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THE DEVELOPING NOTION OF EMPLOYER RESPONSIBILITY FOR THE ALCOHOLIC, DRUG-ADDICTED OR MENTALLY ILL EMPLOYEE: AN EXAMINATION UNDER FEDERAL AND STATE EMPLOYMENT STATUTES AND ARBITRATION DECISIONS

JANET MALESON SPENCER*

INTRODUCTION

It is a generally accepted notion that an individual who wishes to obtain or retain a job has certain responsibilities. For example, he is responsible for performing his job satisfactorily, complying with reasonable work rules and showing up for work. If the individual will not live up to his responsibilities, the employer is under no obligation to him—he may refuse to hire him or, if already employed, he may fire him.1 A further aspect of this notion is that these

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1 At common law, an employer has the right, in the absence of a contractual agreement to the contrary, to hire and fire as he pleases, without regard to the employee's compliance with his responsibilities. See, e.g., Young v. Southwestern Bell Tel. Co., 424 F.2d 256 (8th Cir. 1970); E.I. Du Pont de Nemours & Co. v. Claiborne-Reno Co., 64 F.2d 224 (8th Cir. 1933); Wilson v. Woodward Iron Co., 362 F. Supp. 886 (N.D. Ala. 1973). A protected right to employment has been recognized, however, in situations where the preservation or effectuation of constitutional or statutory rights is at stake. Thus, preemptive legislation has accorded some protection for employees subject to "at will" employment arrangements. See, e.g., Consumer Credit Protection Act, § 204(a), 15 U.S.C. § 1674(a) (1976) (proscribing discharge on the basis of garnishment of an employee's wages); National Labor Relations Act § 8(3), 29 U.S.C. § 158(3) (1976) (unfair labor practice for employer to discriminate in hiring or firing because of labor organization participation); Age Discrimination in Employment Act of 1967, § 4, 29 U.S.C. § 623 (1976), as amended by Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 2, 92 Stat. 189 (prohibiting employment discrimination on the basis of age); Vietnam Era Veterans Readjustment Assistance Act of 1974, 38 U.S.C. §§ 2021-2024 (1976) (ensuring for returning veterans reinstatement in their former positions with the right not to be discharged within the first six months except upon a showing of just
responsibilities are the employee’s responsibility, not the employer’s. The employer’s interest is in operational efficiency. If the employee is deficient, the employer need not be concerned with the reasons for the deficiency. Indeed, it may be improper for the employer to interject himself into the employee’s personal life.

In most instances these basic principles work well. Difficulty emerges, however, when one seeks to apply them to mentally disturbed, alcoholic or drug-addicted employees (“troubled employees”). We may assume that for most employees, failure to live up to basic responsibilities is voluntary. Troubled employees, however, may be unable voluntarily to comply with the employer’s requirements. Of course, there may be others, such as the hopelessly ill or


The employee is afforded a greater degree of security when his tenure is pursuant to an enforceable employment contract. The law is well settled that a contract for a stated term may be cancelled, and the employee discharged, only upon a showing of good cause or mutual agreement. See, e.g., Seco Chems., Inc. v. Stewart, 349 N.E.2d 733 (Ind. App. 1976); Crane v. Perfect Film & Chem. Corp., 38 App. Div. 2d 288, 329 N.Y.S.2d 32 (1st Dep’t 1972).


Voluntary” compliance, even by a non-alcoholic employee, necessarily reflects certain external considerations when examined in the context of the workplace. Even the “normal” worker will sense mild coercion in complying with the requirements of his employer when he contemplates the possible ramifications of non-compliance. Progressive and corrective discipline presuppose that the objectionable behavior is volitional and therefore may be voluntarily altered or discontinued. The troubled employee may be repeatedly involved in disciplinary infractions, however, because he cannot respond to this mild coercion because of his problem. “Constructive coercion” and “coercive confrontation” are alternative appellations for an employment policy that seeks to force an alcoholic to recognize his illness and take steps toward rehabilitation. See id. at 8; Somers, Alcohol and the Just Cause for Discharge, PROCEEDINGS OF THE 28TH ANN. MEETING OF THE NAT’L ACAD. OF ARBITRATORS 103, 116 (B. Dennis & G. Somers, eds. 1975). The application of external pressure through the imposition of disciplinary sanctions is aimed at precipitating a crisis whereby the problem drinker will realize that, if he fails to avail himself of treatment resources and make progress toward rehabilitation, his job will be in jeopardy. Somers, supra, at 116. The relatively low rehabilita-
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...the total incompetent, who are unable voluntarily to live up to their responsibilities. In contrast, the mentally disturbed, the alcoholic and the drug addict may, with help, be able to do so.3

As a result of the anomalies presented in applying to the troubled employee general notions regarding the allocation of responsibility, different rules have developed. In the case of the troubled employee, it appears that the responsibilities normally resting with the employee are to an increasing extent being shared with the employer. The traditional view that the employer has no responsibility for the personal life or problems of his employees is eroding. How has this come to pass and what is the nature of the employer's responsibility today?

There have always been, to be sure, reasons for the employer to concern himself with the troubled employee's problems. One important reason is financial. Often, the result of the troubled employee is impaired work product. Yet, even where this occurs, the...
employer, as a practical matter, cannot readily remove the troubled employee from his work force. Coemployees and supervisors, out of sympathy, identification, or distaste for confrontation, tend to protect or cover-up for the troubled employee. Thus, although their performance is inadequate, these employees may continue in the work force for a long time, often until discharge is provoked by some crisis. The cost of employee retention to the employer can be staggering. Although figures are not available for the mentally disturbed or the drug addict, estimates of employed alcoholics in the United States range from two million to nine million, comprising at least six to ten percent of any employee population. Lost revenues as a

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2 Employer Responsibility, supra, note 4, at 23; Somers, supra note 2, at 113. Crisis-precipitated discharges comprise the majority of published arbitration cases involving alcohol-related dismissals, probably because the quantum of proof necessary to establish "just cause" is more easily met by an overt act of violence or insubordination. Id. at 109-11. The more subtle decline in productivity normally characterizing the developing alcoholic is more difficult to prove as a contractual infraction justifying discharge, and the employer will often be hard-pressed to demonstrate "just cause" on the basis of excessive absenteeism because physicians as well as spouses are often willing to cover up for alcohol-related absences. Id. at 109. Thus, of all discharge grievances reaching arbitration, only eight per cent arise from absenteeism. Id. at 111.


A joint survey of the members of the American Society for Personnel Administration (ASPA) was conducted by ASPA and the Bureau of National Affairs in 1978. According to their findings, 25% of the responding companies reported that alcoholism was a problem for 10% or more of their production forces. Fourteen to fifteen percent of these companies reported a similar rate of alcohol abuse among their professional, managerial, and office workers. Alcoholism was reported as affecting 4.6% of both professional and managerial employees; 3.8% of office or clerical workers; and 7.7% of production or service employees. BNA Report, supra, at 4. This differential between the blue-collar group and management, however, may be illusory. Because of his relative freedom from observation and supervision, the executive alcoholic may merely be harder to isolate. H. Trice & J. Belasco, supra note 2, at 5.
result of alcoholic workers are calculated at one billion to twenty billion dollars annually. As a result of absenteeism, accidents, medical bills, lack of production and the like, it has been estimated that each alcoholic employee represents a minimum cost to his employer of one-quarter of his annual salary.

In addition to financial considerations, altruism may motivate the employer's concern with the troubled employee's personal problems. Although an employer's primary interest is in operational efficiency, he also may have a humane interest in his employees. He may recognize that rehabilitation of the troubled employee is a desirable goal from all points of view and be persuaded that the work place presents a uniquely favorable environment in which the employee can be motivated to seek help.

Once it is accepted that an employer may be furthering his own interest by "concerning" himself with his troubled employees rather than by assuming that the problems they present will disappear, the question must be how the employer can do so constructively. For most, the answer to this question will be that the employer must

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8 BNA Report, supra note 6, at 1, 8. The drinking employee is a financial liability in many facets of the work setting, but absenteeism is the central operational problem generated by alcoholism. Somers, supra note 2, at 111. See generally Trice, The Job Behavior of Problem Drinkers, reprinted in Society, Culture, and Drinking Patterns 493-510 (D. Pittman & C. Snyder eds. 1982). In addition, studies by the National Institute on Alcoholism and Alcohol Abuse (NIAAA), found that alcoholic employees are responsible for 5% of all annual insurance claims, and the accident rate for alcoholic employees is 3.6 times that of nonalcoholic workers. BNA Report, supra note 7, at 10. But see H. Trice & J. Belasco, supra note 2, at 4. It has also been alleged that 70% of union grievances are in some way alcohol-related. Brant, supra note 7, at 23.


10 See Godwin, supra note 7, at 98; United States Dep't of Health, Education and Welfare, supra note 7, at 129. The effectiveness of the work setting in interrupting the addictive patterns of alcoholism derives perhaps from three major sources: the opportunity for early detection, see note 11 infra, motivation to undergo rehabilitative treatment in order to avoid disciplinary action or termination, see note 2 supra, and the proximity of available services. The concept of "in house" rehabilitation programs is generally a misnomer when applied to the operational realities of the majority of alcoholism treatment services implemented by industry. Typically, the employee-assistance program is not oriented toward treatment in the work setting. Rather, the troubled employee generally is connected with community-based resources best suited to his needs. Hill, supra note 6, at 96.
assume responsibility for the troubled employee to this extent—he must provide means by which the troubled employee is identified at an early stage and is motivated to seek rehabilitation. To do this effectively, the employer may establish an occupational program for the identification and rehabilitation of the troubled employee.

The earliest occupational alcoholism programs encountered problems in implementing identification procedures, apparently because of the criterion utilized. Companies instituting management control systems in the 1940's through the 1960's set out to identify the alcoholic population among their employees by training their supervisors to recognize physical manifestations of alcohol abuse, such as slurred speech, tremors, staggering gait, and alcohol-laden breath. Hill, supra note 6, at 95. Since this forced supervisory personnel into a paternalistic and moralistic posture in which they were not comfortable, a phenomenon labelled "supervisory wobble" emerged, in which the supervisor hesitated to report even obviously deviant behavior. H. Trice & P. Roman, Spirits and Demons at Work 37-38 (1972). Often years passed while the supervisor ignored or covered up the situation to the employee's physical detriment and the company's financial loss. Id. As greater understanding of identification procedures developed, however, a more objective criterion, job impairment, was introduced. Under this approach, the supervisor could now abandon his inappropriate role as diagnostician and instead focus upon more empirical manifestations of the alcoholic employee, such as decreased productivity, recurrent illness, unauthorized absenteeism, and frequency of on-the-job injuries. Hill, supra note 6, at 95. Employee acceptance of occupational alcoholism programs continued to be limited, however, because they were still denominated "alcoholism programs," carrying with them the connotations and social stigma attached to that label. Id. In 1971, a survey conducted by the NIAAA revealed an innovative and effective technique for identification currently gaining increasing acceptance among employers. Under this new approach, supervisory personnel are trained to recognize the "troubled employee" rather than the "alcoholic" exclusively. The advantages of this more generic test lie in abandoning the stigma attaching to an "alcoholism" program, reducing the reluctance of supervisors to identify deviant behavior by restoring them to their more appropriate role of evaluating job performance, and identifying more problem drinkers at earlier stages of their addiction, thus facilitating less costly and more effective rehabilitation efforts. Id. at 95-96; United States Dep't of Health, Education and Welfare, supra note 7, at 131. Five elements have been characterized as essential to the successful implementation of early identification programs, focusing primarily on intra-organizational dissemination of information. These include: a written policy setting forth the specifics of the program, including a declaration that alcoholism is a disease and that afflicted employees will not be penalized for participation in the program; establishing channels within the organization for counselling and referral services; instruction at the managerial and supervisory levels regarding their respective roles in implementing the program; education of the entire work force concerning policy and procedure; and cooperation between management and labor unions, where applicable. United States Dep't of Health, Education and Welfare, supra note 7, at 129-30; Somers, supra note 2, at 104-05. For the most recent and comprehensive study using these and additional criteria in establishing a complex treatment center, see C. Schramm, W. Mandell & J. Archer, Workers Who Drink (1978).

While the number of businesses instituting in-house alcoholism programs appears to be steadily increasing, the existence of these programs is still the exception. In 1974, there were 621 employee-alcohol programs in various stages of development in both the public and private sectors. Hill, supra note 6, at 97; Somers, Evaluating Occupational Programs: A Joint Union-Management Approach to Alcoholism, 5 Labor-Management Alcoholism J. 21 (May-June 1976) (citing NIAAA Information & Feature Service: Special Report: Occupational Alcoholism 1 (1974)). Within a year, the number of occupational alcoholism programs had
employer who establishes an occupational program generally is rewarded. The cost of such programs to the employer is well outweighed by the costs traceable to the presence of the troubled employee in the work force, and rate of recovery is often high. Moreover, there are few instances of grievances or arbitrations arising from alcohol-related problems.

Notwithstanding the cost advantage to employers in assuming responsibility for their troubled employees, the number of occupational programs is still relatively small. Apparently, cost effectiveness and altruism alone have not sufficed to trigger a universal, voluntary assumption of responsibility. It is the author's view that

13 The financial merits of in-house treatment and counselling services are well-documented. Although some commentators believe altruism is a motivational factor, e.g., Telephone Conversation with William S. Dunkin, Labor-Management Services, National Council on Alcoholism (June 1978), cost efficiency is more likely to be the compelling reason behind the institution of alcohol counselling services. Bailar, Editorial, 7 LABOR-MANAGEMENT ALCOHOLISM J. 20, 20 (Mar.-Apr. 1978); BNA Report, supra note 6, at 12; Tucker, Comment, reprinted in PROCEEDINGS OF THE 28TH ANN. MEETING OF THE NAT'L ACAD. OF ARBITRATORS, 117, 118 (1975). Industries that have demonstrated an increasing espousal of alcohol rehabilitation programs, notably the airline and auto industries, have noted the profitability of their investments. Pratt & Whitney Aircraft, which began a rehabilitation program in 1975, claimed a first-year return of 350% on its investment, calculated in terms of reduced absenteeism, medical costs and accidents attributable to alcohol abuse. BNA Report, supra note 6, at 5-6. In the second year of its operation, the program realized five dollars for every program dollar spent. Id. at 6. Illinois Bell's program reports a benefit ratio of 10 to 1. Id. Similar savings have been reported in the public sector. In 1969, the United States Postal Service, in conjunction with the postal unions, initiated its Program for Alcoholic Recovery (PAR). Bailar, supra, at 20. Presently covering in excess of 456,000 employees in 122 offices throughout the country, PAR claims 10,000 recovered alcoholics to date. Id. With such a rehabilitation rate, the Post Office estimates a net cost avoidance ratio of five dollars for every program dollar spent. Id. See also Lord, Editorial, 4 LABOR-MANAGEMENT ALCOHOLISM J. 22, 22 (Mar.-Apr. 1975).

14 A rate of recovery of 60% is not unusual. Conversation with Dr. Paul A. Sherman, Director Special Program, ITT, formerly President of the Association of Labor-Management Administrators and Consultants on Alcoholism (Mar. 1979).

15 Brant, supra note 7, at 30, 37.

16 See note 12 supra.

17 It has been suggested that reasons for this include the stigma of the alcoholic as a "skid row bum" as well as a denial of the existence of the problem. Hill, supra note 6, at 95; H. Trice & J. Belasco, supra note 2, at 2. The fallacy of the "skid row bum" stereotype is well documented. Estimates fix the number of the nation's alcoholic population fitting within this category between three and five percent. Hill, supra note 6, at 93; Logan, May a Man Be
developments in the legal and arbitral environment, while not overtly requiring the employer to assume responsibility for the troubled employee, will subtly pressure him to do so. In due course, his total assumption of responsibility for the troubled employee will be the path of least resistance.

This Article will chart the evolution of the notion that the employer bears a certain responsibility for the troubled employee as it has emerged through laws and arbitration decisions and will consider the nature and scope of that responsibility.

OBLIGATIONS OF THE EMPLOYER TO TROUBLED EMPLOYEES UNDER FEDERAL DISCRIMINATION LAWS

Until recently, federal prohibition of employment discrimination has been concentrated in areas unrelated to the handicapped. Predominant among federal laws are Title VII of the Civil Rights Act of 1964 (Title VII), which prohibits employment discrimination on the basis of sex, color, race, religion or national origin, and the Age Discrimination in Employment Act, which protects individuals between the ages of 40 and 70 from such discrimination. It is fair to say that Title VII and related federal laws have had an enormous impact on employment relations. Not only do these statutes affect overtly discriminatory practices, but they have also called into question traditional work modes which, while facially neutral, nev-

Punished Because He Is Ill?, 52 A.B.A.J. 932, 933 (1966). The derogation of the alcoholic and the alcohol abuser that nonetheless persists has been traced to the preoccupation with alcohol and intemperance that permeated every segment of American society in the past, culminating in national prohibition in the early part of the century. Godwin, supra note 7, at 98. This lack of compassion has been deemed to be largely responsible for the neglect characterizing industry's treatment of alcoholism in the work force. Id. at 99.


Whereas this federal intervention applies to a broad cross section of private and public sector employers, discriminatory practices of the many private employers not covered are prohibited by numerous state laws. See notes 61-65 and accompanying text infra.
Nevertheless disproportionately impact upon certain minority groups. The role of the judiciary, which has been required to explore the application and interpretation of these laws in great detail, likewise has been felt. Many employers, by choice or necessity, have undertaken affirmative action programs to avoid culpability. Despite the significant effects of this legislative-judicial effort, one important segment of the workforce, comprised of mentally disabled, drug addicted and alcoholic individuals, has been virtually ignored.

The recent burgeoning of interest in handicap discrimination, albeit in a limited way, is significant in light of the intense concern with employment discrimination which has occurred within the past 15 years. Although Title VII has not been extended to handicap discrimination, it is possible that we are on the threshold of signific-

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21 See, e.g., Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971), modified on rehearing en banc, 452 F.2d 327, cert. denied, 406 U.S. 950 (1972). The affirmative action concept, as opposed to a negative obligation of non-discrimination, first emerged by Executive Order. See Exec. Order No. 10,925, 3 C.F.R. 86 (Supp. 1961), reprinted in 5 U.S.C. app. § 631, at 382 (1964), superseded by Exec. Order No. 11,246, 3 C.F.R. 167 (1977), reprinted in 42 U.S.C. § 2000e nt, at 10294 (1970), as amended by Exec. Order No. 12,086, 3 C.F.R. 230 (1979). Prior to Executive Order 11,246, Title VII had authorized courts to order “such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees.” 42 U.S.C. § 2000e-5(g) (1970) (amended 1972). The affirmative action mandated by Executive Order 11,246 is distinguishable from that authorized under Title VII in that the latter is predicated upon a prior finding of discrimination. Thus, Title VII affirmative action is remedial, while the 11,246 obligation is preventative.

22 Neither Executive Order 10,925, which introduced the appellation, nor 11,246, which superseded it, see note 21 supra, elaborated on the specifics of the “affirmative action” obligation and, because the mandate failed to give rise to any adversarial proceedings until nearly a decade after its inception, there were few judicial or administrative interpretations. Note, Executive Order 11,246: Anti-Discrimination Obligations in Government Contracts, 44 N.Y.U.L. Rev. 590, 592-93 (1969). The language of 11,246 seems to support a narrow construction. The “affirmative action” required by the order is that necessary to “ensure” compliance by the individual company with anti-discrimination mandates. Exec. Order No. 11,246 § 202, 3 C.F.R. 167 (1977), reprinted in 42 U.S.C. § 2000e (1976), as amended by Exec. Order No. 12,086, 3 C.F.R. 230 (1979).

cant changes as a result of the Rehabilitation Act of 1973 (the Act).\textsuperscript{24}

At the time the Act was passed, and indeed for the preceding half century, the rights of the handicapped had been a subject of federal concern.\textsuperscript{25} This concern took the form of federal-state programs of vocational training and rehabilitation.\textsuperscript{26} With the passage of the Act, and its subsequent amendments,\textsuperscript{27} a new approach developed. No longer was the law limited to making handicapped individuals employable and to encouraging employers to hire them. Instead, the Act imposed an obligation on certain employers to hire the handicapped and declared that federal contracts and assistance would be denied to noncomplying employers.\textsuperscript{28} Title V\textsuperscript{29} of the Act, considered to be the "civil rights act for the handicapped,"\textsuperscript{30} contains the major substantive provisions. Section 504 provides in pertinent part:

No otherwise qualified handicapped individual in the United States, as defined in section 7(6) of this Act, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.\textsuperscript{31}

\textsuperscript{28} 29 U.S.C. § 793 (1976); see 41 C.F.R. 60-741.28 (1978). The sanctions available to the government in dealing with contractual infractions of this nature are numerous and a contractor's failure to conciliate a complaint may have serious ramifications. Not only is the Assistant Secretary of Labor authorized by the regulations to enjoin the violation and demand remedial relief, but he may debar delinquent contractors from receiving future contracts, suspend, terminate, cancel or withhold progress payments on current contracts. See generally Steedman, "Banned in Boston—and Birmingham and Boise . . .": Due Process in the Debarment and Suspension of Goverment Contractors, 27 Hastings L.J. 793 (1976).
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This section would appear to protect handicapped individuals who have any relationship with programs, institutions, or organizations which receive federal funding.\(^2\) Section 503 extends the obligation not to discriminate against the handicapped to federal contractors and subcontractors.\(^3\)

**The Rehabilitation Act of 1973 and the Troubled Employee**

Since the protection afforded by sections 503 and 504 of the Act extends only to the “qualified handicapped individual,”\(^4\) a fundamental inquiry is to define a “qualified handicapped individual.” Section 7(6) of the Act defines “handicapped individual” as “any person who (a) has a physical or mental impairment which substantially limits one or more of such person’s major life activities, (b) has a record of such an impairment or (c) is regarded as having such an impairment.”\(^5\) Whether alcoholism or drug addiction is a


\(^3\) Section 503 provides in pertinent part:

Any contract in excess of $2,500 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States shall contain a provision requiring that, in employing persons to carry out such contract the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals. . . . The provisions of this section shall apply to any subcontract in excess of $2,500 entered into by a prime contractor in carrying out any contract for the procurement of personal property and nonpersonal services (including construction) for the United States.


In explaining the apparent inconsistency in the use of the phrase “otherwise qualified” in § 504 while employing merely “qualified” in § 503, the Secretary of Health, Education and Welfare has indicated that

[t]he Department believes that the omission of the word “otherwise” is necessary in order to comport with the intent of the statute because, read literally, “otherwise” qualified handicapped persons include persons who are qualified except for their handicap, rather than in spite of their handicap. . . . In all other respects, the terms “qualified” and “otherwise qualified” are intended to be interchangeable.


\(^4\) 29 U.S.C. §§ 793, 794 (1976); see notes 31 & 33 and accompanying text supra.

\(^5\) 29 U.S.C. § 706(6) (1976), as amended by Rehabilitation Act Amendments of 1974, Pub. L. No. 93-516 § 111(a), 88 Stat. 1619. The Act’s original definition of “handicapped individual” was framed in terms of amenability to rehabilitation, including within its ambit only those persons with physical or mental disabilities resulting in substantial handicap to employment who could “reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to [the Act].” Rehabilitation Act of 1973, Pub. L. No. 93-112, § 7(6), 87 Stat. 361 (codified at 29 U.S.C. § 706(6)). This definition proved to be unworkable. Legislative history of the 1974 Amendments reveals that congres-
“mental impairment” and thus a handicap was a hotly debated subject although the question is now clarified by statute. The historical development of the most recent amendments, the Comprehensive Rehabilitation Act Amendment of 1978, is interesting because it has had an impact on the development of state laws and reflects the concern and confusion over the status of alcoholism and drug abuse.

The historical intent was to overcome the narrowness of the original definition. "The new definition applied to Section 503 . . . in order to avoid limiting the affirmative action obligation of a Federal contractor to only that class of persons who are eligible for vocational rehabilitation services." S. Rep. No. 93-1297, 93d Cong., 2d Sess. 18, reprinted in [1974] U.S. Code Cong. & Ad. News 6373, 6390.

Although the regulations promulgated by the Office of Federal Contract Compliance Programs (OFCCP) fail to explain the term "physical or mental impairments," both the HEW regulations and the Executive Order 11,914 regulations, enacted to coordinate enforcement by all federal agencies dispensing financial assistance, provide that:

"Physical or mental impairment" means (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following bodily systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hematic and lymphatic; skin; and endocrine or (B) any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

45 C.F.R. §§ 84.3(j)(2)(i), 85.31(b)(1) (1978) (emphasis added). The Secretary of HEW has noted that some of the specific diseases covered by the definition are “emotional illness and drug addiction and alcoholism.” 42 Fed. Reg. 22685 (1977).


The Department of Labor, in its designated capacity as chief administrator of § 503 of the Act, see Exec. Order No. 11,758, 39 Fed. Reg. 2075 (1974), acted rapidly to bring alcoholics and drug addicts within the definition of "handicapped individual." The OFCCP took this position as early as February, 1975, when it began investigating complaints from alcoholics and drug addicts. Letter from Secretary of Labor Marshall to Attorney General Bell (April 12, 1977). In addition, the Department of Labor, in an official opinion released on September 24, 1976, declared that alcoholism and drug addiction were within the protection of the Act. Notwithstanding the OFCCP position and the vigorous processing of a total of 18 alcoholism and drug abuse complaints between February, 1975, and March, 1977, the issue whether alcoholics and drug addicts were to be included within the definition of "handicapped individual" was apparently still in need of clarification in 1977.

Executive Order No. 11,914, 3 C.F.R. 117-18 (1977), authorizes the Secretary of HEW to promulgate rules and regulations to implement § 504 of the Act. In this context, Secretary of HEW Califano formally requested the opinion of the Attorney General as to the applicability of the statute to persons suffering from alcoholism and drug addiction. In his opinion letter, Attorney General Bell squarely concluded that the term "handicapped individual" included drug addicts and alcoholics for purposes of § 504 and, by implication, for purposes of §§ 501 and 503 as well. Unpublished Letter from Attorney General Bell to Secretary of Health, Education and Welfare Califano (April 12, 1977), cited at 42 Fed. Reg. 22686 (1977). In reaching this finding, Bell apparently relied on the legislative history of the Act which, although not specifically focusing on the problems of drug addiction and alcoholism, never-
During the legislative process extensive amendments to the Act were proposed. Some questions were raised regarding the application of the Act to alcoholics and drug users, and it was feared that the express extension of the Act to these individuals would lead to such consequences as requiring airlines to hire alcoholic pilots or drug companies to hire drug addicts. Thus, restrictive language was proposed. In conference, efforts were made to arrive at lan-

The issue of the coverage of alcoholics and drug addicts was raised in the final stages of preparation of the implementing regulations. One Senator noted that problems had arisen because "[h]ypothetical examples of what these regulations might result in, such as putting an active drug addict in charge of drug supplies in a hospital or having an active drug addict hired to teach children" has created apprehensions as to the wisdom of such a measure. Letter from Senator Williams to Secretary of Health, Education and Welfare Califano (April 11, 1977). The Senator indicated, however, that these hypotheticals had served to divert attention from the real-life discrimination faced by addicts and alcoholics in medical care, vocational training, and educational and employment opportunities and that "the present draft regulations, as expressed in the preamble, cope quite reasonably . . . with any problems in enforcement which might arise. They allow for legitimate distinctions to be made where these addictions would pose problems in job performance and eligibility and where the condition might interfere with the participation of others." Id.

Thus, in issuing the regulations, HEW undertook to assuage the apprehensions alluded to by Senator Williams. The analysis accompanying the regulations stated:

The Secretary wishes to reassure recipients that inclusion of addicts and alcoholics within the scope of the regulation will not lead to the consequences feared by many commentators. . . . The fact that drug addiction and alcoholism may be handicaps does not mean that these conditions must be ignored in determining whether an individual is qualified for services or employment opportunities.

With respect to the employment of a drug addict or alcoholic, if it can be shown that the addiction or alcoholism prevents successful performance of the job, the person need not be provided the employment opportunity in question.


Thus, it is apparent that HEW, at least since early 1977, and the Department of Labor, since 1975, have regarded alcoholics and drug addicts, and the mentally ill within the coverage of §§ 504 and 503, respectively.


Id.; see Letter from Senator Williams to Secretary of Health, Education and Welfare Califano (April 11, 1977).

41 H. Conf. Rep. No. 95-1780, 95th Cong., 2d Sess. 102 (1978), reprinted in [1978] U.S. Code Cong. & Ad. News 7553, 7591. The House proposal provided that, for the purposes of §§ 503 and 504, the term "handicapped individual" would not include alcoholics or drug abusers "in need of rehabilitation." Id. at 7591. The Senate amendment, on the other hand,
guage which would allay these fears and yet ensure that alcoholics and drug users who were either recovered or in treatment would be protected by the Act. In codifying the compromise language, and thus adopting the official Office of Federal Contract Compliance Programs (OFCCP) and Department of Health, Education and Welfare (HEW) standards, section 7(6) of the Act was amended to include the following within the definition of "handicapped individual":

For purposes of section 503 and 504 as such sections relate to employment, such term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.

While it is clear that alcoholics and drug addicts falling outside

couched in terms of qualification for employment, provided: “[t]he term handicapped individual does not include an alcoholic or drug abuser whose condition of alcoholism or drug abuse renders that individual not qualified for employment by preventing him from performing the essential functions of the job.” Id.

3 See note 42 supra.
4 See note 38 supra.
5 Comprehensive Rehabilitation Services Amendments of 1978, Pub. L. No. 95-602 § 122(a)(6)(C), 92 Stat. 2955 (amending 29 U.S.C. § 706(6) (1976)). The legislative history of the 1978 amendments brings to light the fact that the pre-amendment scope of the Act virtually was unchanged by this addendum. Senator Williams commented that the safety concerns embodied in the amendment were "implicit in the act's limitation and in [the provision] limiting protection to persons who would perform the essentials of the job." 124 CONG. REC. S19002 (daily ed. Oct. 14, 1978) (remarks of Sen. Williams). Nevertheless, to meet the apprehensions expressed by employers, "spelling out the safety concerns was felt [to be] necessary," id., and thus, the amendment merely reflects the previously established congressional intent. Id.; see note 38 supra.

The purpose of the amendment, as stated by Senator Williams, was to unequivocally proscribe discrimination “against those persons having a history or condition of alcoholism or drug abuse who are qualified for the particular employment they seek.” Id. In support of this mandate, the Senator noted that experiences of treatment professionals, major employers, and federal programs alike had demonstrated the ability of alcoholics and drug abusers to be rehabilitated and to be successfully reintegrated into the workplace. Id. Therefore, the import of the amendments lies in the directive that “an employer cannot assume that a history of alcoholism or drug addiction, including a past addiction currently treated by methadone maintenance, poses sufficient danger in and of itself to justify exclusion. Such an assumption would have no basis in fact, and the act does not permit it.” Id. This statement recently was used as an argument before the Supreme Court in a brief in opposition to a petition for a grant of certiorari. See Brief for Respondants at 68, New York City Transit Authority v. Beazer, 99 S. Ct. 1355 (1979). Although certiorari was granted, the Court declined application of the Act to methadone users since the plaintiff’s claim arose before passage of the Act. 99 S. Ct. at 1363.
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these restrictions are now “handicapped individuals,” the actual extent of the protection afforded by the Act is muddled. The protection of the Act extends only to “qualified” handicapped persons, and to date, there have been no definitive interpretations of this term as it applies to the alcoholic or drug addict, either by the courts or enforcement agencies. The Act makes clear that the employer’s

There is no definition of the term “qualified” in the text of the Act itself. As explicated by the OFCCP regulations governing the administration of § 503, a handicapped person is “qualified” only if he is “capable of performing a particular job, with reasonable accommodation to his or her handicap.” 41 C.F.R. § 60-741.2 (1977). The HEW regulations and Executive Order 11,914 impose an additional stipulation. Under their definition, a handicapped person is qualified if he is capable of performing, with “reasonable accommodation,” the “essential functions” of the job. 45 C.F.R. §§ 84.3(k)(1), 85.32(a) (1978). Under the HEW Secretary’s analysis, the addition emphasizes that a handicapped person will not be “unqualified” merely because of difficulty in performing marginal tasks associated with the position in question. 42 Fed. Reg. 22676, 22686 (1977). With respect to federally financed educational programs, the term “qualified” is defined by HEW as capable of meeting “the academic and technical standards requisite to admission or participation in the recipient’s educational program or activity.” 45 C.F.R. § 84.3(k)(3) (1978). See Southeastern Community College v. Davis, 99 S. Ct. 2361, 2386 (1979). Thus, under the OFCCP and HEW regulations, consideration of the “reasonable accommodation” concept is a condition precedent to a determination of an individual’s qualification for a job.

Recently, the Supreme Court delineated the scope of the employer’s obligation under § 504. In Southeastern Community College v. Davis, 99 S. Ct. 2361 (1979), the plaintiff, who suffered from a serious hearing disability, was rejected for admission to the defendant’s state-funded nursing program because the school believed that, relying on an audiologist’s report, the seriousness of the plaintiff’s disability would make it unsafe for her to practice nursing. Id. at 2364. The plaintiff filed suit alleging a violation of § 504 as amended. The district court found for the defendant, holding that the plaintiff was not an “otherwise qualified handicapped individual” protected by § 504 because her disability would “sufficiently” prevent her from performing in the nursing program. Id. at 2365. The fourth circuit reversed, holding that it was error for the district court to have considered the nature of the plaintiff’s handicap in its determination of “otherwise qualified” rather than considering only her “academic and technical qualifications.” Id. at 2366. The circuit court further suggested that § 504 obligated the school to take “affirmative conduct” to accommodate the plaintiff by modifying the program, even if such was expensive. Id.

The Supreme Court reversed, holding that “an ‘otherwise qualified’ person is one who is able to meet all of a program’s requirements in spite of his handicap,” id. (emphasis added), and not one who meets the program’s requirements except where limited by the handicap. Id. at 2367. Under the Court’s interpretation, then, the plaintiff was not protected by § 504 because she could not meet the legitimate physical qualifications necessary for the nursing program. The Court further held that, under the language and legislative history of § 504, affirmative action was not envisioned and that HEW was without authority to require such an obligation under the statute. Id. at 2369-70. An important distinction, however, was made by the Court. Whereas “substantial” modifications were found not to be contemplated within the ambit of the employer’s duty to accommodate, the Court stated:

We do not suggest that the line between a lawful refusal to extend affirmative action and illegal discrimination against handicapped persons will always be clear. It is possible to envision situations where an insistence on continuing past requirements and practices might arbitrarily deprive genuinely qualified handicapped persons of the opportunity to participate in a covered program. . . . Thus situations may arise where a refusal to modify an existing program might become unrea-
sole concern should be the employee's ability to do the job, even where the employee is a current user of drugs or alcohol, as long as his employment would not constitute a direct threat to property or the safety of others. Certainly, then, the employer is prohibited from considering the prior record or addiction of the recovered alcoholic or drug user, although he may verify the employee's recent work history to ensure that the employee is capable of satisfactory performance. Presumably, if a troubled employee now claiming to be recovered had a work record indicating that his alcoholism or drug abuse had made him unable to work, the employer could require evidence of recovery.

The principles governing alcoholics and drug addicts should be applicable to employees with histories of mental illness. Thus, while the employer ought to be free to verify the employee's ability to perform, he should not be permitted to assume that an individual is not capable merely because of a prior history of mental illness.

Identification of those instances where a refusal to accommodate the needs of a disabled person amounts to discrimination against the handicapped continues to be an important responsibility of HEW. \textit{Id.} at 2370. The Court then limited its holding to the particular facts of the case, holding that § 504 does not require a state-funded educational institution to make "substantial change" in its program where such change would render unreasonable legitimate requirements. \textit{Id.}

The problem of employment for persons with histories of mental illness is particularly acute. See generally Miller & Davison, \textit{Effects of Stigma on Re-employment of Ex-Mental Patients}, 49 \textit{Mental Hygiene} 281 (1965); Olshansky, Grob & Malamud, \textit{Employers' Attitudes and Practices in Hiring Ex-Mental Patients}, 42 \textit{Mental Hygiene} 391 (1958). While employers' fears and prejudices regarding the employment of persons with histories of mental illness continue to be strong, studies have indicated that apprehensions about the safety of hiring ex-mental patients are largely unfounded. See Ling, \textit{An Investigation Into the Readjustment to Work of Psychiatric Cases}, 1 \textit{Int'l J. Soc. Psych.} 18 (Autumn 1955). Indeed, certain forms of mental illness do not interfere with job performance.

A review of back pay conciliation agreements through December, 1976, reveals that the OFCCP is enforcing the Act on behalf of persons with heart trouble, ulcers, epilepsy, anemia and mental illness, as well as those with more traditional handicaps. J. \textit{Northrup, supra} note 25 at 91-99 (1977). Northrup documents several cases involving mental and emotional problems. In one instance a job applicant who had been denied a position on the basis of his record
While some forms of mental illness, even when current, may not interfere with job performance, however, a question arises as to whether an employer can determine that a particular job is psychologically unsuited to the mentally ill individual or the individual who, although now recovered, may be vulnerable to relapse. The use of employment tests to determine “qualification” for a particular job is an especially troublesome problem where mental or personality considerations are factors. Can one validate that a certain personality is incompatible with a specific job? For example, can an employer effectively reject an applicant with a history of paranoia from a position requiring team work even though that applicant has a successful history as a night watchman? The lack of definitive standards and the elusiveness of predicting job-relatedness of a particular mental handicap severely limits any expansive definition of

of mental illness was awarded almost $3000 in back pay, expurgation of his personnel record, and the position for which he had previously applied. Id. at 98. But see Spencer v. Toussaint, 408 F. Supp. 1067 (E.D. Mich. 1976) (refusal to consider an applicant with history of mental illness for the position of bus driver not unconstitutional).

It is interesting to note that, while the regulations do not specifically provide for back pay awards in conciliation agreements, see 41 C.F.R. §§ 60-741.26(g), .28(a) (1978), the OFCCP continues to implement this remedy for parties aggrieved under the Act. See Handicapped Workers Awarded Over $115,000 in Back Pay for Job Bias, DAILY LAB. REP. at A-2 (Jan. 10, 1977). The OFCCP relies upon the decision in United States v. Duquesne Light Co., 423 F. Supp. 507 (W.D. Pa. 1976), for its authority to invoke the equitable powers of the court to require back pay and reinstatement.

51 The HEW regulations address the issue of preemployment testing and inquiry. Section 84.13 prohibits the recipient of federal funds from utilizing:

any employment test or other selection criterion that screens out or tends to screen out handicapped persons or any class of handicapped persons unless: (1) the test score or other selection criterion, as used by the recipient, is shown to be job-related for the position in question, and (2) alternative job-related tests or criteria that do not screen out or tend to screen out as many handicapped persons are not shown by the Director to be available.

46 C.F.R. § 84.13(a) (1978). Thus, in light of the requirement that particular job standards be validated, a requirement borrowed from the employment discrimination field involving racial minorities and women, employers are no longer free to act on unproven assumptions that individuals with certain handicaps cannot perform particular jobs. J. NORTHUP, supra note 27, at 81-82. They must be able to produce medical and perhaps industrial production evidence to this effect. Id. This validation requirement, however, assumes an objectivity which may be suitable to physical disabilities but which may have serious implications for placing employees in jobs in accordance with psychological considerations. Id. To date, the issue remains unresolved as to the propriety of administering mental tests to mentally handicapped persons or establishing that a certain personality is compatible with, and therefore required for, a specific job. Id. at 90-91.

"qualified" based on probability. Determining whether a particular individual is "qualified," therefore, will most likely be limited to an inquiry as to the individual's present ability to perform adequately the job sought, unless employment for that job can affirmatively be shown to result in actual danger to coemployees, the public or himself.53 This, of course, must be done on a case-by-case basis.

The Employer's Obligation to Accommodate

While the handicapped person must be capable of performing the job in order to be "qualified," he need not be equal to the non-handicapped individual in his ability to perform. Before disqualifying an individual, the employer has an obligation to consider the "reasonable accommodations" that could be made for the particular handicap.54 Defining "reasonable accommodations," particularly as it relates to the alcoholic, drug addict, or mentally disabled is perplexing. As with the term "qualified," there are no court decisions or administrative regulations defining this term as it relates to the troubled employee. "Accommodation," Northrup states, "requires job structuring when it is 'reasonable' to do so, but no agency or employer really knows what 'reasonable' means. However, the employers are still obligated to help make the law work regardless of the degree of difficulty, subject to business necessity and financial limitation, however that may be defined."55

Concern with the scope of the employer's obligation to accommodate has focused largely on accommodation to the physically handicapped, where accommodation is often a physical or architectural matter.56 Indeed, the whole notion of accommodation actually

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53 Guy, supra note 32, at 266.
54 See 41 C.F.R. § 60-741.2 (1978); 45 C.F.R. §§ 84.3(k), 85.32(a) (1978).
55 J. NORTHRUP, supra note 25, at 85. The test to be used in determining appropriate accommodation is "business necessity and financial limitation." Id. This concept is applied by the courts in other areas of civil rights litigation where a defendant employer is attempting to justify a personnel decision that resulted in the alleged discrimination. Under the OFCCP, HEW, and Executive Order 11,914 regulations, the employer has the burden to demonstrate that a particular accommodation poses "undue hardship." See 41 C.F.R. §§ 60-741.6(d), 250.6(d) (1978); 45 C.F.R. §§ 84.12, 85.53 (1978). Decisions involving violations of § 504 indicate that this may not be an easy task. See Southeastern Community College v. Davis, 99 S. Ct. 2361, 2370 (1979); Barnes v. Converse College, 436 F. Supp. 635 (D.S.C. 1977). See also Crawford v. University of N. Carolina, 440 F. Supp. 1047 (M.D.N.C. 1977). Although this trend has been suggested to mean that the reasonableness of the accommodation foreseen will be judged not from the employer's viewpoint, but from the perspective of the handicapped applicant, J. Northrup, supra note 25, at 99, the Davis Court's decision apparently defines the reasonableness of accommodation as turning on the "substantiability" of the modification. See note 46 supra.
56 The nature of the accommodation duty is set out in detail in the regulations. See 41
may be more appropriate to the physically handicapped than to the mentally-disabled, alcoholic, or drug-addicted individual. Embodied within the spirit of the Act, however, is the notion that accommodation includes such considerations as job restructuring and modified work rescheduling. One may surmise that an employer will have to accommodate a troubled employee's reasonable rehabilitation requirements, such as giving the employee leave to go to a rehabilitation program or to take medicine. The employer may be required to transfer the troubled employee who cannot cope with a particular position to a less stress-producing position if it is available. There may be situations where some form of accommodation could permit a mentally disabled employee to perform a job which, at first glance, he may not seem capable of doing. It is clear that flexible and novel approaches will be necessary. The degree to which this must be done will become apparent as the agencies act on a case-by-case basis.

Finally, while the employer's obligation to "accommodate" before disqualifying an individual as incapable of performing the job does not require him to institute and maintain a well-run occupational rehabilitation program, it has been argued that the employer who does so may be more able to demonstrate compliance with his statutory obligations towards the troubled employee whom he is seeking to discharge.

C.F.R. § 60-741.6(d) (1978); 45 C.F.R. §§ 84.12, 85.53 (1978). The HEW regulations state that "reasonable accommodation may include: (1) making facilities used by employees readily accessible to and usable by handicapped persons, and (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions." Id. § 84.12(b).

Clearly, the granting of time off to attend a program or to take medicine would not conflict with the substantial limitation set forth by the Supreme Court in Southeastern Community College v. Davis, 99 S. Ct. 2361 (1979), since the accommodation would not result in burdensome expense. See also Gittler, Fair Employment and the Handicapped: A Legal Perspective, 27 De Paul L. Rev. 953, 960 n.21 (1978).

See 45 C.F.R. § 84.12(b)(2) (1978). This proposition is considerably buttressed by the HEW and Executive Order 11,914 regulations defining "qualified" as requiring the capability of performing with reasonable accommodation only the "essentials" of the job in question. Id. §§ 84.3(k)(1), 85.32(a).

With respect to mental illness, making the job placement dependent on psychological factors is a possibility. In such a case, a paranoid applicant, for example, after being rejected for a particular team job, may be offered a position more suited to his mental orientation. One conciliation agreement appears to preclude this alternative. J. Northrup, supra note 25, at 92, see Holland v. Boeing Co., 12 Fair Empl. Prac. Cas. 975 (Wash. Super. Ct. 1976), aff'd en banc, 90 Wash. 2d 384, 583 P.2d 621 (1978).

Conversation with Dr. Paul Sherman, past president of the Ass'n of Labor Mgt. Administrators and Consultants on Alcoholism (March 1979).
STATE LAWS AND THE TROUBLED EMPLOYEE

Thirty-seven states currently have laws prohibiting discrimination against employees and applicants on the basis of “handicap” or “disability.” A few of these statutes, however, limit the coverage

[Note 32, at 185. Apparently, the expansive federal policy of recognition and protection of the employment rights of the handicapped was, and continues to be, a persuasive influence for change at the state level. For example, a number of administrative agencies empowered to enforce state fair employment laws are following the lead of the OFCCP and HEW. See notes 70-72 and accompanying text infra.]

to the physically disabled or mentally retarded. The majority of the relevant statutes prohibit discrimination on the basis of "handicaps" either without defining this term or by broadly defining "handicaps" to encompass emotional illness and possibly alcoholism and drug addiction.


The inclusion of alcoholism or drug addiction within the definition of these statutes is properly left to the appropriate commissions as complaints arise. What is suggested here is that the individual state's position on this issue might be guided by other statutes which deal with alcoholism in other fields. The use of such collateral statutes is permitted where the meaning of words, such as the broad terms in the above statutes, is unclear or ambiguous. District of Columbia v. Orleans, 406 F.2d 957, 968 (D.C. Cir. 1968) (use of Uniform Gift to Minors Act applicable to determination of state tax due on conveyance of real property). Such construction was utilized by the Wisconsin Supreme Court in defining "handicap" according to either its common meaning or according to the broader definition of handicap as found in the Wisconsin Rehabilitative Law. See Chicago, Milwaukee, St. Paul & Pac. R.R. v. De-
Although the applicability of these broadly drawn statutes to emotional or mental illness has not been an issue, the question of whether alcoholism and drug abuse are “handicaps” under state statutes has arisen in several states. To date, only the Wisconsin

With such an approach, an alcoholic or drug addict in Washington might employ a statute which was passed to protect disadvantaged persons from involuntary commitment and which analogized alcoholism and drug addiction to mental deficiencies, epilepsy, and mental retardation. See Wash. Rev. Code Ann. § 71.05.040 (Supp. 1978).


Another area of legislation which makes reference to alcoholism and might possibly be used for guidance is the state disability insurance laws. The ability of insurance carriers to segregate alcoholics from group insurance plans is derived from statutory provisions. Certain states require that insurance carriers issuing group disability insurance must offer coverage for inpatient treatment of alcoholism and drug abuse to the insured. E.g., Ky. Rev. Stat. § 304.18-130 (Supp. 1978); Mich. Comp. Laws Ann. § 500.3609 (Supp. 1979-1980); Nev. Rev. Stat. §§ 689A.030(9), .047 (1979); N.J. Stat. Ann. § 17B:27-46.1 (West 1979); Ore. Rev. Stat. § 743.557 (1977); Wis. Stat. § 632.89(2)(a)(1) (1979). In view of these statutes, it would appear that the legislatures consider alcoholism as a disability and therefore, to be consistent, should treat it as such for the purpose of its employment discrimination laws. If not so treated, the legislature would be creating the anomaly whereby an employer could offer his worker coverage for expenses arising from alcoholism, while at the same time discriminate against another alcoholic by firing or refusing to hire him. It should be noted, however, that a majority of states provide in their insurance laws an option for the insurance carriers to exculpate themselves from any liability on claims arising from alcohol or drug related illnesses.

It should also be noted that the trend in most states is to incorporate alcoholism as part of their mental health codes and recognize it as a disease. See, e.g., Mont. Rev. Codes Ann. § 80-2708 (Cum. Supp. 1977); Ore. Rev. Stat. § 430.315 (Supp. 1977); Tenn. Code Ann. § 33.802 (1977). Additionally, the National Health Planning and Resources Development Act of 1974, Pub. L. No. 93-641, 88 Stat. 2225 (codified at 42 U.S.C. §§ 300k-300u (1976)), requires states, in order to receive federal grants, to coordinate alcoholism services planning with general medical services planning, as well as with mental hygiene services. For a medical discussion of alcoholism as a mental illness, see Freed, Some Interfaces Between Alcoholism and Mental Health, 6 J. Drug Issues 213 (1976).

“Emotional illness has never been segregated by handicap discrimination laws because of the difficulty in ascribing a definition to such a term, and generally, it has been subsumed under the broad term “mental illness.” The Council of State Governments, in a recently published recommendation of treatment for the mentally disturbed, see Council of State Governments, State Responsibilities to the Mentally Disabled (1976), divided such a handicap into two areas: (1) mentally ill, and (2) mentally retarded. Acknowledging the possibility of defining the former, the Council settled upon a description which encompassed all persons experiencing serious problems in adjusting to life and who are subjected to “continuous or periodic episodes of depression, acute anxiety, personality disorders, psychosis, problems relating to others, etc.” Id. at 6. These types of emotional illnesses (referred to as mental illnesses throughout this article) also would fit into the description of mental illness as found in the statutes listed in note 65 supra.

Because most of the statutes have been enacted only recently, very few cases have been entertained by the state judiciary or administrative agencies. Although only one state court
judiciary has held alcoholism to be a "handicap" within the meaning of their employment discrimination statute.83

There are, however, indications that administrative agencies charged with enforcing broadly drawn state employment discrimination statutes are beginning to confront the question of whether alcoholism and drug abuse are to be covered. A recent survey of twenty such agencies9 indicates that only one state has officially adopted the view that alcoholism and drug addiction are protected handicaps70 whereas five have done so unofficially.71 Of the remain-

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There is no question that alcoholism or "drinking problems" can operate to make achievement unusually difficult. Knowledge that a person has such a history may interfere with getting new jobs or obtaining promotions, even if the person is no longer drinking. As with many other illnesses, employers' ignorance of the disease or fears of potential future problems may result in discrimination completely unrelated to an employee's [sic] actual ability to perform on the job. The legislative policy of full employment for all qualified persons would thereby be impeded. Id. at 1812. In deciding to broadly construe the term "handicap," the court relied on prior Wisconsin cases which had interpreted "handicap" to include disabilities such as deviated septums, Journal Co. v. Department of Indus., Lab. & Human Relations, 13 Fair Empl. Prac. Cas. 1655 (Wis. Cir. Ct. 1976), and asthma and migraine headaches, Chicago, Milwaukee, St. Paul & Pac. R.R. v. Department of Indus., Lab. & Human Relations, 62 Wis. 2d 392, 215 N.W.2d 443 (1974). The underlying philosophy of the Wisconsin judiciary was succinctly stated by one court which, in rejecting appellant's contention that to be deemed handicapped one must "be incapacitated from normal remunerative occupation, [be] an economic detriment to the normal employer," and be in need of "rehabilitative training," declared:

The Wisconsin Fair Employment Code was promulgated so as to encourage and foster to the fullest extent practicable the employment of all properly qualified persons. . . . If the individual can function efficiently on the job, then the mere fact that he is different from the average employee as to those statutorily proscribed bases may not be used as a basis for discrimination. Id. at 394, 215 N.W.2d at 445.

9 In May and June 1979, the St. John's Law Review conducted an informal telephone survey of 20 state agencies responsible for the enforcement of employment discrimination statutes. The purpose of the survey was to determine current attitudes regarding the inclusion of alcoholism and drug addiction as handicaps. The results are discussed in notes 70-74 and accompanying text infra and are on file with the St. John's Law Review.

70 Although not yet codified, Illinois has incorporated alcoholism and drug addiction by way of a Governor's official memorandum.

71 The Michigan Department of Civil Rights has stated that alcoholism and drug addiction are handicaps in response to inquiries from employers, employee groups and the handicap commission, although no formal opinion has been issued and no complaints have been filed. During the hearing of a complaint which was subsequently settled, the New Jersey
ing states, some have accepted alcoholism but not drug addiction, some are currently debating the question, and others have not reached the issue. Whatever the ultimate decision reached, it is apparent that the determination process has been and will continue to be laborious. The New York experience is illustrative. In response to guidelines issued by the New York State Division of Human Rights, the New York Human Rights Law was amended in 1974 to prohibit employment discrimination on the basis of “disability" which included, *inter alia*, “mental conditions.”

The position taken by the Pennsylvania Human Relations Commission presents an enigma. A Commission press release dated June 3, 1975 (on file with the St. John’s Law Review) announced that “impairments which are . . . mental or emotional, including those which are drug or alcohol-related” would be included within the definition of handicap in the forthcoming Commission regulations. Nevertheless, the final version of the regulations, PA. CODE tit. 43, ch. 17 (1978), adopted on August 28, 1978, did not expressly include alcoholism or drug addiction. Instead, the handicap definition was adopted verbatim from the HEW § 504 regulations. The Commission did indicate, however, that it is prepared to accept the broadest possible interpretation of the definition and hence alcoholism and drug addiction will probably be covered.

Kansas (unofficial), Montana (official) and Nevada (unofficial) fall within this category. The Montana Human Rights Division is currently scheduling a hearing to determine the status of drug addition.

Alaska, Florida, Georgia, Hawaii, Rhode Island and Wyoming have not decided whether to include alcoholism or drug addiction within the meaning of “handicap.” The Florida commission on Human Relations is currently revising their regulations and plan to draw from §§ 503 and 504 of the Rehabilitation Act. The Georgia Office of Human Affairs has indicated that attitudes toward drug and alcohol addiction as handicaps are positive, but that the issue remains unresolved. An amendment to the Washington D.C. statute which would include alcoholism and drug addiction within the handicap definition has been proposed by the Office of Human Rights, which is optimistic about its passage.

The question has not been discussed in California, Colorado, Indiana, Maine and Maryland.

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Division of Civil Rights took the position that recovered alcoholics and drug addicts were protected handicapped persons. The Civil Rights Commission of Ohio, influenced by the HEW guidelines to § 504 of the Rehabilitation Act of 1973, as amended, has informally indicated that alcoholics and drug addicts fall within the definition of handicap. In a recent amendment to its employment discrimination statute, Pub. Act 79-480 (1979) (amending CONN. GEN. STAT. § 31-126 (1979)), Connecticut extended protection to those persons with “present or past history of mental disorder.” The Commission of Human Rights and Opportunities has stated that they will process complaints of employment discrimination based on alcoholism or drug addiction, these conditions interpreted as being “mental disorders.”

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[1974] N.Y. LAWS Ch. 988, § 1 (amending N.Y. EXEC. LAW § 292 (McKinney 1972)).

N.Y. EXEC. LAW § 292(21) (McKinney Pam. 1978). Disability is defined as follows: The term “disability” means a physical, mental or medical impairment resulting from anatomical, physiological or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques, provided, however, that in all provisions of this
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Rights Division, however, did not initially interpret the term “disability” to include alcoholism and drug abuse; rather, they were viewed as “social diseases.” Hence, an employer’s firing of an employee or rejection of a job applicant because of prior or current alcohol or drug abuse was deemed lawful.

Influenced by both interpretations of the Act and the results of “recent medical and social research,” the State Division of Human Rights subsequently reconsidered the status of alcoholism and officially revised the definition of “disability” to include the recovered alcoholic. The drug addict, however, is still regarded as a “social problem,” and therefore, even if recovered, is outside the purview of the statute.

Since a primary requisite under the New York statute is that
the handicapped employee be able to perform his duties, an employer is not acting unlawfully if he fires or refuses to hire an employee who cannot perform satisfactorily. Consistent with this, the Division of Human Rights has indicated that the law "does protect an individual with a disease involving future risk so long as the disease does not presently interfere with the individual's ability to perform." The implication is that with respect to the recovered alcoholic or to the person with a history of mental illness, the employer cannot consider in his hiring decision any concern he may have as to the potential of recurrence of the disability.

In summary, although the Act and the regulations promulgated thereunder have stimulated discussion of extending legislative protection to recovered alcoholics, drug addicts and the mentally ill, it apparently will take some time before state protection is actually afforded. The trend has been to recognize recovered alcoholics and persons with mental illness histories as "disabled" for purposes of some statutes; whether they will be considered legally "handicapped" for purposes of discrimination laws in most states remains to be resolved. It is clear, however, that there is resistance to viewing drug addiction as other than a social problem; as long as

"should be involved in an alcoholism rehabilitation program for six months," with such period serving only as a guideline, Id. at 3-4. Perhaps the most important aspect of the Division's decision was their recognition of accommodation.

In order to enforce the anti-discrimination provisions as they apply to alcoholics, it may be necessary for the Division to order respondents to create or upgrade occupational alcoholism programs. Likewise, alcoholics who file complaints with the Division of Human Rights may, depending on the facts of the case, be required to participate in alcoholism rehabilitation programs in order to be permitted to keep their jobs.

Id. at 5.


The capacity to perform is determined somewhat by the statutory duty an employer owes to accommodate an employee's handicap. This issue has been put off by the Division of Human Rights until it acquires a "fund of experience in the course of its administering of the Flynn Act." Flynn Act Guidelines, supra note 75, at 2. Notwithstanding this uncertainty, an employer must permit employees to leave their work station to take medicine. Conversation with Ann Thatcher Anderson, General Counsel, New York State Division of Human Rights (March 1979).

Rulings on Inquiries, § 15B (published by the Division of Human Rights of New York as an aid to the interpretation of its Human Rights Law. N.Y. Exec. Law §§ 290-301 (McKinney 1972)). The ability to perform means the ability to perform over a reasonable period of time, this time period varying from job to job.

See Flynn Act Guidelines, supra note 75, at 4.

See notes 65 & 66 supra.
this resistance remains, state protection will not be extended to the recovered drug addict. Moreover, since consideration of reasonable accommodation is not a factor under state employment laws, the protection extended will be more limited than that extended by federal law. For the time being, then, recovered alcoholics, drug addicts and the mentally disturbed can be discriminated against in most states without recourse.

**Arbitration Decisions**

Having considered the legal constraints on the employer's freedom of action by virtue of federal and state law, we will now consider the constraints imposed by arbitrators. Arbitrators have been called upon to determine whether an employer's decision concerning an employee with a problem of drug abuse, alcoholism or emotional illness is violative of the collective bargaining agreement. This determination is made apart from any consideration of whether the employer also is violating any law. In this section, arbitration cases will be analyzed to assess how arbitrators review employers' decisions. Of particular interest is the question of whether arbitrators tend to apply different standards where a troubled employee is involved than in the case of a non-troubled employee and, further, whether arbitrators apply the same standard to all troubled employees or whether they treat alcoholics differently from the drug abuser or the mentally disabled.

Most cases involve challenges to management's discipline or discharge of the employee. Typically, the union charges that management's decision to discharge or discipline an employee was with-
out just cause and hence was in violation of the collective bargaining agreement. The issue usually placed before the arbitrator will be: "Was the discharge/suspension of X for just cause and if not, what shall the remedy be?"

**Discharge Because of Problem Alone or Problem-Caused Behavior Away from the Job**

Initially, one must ask whether an employer ever has "just cause" to discharge an employee solely because of his problem of drug abuse, alcoholism or mental disorder. Generally, the answer is no. The basic view is that the employee's behavior away from his job is his own business and that "the employer does not [because of the employment relationship] become guardian of the employee's every personal action and does not exercise parental control." Thus, if the employer discovers that an employee padlocks his apartment to prevent a Communist Party invasion, or drinks or takes drugs to excess every weekend, the employer has no justification for discharging that employee. Naturally, the same principle

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81 Normally, the collective bargaining agreement will provide, in substance, that an employee may not be disciplined or discharged by an employer without "just cause." F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS 612-13 (3rd ed. 1973) [hereinafter cited as ELKOURI & ELKOURI].

82 This determination is made apart from legal considerations which would limit the freedom of action of an employer covered by the applicable federal or state discrimination laws.

83 Pioneer Gen-E-Motors Corp., 3 Lab. Arb. 486, 488 (1946) (Blair, Arb.).

84 Inland Container Corp., 28 Lab. Arb. 312, 314 (1957) (Ferguson, Arb.) (dictum). In Pioneer Gen-E-Motors Corp., 3 Lab. Arb. 486, 488 (1946) (Blair, Arb.), an assault of a supervisor off company property and after working hours was held not to be cause for discharge. "To hold otherwise would, in effect, be to extend company or employer supervision over the private lives of their employees. Just as the authority of the employer would be extended, so, also, would his responsibility. Would such a responsibility be desired? The answer is obvious." Id. See also W.E. Caldwell Co., 28 Lab. Arb. 434, 436-37 (1957) (Kesselman, Arb.). In Greenlee Bros. & Co., 67 Lab. Arb. 847 (1976) (Wolff, Arb.), it was stated that: [t]he overriding issue is whether the grievant's alcoholism has manifested itself in relation to his work performance and attendance to a degree justifying his discharge. Alcoholism, like any other disease, is not a *per se* basis for discharge. . . . An employer can have no legitimate complaint about an employee who drinks excessively at home but who is able to report to work regularly and perform up to standards. Thus, the critical issue is not the degree of grievant's drinking, but the degree of his absenteeism and the quality of his work performance.

Id. at 854 (footnote omitted).

would prevent an employer's taking disciplinary action against a now-recovered employee upon learning that he had previously been "troubled." 6

While it is generally true that the employee's behavior away from his job is not a legitimate concern of his employer, 7 it is also true that the employer does have a legitimate concern when this behavior adversely affects the business. 8 For example, the other employees may fear the troubled employee and be unwilling to work with him, 9 or the company's reputation for safety or for the reliabil-


7 Inland Container Corp., 28 Lab. Arb. 312, 314 (1957) (Ferguson, Arb.); Elkouri & Elkouri, supra note 91, at 616-17. In W.E. Caldwell Co., 28 Lab. Arb. 434 (1957) (Kesselman, Arb.), Arbitrator Kesselman outlined the reasoning underlying this rule:

The Arbitrator finds no basis in the contract or in American industrial practice to justify a discharge for misconduct away from the place of work unless:

1) behavior harms Company's reputation or product . . . .

2) behavior renders employee unable to perform his duties or appear at work, in which case the discharge would be based on inefficiency or excessive absenteeism. . . . or

3) behavior leads to refusal, reluctance or inability of other employees to work with him.

Id. at 436-37.

The arbitrator may rely on the existence of a safety hazard, recognizing that the employer must provide a safe place to work. See Green River Steel Corp., 49 Lab. Arb. 117, 120 (1967) (Chalfie, Arb.) (alcoholism); Chicago Pneumatic Tool Co., 38 Lab. Arb. 891, 893 (1961) (Duff, Arb.) (cocaine addiction potential hazard); cf. Albritton Eng'r Corp., 46 Lab. Arb. 857 (1968) (Hughes, Arb.) (off-premises tendency to violence).

8 In Alabama Power Co., 66 Lab. Arb. 220 (1976) (Caraway, Arb.), an intoxicated employee, C, murdered another individual during non-working hours off the premises. The employer fired the employee, citing as his reason that the employees would be afraid to work with C and the operation would suffer. Rejecting this argument, the arbitrator found that the employees had no fear of C and that the murder was in self-defense. Id. at 223-24. In Herr-Voss Corp., 70 Lab. Arb. 497 (1978) (Sherman, Arb.), the arbitrator noted the reasonableness of the employer's objections to the reinstatement of a mentally ill employee who had been violent but held that this did not warrant termination of his seniority. See also Robertsaw Controls Co., 64-2 ARB ¶ 8748 (1984) (Duff, Arb.). Although upholding a discharge in Robertsaw Controls Co., Arbitrator Duff expressed some reservations:

Arbitrators are reluctant to sustain discharges based on off-duty conduct of employees unless a direct relationship between off-duty conduct and employment is proved. Discretion must be exercised, lest employers become censors of community morals. However, where socially reprehensible conduct and employment duties and risks are substantially related, conviction for certain types of crimes may justify discharge.
ity of its product may be harmed by the continued employment of a troubled individual who has engaged in a violent act. In these circumstances, the fear by customers is frequently raised.\textsuperscript{100}

Although these employer concerns are of great weight, it must be emphasized that a mere surmise that the employee will not perform properly on the job,\textsuperscript{101} that employees will not work with him,\textsuperscript{102} or that the company’s reputation will be hurt will not be enough.\textsuperscript{103} The actual connection between the employee’s off-the-premises behavior and harm to the company’s reputation or operation must be established to the satisfaction of the arbitrator.\textsuperscript{104} There are, no doubt, many troubled individuals whose disorders and conduct

\textit{id.} at 4 (quoting Chicago Pneumatic Tool Co., 38 Lab. Arb. 891, 893 (1961) (Duff, Arb.)). Another consideration in denying reinstatement is the adverse impact on the authority of supervisors if the now rehabilitated troubled employee returns to work. NCR Appleton Papers Div., 70 Lab. Arb. 756, 759 (1978) (Gundermann, Arb.).

The discussion here is limited to cases involving potential fears or concerns of fellow employees or supervisory staff. The question of management’s rights to terminate the employment relationship where the employee would pose an actual safety hazard to persons or property is discussed at notes 98 supra & notes 101-104, 106 infra and accompanying text.\textsuperscript{100} See generally Alabama Power Co., 66 Lab. Arb. 220, 224 (1976) (Caraway, Arb.); W.E. Caldwell Co., 28 Lab. Arb. 434, 436-37 (1957) (Kesselman, Arb.).


\textsuperscript{103} See Elkouri & Elkouri, supra note 91, at 617, and cases cited therein. See also W.E. Caldwell Co., 28 Lab. Arb. 434, 437 (1957); (Kesselman, Arb.) (“The charge that [the employee’s] experience might start a ‘bad tendency’ among the other employees is merely hypothetical and cannot be taken seriously without proof.”).

\textsuperscript{104} As discussed by Arbitrator Ferguson:

The connection between the facts which occur and the extent to which the business is affected must be reasonable and discernible. They must be such as could logically be expected to cause some result in the employer’s affairs. Each case must be measured on its own merits.

Inland Container Corp., 28 Lab. Arb. 312, 314 (1957) (Ferguson, Arb.). Even where the employer has discharged an employee for sale or use of drugs off the premises, he generally must show some “drug problem” in the plant, some other adverse effect on the company’s operation or business that will result from the employee’s wrongdoing, or some adverse effect on the employee’s work performance. See Kentile Floors, Inc., 57 Lab. Arb. 919, 922 (1971) (Block, Arb.); Movieman Inc., 50 Lab. Arb. 632, 633 (1968) (McMahon, Arb.); Linde Co., 37 Lab. Arb. 1040, 1042-43 (1962) (Wyckoff, Arb.). The degree of proof of “adverse effect” may differ depending on the type of conduct involved. Where arrest or conviction was for the sale or possession of hard drugs or for the sale of soft drugs, the employer may only have to establish probable adverse effect. Where the arrest or conviction was for possession of soft drugs, arbitrators may require specific evidence of adverse effect or of a drug problem. Wynns, \textit{Arbitration Standards in Drug Discharge Cases}, 34 Arb. J. 19, 21-22 (1979); see Brown & Williamson Tobacco Corp., 60 Lab. Arb. 502 (1973) (Duff, Arb.); Ward School Bus Mfg., 60 Lab. Arb. 183 (1973) (Wagner, Arb.); Chicago Pneumatic Tool Co., 38 Lab. Arb. 891 (1961) (Duff, Arb.).
away from the plant constitute no threat to anyone's safety and bear no relationship to their employment. The alcoholic can rarely be said to create fear among fellow employees and his problem and conduct away from the plant will have an impact on the company's reputation only in rare instances. An example would be where the employee operates a vehicle or machine and confidence in the safety of the operation is crucial. Even here, unless the employee in manifesting his problem off the premises is identified with the company in some way, for example, by his uniform, it may be difficult to prove adverse impact on the company's reputation.

Refusal to Reinstatement Because of Problem of Alcoholism, Drug Addiction or Mental Disorder

A variation on the theme of the employee discharged merely because of his problem is that of the formerly disabled employee who is denied reinstatement from a leave of absence because of his problem. Here we have an individual whose work performance, when he was disabled, was admittedly impaired. When the employer refuses reinstatement, however, he has no record to present to the arbitrator showing current impairment in the employee's job performance as a result of the "problem." Rather the employer asks the arbitrator to agree with his prediction that, if reinstated, the employee's work will be impaired or, in other words, that he will be unable to perform the job.

To be sure, the current ability of the employee to perform the work is a legitimate concern of the employer. Clearly, where it is satisfactorily established that the employee will not be able to perform the job, or that he would be a safety hazard to himself or others if returned to work, the refusal to reinstate will be upheld.

Resolution of the question of the employee's fitness to return to work, however, often must be made in the face of conflicting medical opinion. The employee generally produces letters from his personal doctor stating that he is ready to resume work, and the company produces its doctor disagreeing. In some cases, the arbitrator will sustain the employer's right to rely on the advice of its chosen

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103 Since the contract may have a time limit on the duration of sick leave or leave of absence, refusal to reinstate, for all practical purposes, may have the effect of a discharge. See Ashtabula Bow Socket Co., 45 Lab. Arb. 377, 382 (1965) (Dworkin, Arb.).

medical expert. In others, the arbitrator undertakes to weigh the conflicting medical testimony. Recently, some arbitrators have given the benefit of the doubt to those doctors who testify that the employee may resume work. Still other arbitrators will urge the parties to seek another opinion from a mutually agreed upon psychiatrist and will find that opinion decisive.

Another situation—with implications for the recovered alcoholic and drug addict— involves the mentally ill in a state of remission. Here the employer may concede that the employee is currently able to do the job but claims that the employee may have a relapse in the future and be unable to work. In one case, for example, the employee who sought reinstatement had been on disability leave for almost 5 years because of his mental illness. He was fit to return to work but even his own psychiatrist conceded that he was in a state of remission and might have a relapse at any time. The employer refused reinstatement, arguing that he had a right to expect reasonable longevity from his employees. In ordering reinstatement, however, the arbitrator emphasized that the employer's legitimate concern was the ability of the employee to work and rejected the notion that the employer had a right to expect indefinite performance from his employees. This is consistent with the insistence by most arbitrators in discharge cases that the critical factor is current work impairment and not potential for impairment in the future.

One problem in reinstating an employee who may not be able to perform either immediately, if the arbitrator errs in assessing his current ability, or in the future, due to relapse, is the cost to the employer. It is not enough merely to say that the employer will be able to discharge the employee when he becomes unable to work. The employer may fear accident, with its attendant workmen's compensation problems, excessive use of sick leave, and renewal of disability leave.

Arbitrators are not unaware of these and other more subtle

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107 See Maremont Automotive Prods., Inc., 37 Lab. Arb. 175 (1961) (Kelliher, Arb.). The expert's advice, however, must not be unreasonable, arbitrary or capricious. Elkouri & Elkouri, supra note 91, at 292.
108 See Elkouri & Elkouri, supra note 91, at 293.
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concerns of the employer. Usually, however, the arguments in favor of reinstatement are eloquent, because balanced against the risk of costs to the employer is the risk that the employee's rehabilitation may be seriously retarded or halted if he cannot work, to say nothing of his ability to obtain employment elsewhere. While the arbitrator often reinstates the employee outright, occasionally there is some accommodation to the problem of the employer's potential liability. For example, reinstatement may be subject to satisfactory performance during a trial period or the right of employers to examine the employee periodically.

Discharge for Cause

Since the employer normally cannot discharge the troubled employee because of his problem alone, for what reasons may he discharge him? As has been discussed, it is generally accepted that an employer is permitted to expect an employee to perform his job satisfactorily and to abide by reasonable work rules. Conversely, when the employee fails to live up to his side of the bargain, either because job performance is impaired or rules are not followed, the employer need not continue to employ him.

Predictably, since mental disorder, drug addiction or alcoholism standing alone are not grounds for discharge, the discharge of the troubled employee will be based on a cause which is not unique.

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114 In Philco Corp., 43 Lab. Arb. 568 (1964) (Davis, Arb.), the arbitrator, in reversing the discharge of an employee based, inter alia, on the company's fears that the employee would have a relapse or might engage in violence, stated: "If his own past employer is not obligated to offer the grievant an opportunity to continue to support himself, who else in the community can be expected to permit him a chance to continue to survive economically?" Id. at 569.


116 Dayton Malleable Iron Co., 43 Lab. Arb. 959 (1964) (Stouffer, Arb.).

117 See Elkouri & Elkouri, supra note 91, at 612 (quoting Arbitrator McGoldrich in Worthington Corp., 24 Lab. Arb. 1, 6-7 (1955) (McGoldrich, Arb.)). See also notes 1-2 and accompanying text supra.

So basic is this notion that those pressing on employers a legal obligation not to discriminate on the basis of mental disorder, alcoholism or drug addiction have attempted to reassure them that such an obligation exists only where the employee can perform the job. See notes 106, 111 & 112 and accompanying text supra. This obligation is subject, of course, to the duty "to accommodate," which, as discussed, raises some questions about the employer's ability to apply the same standards to the troubled employee as he would to the non-troubled employee.

Of course, principles of progressive discipline, see notes 128-131 and accompanying text infra, require that the employee be given an opportunity to correct his deficiencies before the ultimate penalty of discharge is imposed.
to the troubled employee,\textsuperscript{118} for example, assault on a foreman or chronic absenteeism. The cause for discharge nevertheless may be related to his “problem” and more common to the troubled employee than to the normal employee, as, for example, bringing intoxicating beverages or drugs into the plant, drinking or taking drugs on the job or being under the influence of drugs or alcohol on the job.\textsuperscript{118} Occasionally, the employee’s troubles are so intertwined with his job performance that it is difficult to separate them, as when the alcoholic is essentially incapacitated. In all cases, however, it is the employee’s inability to perform a proper day’s work or his misconduct that the employer should, and generally does, rely on.

As previously stated, unions typically charge in discharge cases that there was no just cause for the discipline or discharge. Certain standards generally are applied by the arbitrator to determine whether there is merit to this claim. A question arises whether these generally applicable standards apply where a troubled employee is involved.

Although arbitrators do not always speak in terms of burdens of proof, it is generally agreed that in discharge cases, the employer has the burden of proving that there was just cause for discharge.\textsuperscript{129}

\textsuperscript{118} The Trice-Belasco study revealed that a majority of the troubled employees reinstated were discharged after a dramatic incident provoked the supervisor’s action. They concluded that, in general, supervisors are more likely to impose discipline where there is overt dramatic misbehavior than where there is a continual pattern of subtle misbehavior which is easier to tolerate. H. Trice & J. Belasco, \textit{supra} note 2, at 19. See also Greenlee Bros. & Co., 67 Lab. Arb. 847 (1976) (Wolff, Arb.); Thrifty Drug Stores Co., 56 Lab. Arb. 789 (1971) (Peters, Arb.); Philco Corp., 43 Lab. Arb. 568 (1964) (Davis, Arb.).

Employers discipline or discharge employees for many reasons, among them absenteeism, tardiness, loafing, early quitting, sleeping on the job, assault and fighting among employees, horseplay, insubordination, threat or assault of a management representative, abusive language to supervisors, profane or abusive language to others, falsifying company records, falsifying of employment applications, dishonesty, theft, disloyalty to government (security risk), disloyalty to employer, “moonlighting,” negligence, damage to or loss of machine or materials, incompetence or low productivity, refusal to accept a job assignment, refusal to work overtime, strike misconduct, a prohibited strike or slowdown, obscenely immoral conduct, gambling, abusing customers, attachment or garnishment of wages. In addition, an employee may be discharged or disciplined for violation of rules concerning possession or use of intoxicants or possession or use of drugs. See \textit{Elkouri} & \textit{Elkouri}, \textit{supra} note 91, at 651.

\textsuperscript{119} Thus, while one need not be an addict or alcoholic to engage in this sort of misconduct, e.g., Blue Diamond Co., 66 Lab. Arb. 1136, 1138 (1976) (Summers, Arb.); Mass Transit Administration v. Amalgamated Transit Union, No. 187-15, slip op. at 5 (Am. Arb. Ass’n 1974) (Strongin, Arb.), the troubled employee is certainly more likely to do so than the nontroubled one. See, e.g., Eden Hospital, 56 Lab. Arb. 319 (1971) (Eaton, Arb.).

\textsuperscript{120} In Hussman Refrigerator Co., 68 Lab. Arb. 565, 569-71 (1977) (Mansfield, Arb.), the arbitrator discussed the various rationales utilized by arbitrators in justifying the imposition of burdens of proof. Six rationales were distinguished:

1) since discharge is the most severe penalty an employer can impose, being the
Thus, the employer must first prove that the employee was guilty of the wrongdoing and second that the wrongdoing justified the penalty of discharge or that the employer was reasonable in believing it did so.

In requiring proof of guilt of wrongdoing, the standards adhered to by arbitrators where troubled employees are involved appear to be no different than those that are applied in the case of any employee. The employer is generally not subject to a lower standard of proof merely because a troubled employee is involved. Nor does it appear that employers are held to any higher standard of proof in the case of a troubled employee. Sometimes it may, however,
be harder to prove the guilt or wrongdoing of a troubled employee.\textsuperscript{125} For example, it has been stated that there is a strong work group norm protecting the alcoholic and emotionally disturbed employee from exposure, which consequently may make it difficult for witnesses to agree on the inability of the discharged employee to work or, if relevant, on the state of his inebriation.\textsuperscript{126} Moreover, if the employer is relying on job impairment, the problem of proof may be compounded by the fact that the employee may perform satisfactorily in some areas but break down in others. Thus, even though the usual standards are applied, the employer in some instances may be at a disadvantage in proving his case.\textsuperscript{127}

standards of proof used by arbitrators in drug discharge cases on and off company premises, see Wynn, \textit{supra} note 104.

\textsuperscript{125} Thus, cases involving alcoholics, drug addicts or the mentally disturbed are frequently resolved against the employer because of his failure to meet the standard burden of proof. See, e.g., Greenlee Bros. & Co., 67 Lab. Arb. 847 (1976) (Wolff, Arb.). In addition, it cannot be overstressed that the mere existence of the problem is not a cause, in itself, for discharge.

\textsuperscript{126} H. Trice & J. Belasco, \textit{supra} note 2, at 18. See also Thrifty Drug Stores Co., 56 Lab. Arb. 789, 790 (1971) (Peters, Arb.) (evidence indicated supervisors previously had covered up grievant's intoxication).

\textsuperscript{127} H. Trice & J. Belasco, \textit{supra} note 2, at 18. Mention must be made of the proof of alcohol or drug intoxication. Many cases involve discharge or discipline of non-troubled as well as troubled employees for violating rules which prohibit being under the influence of alcoholic beverages or drugs on the job. \textit{E.g.}, Schaefer-Alabama Corp., 70 Lab. Arb. 856 (1978) (LaValley, Arb.). Severe penalties are often imposed for violation. \textit{See, e.g.}, Blue Diamond Co., 66 Lab. Arb. 1136 (1976) (Summers, Arb.); General Tel. Co., 60 Lab. Arb. 1236 (1973) (Leventhal, Arb.) (penalty for first offense was two weeks disciplinary suspension and probation period during which further violation would result in discharge). As stated by Arbitrator Leventhal in \textit{General Tel.:} "Alcohol is a serious work related problem due to the potential for injury to the public, co-workers, property and the individual himself. For these reasons severe penalties are generally set forth for drinking on the job, or reporting to work under the influence of alcohol." \textit{Id.} at 1239. In \textit{Blue Diamond Co.}, the arbitrator upheld the discharge of a driver who was drunk while driving, stating that a discharge would not be unreasonable "particularly in the absence of any claim by the Union that he could be assigned to warehouse or some other non-driving work." 66 Lab. Arb. at 1138; \textit{accord}, Mass Transit Administration v. Amalgamated Transit Union, No. 187-15, slip op. at 1 (Am. Arb. Ass'n 1974) (Strongin, Arb.); Standard Chlorine Chem. Co. v. Local 866, Internat'l Bhd. of Teamsters, No. 179-10, slip op. at 3 (Am. Arb. Ass'n 1973) (Yagoda, Arb.).

In some of these cases, where the employee did not have or was not known to have an alcohol problem, alcoholism was not a factor at the hearing. In these cases, only the rule violation is in issue. The arbitrator will require adequate proof that the employee was in fact "under the influence." Trans World Airlines, 38 Lab. Arb. 1221, 1222-23 (1962) (Wallen, Arb.); South Penn Oil Co., 29 Lab. Arb. 718 (1957) (Duff, Arb.). \textit{But see} New York Tel. Co., 66 Lab. Arb. 1037 (1976) (Markowitz, Arb.). Clearly, the standard of proof should be the same where the employee involved is in fact an alcoholic or drug addict. It is difficult, however, to assess the degree to which an arbitrator may be influenced by his knowledge of the employee's problem or may credit employer witnesses who testify as to their observations
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There is some evidence of arbitral reluctance to rely on the supervisor's observations. The arbitrator may not accept the "symptoms" observed by the supervisors as sufficient evidence of intoxication where any uncertainty or other explanation exists. See, e.g., Memphis Light, Gas & Water Div., 66 Lab. Arb. 948, 950 (1976) (Leventhal, Arb.). As stated in General Tel. Co., 60 Lab. Arb. 1236 (1973) (Leventhal, Arb.):

"Arbitrators generally reject attempts on the part of management representatives to make their own medical determinations. In a case such as this, an opinion by a medically untrained foreman that someone is under the influence, or they "smelled" alcohol is far from a medical determination. What appears to be slow actions or behavior to one may be only slightly below normal, or for that matter, normal to another. It becomes difficult for an employer to sustain an allegation of had been drinking [sic] when faced with conflicting testimony and the existence of another probable cause for an employee's usual behavior."

Id. at 1238.

Since the employer may have difficulty sustaining an allegation that the grievant was "under the influence" based only on the supervisor's observations, the employer often will seek verification of the employee's condition through examination by the company-selected doctor or scientific tests. Id. Where the employee refuses to submit to the examination or test or leaves the job before they can be carried out, the question arises whether the employer has met his burden by basing his case solely upon the observations of lay persons. The answer appears to be affirmative. See Sherwin-Williams Co., 66 Lab. Arb. 273 (1976) (Rezler, Arb.); General Tel. Co., 60 Lab. Arb. at 1238-39.

In Blue Diamond Co., 66 Lab. Arb. 1136 (1976) (Summers, Arb.), the employee refused to take a sobriety test when accused of being "under the influence." Here, the arbitrator concluded that refusal to take the test gave rise to a presumption of intoxication which could be rebutted by evidence of non-intoxication. The amount of evidence necessary to rebut the presumption was stated to be enough to "make it more probable than not that the presumed [intoxication] was not true . . . [that is,] by preponderance of the evidence." Id. at 1140. This was established in this case because the only evidence of intoxication was that the employee had been speaking incoherently and slurring his words. The company admitted that the employee always spoke incoherently when he was excited and that this was the situation here. In addition, the arbitrator observed that the grievant, when testifying at the arbitration hearing, spoke incoherently and slurred his words. Accordingly, the arbitrator concluded that a reasonable person could think that the grievant was not intoxicated, since there were no
Special Treatment of the Troubled Employee

Assuming that the employer has proved to the satisfaction of the arbitrator that the employee engaged in the conduct for which he was discharged, the arbitrator will then be required to consider whether the penalty of discharge was justified. It appears that although discharge normally might be the reasonable remedy for such conduct if engaged in by an untroubled employee, it may not be for the troubled employee because different considerations are involved. Before exploring the cases some general principles should be discussed.

Initially, the arbitrator does not require an employer to handle every wrongdoing in the same manner. It is often said that an employer must use progressive discipline. Progressive discipline means that the employee will be given warning of his wrongdoing and will be given a chance over a period of time to improve his work performance or to eliminate the cause of employer dissatisfaction. Thus, progressive discipline calls for increasingly severe penalties ultimately resulting, if the employee does not respond, in discharge.

Progressive discipline, however, is not required in all cases. In some cases an employee knows without being told that he is doing something in contravention of the rules, as, for example, when he steals. Here, no prior warnings are required and immediate discharge is appropriate.

Implicit in the concept of progressive discipline and suspension
of the requirement for egregious wrongdoings is the assumption that the employee is responsible for his actions. If a reasonable employee knows that he should not assault a foreman, he is held responsible for the act of assault and generally may be immediately discharged. Similarly, if an employee is warned that his repeated absenteeism is unacceptable and that a failure to conform will lead to increasingly severe penalties and ultimately to discharge, and the employee fails to improve, he has no defense when he is finally discharged. In all of these cases involving the non-troubled employee, an act of will is involved.

A problem arises when one attempts to apply these general principles to the troubled employee. If the troubled employee cannot help getting drunk, he may not be able to avoid being absent. If he was drunk at work, he may not have been fully responsible when he punched his foreman in the face.\textsuperscript{120} To say that an employee is not responsible for his acts, however, does not respond to the legitimate concerns of the employer. An employer still has a right to have a functioning work force. Thus, arbitrators faced with discipline of employees whose wrongdoing has been caused or aggravated by their mutual instability, drug addiction or alcoholism are confronted with the problem of trying to reconcile the employer's rights with the fact that the employee was not fully responsible for his acts.

The arbitrator who concludes that discharge is too harsh because the employee was "troubled" faces a dilemma: the employee may not be responsible for his acts, but what good will be served by reinstating the employee to his job? Reinstatement puts the troubled employee right back in the work force, where he still will be unable to control his actions and hence hardly be productive.\textsuperscript{121}

\textsuperscript{120} Chrysler Corp., 26 Lab. Arb. 295 (1956) (Wolff, Arb.). Aside from not being fully responsible, his condition may not be viewed as a voluntary choice. As stated by one arbitrator:

Problem drinking is becoming more widely accepted as a medical problem. Alcoholism is recognized as a disease by the American Hospital Association, the American Psychiatric Association, and the American Medical Association. As testified to by Dr. Lewandowski, no one starts and no one keeps drinking in order to become an alcoholic. Once they become an alcoholic, it is similar to any other illness and must be treated accordingly.


\textsuperscript{121} It has been well established that arbitration decisions tend to reverse discharges of mentally ill and alcoholic employees. In 1966, Harrison M. Trice and James A. Belasco published an important monograph entitled \textit{Emotional Health and Employer Responsibility},
Thus, it could be argued that the troubled employee should be treated no differently than the chronically or incurably ill or the total incompetent who also is not responsible for wrong doings but who need not be retained in the work force by the employer.\(^{122}\) This argument, however, presupposes that the troubled employee always will be just as inadequate as the total incompetent or chronically ill. There is a distinction, however. The troubled employee resembles the chronically ill or incompetent in that he may not be responsible for his actions, but he differs in that he may have the potential for being in control of his actions and hence become an adequate employee through rehabilitation.\(^{123}\)

This potential for rehabilitation has prompted arbitrators to place at least some of these troubled employees in a special category—neither normal (responsible for their actions) nor beyond hope (as the total incompetent or chronically ill) of becoming a fully functioning member of the work force. The nature of this "special treatment" will be considered in the sections that follow.

**Special Treatment for Alcoholics**

Sometimes unions will argue that since alcoholism is a disease, no disciplinary procedures are applicable at all.\(^{124}\) Rather, the argument goes, the alcoholic should be treated as any other sick or mentally or physically disabled employee. To the extent that this view purports to limit the employer's power ultimately to discharge the chronic alcoholic, however, it generally is not accepted.\(^{125}\) In-

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\(^{122}\) This is not to say that an arbitrator may not explore the possibility of solutions other than discharge, such as disability, medical leave of absence or transfer.

\(^{123}\) The distinction between a troubled and chronically ill or incompetent employee is not relevant in the case of the troubled employee who is not "salvageable." Greenlee Bros. & Co., 67 Lab. Arb. 847, 855 n.7 (1976) (Wolff, Arb.).


stead, there appears to be general agreement that alcoholic employees are subject to disciplinary provisions of the contract. Yet, many arbitrators have become convinced that their view of "just cause" for discharge should be modified. Thus, although the employer may prove that the employee was discharged for misconduct or work impairment which, in the case of a normal employee, would reasonably be just cause for discharge, this proof may not suffice where an alcoholic employee is involved. In the case of the alco-

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136 See, e.g., Monte Mart-Grand Auto Concession, 56 Lab. Arb. 738 (1971) (Jacobs, Arb.). In upholding the application of disciplinary procedures, the arbitrator distinguished Department Store Employees Union, Local 110 v. U.S.E. Discount Dep't Stores (Burns, Arb.) (unpublished) wherein the arbitrator determined that an admitted alcoholic should be placed on medical leave of absence rather than be subjected to discharge since the parties had contractually stipulated that alcoholism was illness.


In City of Buffalo, 56 Lab. Arb. 334 (1972) (Rinaldo, Arb.), the grievant, an alcoholic, had been previously discharged and subsequently reinstated upon agreement with the union that she seek rehabilitation. Notwithstanding her attempt to rehabilitate herself, she twice reported for work in an intoxicated condition. The company then discharged her on the grounds that her rehabilitation effort had failed and she was unable to perform satisfactorily. The arbitrator found that the grievant sincerely wished to rehabilitate herself, that remissions prior to eventual rehabilitation were not uncommon and that grievant's program of rehabilitation had been lacking, through no fault of her own, because of the unavailability of group therapy in addition to Alcoholics Anonymous. Group therapy became available to the grievant after the hearing. The arbitrator found the discharge penalty too severe and reinstated the grievant. In responding to the employer's contentions, the arbitrator stated:

The employer . . . asks whose responsibility is it to see that programs [sic] are available to persons who find themselves with the problem B— is encountering. Doesn't the City, as her employer, have the right to extract from her certain standards of conduct and performance of her duties as they do of every other employee?

An employer has a right to discharge an employee where there is just cause. Discharge in the field of industrial relations has been equated to capital punishment because it destroys an employee's equity which has been built up over the years of employment and leaves lasting and permanent implications which carry with employees in their effort to seek future employment.

Her request [for reinstatement] should not be refused in light of her 15 years employment record with the City. To deny B— this opportunity would be unwarranted considering that since returning to work in September, only two incidents have been established which it was proven interfered [sic] with B—'s ability to properly perform.


holic, the arbitrator will incorporate into the just cause standard a requirement that the employer assess the employee's potential and willingness for rehabilitation before discharging him. In practice


Interestingly, it is not unusual for the discharge itself to precipitate rehabilitation. The Arbitration Board in Pacific Northwest Bell Tel. Co., 66 Lab. Arb. 965 (1976) (Harter, Jr., Impartial Chairman), noted that alcoholism differed from other diseases in that alcoholism is "self-inflicted": "[I]t can be controlled only through an exercise of will. If an individual has enough incentive he is more likely to muster the required strength of will to bring himself under control. Sometimes a crisis provides that incentive." Id. at 972. The arbitrator also noted the remarkable pattern that occurs in cases involving discharge of alcoholics, stating:

Despite the exercise of progressive discipline by the employer the alcoholic employee fails to respond to warnings, supervisors, and other forms of discipline. When he finally exhausts the patience of the employer, he is discharged.

During the crisis of the discharge while waiting for an arbitration hearing, he seems to pull himself together. He cooperates with those treating him, allows himself to be hospitalized, and may join Alcoholics Anonymous. By the time of the hearing his Union can point to his progress toward recovery. Authorities testify optimistically as to his prognosis.

Id. The Arbitration Board surmised that the "arbitrator is placed in an unusual position." Id. "If he ignores the post-dismissal behavior and denies the grievance, he may be foreclosing on all hope for the grievant. Usually the grievant is an employee of long service and old enough to make other employment difficult to find." Id. Thus, it is that the arbitrators do take into consideration post-discharge behavior, concluding that the discharge was too severe in view of the potential for recovery. The concluding statement in Pacific Northwest is illuminating.

The Grievant was not dismissed for just cause. The Employer's pre-discharge investigation failed to uncover that he still retained a capacity to recover. A reasonable person might have imposed a severe penalty. However a reasonable person realizing that the Grievant had a good chance to recover would not have discharged him. The officials of the Employer displayed considerable generosity and patience,
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this means that, at the very least, the employer must have given the employee a chance for rehabilitation. If the employer discharges the employee without having done so, the discharge will not be sustained.\footnote{See note 139 supra.}

The modern view as to the prerequisites to discharge of an alcoholic employee, as outlined by arbitrator Lewis Kesselman, is:

(1) That the employee be informed as to the nature of his illness.
(2) He must be directed or encouraged to seek treatment.
(3) He must refuse treatment or
(4) He must fail to make substantial progress over a considerable period of time.\footnote{See \textit{American Synthetic Rubber Corp.}, 73-1 ARB 8070 (1973) (Kesselman, Arb.). The requirement that the employee be directed or encouraged to seek treatment often may entail employer assistance in the form of leaves of absence, payment of treatment costs, granting of sick leave benefits and the like. \textit{Id.} at 3277. The requirement that the employee be given a considerable amount of time to progress must be complied with despite the employee's having received a last warning that continued failure to cope with the problem will mean his job. \textit{Id.} at 3278.}

It is important to note that the employer is expected actively to direct or to encourage the employee to seek rehabilitation.\footnote{\textit{But cf. P. N. Hirsch & Co.}, 60 Lab. Arb. 1335 (1973) (Bothwell, Arb.) (discharge but no encouragement or direction to seek rehabilitation).} This is

but acted without complete information.\footnote{\textit{Id.} at 975.}

\begin{quote}
In \textit{Pacific Northwest} the employee had 27 years of service and a history of drinking problems for more than 20 years. He capped off a long career of difficulties, both on and off the job, with an unexcused absence for 3 days which, in addition to an accumulation of prior events, caused the employer to doubt whether he was worth retaining. \textit{Id.} at 974. The arbitrator concluded that “because the grievant has performed long years of service and because there is a reasonable prospect that he will recover, [the discharge] penalty is not appropriate. The Employer misjudged [the employee’s] capacity to respond to treatment.” \textit{Id.} at 975. Accordingly, the arbitrator reinstated the grievant, with qualifications.
\end{quote}

An anomalous result occurs when one treats drug addiction, alcoholism or a mental disorder as a defense to a charge that misconduct or impaired job performance is cause for discharge. For the same wrongdoing, an employee who is not “troubled” may be discharged whereas the true “troubled” employee may not. This anomaly stems from the notion that normal employees are capable of obeying the rules; hence the rules may be strictly enforced against them. Addicted or mentally disturbed employees may be incapable of obeying such rules because of their addiction.

Special treatment thus means that alcoholic employees will be given second chances, unlike non-troubled employees. For example, an employee who physically attacks his foreman may expect immediate discharge. Indeed, such discharges have been upheld in many cases. \textit{E.g.}, \textit{Newspaper & Mail Deliveries Union v. New York Daily News} (Aug. 5, 1974) (Haber, Arb.) (unpublished). Where the assailant had a drinking problem and a previously unblemished record, however, the same arbitrator reversed the discharge. \textit{Newspaper & Mail Deliverers Union v. New York Daily News} (Jan. 25, 1978) (Haber, Arb.) (unpublished); \textit{accord}, \textit{New York Daily News v. Newspaper & Mail Deliverers Union} (Dec. 30, 1970) (House, Impartial Chairman) (unpublished).
so even where the employer has established and makes a program of counselling and treatment available to alcoholic employees. The employer cannot passively rely on the employee's taking advantage of the program on his own.\textsuperscript{143} Arbitrators will reinstate employees where no active effort was made, even if the employee was told of the program.\textsuperscript{144}

It should also be noted that, as has been previously discussed, arbitrators do not expect employers to tolerate indefinitely alcoholic employees who are incapable of carrying out their basic responsibilities. Thus, where the employer has fulfilled his obligations with respect to the employee’s rehabilitation and the employee’s misconduct continues, either because rehabilitation efforts have failed or the employee proves to be unsalvageable, the employer’s discharge of the employee may be sustained.\textsuperscript{145} Interestingly, however, some arbitrators recently have recognized that temporary relapse may not preclude eventual rehabilitation, and they may require more than

\textsuperscript{143} Arbitrators understand that the alcoholic employee is the last person to recognize and admit that he has a problem. See General Elec. Co. v. United Elec. Workers Local 506 (Dec. 9, 1976) (Joseph, Arb.) (unpublished); General Elec. Co. v. United Elec. Workers Local 506 (Nov. 1, 1976) (Mullen, Jr., Arb.) (unpublished); cf. General Elec. Co. (Nov. 9, 1978) (Clark, Arb.) (unpublished) (responsibility placed on Union).

The company's lack of knowledge of the employee's condition may be raised in defense of the employer's failure to use active efforts to convince the employee to seek help. Supervisors, however, are expected to be sensitive to the possibility of a problem where an employee's work performance or behavior is suspicious. General Elec. Co. v. United Elec. Workers Local 506 (Nov. 1, 1976) (Mullen, Jr., Arb.) (unpublished).


It is interesting that Arbitrator Mullen reinstated the grievant without back pay, believing that the grievant could not be completely exonerated for failing to take advantage of the program on his own, id., whereas Arbitrator Joseph reinstated the grievant with back pay. General Electric (Dec. 9, 1976) (Joseph, Arb.) (unpublished). The author of this Article was advised that the grievant reinstated by Arbitrator Joseph was subsequently discharged for excessive absenteeism but that the grievant reinstated by Arbitrator Mullen had become a productive employee and was continuing to participate in the program.

one chance be given to an employee who has relapsed but who is sincere in his desire to rehabilitate himself and continues with the rehabilitation program.\footnote{City of Buffalo, 59 Lab. Arb. 334, 337 (1972) (Rinaldo, Arb.). In Thrifty Drug Stores Co., 56 Lab. Arb. 789 (1971) (Peters, Arb.), although the company had been very tolerant and had given grievant two medical leaves in 1 year for rehabilitation, the arbitrator refused to uphold the discharge even though the employee returned to work intoxicated. Several factors militated in the grievant's favor, including a long, excellent work record, a positive attitude and high moral character, and an assurance that he would join a Spanish-speaking therapy group which had not been part of his previous rehabilitation program. \textit{Id.} at 792-94.}

Where the employer has discharged the alcoholic employee without giving the employee a chance for rehabilitation, the arbitrator, as previously stated, probably will not sustain the discharge. What will the employer's remedy be, however?

Reinstating an employee who is incapable of complying with work requirements because of his problem will unfairly burden the employer.\footnote{This sometimes involves a medical leave or leave of absence. See Greenlee Bros. & Co., 67 Lab. Arb. 847, 856 (1976) (Wolff, Arb.); Monte Mart-Grand Auto Concession, 56 Lab. Arb. 738, 747 (1971) (Jacobs, Arb.).} Indeed, a subsequent discharge will be inevitable. Arbitrators recognize this problem. Hence, reinstatements are almost always conditional on the employee's participation or continued participation in a rehabilitation program,\footnote{In \textit{Newspaper & Mail Deliverers Union v. New York Daily News} (Jan. 25, 1978) (Haber, Arb.) (unpublished), the arbitrator imposed a suspension for six months without pay and conditioned reinstatement on the grievant's participation in a "continuing program of alcoholic rehabilitation and in a related program of psychological support." The \textit{House} award in an arbitration between the same parties, \textit{New York Daily News v. Newspaper & Mail Deliverers Union} (Dec. 30, 1970) (House, Impartial Chairman) (unpublished), did not choose to suspend the grievant but conditionally reinstated him without back pay. The conditions were that the grievant join Alcoholics Anonymous and remain a member of that organization for the duration of his employment with the publisher and refrain from drinking alcoholic beverages on the job or being found under the influence of liquor on the job upon pain of discharge by the publisher. \textit{Id.; accord, Land O'Lakes Bridgeman Creamery, 65 Lab. Arb. 803, 804 (1975) (Smythe, Arb.); Texaco, Inc., 42 Lab. Arb. 408, 412 (1963) (Prasow, Arb.).} \textit{But see} City of Buffalo, 59 Lab. Arb. 334 (1972) (Rinaldo, Arb.) (unconditional reinstatement).}

and often on his continued good behavior.\footnote{This criticism has been made as a result of a study which ascertained that a high percentage of those employees reinstated by arbitrators were subsequently discharged. \textit{Employer Responsibility} supra note 4, at 25.}

Special Treatment for the Mentally Disturbed

Employer's actions adversely affecting the mentally disturbed employee are at issue in a number of arbitration cases.\footnote{These actions may involve not only discharge, but also other forms of adverse action...
viously discussed, the existence of a problem alone will not justify discharge or refusal to reinstate. It is well established, however, that where the mentally disturbed employee's presence on the job constitutes or will constitute a safety hazard to himself or others, the employer is justified in taking action which will eliminate the hazard, even though it will adversely affect the employee. More difficult cases involve discharge and refusal to reinstate where there is no safety hazard but rather alleged actual or probable inability adequately to perform the job. Do arbitrators apply standard criteria or do they, as with the alcoholic, require some special treatment?

Mental disorders may be more or less severe and may impair work performance to different degrees. Therefore, the arbitrator first will have to be satisfied not only that there is a mental disorder but that it makes the employee unfit for work or impairs his work such as refusal to promote because of mental unfitness, and refusal to reinstate after medical leave of absence. See notes 151-171 and accompanying text infra.

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151 See, e.g., Foundry Equip. Co., 28 Lab. Arb. 333 (1957) (Vokoun, Arb.) (confinement to mental hospital); International Harvester Co., 24 Lab. Arb. 229 (1965) (Cole, Arb.) (sexual irregularity). Without some nexus between the problem and the employee's ability to perform the job, a failure to promote an employee because of his unrelated problem would also not be justified.

152 Transfer, demotion, layoff, refusal to reinstate or discharge, particularly if no other job is available to which an employee could be transferred, may be upheld on the basis of a safety risk. The arbitrator will have to consider medical evidence regarding the nature of the employee's condition and the hazard his condition poses in his particular job. See Herr-Voss Corp., 70 Lab. Arb. 497 (1978) (Sherman, Arb.); Ashtabula Bow Socket Co., 45 Lab. Arb. 377, 383 (1965) (Dworkin, Arb.) (refusal to reinstate), 45 Lab. Arb. 384, 387 (Supplemental Opinion); Alcas Cutlery Corp., 38 Lab. Arb. 297, 300 (1962) (Guthrie, Arb.); Hiller Chevrolet-Cadillac, Inc., 37 Lab. Arb. 629, 633-34 (1961) (Mueller, Arb.) (refusal to reinstate; employee subject to episodes of violence); Maremont Automotive Prods., Inc., 37 Lab. Arb. 175, 176-77 (1961) (Kellihier, Arb.) (non-disciplinary refusal to continue in employment); Chrysler Corp., 26 Lab. Arb. 295 (1956) (Wolff, Arb.); ELKOURI & ELKOURI, supra note 91, at 677-79.

153 Where an employee is seeking promotion to a higher level job, it appears that mental or psychological fitness, where relevant, may be a factor in considering his "ability and fitness" for the job. If the job entails "psychological strain and stress" an employer may pass over the senior employee whose anxiety and fear in connection with his work would make him unfit. Pacific Gas & Elec. Co., 23 Lab. Arb. 556, 559 (1954) (Ross, Arb.); Bethlehem Steel Co., 18 Lab. Arb. 683, 685 (1952) (Shipman, Arb.); cf. Titanium Metals Corp., 49 Lab. Arb. 1144 (1967) (Block, Arb.) (fear of heights as disqualification for work on a high crane after a trial period); Seeger Refrigerator Co., 16 Lab. Arb. 525 (1951) (Lockhart, Arb.) (bad attitude as disqualification for supervisory position). See generally ELKOURI & ELKOURI, supra note 91, at 599-603.

154 Sometimes, mental disorders may not impair work performance at all. The well-known case of the paranoid as night watchman, see text accompanying note 52 supra, is relevant. Such an emotionally ill person may function well in this capacity but may fare poorly on an assembly line. The "workaholic's" neurosis also may not "impair" work performance. EMPLOYER RESPONSIBILITY supra note 4, at 18, 29-33.
performance.\textsuperscript{155} Where he is not satisfied that this is the case, the refusal to reinstate or the discharge will not be sustained. Where the arbitrator is satisfied that the employee's mental condition is impairing his job performance or will do so if the employee is reinstated, what the arbitrator will do is not clear.

Certainly, discharges\textsuperscript{156} and refusals to reinstate\textsuperscript{157} have been upheld where the necessary connection between the mental disorder and the present or future work impairment has been established. There is, however, evidence of special consideration for the mentally disturbed employee. As with the alcoholic, arbitrators have sometimes excused misconduct by the mentally disturbed employee because the employee is not fully responsible for his actions\textsuperscript{158} and have required employers who are reluctant to reinstate formerly mentally incapacitated employees to "go the second mile" and give them a chance.\textsuperscript{159} In addition, although arbitrators reject the argument that disciplinary procedures should not be applicable to alcoholics on the grounds that alcoholism is an illness, they do not do so with respect to mental illness. Arbitrators are emphatic in pointing out that a termination of a mentally disturbed employee is non-disciplinary,\textsuperscript{160} albeit, as a practical matter, the employee is out of a job. Moreover, where the contract permits, arbitrators occasionally will criticize employers who discharge a mentally ill employee because of inadequate performance when the employee should have been placed on medical leave.\textsuperscript{161}

\textsuperscript{155} Philco Corp., 43 Lab. Arb. 568 (1964) (Davis, Arb.); Alcas Cutlery Corp., 38 Lab. Arb. 297 (1962) (Guthrie, Arb.). Where an employer refuses to let an employee continue working and either terminates or places him on sick leave because of apparent medical incapacity, the action is non-disciplinary and the employer is not held to the same heavy standard of proof as in a disciplinary case. Arandell Corp., 56 Lab. Arb. 832, 834 (1971) (Hazel, Arb.).


\textsuperscript{157} United States Steel Corp., 46 Lab. Arb. 545, 549 (1966) (Rock, Arb.).

\textsuperscript{158} Herr-Voss Corp., 70 Lab. Arb. 497, 500 (1978) (Sherman, Arb.); Cities Serv. Ref. Corp., 39 Lab. Arb. 604 (1982) (Coffey, Arb.); Chrysler Corp., 26 Lab. Arb. 295, 299 (1956) (Wolff, Arb.). See also Associated Press, 49 Lab. Arb. 564, 568 (1967) (Sugarman, Arb.). In Cities Service, discharge of an employee who failed to return to work from sick leave as ordered was "heedless of and without necessary attention to the mitigating and extenuating circumstances" since the employee was schizophrenic and his behavior could not "be measured by standards that apply to a reasonably prudent man." Id. at 606.


\textsuperscript{161} Menasco Mfg. Co., 19 Lab. Arb. 405 (1952) (Pollard, Arb.) (otherwise competent employee too nervous to work). See also Herr-Voss Corp., 70 Lab. Arb. 497, 500 (1978) (Sherman, Arb.).
Finally, arbitrators recognize that there may be a connection between the employee's mental disorder and the nature of the employee's particular job. Thus, where the nature of the job is such that the employee presents a safety hazard or where the nature of the job is incompatible with or exacerbating the employee's emotional problem, arbitrators may expect the employer to explore the possibility of transferring the employee to a job he can handle safely and competently. This approach clearly is consistent with the treatment by arbitrators of disabled or otherwise handicapped employees.

The behavior of the mentally disturbed and the alcoholic in the work place is sometimes analogous. For example, their work performance may be impaired, they may engage in misconduct and violate company rules, and neither may be fully responsible for his acts. Nevertheless, arbitrators seldom explicitly require employers to direct the mentally disturbed employee to seek rehabilitation prior to taking adverse action as in the case of the alcoholic, except that the employer must place the severely disturbed employee on medical or sick leave rather than discharge him. It is clear, however, that employers will not be able to remove permanently the mentally disturbed employee with ease. The employer will be encouraged to retain the functioning employee if possible, perhaps in another job. In cases involving reinstatement of employees who have been severely disturbed but are now in a state of remission, the arbitrator may look to the employee's present capacity for work and order reinstatement, unless future relapses would create real safety risks. In some cases, the employer will be required to reinstate the employee to his former job and in others, to a job which will not exacerbate his problem.

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166 E.g., West Penn Power Co., 67 Lab. Arb. 1085 (1976) (Blue, Arb.); Dayton Malleable
under some obligation to accommodate the particular needs of the mentally unstable employee. Finally, arbitrators do recognize the burden on the employer when unstable employees are returned to or are retained in the work force and hence may impose probationary periods, retain jurisdiction for a limited period to handle potential problems, give the company the express right to make periodic examinations or make reinstatement conditional upon continued treatment or taking of medication.

Special Treatment for the Drug Addict

Arbitrators generally believe that the drug addict, like the alcoholic, is subject to discipline. In the case of the alcoholic, arbitrators have evolved new concepts of what constitutes “just cause” for discharge in recognition of the nature of alcoholism. If one accepts the premise that the drug addict resembles the alcoholic in that he is not in control of his actions because of his addiction and, perhaps, can be rehabilitated and become a satisfactory employee, one might expect to see the evolution of similar concepts applied. Although the cases are too few in number to determine a definite trend, there are indications that arbitrators will be less sympathetic to the drug user or addict than to the alcoholic.


See, e.g., Dayton Malleable Iron Co., 43 Lab. Arb. 959 (1964) (Stouffer, Arb.).

Herr-Voss Corp., 70 Lab. Arb. 497 (1978) (Sherman, Arb.). See also Foundry Equip. Co., 28 Lab. Arb. 333 (1957) (Vokoun, Arb.). One interesting notion is the union’s role. Sometimes the employee in remission may avoid relapse if he takes medication and continues treatment. Interestingly, in one case where a reinstated employee was in such a position, the arbitrator expressly placed the responsibility for monitoring the employee’s compliance upon the union, not the company. Dayton Malleable Iron Co., 43 Lab. Arb. 959 (1964) (Stouffer, Arb.). See also Philco Corp., 43 Lab. Arb. 568, 570 (1964) (Davis, Arb.) (arbitrator held union representatives to an obligation to assist the company in insuring the grievant’s continued efficiency).

A heroin addict, although unfit for work, may become able to perform satisfactorily by participating in a methadone maintenance program. See Great Lakes Steel Corp., 57 Lab. Arb. 884, 889 (1971) (Mittenthal, Arb.).

Few drug abuse cases involve the addict although a number concern possession, sale, use or being under the influence of drugs by non-addicts. See generally Levin & Denenberg, supra note 124. In the few cases involving addicts or users of hard drugs, discharge was imposed because of drug-related conduct, such as use of hard drugs, rather than for misconduct or job impairment per se.

In Sherwin-Williams Co., 66 Lab. Arb. 273 (1976) (Rezler, Arb.), a drug addict was
For example, arbitrators generally tolerate an employer's more rigorous enforcement of rules prohibiting possession and use of drugs on company premises than of identical rules for alcohol. Thus, arguments based on inconsistency of treatment of the employee drinking on the premises and the employee taking drugs on the premises may not be persuasive.\footnote{Plant rules may prohibit possession and use of intoxicating beverages or drugs on the premises or being at work under the influence of either. Drug rules, however, may be enforced more rigorously than rules against alcohol. Where this occurs, unions may argue inconsistency of treatment in drug cases. In at least one case, which involved discharge for smoking marijuana, the arbitrator refused to consider the company's disparate treatment of alcohol and drugs, looking only to the consistency of the company's treatment of marijuana users. Combustion Eng'r Inc., 70 Lab. Arb. 318 (1978) (Jewett, Arb.). The arbitrator stated that the fact that the company regarded marijuana smoking as a "gross violation of its rules" as opposed to intake of alcohol, was acceptable and that "[t]his attitude is born out by society at large in that it is still illegal to use or possess marijuana in most jurisdictions." Id. at 320. See also Pepsi-Cola Bottlers, 68 Lab. Arb. 792 (1977) (Klein, Arb.); Howmet Corp., 60 Lab. Arb. 1160, 1163 (1973) (Sembower, Arb.). But cf. Southwestern Bell Tel. Co., 59 Lab. Arb. 708, 712 (1972) (Kates, Arb.) (drug rules as applied to amphetamines should not be different than alcohol rules).}

Moreover, arbitrators regard employee conduct involving hard drugs, whether or not the employee is addicted, as very serious offenses, more so than similar conduct involving soft drugs or alcohol.\footnote{Wynns, supra note 104, at 25. Hard drugs include heroin, cocaine, and opium derivatives, whereas soft drugs are items such as marijuana, tranquilizers, amphetamines and barbiturates. Id. at 24 n.3.}

Thus, for example, use or possession of hard drugs on the premises generally will be viewed as just cause for discharge.\footnote{By definition, the addict generally will be a user of hard drugs. Thus, there is the anomaly that the use of hard drugs by an addict will be viewed as a more serious offense than the use of soft drugs by a non-addict, even though the addict is not acting voluntarily, whereas, in contrast, a non-addict user of soft drugs is acting voluntarily.} In discharged for being under the influence of drugs while on the job. The union urged the arbitrator to treat drug addiction as an illness and require the employer to give the employee an opportunity to cure himself, rather than subject him to discharge. The arbitrator stated that he was aware of the school of thought which advanced this viewpoint and was in sympathy with the suggestion of the union but that he believed his duty as an arbitrator was to interpret the provisions of the agreement. \textit{Id.} at 276; cf. Hayes-Albion Corp., 70 Lab. Arb. 696 (1978) (Glendon, Arb.) (emotional illness); NCR, Appleton Papers Div., 70 Lab. Arb. 756 (1978) (Gundermann, Arb.) (alcoholism).}

\footnote{\textit{Combustion Eng'r Inc., 70 Lab. Arb. 318 (1978) (Jewett, Arb.). The arbitrator stated that the fact that the company regarded marijuana smoking as a "gross violation of its rules" as opposed to intake of alcohol, was acceptable and that "[t]his attitude is born out by society at large in that it is still illegal to use or possess marijuana in most jurisdictions." \textit{Id.} at 320. See also Pepsi-Cola Bottlers, 68 Lab. Arb. 792 (1977) (Klein, Arb.); Howmet Corp., 60 Lab. Arb. 1160, 1163 (1973) (Sembower, Arb.). But cf. Southwestern Bell Tel. Co., 59 Lab. Arb. 708, 712 (1972) (Kates, Arb.) (drug rules as applied to amphetamines should not be different than alcohol rules).}}
addition, the general rule that misconduct away from the workplace on the employee's own time does not justify discharge except where the conduct "has an adverse effect on the company's business or reputation, the morale and well-being of other employees, or the employee's ability to perform his regular duties,"\textsuperscript{178} which is applicable to alcoholics or soft drug users, takes some interesting twists where hard drug users or addicts are concerned. Normally, specific evidence tending to show probable adverse effect is required.\textsuperscript{179} Where the employee involved in off-the-premises misconduct is an addict or user of hard drugs, arbitrators may infer a probable adverse impact on the plant without specific evidence.\textsuperscript{180} In one case, for example, an employee was convicted of cocaine possession and use. Although there was no evidence that he ever came to work under the influence of drugs or that his work was in any way impaired, the arbitrator credited medical testimony that in its advanced stages the grievant would present a safety hazard.\textsuperscript{181}

Employers sometimes give drug addicted as well as alcoholic employees a chance to rehabilitate themselves before imposing discharge. The employer is free to discharge a drug addicted or alcoholic employee, however, once he has been given the chance for rehabilitation and has failed.\textsuperscript{182} In considering whether the discharge

\textsuperscript{178} See Wheaton Indus. v. Glass Bottle Blowers Ass'n, No. 195-5, slip op. at 6 (Am. Arb. Ass'n 1975) (Kerrison, Arb.); note 98 supra.

\textsuperscript{179} In the case of soft drugs, the general rule applies where the employee is discharged because of his conviction for possession. Without specific evidence of "adverse effect" the conviction standing alone generally will not be viewed as cause for discharge. See note 104 supra. See generally Wynns, supra note 104, at 21-22, 26-27. For example, in one case, use of marijuana which allegedly created a safety hazard by dulling one's senses did not justify discharge because such a hazard did not in fact occur. Macnaughton-Brooks, Inc., 60 Lab. Arb. 125 (1973) (Shistler, Arb.). But cf. Port Terminal R.R. Ass'n, 60 Lab. Arb. 430, 431 (1973) (Wyckoff, Arb.) (arbitrator would uphold discharge for marijuana conviction if probation revoked).

\textsuperscript{180} See generally Wynns, supra note 104, at 21-22.

\textsuperscript{181} Chicago Pneumatic Tool Co., 38 Lab. Arb. 891, 893 (1961) (Duff, Arb.). See Great Lakes Steel Corp., 57 Lab. Arb. 884, 886 (1971) (Mittenthal, Arb.) (heroin addict per se unfit for work). In Kentile Floors, Inc., 57 Lab. Arb. 919 (1971) (Block, Arb.), the employee was convicted of possession of amphetamine sulfate, a misdemeanor resulting in probation; the arbitrator reversed the discharge since the conviction on a misdemeanor charge of narcotics possession had no discernible effect on the employer's business or on his employer-employee relationships. It seems clear from the arbitrator's reasoning that had the grievant been a user of hard drugs he would have sustained the discharge "without hesitation." Id. at 921. The arbitrator stressed that the individual had not been convicted of the felony of narcotics use, and that there was no "basis for assuming a comparable impact upon the work force." Id. See also Wheaton Indus. v. Glass Bottle Blowers Ass'n, No. 195-5, slip op. (Am. Arb. Ass'n 1978) (Kerrison, Arb.); Macnaughton-Brooks, Inc., 60 Lab. Arb. 125 (1973) (Shistler, Arb.).

should be upheld, arbitrators may tolerate a disparity in the degree of the "chance for rehabilitation" offered by the employer to its alcoholic as opposed to its drug addicted employees. Moreover, although published cases involving drug addicts are few in number, arbitrators do not appear to be requiring employers to give the drug addicted employee a chance for rehabilitation prior to discharge, as they do with alcoholics.

That arbitrators are less sympathetic to the drug addict than the alcoholic may be consistent with the general attitudes present in society. After all, society impliedly encourages the social consumption of alcohol, but drug use is unlawful. Moreover, many arbitrators often consider mitigating factors such as age, seniority and prior good record of an employee in assessing the appropriateness of the discharge penalty. Since problem drinking generally occurs during the middle years of an employee's career whereas the drug addicted employee is more likely to be young, these factors will frequently not be considered in the case of a discharged addict.

Conclusion As To Arbitral Trends

It is clear that employers cannot treat the alcoholic like any other employee. Although his behavior may justify discharge were he a normal employee, this employee generally cannot be held completely responsible because of his problem. On the other hand, the employer cannot be required to tolerate an inadequate employee indefinitely. The arbitrators have evolved certain principles in trying to balance the societal needs of the alcoholic and the needs of the employer, and have identified the characteristics which differentiate the alcoholic from the permanently inadequate employee, for example, the incompetent and the incurably ill, which the employer should not have to tolerate. The distinguishing factor is the

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183 E.g., Lever Bros., 70 Lab. Arb. 75 (1977) (Stix, Arb.).

184 See Levin & Denenberg, supra note 124, at 107-08. Interestingly, the authors noted that some arbitrators recommended a reinstatement conditioned on rehabilitation but felt powerless to order it. Apart from any affirmative obligation on the employer to encourage rehabilitation prior to discharge, the authors noted that 75% of the 87 arbitrators responding to a questionnaire sent to members of the National Academy of Arbitrators felt that were the grievant enrolled in a treatment program or were he to convince the arbitrator of his sincere desire to end his habit, the arbitrator might, under some circumstances, reduce the discharge penalty to a suspension conditioned on the employee's participation in a bona-fide rehabilitation program. Id.

185 EMPLOYER RESPONSIBILITY, supra note 4, at 25.

possibility of rehabilitation. Where the employer has "gone the extra mile" with the employee and has directed the employee to seek rehabilitation or to avail himself of some rehabilitation offered by the company, the employer will have fulfilled his obligation, and should the employee not accept the offer, he may be discharged.

While the drug addict would seem to share the same characteristics as the alcoholic, it is much less certain whether arbitrators will balance their needs and those of the employer in quite the same manner. There apparently is no trend toward requiring the employer to give the addicted employee a chance for rehabilitation prior to discharge as there is with alcoholics.

Although the special treatment takes a somewhat different form with respect to the mentally ill, it is clear that the employer will be required to make special efforts to retain the troubled employee in the workplace and that, as with the alcoholic who is being treated, he will have to retain the mentally ill employee who, because of remission, treatment or medication, is able to do an acceptable job.

**Workmen's Compensation Laws**

The preceding analyses of statutes, administrative policies and arbitral decisions indicate that treatable alcoholism, mental illness and in some cases drug addiction are generally no longer considered barriers to successful employment and that the role of the employer in assuming responsibility for the rehabilitation of otherwise qualified troubled employees is encouraged and often mandated. It appears that workmen's compensation laws also may play a role in encouraging employers to assume this responsibility.

Workmen's compensation laws make the employer financially responsible, irrespective of fault, for an employee's job-connected injuries and illnesses which result in an inability to work. Initially, the laws extended to physical injuries or illnesses only. Since em-

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187 The need for statutory compensation schemes arose out of the contraction of common-law remedies available to the injured employee during the period of industrial expansion at the turn of the century. Three defenses afforded the employer—assumption of risk, contributory negligence, and the fellow servant doctrine—left the employee virtually remediless. 1A A. Larson, Workmen's Compensation Law § 4.30 (1979).

188 While some statutes expressly require "physical injury" or "injury to the physical structure of the claimant's body," other states have imposed a "physical injury" requirement by drawing upon the common-law impact rule to supplement skeletal statutory language. Note, Workmen's Compensation—The Compensability of Nervous Injuries From Psychic Trauma—Who's Afraid of Wolfe?, 25 U. Kan. L. Rev. 158, 161-62 (1976). Thus, courts have uniformly found distinct physical injury caused by mental stimulus to be compensable. See,
ployers were absolutely responsible for the resulting costs, they were encouraged to prevent accidents. Thus, it was in the employer's financial interest to eliminate from the work force employees whose problems, such as alcoholism, drug addiction, or mental disability, could make them more susceptible to accidents. The same may be said today except that removal of such employees is impermissible in most cases because of federal and state statutes. It therefore seems that the avenue of self-protection for the employer is rehabilitation.

Although the liability of the employer for the physical injury to the troubled employee whose reactions were impaired was estab-

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189 See Phillips v. Air Reduction Sales Co., 337 Mo. 587, 590, 85 S.W.2d 551, 555 (1935). Courts are disinclined to hold an employee to have forfeited compensation merely because he was intoxicated. At least one extra-statutory approach, however, has been utilized by the courts in disallowing an award of compensation. Referred to as the "departure from the course of employment" approach, the claimant is said to have abandoned his employment by reaching an advanced stage of intoxication that he has rendered himself incapable of engaging in the duties of that employment. See, e.g., John A. Roebling's Sons Co. v. Industrial Acc. Comm'n, 36 Cal. App. 10, 171 P. 987 (1918); Emery Motor Livery Co. v. Industrial Comm'n, 291 Ill. 532, 126 N.E. 143 (1920); O'Neill v. Fred Evens Motor Sales Co., 160 S.W.2d 775 (Mo. App. 1942). If the claimant continues to perform his duties despite his intoxication, however, he will not be deemed to have abandoned his employment. 1A A. Larson, WORKMEN'S COMPENSATION LAW § 34.21 (1979). Similarly, the employer's attempt to establish drinking as willful misconduct has generally been unsuccessful. Id. at § 34.22. States which include intoxication as a statutory defense impose varying standards with respect to causation, thus determining the facility with which the employer may escape liability for alcohol-related injuries. Three states merely require proof of intoxication without regard to causation. NEB. REV. STAT. § 48-127 (1978); Nev. Rev. Stat. § 616.565(1)(c) (1977); Tex. Rev. Civ. Stat. Ann. art. 8309, § 1 (Vernon 1967). Three others mandate that intoxication be the proximate cause of the injury standard. IOWA CODE ANN. § 85.16(2) (West Supp. 1979-1980); MINN. STAT. ANN. § 176.021(1) (West Supp. 1979); N.J. STAT. ANN. § 34:15-7 (West 1959). Finally, three states impose the stringent probative standard that intoxication be the sole cause of the injury. ALASKA STAT. § 23.30.235 (1972); Md. Ann. Code art. 101, § 45 (1979); N.Y. WORK. COMP. LAW § 64-10 (McKinney 1978). Thus, it is apparent that the employer will generally bear the cost through workmen's compensation where the employee's intoxication is only partially responsible for the accident.
lished, these cases still involved physical injury. Defining the scope of the employer's potential liability to the employee whose disability, alcoholism, or drug addiction is precipitated by the job is more difficult in light of established compensation principles. It is well established that certain employees—the so-called "vulnerable" or "ready" personalities—encounter risks to their mental stability in their work environment.199 These risks may arise from job content or job organization. For example, different jobs have different temperamental demands and some employees simply may not be compatible with a particular job.120 Similarly, there may be changes in job content requiring adjustments which certain individuals may find difficult.121 Day to day problems also may create pressures on the "ready personality."122

If mental illness can be precipitated by the work environment,123 why not alcoholism and drug addiction? It has been argued that alcoholism and drug addiction are voluntary and therefore should not be the employer's responsibility.124 This notion, however, is controverted by other sources which identify alcoholism and drug

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199 EMPLOYER RESPONSIBILITY, supra note 4, at 29. The "ready" or "vulnerable" personality has a sharp predisposition for overt emotional breakdowns which may remain latent and asymptomatic until a series of pressures and stresses pose a definite risk to their emotional health. Id. at 29-30.

120 Id. at 30-31.

121 Id. Those risks to emotional health originating in the workplace may be broadly divided into two groups: risks that derive from intrinsic job content and risks that arise from features of the organization. Id. at 30. Temperamental demands of the job, stemming from changes in technical job content and threats of job obsolescence, create for the vulnerable individual a lack of job predictability which in the past provided a source of emotional stability. In addition, organizational risk factors, such as performance evaluation, status changes through promotion, demotion, or transfer and managerial succession threaten the "ready" employee's self-esteem and the predictability of the people and tasks with which he is confronted. Id. at 31-32.

122 Id. at 30.

123 The most difficult problem in determining the compensability of work-related mental illness is evidentiary. Id. at 6-9. In order to establish the necessary causal link between protracted, non-traumatic stress and psychic injury, courts have relied upon psychiatric speculation rather than upon medical fact. Id. at 8. Occasionally, if the mental illness manifests itself at the workplace, the claimant may have the benefit of a statutory presumption that it is work-related. See Butler v. District Parking Mgt. Co., 363 F.2d 682 (D.C. Cir. 1966) (per curiam).


addiction as diseases or disabilities, thus suggesting that they should share the same status as mental illness.\textsuperscript{196} Accepting that mental disorders, drug addiction and alcoholism can be caused by job-related stress, the question remains as to the employer's financial accountability by virtue of workmen's compensation laws. If the employer is to be liable, these "disorders" presumably would be treated in the same manner as a physical injury—with the employer bearing the costs of medical treatments and loss of earnings.

Courts have recognized job stress as a causative factor of certain physical impairments which are compensable under worker's compensation.\textsuperscript{197} The courts also have required compensation for mental or nervous conditions or other psychological problems traceable to a physical injury sustained on the job.\textsuperscript{198} In addition, it has been held that an employee may recover benefits for psychological

\footnotesize{\textsuperscript{196} The Rehabilitation Act of 1973, see notes 24-49 and accompanying text supra, some state handicap and disability statutes, see notes 65, 67-68, 70 & 71 and accompanying text supra, and arbitral decisions, see notes 134-153 and accompanying text supra, provide examples of areas where alcoholism and mental illness are treated equally. As with alcoholism, drug addiction also may conceivably be precipitated by job stress. In the case of drug abuse, however, the volitional element seems more difficult to discount because the illicit drug user must violate the law and usually make substantial efforts to purchase narcotics. Whereas some employees may be said to be operating in an environment conducive to alcoholism, such a rationale could apply to an employee's drug addiction only when he works in circumstances in which drugs are easily acquired. Here too is the contradictory notion that drug addiction, like alcoholism, is a disease rather than a social problem.


Such physical injury need only be a "contributing cause" of the mental disorder. See McAllister v. Workmen's Comp. Appeals Bd., 69 Cal. 2d 408, 445 P.2d 313, 71 Cal. Rptr. 697 (1968); Edmonds v. Kalfaian & Son, Inc., 9 App. Div. 2d 551, 189 N.Y.S.2d 456 (3d Dep't 1959).}
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or mental injury resulting from sudden and shocking trauma, even in the absence of a precipitating physical injury. Where, however, the job-related stresses gradually accumulate and eventually cause the emotional or nervous disorder, without any physical manifestation, the responsibility of the employer under worker's compensation is by no means certain, although courts are starting to permit recovery. For example, in *Carter v. General Motors Corp.*, the plaintiff was an assembly-line worker who had difficulty keeping up with his assigned tasks and developed paranoid schizophrenia. The court granted compensation, concluding that there was no requirement that the mental trauma be tied to a single event. The Ari-

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199 See, e.g., *Lyng v. Rao*, 72 So. 2d 53 (Fla. 1954) (stenographer afflicted with chest pains after her building had been struck by lightning); *Pathfinder Co. v. Industrial Comm'n*, 62 Ill. 2d 556, 343 N.E.2d 913 (1976) (claimant experienced headaches, numbness and nervousness as result of witnessing severance of a co-worker's hand in machinery); *In re Fitzgibbons*, Mass. 373 N.E.2d 1174 (Mass. 1978) (corrections officer suffered psychotic-depressive reaction from inmate disturbance). In *Bailey v. American Gen. Ins. Co.*, 154 Tex. 430, 279 S.W.2d 315 (1955), plaintiff suffered a severe shock when a scaffold on which he was standing collapsed, resulting in the death of a fellow worker. He later suffered a "disabling neurosis" and "anxiety." An award was affirmed even though the state statute required "harm to the physical structure of the claimant's body" as a prerequisite to recovery.

The landmark case in the emotional trauma area is *Wolfe v. Sibley, Lindsay & Curr Co.*, 36 N.Y.2d 505, 330 N.E.2d 603, 369 N.Y.S.2d 637 (1975), wherein the claimant discovered the body of her supervisor who had committed suicide in his office. She suffered an acute depressive reaction requiring shock treatments. The New York Court of Appeals held that psychological or nervous injury caused by psychic trauma was compensable to the same extent as physical injury. *Id.* at 510, 330 N.E.2d at 606, 369 N.Y.S.2d at 641. See generally *Render, Mental Illness as An Industrial Accident*, 31 TENN. L. REV. 288 (1964); Note, *Workmen's Compensation—The Compensability of Nervous Injuries from Psychic Trauma—Who's Afraid of Wolfe?*, 25 U. KAN. L. REV. 158 (1976).

200 See 1B A. LARSON, WORKMEN'S COMPENSATION LAW § 42.23(b) (1979).


202 *Id.* at 580, 106 N.W.2d at 113. The *Carter* claimant's job-related stress was classified as "ordinary" day-to-day tension. *Id.* at 582, 106 N.W.2d at 109. The court recognized the broad implications of its decision when it noted that the ordered compensation would tend to place upon industry the economic burden of mental disability caused by ordinary job pressures. *Id.*

Several alternative approaches have been suggested to distinguish compensable from non-compensable protracted stress injuries. New York courts have taken a dual stance, in some cases requiring that the injury-producing stress be greater than the "wear and tear" of ordinary non-employment life, see, e.g., *Mulholland v. New York State Dep't of Pub. Works*, 34 App. Div. 2d 1033, 312 N.Y.S.2d 687 (3d Dep't 1970); *Ferreri v. General Auto Driving School, Inc.*, 26 App. Div. 2d 601, 271 N.Y.S.2d 421 (3d Dep't 1966), and in others applying the "other employee" test, wherein the stress experienced must be greater than that endured by other employees similarly situated. See, e.g., *Zygler v. Tenzer Coat Co.*, 19 App. Div. 2d 660, 240 N.Y.S.2d 543 (3d Dep't 1963), aff'd, 15 N.Y.2d 562, 203 N.E.2d 217, 254 N.Y.S.2d 537 (1964); *Cramer v. Barney's Clothing Store*, 16 App. Div. 2d 329, 223 N.Y.S.2d 813 (3d Dep't 1963), aff'd, 13 N.Y.2d 711, 191 N.E.2d 901, 241 N.Y.S.2d 844 (1963); accord, Swiss Colony, Inc. v. Department of Indus., Labor & Human Relations, 72 Wis. 2d 46, 240 N.W.2d
Supreme Court similarly has permitted compensation for “mental breakdown” caused by job tensions. Another court allowed an employee who became schizophrenic to take advantage of a statute granting him a presumption that his mental disorder was work-related. The court assumed sub silentio that his stress-induced mental condition was compensable.

The trend to grant compensation for mental injury caused by job-related mental stress even if the stress is “ordinary and gradual” reflects recognition of the notion that, where the employee is disabled and has lost his earning capacity, it matters little whether the injury was physical or mental. This trend, however, portends


203 Fireman's Fund Ins. Co. v. Industrial Comm'n, 119 Ariz. 51, 579 P.2d 555 (1978). The *Fireman's Fund* claimant, described as a “conscientious employee and a perfectionist,” *id.* at 52, 579 P.2d at 556, assumed greatly increased job responsibilities and pressures when her company expanded. Following an altercation with a customer, she left the office and in the evening took a slight overdose of sleeping pills. *Id.* at 53, 579 P.2d at 557. The applicable compensation statute provided: “Every employee covered by insurance in the state compensation fund who is injured by accident . . . shall receive such medical, nurse and hospital services and medicines . . . as provided in this chapter.” *Id.* (emphasis added). The court rejected the notion that “accident” necessarily imports physical impact or exertion, holding instead that “an injury is caused ‘by accident’ when either the external cause or the resulting injury itself is unexpected or accidental.” *Id.* (quoting Paulley v. Industrial Comm'n, 91 Ariz. 266, 272, 371 P.2d 888, 893 (1962)). Thus, plaintiff's injury was sufficiently unanticipated to fall within the statutory definition. *Id.*


205 *Id.* at 684. In Butler, the claimant, who had been employed as a parking lot attendant for 20 years, became ill during working hours and failed to report to work thereafter. He was diagnosed as having suffered a mental breakdown, schizophrenia reaction. The Longshoremen’s and Harbor Workers’ Compensation Act, 33 U.S.C. § 920 (1976), under which his claim was brought, 363 F.2d at 683, provides in pertinent part: “it shall be presumed, in the absence of substantial evidence to the contrary (a) that the claim comes within the provisions of this chapter.” 33 U.S.C. § 920 (1976). The Butler court held that the employer had failed to meet its statutory burden of proof to rebut the presumption that illness or injury occurring during employment was caused by that employment, and thus compensation was granted. *Id.* at 684.


enormous financial responsibility.\textsuperscript{208} As with physical injuries, it would undoubtedly pressure the employer into protecting the employee from job-induced alcoholism, drug addiction or mental illness by identifying the vulnerable personality at any early stage and taking preventative measures. Steps may be taken to match the employee with the temperamental demands of the job\textsuperscript{209} or, more likely, encourage or even provide rehabilitation measures at an early stage when it is easier to deal with the disorder.\textsuperscript{210} One important question left unanswered by the \textit{Carter} line of cases is the extent to which the alcoholic, drug addicted or mentally disabled employee is entitled to compensation if his behavioral disorder is a mere “surfacing” of a preexisting problem. The employer may have hired the individual pursuant to laws prohibiting discrimination against the recovered individual who can presently perform the job. It is questionable whether the employer should be held financially responsible when the problem recurs, even though the employer has had no opportunity to reject an employee on the basis of the em-

\textsuperscript{208} The financial costs of compensating job-induced mental injury is probably greater than with physical injury. See H. TRICE \& J. BELASCO, supra note 2, at 3-12.

\textsuperscript{209} See notes 11, 59, 141-167 and accompanying text supra.

\textsuperscript{210} See notes 11 & 12 and accompanying text supra.

\textsuperscript{211} No statistical studies have been found, however, which validate a supposition that the recovered alcoholic is more vulnerable to future work impairment due to alcoholism than someone in the general population who has never had a history of alcoholism. The same is true of mental illness and drug addiction.
employee's potential vulnerability. There is, however, some support for continued liability to the employer. In cases involving physical injuries, courts have indicated that the employer "takes his employee as he finds him,"212 and thus even if the employee would have developed a problem anyway, his previous history would not bar compensation.213 This rationale can be extended to the troubled employee whose problem recurs or intensifies.

In delineating the scope of an employer's compensation liability to the troubled employee who develops alcoholism or drug addiction, courts will be confronted with a twofold inquiry. First, they must determine whether alcoholism or drug addiction or both are analogous to mental disorders induced by job-related stress and second, whether the amount of evidence offered to prove the necessary causal nexus must be more compelling in the case of the alcoholic or drug addict. To date, these questions remain unresolved. The employer also faces a dilemma, that is, whether it is financially more burdensome to defend and, if he loses, pay the compensation claim, or to establish preventive and rehabilitative programs or policies. The experience of many companies which employ these programs214 as well as arbitral decisions argue in favor of the latter.

CONCLUSION

Having reviewed in this Article the relevant federal and state laws prohibiting handicap discrimination, the decisions of arbitrators and workmen's compensation laws, it is fair to say that there is a convergence of pressures on the employer to develop constructive methods of dealing with the "troubled" employee—the alco-

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214 See notes 11 & 12 and accompanying text supra. See also notes 141-167 and accompanying text supra.
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holic, drug addict or mentally ill. To begin, some federal and state laws are forcing employers to recognize the possibility of successful rehabilitation of the troubled employee by requiring the employer to include in its work force employees who have suffered from work-imparing alcoholism, drug addiction or mental illness in the past. The federal and some state laws further require the employer to "accomodate." Thus, while the employer may discharge a troubled employee who is not performing satisfactorily, he presumably cannot do so if the employee will be able to perform with some "accomodation" by the employer. Certainly the duty to "accomodate" does not per se require the institution of an occupational rehabilitation program. The employer who has made available a well-run rehabilitation program to the employee, however, will have gone far in meeting his obligation to accomodate.

Furthermore, arbitrators have made impossible facile discharge of such employees who develop problems after a period of satisfactory employment. On the whole, with some inconsistencies in the area of drug addiction, arbitrators are demanding that employers not only recognize that there is a possibility for rehabilitation, but that they assume some responsibility for the undertaking of rehabilitation before discharging the troubled employee. This responsibility may range from giving the individual a chance to rehabilitate himself to taking positive steps to encourage and supervise the rehabilitation. Finally, the placing of economic liability on the employer for mental disorders caused by job stress under workmen's compensation laws may be encouraging employers to assume responsibility for rehabilitation of some troubled employees. Whether this economic liability will extend to alcoholism or drug addiction caused by job tensions is less certain.

Interestingly, as pressures increase on the employer to assume responsibility for the troubled employee, counter-balancing pressures are placed on the employee. Thus, there is the increasingly emphasized notion and recognition that the employee also must bear some responsibility. The laws emphasize that the employer's obligation not to discriminate does not include a duty to hire or retain an employee who is not performing or is not capable of performing his job. In addition, whereas early arbitration cases dealing with alcoholics sometimes reinstated the alcoholic unconditionally, reinstatement in the modern cases is almost uniformly conditioned on the employee's continued participation in a rehabilitation program. Imposing this condition recognizes that reinstatement without therapy, which was often the order in the past, is useless. Thus,
while imposing obligations on employers to give the employee a chance to rehabilitate himself, the employee must take advantage of this chance. Arbitrators today recognize that at some point the employer may terminate the employee who, although given a chance for rehabilitation, has not been rehabilitated for whatever reason. The existence of a well-run occupational rehabilitation program would undoubtedly assist the employer in establishing, to the satisfaction of the courts, administrative agencies and arbitrators, that the discharged employee was properly terminated. Moreover, the costs of instituting and maintaining a prevention and rehabilitation program are less than those attributable to operational losses and termination expenditures caused by non-productive troubled employees.

In all, it seems clear that more and more employers will assume responsibility for the rehabilitation of the troubled employee as the most constructive, humane and least costly path available. In so doing, the employer at best will be able to convert non-productive employees into productive ones and at least to cut short company losses attributed to long-term tolerance of the non-productive employee by identifying those employees, fulfilling company obligations to them with respect to rehabilitation and terminating the employees who cannot comply. In the long run, these policies will benefit employers as well as employees.

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215 Whether that individual can then claim Workmen's Compensation benefits (including lost earnings) claiming that his condition was caused by job stress is an open question.