

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

E. MICHAEL SALLEY, :  
Plaintiff, :  
 :  
v. : Civil No. 96-6368  
 :  
CIRCUIT CITY STORES, INC., :  
Defendant. :

M E M O R A N D U M

Cahn, C.J.

October \_\_\_\_\_, 1997

In this case, the court must decide whether Plaintiff E. Michael Salley, a chemically-dependent person who engaged in the illegal use of drugs approximately three weeks before being terminated by Defendant Circuit City Stores, Inc., is a "qualified individual with a disability" for purposes of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12101-12213 (1994). For the reasons that follow, the court finds that under the ADA, Plaintiff is not a "qualified individual with a disability" because at the time of his termination, Plaintiff was "currently engaging in the illegal use of drugs," and because Defendant discharged Plaintiff on the basis of such use. Plaintiff's ADA claim therefore fails. Plaintiff's claim under the Pennsylvania Human Relations Act ("PHRA"), 43 Pa. Cons. Stat. Ann. §§ 951-963 (West 1991 & Supp. 1997), also fails because it is coextensive with Plaintiff's ADA claim. Accordingly, the

court grants Defendant's Motion for Summary Judgment.

**I. BACKGROUND<sup>1</sup>**

Plaintiff is forty-five years old and has engaged in the illegal use of drugs for much of his adult life. At approximately age 17, Plaintiff became addicted to heroin. (Tr. of 7/8/97 Salley Dep. ("Tr.") at 9.) Plaintiff remained addicted to heroin for approximately the next 13 years, (id.), during which time Plaintiff also became addicted to alcohol, (id. at 20). Plaintiff participated in several inpatient and outpatient recovery programs of various lengths in an attempt to control his addiction to alcohol and heroin. (See, e.g., id. at 27.) Plaintiff ultimately was able to abstain from the consumption of alcohol or illegal drugs from approximately June of 1983 until the fall of 1993. (Id. at 31, 107-08.)

Defendant, a national retailer of consumer electronics and home appliances, hired Plaintiff in August, 1988 as a video-sales counselor. A series of standard operating procedures governs Defendant's operations. Procedure Number 200-072, entitled "Drug and Illegal Substance Use and Testing," sets forth Defendant's drug policy.<sup>2</sup> (Sanchez Aff. ¶ 3.) It provides in relevant part

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<sup>1</sup> Where the parties have contested the facts set forth below, the court accepts Plaintiff's version for purposes of the court's summary judgment analysis.

<sup>2</sup> Two versions of Defendant's drug policy came into effect during Plaintiff's employment. (See Aff. of Aldo Sanchez Supp. Summ. J. ("Sanchez Aff.") ¶ 5.) The version in effect when

that "[e]vidence of habitual use, possession, or distribution of a drug by an employee at any time may subject the employee to disciplinary action up to and including dismissal."<sup>3</sup> (Id. Ex. A at 4.) Defendant's drug policy reflects Defendant's concern that, as set forth in the 1988 Policy, an employee's use of illegal drugs may: (1) put the employee under an unusual financial burden such that the employee may resort to theft of Defendant's assets; (2) adversely affect the employee's job performance; (3) jeopardize workplace safety; and (4) hurt the morale of the employee's coworkers. (Id. ¶ 7 & Ex. A at 1-2.) The 1988 Policy further provides that Defendant will strive to ensure that employees are free from the effects of alcohol or illegal drugs and that Defendant will not subject its employees to persons who consciously engage in criminal conduct such as illegal drug use. (Id.)

Defendant initially hired Plaintiff at one of Defendant's stores in California. (Tr. at 63.) In 1989 or 1990, Defendant transferred Plaintiff to Pennsylvania, where Plaintiff assumed a management position. (Id. at 65-66, 86.) Plaintiff first became a sales manager at Defendant's store in Springfield,

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Defendant hired Plaintiff was dated May 3, 1988 (the "1988 Policy"). (See id. Ex. A.) The 1988 Policy was later superseded by a version dated September 14, 1994 (the "1994 Policy"). (Id.)

<sup>3</sup> This provision is worded identically in the 1988 and 1994 Policies; the emphasis, however, was removed in the 1994 Policy.

Philadelphia, (id. at 85); then, sometime between March and May, 1990, Plaintiff became store manager at Defendant's store in Whitehall, Pennsylvania ("Whitehall"), (id. at 65, 101).

Before becoming store manager at Whitehall, Plaintiff participated in Defendant's store-manager training program and received other informal training. As a result, Plaintiff was certified to conduct "Loss Prevention ("LP") interviews" of candidates for employment at Whitehall. (Id. at 84, 87, 89, 92.) LP interviewers ask candidates a series of scripted questions and gauge whether candidates' answers fall within the range of acceptable answers. (Id. at 89, 91-92.) For example, around the time Plaintiff became store manager at Whitehall, LP interviewers routinely asked candidates what they would do if they became aware that a coworker used illegal drugs. (Id. at 97.) When Plaintiff first conducted LP interviews, the only acceptable answer to this question was that the candidate would notify his superior or otherwise turn in the coworker.<sup>4</sup> (Id. at 98.) Defendant instructed Plaintiff that, given Defendant's association of illegal drug use with a heightened risk of theft, one of the purposes of LP interviews was to elicit any information regarding a candidate's use of illegal drugs. (Id.

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<sup>4</sup> Defendant later broadened the category of acceptable responses to permit responses such as warning the coworker. (Id. at 99.) Defendant ultimately may have deleted this question from the LP interview script several months before terminating Plaintiff. (Id. at 100.)

at 59, 88.)

As store manager at Whitehall, Plaintiff was responsible for all store functions. (Id. at 101-02.) To this end, Plaintiff maintained a binder containing Defendant's standard operating procedures, including Defendant's drug policy. (Id. at 78-79.) Plaintiff's duties included ensuring that all Whitehall employees followed Defendant's standard operating procedures and employment policies, (id. at 80, 103), including Defendant's drug policy, (id. at 71), and disciplining Whitehall employees when appropriate, (id. at 104). Plaintiff also had an obligation as store manager at Whitehall to cooperate with investigations conducted by Defendant's LP Department<sup>5</sup> concerning Whitehall or Whitehall employees. (Tr. at 146-47, 150.)

In 1991, Plaintiff voluntarily informed Terry Nedelka, who was a District Operations Manager for Defendant and one of Plaintiff's superiors, of Plaintiff's history of chemical dependency. (Id. at 67-69, 73-74.) At the time, Plaintiff had not consumed alcohol or illegal drugs for approximately eight years. (Id. at 68.) Nedelka told Plaintiff there was no reason for Defendant to take any action in response to Plaintiff's disclosure, and no such action was taken. (Id. at 74.)

In the fall of 1993, Plaintiff resumed the consumption of

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<sup>5</sup> One of the responsibilities of Defendant's LP Department is to investigate and report illegal drug use by Defendant's employees. (Sanchez Aff. ¶ 11.)

alcohol.<sup>6</sup> (Id. at 107.)

In late 1993 or early 1994, Plaintiff became aware that Kevin Heavner, who was a Whitehall employee and one of Plaintiff's subordinates, was engaged in the use of illegal drugs off the job. (Id. at 105, 112, 119, 122.) Although Plaintiff believed Heavner's drug use violated Defendant's company policy, Plaintiff did not inform Heavner of this belief. (Salley Dep. Ex. 5 at 3; Tr. at 165.) Plaintiff did not report Heavner's drug use to Defendant or otherwise take disciplinary action against Heavner. (Tr. at 105, 122.) Instead, when Heavner offered to obtain heroin for Plaintiff, Plaintiff agreed. (Id. at 113.) Plaintiff subsequently gave Heavner money to obtain heroin for him on approximately three separate occasions, and Plaintiff and Heavner used heroin together several times. (Id. at 116.)

Plaintiff's relapse into heroin use led to a renewed addiction to heroin by sometime between April and August, 1994. (Salley Dep. Ex. 6 at 2.) During the period of renewed addiction, Plaintiff used heroin at least once a day, (Tr. at 131), and eventually spent \$500-\$600 each week on the drug, (id. at 138). In addition, Plaintiff sometimes left Whitehall during his lunch break to use heroin, (id. at 128, 130), and often

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<sup>6</sup> Plaintiff did not again become addicted to alcohol until after Defendant terminated his employment. (Id. at 108.)

worked while under the influence of heroin, though ironically it was the nonuse of heroin that negatively affected Plaintiff's performance, (id. at 134). If Plaintiff did not take heroin regularly, he would experience withdrawal symptoms which would distract him at work and prevent him from performing to his maximum potential. (Id.) In general, however, Plaintiff's heroin addiction did not prevent Plaintiff from performing his job properly in 1994. (Salley Aff. Opp'n. Summ. J. ("Salley Aff.") ¶ 19; Tr. at 133-34.) Plaintiff never engaged in heroin use on the premises of Whitehall or on any of Defendant's other property. (Salley Aff. ¶ 18.)

In late August, 1994, Plaintiff again sought treatment for his heroin addiction. (Id. ¶ 8.) Beginning on August 29, 1994, Plaintiff saw a doctor for detoxification treatments<sup>7</sup>, (Salley Dep. Ex. 8, 10), and Plaintiff was able to abstain from heroin use for a short time after September 2, 1994, (Pl.'s Mem. Opp'n. Summ. J. at 6; Def.'s Mem. Supp. Summ. J. ("Def.'s Mem.") at 5).

In September, 1994, Defendant's LP Department received information that Plaintiff used illegal drugs with Heavner. (Sanchez Aff. ¶ 12.) On September 16, 1994, Aldo Sanchez and Phil Herschewe, LP Managers for Defendant, each interviewed

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<sup>7</sup> Plaintiff went to see the doctor seven times between August 29 and November 8, 1994. (Salley Dep. Ex. 9, 10; Tr. at 197.) The detoxification treatments ultimately failed to control Plaintiff's heroin addiction.

Plaintiff at Whitehall to determine if Plaintiff had violated Defendant's drug policy. (Id. ¶ 13; Tr. at 145-46.) Plaintiff refused to cooperate during the interviews. (Sanchez Aff. ¶ 15.) Plaintiff was evasive in his responses to Sanchez's and Herschewe's questions, (Tr. at 148-49, 151-52); in some instances, Plaintiff gave false answers, (Salley Dep. Ex. 5 at 6). In addition, Plaintiff refused to give a written statement.<sup>8</sup> (Tr. at 152.) As a result, Defendant suspended Plaintiff. (Sanchez Aff. ¶ 16.)

After consulting with an attorney, Plaintiff telephoned Herschewe on September 19, 1994 and told Herschewe that he was willing to give a written statement. (Salley Dep. Ex. 5 at 6; Tr. at 156.) On September 21, 1994, Plaintiff met with Herschewe and the two worked together to prepare a statement (the "September 21 statement") in Plaintiff's handwriting, which Plaintiff signed upon its completion.<sup>9</sup> (Id. at 160-61.) In the

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<sup>8</sup> Plaintiff refused to cooperate with Sanchez and Herschewe on the advice of the persons who at that time were involved in treating Plaintiff for his heroin addiction. These persons assured Plaintiff on several occasions that the details of his treatment would be kept confidential, and encouraged Plaintiff to take steps to preserve such confidentiality. (See Salley Aff. ¶¶ 11, 21.)

<sup>9</sup> Plaintiff originally intended to deliver to Herschewe a written statement that Plaintiff had prepared on September 19, 1994 (the "September 19 statement"), (Tr. at 157-59), but Herschewe rejected the September 19 statement, (id. at 160). The September 21 statement is based on disclosures contained in the September 19 statement, as well as on conversations between Plaintiff and Herschewe. (Id. at 161, 168.)

September 21 statement, Plaintiff admits to, inter alia, the following: engaging in the use of alcohol and heroin; using heroin on a regular basis before work, after work, and occasionally during lunch breaks; failing to report Heavner's drug use; purchasing heroin through Heavner; using heroin with Heavner; and telling unspecified lies and refusing to cooperate during the interviews conducted by Sanchez and Herschewe on September 16, 1994. (See Salley Dep. Ex. 5; Sanchez Aff. ¶ 19.) Although Plaintiff maintains that he signed the September 21 statement under duress, (Salley Aff. ¶ 23), Plaintiff concedes that to the best of his knowledge, all the information set forth in the September 21 statement is true and accurate, (Tr. at 162). Plaintiff also concedes that Herschewe made no guarantees at any time regarding the prospect of Plaintiff's continued employment with Defendant. (Id. at 180.)

On September 23, 1994, Defendant terminated Plaintiff's employment. (Salley Aff. ¶ 16; Def.'s Mem. at 5.) Defendant claims Plaintiff was fired for violating Defendant's drug policy by engaging in the use of illegal drugs, and for violating other of Defendant's employment policies by encouraging a subordinate to use drugs, failing to report an employee's drug use, hindering an investigation conducted by Defendant's LP Department, and lying to Defendant's management. (See Sanchez Aff. ¶ 20.) Defendant claims Plaintiff was not fired because of Plaintiff's

alleged chemical dependency. (Id. ¶ 21.)

On approximately September 26, 1994, Plaintiff resumed regular heroin use, (Tr. at 178), and such use continued until November, 1994, (id. at 187). From that time until December, 1996, (id. at 6, 141), Plaintiff experienced alternating periods of heroin use and drug treatment.

Plaintiff instituted this action on September 19, 1996. In his amended complaint filed on February 4, 1997, Plaintiff alleges that Defendant terminated his employment in violation of the ADA and the PHRA. Before the court is Defendant's Motion for Summary Judgment.

## **II. DISCUSSION**

### **A. Summary Judgment Standard**

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is material if it might affect the outcome of the suit under governing substantive law. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In addition, a dispute about material facts must be "genuine," such that a reasonable jury could return a verdict for the nonmoving party. Id. The moving party has the

initial burden of producing evidence purporting to establish the absence of a genuine issue of material fact; however, if the nonmoving party fails to produce sufficient evidence with respect to an essential element of its claim and for which it will bear the burden of proof at trial, then the moving party is entitled to summary judgment. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Once the moving party meets its burden, the nonmoving party must come forward with specific facts contradicting those set forth by the moving party, thereby showing that there is a genuine issue for trial. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986); Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 888 (1990). Although the court considers the nonmovant's evidence as true and draws all reasonable inferences in the nonmovant's favor, see Anderson, 477 U.S. at 255, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita, 475 U.S. at 586.

#### **B. Analysis of Claims Under the ADA and the PHRA**

Although they are not bound to do so, Pennsylvania courts generally interpret the PHRA in accord with its federal counterparts, among them the ADA. See Kelly v. Drexel Univ., 94 F.3d 102, 105 (3d Cir. 1996). This is due in part to the substantial similarity between the definition of "handicap or disability" under the PHRA and the definition of "disability"

under the ADA. Id. The Third Circuit Court of Appeals has held that a claim under the PHRA is coextensive with a claim under the ADA. Id. Accordingly, the court's analysis of Plaintiff's ADA claim applies equally to Plaintiff's PHRA claim.

**C. "Qualified Individual with a Disability"**

The ADA prohibits discrimination by a covered employer against a "qualified individual with a disability" on account of such disability with respect to various employment-related matters, among them the termination of employment. 42 U.S.C. § 12112(a). The definition of the term "qualified individual with a disability" does 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." Id. § 12114(a). This qualification is further refined in the subsection that immediately follows it, which provides in relevant part:

Nothing . . . 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; [or]

(2) is participating in a supervised rehabilitation program and is no longer engaging in such use. . . .

Id. § 12114(b).<sup>10</sup>

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<sup>10</sup> Sections 12210(a) and (b), which specifically address the illegal use of drugs, contain a virtually identical definition with respect to the term "individual with a disability." Thus, although the court's analysis focuses solely on § 12114, it is intended to be equally applicable to § 12210.

The regulations accompanying the ADA contain a clarification of the term "currently engaging in the illegal use of drugs."

They provide that

[t]he 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. § 1630.3 App. (1996). Similarly, section 8.3 of the Equal Employment Opportunity Commission's Technical Assistance Manual on the ADA (Jan. 1992) states:

"Current" drug use means that the illegal use of drugs occurred recently enough to justify an employer's reasonable belief that involvement with drugs in an on-going problem. It is not limited to the day of use, or recent weeks or days, in terms of an employment action. It is determined on a case-by-case basis.<sup>11</sup>

**1. "Currently Engaging in the Illegal Use of Drugs"**

In its Motion for Summary Judgment, Defendant claims that at the time of Plaintiff's termination, Plaintiff was "currently engaging in the illegal use of drugs" for purposes of § 12114(a), and thus was "engaging in the illegal use of drugs" for purposes of § 12114(b).

In response, Plaintiff argues that at the time of his termination, he was neither "currently engaging in the illegal

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<sup>11</sup> Although EEOC interpretive guidelines are not binding on the court, the court may properly turn to them for guidance. See, e.g., Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986).

use of drugs" nor "engaging in the illegal use of drugs." Plaintiff bases his argument on a strict reading of the subject provisions and on the observation that he did not engage in the illegal use of drugs for approximately three weeks before he was fired.

Thus, the initial issue before the court is whether Plaintiff, a chemically-dependent person who engaged in the illegal use of drugs approximately three weeks before Defendant fired him, was "currently engaging in the illegal use of drugs" at the time of his termination for purposes of § 12114(a). If so, it follows that Plaintiff was also "engaging in the illegal use of drugs" for purposes of § 12114(b) and, assuming Defendant acted on the basis of such illegal use, Plaintiff is not a "qualified individual with a disability" protected by the ADA.

Although the Third Circuit Court of Appeals has not yet had occasion to construe the "currently engaging" language of § 12114(a), the Ninth Circuit Court of Appeals did in Collings v. Longview Fibre Company, 63 F.3d 828 (9th Cir., 1995), cert. denied, -- U.S. --, 116 S.Ct. 711 (1996). In Collings, several employees were terminated following an investigation by Longview, which had a strict drug policy, into rumors of employee drug activity. The employees sued Longview under the ADA, some of them arguing that they were not "currently engaging" in drug use when Longview discharged them because they were drug-free on the

date they were fired. To support their claim, these employees took and passed a drug test shortly after their discharge. The court of appeals rejected the employees' argument. Quoting section 1630.3 App. of the regulations accompanying the ADA, see supra p. 12, the court of appeals concluded that

the fact that the employees may have been drug-free on the day of their discharge is not dispositive. Their own admissions of drug involvement during the weeks and months prior to their discharge indicated that they were recently involved in drug-related misconduct.

Collings, 63 F.3d at 833.

Of the few other courts that have addressed situations like that presented in Collings and in the instant case, the majority have reached a similar conclusion. See, e.g., Shafer v. Preston Mem'l Hosp. Corp., 107 F.3d 274, 278-80 (4th Cir. 1997) (holding that person who used narcotics in weeks and months prior to termination, but not on date of discharge, was "currently engaging in the illegal use of drugs"; narrow interpretation of the term would thwart ADA's purpose); McDaniel v. Miss. Baptist Med. Ctr., 877 F. Supp. 321, 327-28 (S.D. Miss. 1995) (holding that person who was drug-free for six weeks before being terminated was "engaging in illegal drug use"; legislative history of the ADA indicates that long-term abstinence is required), aff'd, 74 F.3d 1238 (5th Cir. 1995); Baustian v. Louisiana, 910 F. Supp. 274, 276-77 (E.D. La. 1996) (holding that seven weeks' abstinence does not satisfy ADA requirement that

person be in recovery long enough to have become stable); Wormley v. Arkla, Inc., 871 F. Supp. 1079, 1084 (E.D. Ark. 1994) (holding that person's drug use in month before discharge was "sufficiently recent to justify an employer's reasonable belief that it was an ongoing problem rather than a problem that was in the past," and thus was "current" use under the ADA); Bd. of Med. Exam'rs v. Davis, 893 P.2d 1365, 1368 (Colo. Ct. App. 1995) (holding that there is no requirement of illegal drug use at time of employment action in order to find that person engaged in "current illegal use of drugs"); but see Teahan v. Metro-North Commuter R.R., 951 F.2d 511, 518 (2d Cir. 1991) (holding, in case under the Rehabilitation Act of 1973<sup>12</sup>, as amended, 29 U.S.C. §§ 701-797 (1994), that "the relevant time frame for assessment of [a person's] 'current' status is the time of his actual firing"); Dauen v. Bd. of Fire and Police Comm'rs, 656 N.E.2d 427, 431 (Ill. App. Ct. 1995) (same with respect to ADA, citing Teahan).

After reviewing the cases cited above, the court finds the majority view expressed in the Collings line of decisions persuasive. It is clear that a proper construction of the term "currently engaging" in the context of § 12114(a) cannot be limited to the strict reading that Plaintiff urges the court to

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<sup>12</sup> The ADA's text, as well as its legislative history, suggests that case law interpreting the Rehabilitation Act be incorporated by reference in construing the ADA. See 42 U.S.C. § 12201(a); Collings, 63 F.3d at 832 n. 3.

adopt. The Technical Assistance Manual and the relevant regulations accompanying the ADA, both of which are excerpted above, as well as the legislative history discussed in the Collings line, see, e.g., Shafer, 107 F.3d at 279-80, are strong evidence that in wording § 12114(a), Congress did not intend the term "currently engaging" to be read narrowly.

Common sense leads to the same conclusion. As the court in Shafer observed, it would be strange indeed if it was the aim of Congress in drafting § 12114(a) to "restrict the right of employers to fire drug-using employees to the narrow class of cases where the employer catches the employee flagrante delicto and terminates him on-the-spot," Shafer, 107 F.3d at 278, as a strict reading of § 12114(a) would lead one to believe. The ADA is not meant to protect a chemically-dependent person who uses drugs on Monday but is not fired for it until Tuesday.

Accordingly, the court adopts the majority interpretation described above, and holds that the term "currently engaging" for purposes of § 12114(a) is not confined to illegal drug use on the date of the subject employment action, but rather applies to illegal drug use that bears a temporal relationship to the employment action such that an employer may reasonably conclude at the time of the employment action that illegal drug use is an ongoing problem. Insofar as Teahan and Dauen represent a narrower interpretation of this language, the court declines to

follow them.

Having construed the "currently engaging" language of § 12114(a), the court must determine whether Plaintiff's use of illegal drugs shortly before his termination was "current" use or "past" use under the ADA. As suggested in the Technical Assistance Manual, this determination must be made on a case-by-case basis. Here, given Plaintiff's long history of heroin addiction, which featured repeating periods of treatment and relapse, and especially in light of Plaintiff's admissions regarding his regular heroin use in the months leading up to his termination, Defendant could reasonably conclude as of the date of Plaintiff's discharge that Plaintiff was actively engaged in illegal drug use. The intervening period of approximately three weeks during which Plaintiff was drug-free was not, this court believes, of the "considerable length" contemplated by Congress to be sufficient to support the conclusion that Plaintiff was in recovery long enough to be stable, see McDaniel, 877 F. Supp. at 327-28. The fact that Plaintiff resumed his heroin use within three days after being discharged is further evidence that Plaintiff's involvement with illegal drug use was not in remission.<sup>13</sup> Therefore, the court finds that at the time of

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<sup>13</sup> Judge Calabresi recently followed this reasoning in Buckley v. Consolidated Edison Co., No. 1224, Docket No. 96-9039, 1997 WL 616686 (2d Cir. Oct. 8, 1997) (Kearse, J., dissenting). In vacating the lower court's dismissal of the plaintiff's complaint for failure to state a claim under the ADA, the court

Plaintiff's termination, Plaintiff was "currently engaging in the illegal use of drugs" for purposes of § 12114(a), and was "engaging in the illegal use of drugs" for purposes of § 12114(b).<sup>14</sup>

## **2. Acting on the Basis of Illegal Drug Use**

Given that, at the time of his termination, Plaintiff was "currently engaging in the illegal use of drugs," the only remaining issue for purposes of § 12114(a) is whether Defendant acted on the basis of such use, as opposed to Plaintiff's past drug use or Plaintiff's chemical dependency, in terminating Plaintiff.

Defendant claims that Plaintiff was not fired because of his past drug use or chemical dependency. As described earlier, Defendant maintains that Plaintiff was discharged because of his drug-related misconduct in violation of Defendant's employment

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in Buckley held that on the facts alleged, the defendant discriminated against the plaintiff, who was a recovering drug and alcohol addict, by testing him for drug use more frequently than employees who were not recovering addicts, without accommodating his neurogenic bladder condition which allegedly prevented him from producing urine samples in the time allotted. In so holding, the court observed that the ADA "was intended to apply to recovering addicts." Buckley at \*3 (emphasis added).

<sup>14</sup> Because the court finds that Plaintiff was "engaging in the illegal use of drugs" under § 12114(b), the court does not address the issue of whether, at the time of his termination, Plaintiff had successfully completed or was participating in a "supervised rehabilitation program."

policies, for hindering an investigation conducted by Defendant's LP Department, and for lying to Defendant's management.

In response, Plaintiff makes three arguments. First, Plaintiff argues that because Plaintiff was not using drugs at the time of his termination, Defendant's explanation with respect to Plaintiff's alleged drug-related misconduct is in fact an admission that Defendant fired Plaintiff because of Plaintiff's past drug use or chemical dependency. Second, Plaintiff argues that when he allegedly hindered the investigation and lied to management, Plaintiff was merely trying to preserve the confidentiality of his treatment and should not be penalized for doing so. Third, Plaintiff argues that Defendant has not identified any policy that provides for the termination of employees who lie to management, nor has Defendant identified any specific lies allegedly told by Plaintiff to management.

At the outset the court notes that there is a clear distinction between drug-related misconduct, for which termination is permissible, and drug-related disability, for which it is not. This distinction is implicit in the ADA provision which allows an employer to

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) (emphasis added).<sup>15</sup> In addition, the regulations accompanying the ADA provide that an employer “may discharge or deny employment to persons who illegally use drugs, on the basis of such use, without fear of being held liable for discrimination.” 29 C.F.R. § 1630.3 App. (1996).

The Third Circuit Court of Appeals has acknowledged the misconduct-disability distinction by suggesting that an employer may hold chemically-dependent employees to the same, uniformly applied standards of conduct as other employees. Cf. Copeland v. Philadelphia Police Dept., 840 F.2d 1139, 1149 (3d Cir. 1988) (holding in Rehabilitation Act case that employer was not required to accommodate employee’s illegal drug use where such use violated employees’ duty to refrain from illegal conduct; upholding termination). Other courts of appeals have reached the same conclusion more directly. See, e.g., Harris v. Polk County, 103 F.3d 696, 697 (8th Cir. 1996) (ADA); Williams v. Widnall, 79 F.3d 1003, 1007 (10th Cir. 1996) (Rehabilitation Act); Despears v. Milwaukee County, 63 F.3d 635, 637 (7th Cir. 1995) (ADA); Maddox v. Univ. of Tenn., 62 F.3d 843, 847 (6th Cir. 1995) (Rehabilitation Act and ADA); Collings, 63 F.3d at 832 (ADA);

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<sup>15</sup> That the ADA permits employers to discipline employees for their drug-related misconduct is further evidenced by §§ 12114(c)(1) and (2), which allow an employer to prohibit the illegal use of drugs or alcohol at the workplace, and to require that employees shall not be under the influence of illegal drugs or alcohol at the workplace.

Leary v. Dalton, 58 F.3d 748, 753-54 (1st Cir. 1995)

(Rehabilitation Act); Little v. FBI, 1 F.3d 255, 258-59 (4th Cir. 1993) (Rehabilitation Act); but see Teahan, 951 F.2d at 516-17 (Rehabilitation Act).

The facts in the instant case establish that Defendant discharged Plaintiff because of Plaintiff's misconduct related to Plaintiff's "current" use of illegal drugs, and not because of Plaintiff's past drug use or chemical dependency. As recently as three weeks prior to his termination, Plaintiff violated Defendant's drug policy and other employment policies by engaging in heroin use, working while under the influence of heroin, and failing to report Heavner's illegal drug use. Shortly before that period of time, Plaintiff committed additional policy violations by obtaining heroin through Heavner and by engaging in heroin use with Heavner. Plaintiff's argument that these events constitute "past drug use," because they took place before the date of his termination, lacks merit. As indicated earlier, Plaintiff's illegal drug use shortly before his discharge was, for purposes of the ADA, "current" use. Plaintiff's contention that he was fired because of his chemical dependency is also unavailing given the complete absence of evidence from which a fact finder could reasonably conclude that Defendant's reasons

for discharging Plaintiff were pretextual.<sup>16</sup> Plaintiff bases his claim solely on an inference of discrimination stemming from Defendant's knowledge of Plaintiff's history of addiction following Plaintiff's disclosures to Nedelka in 1991. This inference is not a reasonable one which the court must adopt in its summary judgment analysis. Finally, Plaintiff has not alleged that Defendant did not hold all its employees to the same standards of conduct, or that Defendant's employment policies were not uniformly applied. Accordingly, the court finds that in discharging Plaintiff, Defendant acted on the basis of Plaintiff's misconduct related to Plaintiff's "current" use of illegal drugs.<sup>17</sup>

### **III. CONCLUSION**

The unfortunate consequences of chemical dependency are numerous and well-known, and our government has sought to mitigate them for the benefit of those suffering from addiction and for the good of society as a whole. One way in which the ADA

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<sup>16</sup> The court notes that Plaintiff admitted during his deposition that he was not surprised that Defendant terminated him for the various policy violations cited above. (Tr. at 185-86.)

<sup>17</sup> The court does not address the issue of whether Plaintiff's hindering Defendant's investigation and lying to Defendant's management could properly be considered in the decision to terminate Plaintiff's employment. The court notes, however, that even a finding in Plaintiff's favor on this issue would not change the outcome of the court's summary judgment analysis.

and the PHRA serve this purpose is by protecting chemically-dependent persons against being discharged from employment on the basis of their chemical dependency. However, although these laws are intended to insulate a chemically-dependent employee from his employer's wrongdoing, they are not meant to shield the employee from the consequences of his own misdeeds. If that were not the case, then the ADA and the PHRA might be transformed from laws prohibiting discrimination against the chemically dependent, to laws advocating discrimination in their favor. The exact limits of the protection offered by the ADA and the PHRA may be unclear; nevertheless, cases sometimes arise in which a party clearly seeks to exceed them. This is such a case.

Here, for the reasons described above, the court finds that at the time of his discharge, Plaintiff was "currently engaging in the illegal use of drugs" for purposes of §§ 12114(a) and 12210(a), and thus was "engaging in the illegal use of drugs" for purposes of §§ 12114(b) and 12210(b). The court also finds that in terminating Plaintiff's employment, Defendant acted on the basis of Plaintiff's "current use" of illegal drugs for purposes of §§ 12114(a) and 12210(a). In light of the foregoing, the court finds that Plaintiff was not a "qualified individual with a disability" under § 12114(a), nor was Plaintiff an "individual with a disability" under § 12210(a). Therefore, Plaintiff is not entitled to protection under the ADA.

With respect to Plaintiff's claim under the PHRA, the court finds that Plaintiff's PHRA claim and the analysis thereof is coextensive with Plaintiff's ADA claim. Thus, given that Plaintiff's ADA claim fails, Plaintiff's PHRA claim also fails.

The court therefore grants Defendant's Motion for Summary Judgment.

An appropriate order follows.

BY THE COURT:

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Edward N. Cahn, Chief Judge