such amount at eighteen percent per annum compounded annually, if applicable, if the result of the test is not a confirmed positive drug or alcohol test

which indicates a violation of the employer's written policy.

D. Special Rule with First Confirmed Positive Alcohol Test

1. Upon receipt of a confirmed positive alcohol test which indicates an alcohol concentration greater than the concentration level established by the employer pursuant to this section, and if the employer has at least fifty employees, and if the employee has been employed by the employer for at least twelve of the preceding eighteen months, and if rehabilitation is agreed upon by the employee, and if the employee has not previously violated the employer's substance abuse prevention policy pursuant to this section, the written policy shall provide for the rehabilitation of the employee pursuant to subsection 10, paragraph *"a"*, subparagraph (1), and the apportionment of the costs of rehabilitation as provided by this paragraph.

   a. If the employer has an employee benefit plan, the costs of rehabilitation shall be apportioned as provided under the employee benefit plan.

   b. If no employee benefit plan exists and the employee has coverage for any portion of the costs of rehabilitation under any health care plan of the employee, the costs of rehabilitation shall be apportioned as provided by the health care plan with any costs not covered by the plan apportioned equally between the employee and the employer. However, the employer shall not be required to pay more than two thousand dollars toward the costs not covered by the employee's health care plan.

   c. If no employee benefit plan exists and the employee does not have coverage for any portion of the costs of rehabilitation under any health care plan of the employee, the costs of rehabilitation shall be apportioned equally between the employee and the employer. However, the employer shall not be required to pay more than two thousand dollars towards the cost of rehabilitation under this subparagraph.

2. Rehabilitation required pursuant to this paragraph shall not preclude an employer from taking any adverse employment action against the employee during the rehabilitation based on the employee's failure to comply with any requirements of the rehabilitation, including any action by the employee to invalidate a test sample provided by the employee pursuant to the rehabilitation.

E. Training

1. In order to conduct drug or alcohol testing under this section, an employer shall require supervisory personnel of the employer involved with drug or alcohol testing under this section to attend a minimum of two hours of initial training and to attend, on an annual basis thereafter, a minimum of

one hour of subsequent training. *The training shall include, but is not limited to, information concerning the recognition of evidence of employee alcohol and other drug abuse,* the documentation and corroboration of employee alcohol and other drug abuse, and the referral of employees who abuse alcohol or other drugs to the employee assistance program or to the resource file maintained by the employer pursuant to paragraph *"c"*, subparagraph (2).