

DRUNK OR DISABLED? THE LEGAL AND SOCIAL
CONSEQUENCES OF ROY TARPLEY'S
DISCRIMINATION CLAIM
AGAINST THE NBA

I. INTRODUCTION

“Roy Tarpley is among the best basketball players who never starred in the NBA.”¹ Roy Tarpley (“Tarpley”) never starred in the National Basketball Association (“NBA”) because of his ongoing problems with alcohol and drugs.² In 1989, the NBA suspended Tarpley from the league for failing a mandatory drug test.³ In 1991, the NBA suspended Tarpley again after the police arrested him for driving while intoxicated.⁴ Later that year, the NBA dismissed Tarpley from the league for failing another drug test, but the NBA reinstated him in 1994.⁵ In 1995, the NBA dismissed Tarpley again after he failed yet another drug test.⁶ In 2003, the NBA denied Tarpley’s application for reinstatement, even though he had passed all drug tests during the past four years.⁷

The NBA can approve or deny the reinstatement of a previously dismissed player at its discretion.⁸ The Equal Employment

1. Posting of Michael McCann to Sports Law Blog, *Roy Tarpley, Addiction, and the American with Disabilities Act*, <http://sports-law.blogspot.com/2007/08/roy-tarpley-addiction-and-american-with.html> (Aug. 3, 2007, 18:34 EST) [hereinafter *Tarpley, Addiction*].

2. See Associated Press, *Tarpley Seeking \$6.5 Million in Damages After Favorable EEOC Ruling*, ESPN.COM, Aug 1, 2007, <http://sports.espn.go.com/nba/news/story?id=2957945> (explaining NBA frequently disciplined Tarpley for alcohol and drug related conduct). “[Tarpley’s] career with the Mavericks . . . was interrupted by one suspension and ended by another . . .” *Id.*

3. See *Tarpley, Addiction*, *supra* note 1 (noting NBA suspended Tarpley in 1989 for failing drug tests).

4. See *id.* (stating NBA suspended Tarpley in 1991 after police arrested him for driving while intoxicated).

5. See *id.* (noting NBA dismissed Tarpley in 1991 for failing drug test but reinstated him in 1994).

6. See *id.* (explaining NBA dismissed Tarpley in 1995 for failing drug test).

7. See *id.* (“Although . . . Tarpley had remained in good physical condition and had repeatedly passed drug tests (including those for alcohol, the substance which led to Tarpley being banned in 1995), the NBA rejected the petition.”).

8. See NAT’L BASKETBALL PLAYERS ASS’N, COLLECTIVE BARGAINING AGREEMENT, art. XXXIII, § 12(a) (July 29, 2005), available at http://www.nbpa.com/cba_articles/article-XXXIII.php [hereinafter Art. XXXIII] (“The approval of the NBA and the Players Association shall rest in their absolute and sole discretion, and their decision shall be final, binding, and unappealable.”). For a further discussion of the NBA’s reinstatement procedures, see *infra* notes 163-68 and accompanying text.

Opportunity Commission (“EEOC”) reviewed the NBA’s exercise of discretion in this matter and found that the NBA discriminated against Tarpley⁹ and violated the Americans with Disabilities Act (“ADA”) when it refused to reinstate him in 2003.¹⁰ Specifically, the EEOC found that Tarpley provided the NBA with adequate evidence establishing that he was qualified to play in the league, no longer abused alcohol, and no longer used drugs.¹¹ Tarpley filed a lawsuit against the NBA and the Dallas Mavericks claiming that, “they discriminated against him by refusing reinstatement on the basis of his disability as a recovering alcoholic and drug abuser.”¹²

This Comment explores the legal and social consequences of Roy Tarpley’s discrimination claim against the NBA. Section II outlines the facts of Tarpley’s claim,¹³ closely examines the ADA’s provisions regarding employment and alcohol and drug abuse by taking a comprehensive look at recent case law,¹⁴ and details the National Basketball Players Association Anti-Drug policy.¹⁵ Section

9. See Associated Press, *supra* note 2 (stating EEOC believes it was unlawful for NBA to refuse to reinstate Tarpley). “The Equal Employment Opportunity Commission (EEOC) is the federal agency responsible for enforcing employment discrimination laws.” EEOC Training Institute, <http://www.eeotraining.eeoc.gov> (lasted visited May 1, 2008). The process for filing an employment discrimination claim is different than the process for filing most other lawsuits. See EEOC’s Charge Processing Procedures, http://www.eeoc.gov/charge/overview_charge_processing.html (last visited May 1, 2008) (delineating procedure for filing ADA claim with EEOC). First, an individual must file the claim with the EEOC; then, the EEOC may suggest mediation, dismiss the claim, or commence investigation if it believes that the claim has merit. See *id.* After the investigation is complete, the EEOC may then suggest mediation, dismiss the claim, or issue a right to sue letter if it still believes that the claim has merit. See *id.* Upon receiving a right to sue letter, the individual has ninety days from receipt of the right to sue letter to file a discrimination lawsuit in court. See *id.*

10. See *Tarpley, Addiction*, *supra* note 1 (stating EEOC ruled that NBA violated ADA by refusing to reinstate Tarpley in 2003). The ADA protects individuals with disabilities from discrimination. See *id.* (describing ADA). “Alcoholics and drug addicts (although not those engaged in current use of illegal drugs) are protected by the ADA, provided they are able to perform the essential functions of the job.” *Id.* For a further discussion of the ADA, see *infra* notes 64-143 and accompanying text.

11. See *Tarpley, Addiction*, *supra* note 1 (“The EEOC believed Tarpley offered enough evidence that he could play in the NBA, since he showed that he no longer used drugs and apparently had his alcoholism under control.”).

12. Associated Press, *Ex-Mav Tarpley Sues Team and NBA, Claiming Discrimination*, USA TODAY, Sept. 26, 2007, http://www.usatoday.com/sports/basketball/nba/2007-09-26-tarpley-suit_N.htm?csp=34 [hereinafter *Tarpley Sues Team*].

13. For a further discussion of the facts of Tarpley’s claim, see *infra* notes 19-63 and accompanying text.

14. For a further discussion of the ADA, see *infra* notes 64-143 and accompanying text.

15. For a further discussion of the National Basketball Players Association’s Anti-Drug policy, see *infra* notes 144-68 and accompanying text.

III analyzes the strengths and weaknesses of Tarpley's claim.¹⁶ Section IV proposes a potential consequence of a verdict in favor of Tarpley.¹⁷ Finally, Section V concludes that the court will not find in Tarpley's favor.¹⁸

II. BACKGROUND

A. Facts of Tarpley's Claim

Roy Tarpley, a seven foot tall power forward, excelled in basketball at the University of Michigan in the mid-eighties.¹⁹ Tarpley's professional basketball career commenced in 1986 when the Dallas Mavericks selected him seventh overall in the NBA draft.²⁰ Tarpley's basketball success continued during his first two seasons in the NBA and his career appeared promising.²¹ Nevertheless, his ongoing addiction to alcohol and drugs worsened during this time.²² Tarpley sought counseling and treatment, but neither was successful.²³

Tarpley's basketball career began its descent during the 1988-1989 season when a series of knee injuries sidelined him for most of

16. For a further discussion of the legal analysis of Tarpley's claim, see *infra* notes 169-235 and accompanying text.

17. For a further discussion of a potential consequence of a verdict in Tarpley's favor, see *infra* notes 236-54 and accompanying text.

18. For a further discussion of the viability of Tarpley's claim, see *infra* notes 255-70 and accompanying text.

19. See *Tarpley, Addiction*, *supra* note 1 (describing Tarpley's basketball career at University of Michigan as "stellar"); see also Roy Tarpley Past Stats, <http://www.databasebasketball.com/players/playerpage.htm?ilkid=TarplRo01> (last visited May 1, 2008) (displaying Tarpley's statistics at University of Michigan, including 13.1 points per game and 7.8 rebounds per game).

20. See *Tarpley, Addiction*, *supra* note 1 (stating Dallas Mavericks selected Tarpley with seventh pick in 1986 NBA draft).

21. See *id.* (describing how Tarpley made all-rookie team after first year, won NBA's Sixth Man of the Year Award after second year, and helped Mavericks win fifty-three games and make it to Western Conference Finals); Roy Tarpley Past Stats, *supra* note 19 (displaying Tarpley's first NBA season statistics, including 7.5 points per game and 7.1 rebounds per game in seventy-five games and Tarpley's second season statistics, including 13.5 points per game and 11.8 rebounds per game in eighty-one games). "Tarpley initially seemed like a star in the making." *Tarpley, Addiction*, *supra* note 1.

22. See *Tarpley, Addiction*, *supra* note 1 (noting Tarpley's alcohol and cocaine addictions worsened). Tarpley stated, "[m]y problem was with success. Every time I was successful, I had to go out and party." Ian Thomsen, *Roy Tarpley Seeks Self-Control, and a Second Chance in the NBA*, INT'L HERALD TRIB., Feb. 1, 1993, <http://www.iht.com/articles/1993/02/01/tarp.php> (explaining Tarpley's alcohol and drug problems worsened when basketball career was flourishing).

23. See *Tarpley, Addiction*, *supra* note 1 (stating Tarpley sought counseling and treatment for alcohol and drugs, but without success).

the season.²⁴ During his time away from the basketball court, Tarpley's addiction to alcohol and drugs continued to worsen.²⁵ After failing mandatory drug tests, the NBA suspended him on January 5, 1989.²⁶

The NBA permitted Tarpley to return for the 1989-1990 season.²⁷ Tarpley, however, failed to take advantage of this opportunity. Six games into the season, the police arrested him for driving while intoxicated and resisting arrest.²⁸

Tarpley's 1990-1991 season was strikingly similar to his 1988-1989 season.²⁹ Five games into the season, Tarpley suffered another knee injury, which forced him to miss the rest of the season.³⁰ Once again, time away from the basketball court exacerbated his alcohol and drug problems.³¹ In March of 1991, the police arrested Tarpley for driving while intoxicated, and the NBA suspended him again.³²

Tarpley did not play in the 1991-1992 season either; however, it was not an injury that sidelined him this time.³³ Pursuant to the league's collective bargaining agreement, the NBA dismissed Tarpley after he failed another drug test.³⁴

Following his dismissal from the NBA, Tarpley moved to Greece so he could continue to play professional basketball.³⁵ He played well in Greece, leading his team to a championship in

24. *See id.* ("Tarpley's third season proved to be the beginning of his career's end. He started to suffer a series of knee injuries, which . . . caused him to miss games."). Tarpley played in only nineteen games in his third season. *See Roy Tarpley Past Stats, supra* note 19 (listing Tarpley's 1988-1989 statistics).

25. *See Tarpley, Addiction, supra* note 1 ("The time off wasn't a blessing, as [Tarpley] more heavily dabbled in cocaine and other drugs, and also began consuming more alcohol.").

26. *See id.* (stating NBA suspended Tarpley indefinitely in 1989 for failing drug tests).

27. *See id.* (noting Tarpley returned to NBA for 1989-1990 season).

28. *See id.* (explaining that police arrested Tarpley for driving while intoxicated and resisting arrest six games into 1989-1990 season).

29. For a further discussion of Tarpley's 1988-1989 season, see *supra* notes 24-26 and accompanying text.

30. *See Tarpley, Addiction, supra* note 1 (describing Tarpley's 1990-1991 season).

31. *See id.* (noting Tarpley's alcohol and drug problems worsened when not playing basketball).

32. *See id.* (stating NBA again suspended Tarpley for his arrest for driving while intoxicated).

33. *See id.* (explaining Tarpley missed season because of suspension).

34. *See Associated Press, supra* note 2 (stating NBA dismissed Tarpley in 1991 for using cocaine).

35. *See id.* (describing Tarpley's activity after NBA dismissal).

1993.³⁶ The following year, Tarpley returned to the United States and applied for reinstatement to the NBA.³⁷ The NBA granted his reinstatement for the 1994-1995 season.³⁸

Tarpley, then twenty-nine years old, "signed a six-year contract with the Dallas Mavericks for \$20 million,"³⁹ and his career again appeared promising.⁴⁰ Nevertheless, in December of 1995, Tarpley tested positive for alcohol, failing yet another drug test.⁴¹ The NBA dismissed him again, canceling the remainder of his \$20 million contract with the Mavericks.⁴²

Tarpley moved back to Greece to play professional basketball, but in 2000 he returned to the United States unemployed.⁴³ By 2003 Tarpley was out of money,⁴⁴ so he applied for reinstatement to the NBA.⁴⁵ Even though Tarpley had remained in good physical condition, repeatedly passed alcohol and drug tests, and entered an alcohol and drug recovery program,⁴⁶ the NBA refused to reinstate

36. See *Tarpley, Addiction*, *supra* note 1 (noting Tarpley led his team, Aris BC Salonica, to European Cup in 1993). Tarpley played professional basketball in Greece for two years. See Associated Press, *supra* note 2 (commenting on duration of Tarpley's stay in Greece).

37. See *Tarpley, Addiction*, *supra* note 1 (explaining why Tarpley returned to United States).

38. See *id.* (noting NBA's response to Tarpley's application for reinstatement).

39. *Id.*

40. See *id.* (listing Tarpley's statistics as thirteen points per game and eight rebounds per game in fifty-five games during 1994-1995 season).

41. See *id.* ("[H]e . . . failed another drug test – for using alcohol and violating the terms of a court-imposed personal after-care program."); Associated Press, *supra* note 2 (stating Tarpley failed drug test in December 1995).

42. See *Tarpley, Addiction*, *supra* note 1 ("With [another failed drug test], the NBA kicked him out for good, thus negating the remainder of his \$20 million contract.").

43. See *id.* (stating Tarpley returned to Greece to play basketball, but came back to United States in 2000).

44. See *id.* (quoting Jeff Bounds & David Wethe, *Former Mav Facing Bankruptcy*, DALLAS BUS. J., July 4, 2003, <http://www.bizjournals.com/dallas/stories/2003/07/07/story3.html>) (explaining that Tarpley's financial problems stemmed from two civil judgments, totaling \$8.5 million, entered against Tarpley from 1997 death of Good Samaritan who tried to help Tarpley's friend who got in car accident in Tarpley's car).

[H]e did not have any cash on hand, checking or savings accounts, household goods, investments or cars [H]e said he has been unemployed for four years, and that he was staying with an unnamed friend in Arlington. Tarpley indicated this person, or persons, had fed and otherwise provided for him Tarpley has at least \$8,596 in credit card bills, \$36,348 in federal tax liabilities dating to 1994 and a California state tax bill of \$13,324 from 1995

Id.

45. See *id.* (stating Tarpley again applied for reinstatement to NBA).

46. See *id.* (explaining Tarpley remained healthy, passed all alcohol and drug tests, and entered treatment program).

him.⁴⁷ Tarpley applied for reinstatement numerous times, but the NBA continued to reject his applications.⁴⁸

“Still wanting to play [professional basketball], Tarpley signed with the . . . Continental Basketball League (“CBL”).”⁴⁹ Tarpley played well during his first season in the CBL, aside from frequent injuries.⁵⁰ After three years, however, his team disbanded.⁵¹ At the age of forty-one, Tarpley was again unemployed.⁵²

In July of 2006, Tarpley filed a discrimination claim against the NBA with the EEOC.⁵³ On May 17, 2007, the EEOC ruled that the NBA violated the ADA when it refused to reinstate Tarpley.⁵⁴ The EEOC attempted to mediate an out of court resolution between Tarpley and the NBA, but failed, so on June 28, 2007, it issued Tarpley a right to sue letter.⁵⁵

On September 26, 2007, Tarpley filed a lawsuit against the NBA and the Dallas Mavericks in the United States District Court for the Southern District of Texas.⁵⁶ In the suit, Tarpley claims that the NBA discriminated against him when it refused to reinstate him because of his status as a recovering alcoholic and drug addict.⁵⁷ Joe Walker, Tarpley’s attorney, stated that the purpose of the lawsuit is to make the NBA responsible for its unfair treatment of Tarpley, noting that Tarpley complied with all of the NBA’s requests.⁵⁸

47. *See id.* (noting NBA’s response to Tarpley’s petition for reinstatement).

48. *See id.* (explaining Tarpley unsuccessfully applied for reinstatement many times).

49. *Id.*

50. *See id.* (noting Tarpley averaged sixteen points per game and ten rebounds per game for Michigan Mayhem, though frequently injured).

51. *See id.* (explaining Tarpley stopped playing for Michigan Mayhem because team disbanded).

52. *See id.* (noting Tarpley was unemployed and forty-one when team disbanded).

53. *See Tarpley Sues Team, supra* note 12 (noting Tarpley’s filing of EEOC claim).

54. *See Associated Press, supra* note 2 (explaining EEOC sided with Tarpley in May 2007).

55. *See id.* (stating EEOC issued right to sue letter after mediation failed).

56. *See Tarpley Sues Team, supra* note 12 (commenting that Tarpley filed lawsuit in federal court in Houston, Texas in September 2007).

57. *See id.* (describing basis for Tarpley’s lawsuit). Tarpley’s lawsuit states: “Tarpley is a qualified individual with a disability within the meaning of the ADA, in that he has a disability in the form of past drug and alcohol abuse, which substantially limits at least one of his major life activities.” *Id.*

58. *See id.* (“What he went through and the hoops that he went through to comply with what the NBA wanted and how the NBA treated him was just downright wrong, unfair, and cruel. We’re making the NBA and the Mavericks accountable for the way they treated him.”).

Tarpley stated that his objectives are to clear his name and to help others that suffer from alcoholism and drug addiction.⁵⁹

In his lawsuit, Tarpley contends that the NBA dismissed him from the league in 1995 for testing positive for alcohol with a blood alcohol level of approximately 0.003 percent, a very low result considering that Texas defines a driver as intoxicated with a minimum blood alcohol level of 0.08 percent.⁶⁰ The lawsuit also notes that Tarpley passed all alcohol and drug tests that the NBA required him to take pursuant to his application for reinstatement to the league.⁶¹ The lawsuit did not specify the amount of money Tarpley is seeking,⁶² but he sought at least \$6.5 million in his original EEOC complaint.⁶³

B. Americans with Disabilities Act

1. *Legislative History of Americans with Disabilities Act*

In 1990, Congress passed the Americans with Disabilities Act, the United States' first civil rights act to target the needs of individuals with disabilities.⁶⁴ Congress found that the law was necessary given the history of discrimination against the disabled in the United States.⁶⁵ Congress's goal was to ensure that disabled individuals receive equal opportunities and attain social and economic in-

59. See Associated Press, *supra* note 2 ("Right now it's about me getting my name back and being able to help someone else who's struggling with issues.").

60. See *Tarpley Sues Team*, *supra* note 12 (explaining NBA banned Tarpley for failing alcohol test and emphasizing Tarpley's extremely low test result).

61. See *id.* (stating Tarpley passed NBA requested alcohol and drug tests for fifty-two weeks).

62. See *id.* (noting Tarpley did not specify dollar amount in lawsuit).

63. See Associated Press, *supra* note 2 (listing amount Tarpley sought in EEOC complaint).

64. See EEOC and Title I of the ADA: Overview and History, <http://www.eeoc.gov/ada/adahistory.html> (last visited May 1, 2008) ("[T]he Americans with Disabilities Act (ADA) is the first comprehensive civil rights law addressing the needs of people with disabilities, prohibiting discrimination in employment, public services, public accommodations, and telecommunications.").

65. See 42 U.S.C. § 12101(a) (1990) (providing Congress's findings regarding disabled individuals). Section 12101(a) of the Americans with Disabilities Act states:

(1) some 43,000,000 Americans have one or more physical or mental disabilities . . . ;

(2) historically, society has tended to isolate and segregate individuals with disabilities, . . . ;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who

dependence.⁶⁶ Accordingly, the ADA's purpose is to provide a law with clear standards to eliminate discrimination against individuals with disabilities.⁶⁷

2. *Employment Under Americans with Disabilities Act*

The ADA prohibits an employer from discriminating against an individual with a disability in regard to hiring, promotion, termination, compensation, training, conditions, and privileges of employment.⁶⁸ A prima facie ADA claim has three requirements.⁶⁹ First, the plaintiff must have been "disabled within the meaning of the ADA."⁷⁰ Second, the plaintiff must have been "qualified to per-

have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, . . . ;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities . . . have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

Id. §§ 12101(a)(1)-(7).

66. *See id.* § 12101(a)(8) ("[T]he Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency . . .").

67. *See id.* §§ 12101(b)(1)-(2) ("It is the purpose of this [Act] – (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; [and] (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities . . ."). The ADA's other purposes are:

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this [Act] on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

Id. §§ 12101(b)(3)-(4).

68. *See id.* § 12112(a) ("No [employer] shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.").

69. *See Bailey v. Georgia-Pacific Corp.*, 306 F.3d 1162, 1166 (1st Cir. 2002) (listing requirements of prima facie ADA claim that plaintiff must prove by preponderance of evidence).

70. *Id.* For a further discussion of the definition of a disability under the ADA, see *infra* notes 73-123 and accompanying text.

form the . . . job. . . .”⁷¹ Third, the employer must have taken “adverse action against [the plaintiff] because of the disability.”⁷²

a. Disability

The first element a plaintiff must establish is that he or she is disabled.⁷³ The ADA defines a disability as: “(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.”⁷⁴

i. Impairment that Substantially Limits a Major Life Activity

The court applies a three-part test to determine whether the plaintiff is disabled within the ADA’s first definition of a disability.⁷⁵ First, the plaintiff’s condition must constitute a mental or physical impairment under the ADA.⁷⁶ The court reviews past case law and the ADA’s legislative history to ascertain whether the condition is a mental or physical impairment.⁷⁷ Second, the plaintiff’s limited activity must constitute a major life activity.⁷⁸ An activity is a major life activity if it is “of central importance to daily life.”⁷⁹ Third, the im-

71. *Bailey*, 306 F.3d at 1166. For a further discussion of the definition of a qualified individual under the ADA, see *infra* notes 124-29 and accompanying text.

72. *Bailey*, 306 F.3d at 1166. For a further discussion of the adverse action requirement, see *infra* notes 130-35 and accompanying text.

73. See *Bailey*, 306 F.3d at 1166 (listing disability as first requirement in *prima facie* ADA claim).

74. 42 U.S.C. §§ 12102(2)(A)-(C) (1990).

75. See *Bailey*, 306 F.3d at 1167 (applying three-part test to determine whether plaintiff is disabled under ADA’s first definition of disability).

76. See *id.* (“First, we consider whether [the plaintiff’s] condition constitutes a mental or physical ‘impairment.’”).

77. See generally *id.* (referring to past cases and legislative history to prove whether plaintiff’s condition satisfies first prong of analysis). A physical or mental impairment is:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

29 C.F.R. §§ 1630.2(h)(1)-(2) (2007).

78. See *Bailey*, 306 F.3d at 1167 (“Second, we identify the life activities upon which [the plaintiff] relies to determine whether they constitute ‘major life activities.’”).

79. *Id.* “Major Life Activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.” 29 C.F.R. § 1630.2(i).

pairment must substantially limit the major life activity.⁸⁰ Substantially limited means “unable to perform” or “significantly restricted.”⁸¹

Drug addiction is a mental or physical impairment under the ADA.⁸² Nevertheless, the ADA provides limited protection for drug addicts.⁸³ The ADA does not protect an individual who was using illegal drugs at the time the employer took adverse action.⁸⁴

Alcoholism is also a mental or physical impairment under the ADA.⁸⁵ In contrast to drug addicts, the ADA does not automatically deny protection to an individual who was using alcohol at the time of the employer’s adverse action;⁸⁶ however, the ADA still provides limited protection for alcoholics.⁸⁷ Alcoholism is not a per se disability.⁸⁸ Consequently, an alcoholic must demonstrate that alcoholism substantially limits a major life activity.⁸⁹ An alcoholic’s inability to walk, speak, think, drive, or sleep while intoxicated does

80. See *Bailey*, 306 F.3d at 1167 (“Third, we must determine whether the impairment substantially limits the major life activity identified.”).

81. 29 C.F.R. § 1630.2(j)(1)(i). When determining whether an impairment substantially limits a major life activity, the court considers factors such as: “(i) [t]he nature and severity of the impairment; (ii) [t]he duration or expected duration of the impairment; and (iii) [t]he permanent or long-term impact, or the expected permanent or long term impact of . . . the impairment.” *Id.* §§ 1630.2(j)(2)(i)-(iii).

82. See generally 42 U.S.C. § 12114 (1990) (providing limited coverage of drug addicts).

83. See *id.* §§ 12114(a)-(d) (explaining limitations for drug addicts under ADA).

84. See *id.* § 12114(a) (“[Q]ualified individual with a disability’ shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the [employer] acts on the basis of such use.”); U.S. EQUAL EMPLOYMENT OPP’TY. COMM’N. & U.S. DEP’T OF JUSTICE, AMERICANS WITH DISABILITIES ACT: QUESTIONS & ANSWERS 10 (1992) [hereinafter QUESTIONS AND ANSWERS] (explaining that ADA does not protect individuals currently using drugs).

85. See generally 42 U.S.C. § 12114 (providing limited coverage of alcoholics).

86. See Alan M. Koral, *Litigating ADA (Title I) Discrimination and Accommodation Cases*, in 759 PRACTISING LAW INSTITUTE, LITIGATION AND ADMINISTRATIVE PRACTICE COURSE HANDBOOK SERIES, LITIGATION 365, 369 (2007) (“Unlike an illegal drug user, an employee who is currently abusing alcohol is not automatically denied protection under the ADA because of her alcohol use.”); see also QUESTIONS AND ANSWERS, *supra* note 84, at 10 (explaining ADA’s coverage of alcoholics).

87. See 42 U.S.C. § 12114(c) (1990) (listing restrictions on alcoholics under ADA); see also *Goldsmith v. Jackson Mem’l Hosp. Pub. Health Trust*, 33 F. Supp. 2d 1336, 1341 (S.D. Fla. 1998) (“Although alcoholics may be detrimentally impacted in many facets of their lives by their addiction, the ADA requires an individualized determination of impact, not simply an assumption.”).

88. See *Burch v. Coca-Cola Co.*, 119 F.3d 305, 316 (5th Cir. 1997) (rejecting alcoholism as per se disability unlike HIV, which court automatically considers disability without proof that it substantially limits major life activity).

89. See *Goldsmith*, 33 F. Supp. 2d at 1342 (requiring plaintiff to prove alcoholism substantially limited major life activity).

not establish that alcoholism substantially limits a major life activity because the same temporary consequences could result if the alcohol consumer was not an alcoholic.⁹⁰ Even though an alcoholic may experience these alcohol-induced limitations more frequently than a social drinker, the limitations are not sufficient because the impairment is not permanent.⁹¹ Conversely, an alcoholic can prove that alcoholism substantially limits a major life activity by demonstrating that alcoholism permanently affects the ability to walk, think, speak, drive, or sleep, even when sober.⁹²

The EEOC is reluctant to regard working as a major life activity, but it may do so if the individual is not substantially limited in any other major life activity.⁹³ Substantially limited in regard to working means the individual is limited in performing a class of jobs or a broad range of jobs compared to an individual with similar training, skill, and ability.⁹⁴ When determining whether an impairment substantially limits an individual's ability to work, the court looks to factors such as: the geographical area where the individual is able to work, the number and type of jobs requiring similar skill that the individual is precluded from performing, and the number and type of jobs not requiring similar skill that the individual is pre-

90. See *Burch*, 119 F.3d at 316 (comparing alcoholic to social drinker); see also *Goldsmith*, 33 F. Supp. 2d at 1342 (holding plaintiff's inability to socialize, drive, and perform manual tasks while drinking were inadequate because they were temporary).

[Plaintiff] produced no evidence that the effects of his alcoholism-induced inebriation were qualitatively different than those achieved by an overindulging social drinker: in both situations, the natural result of overindulgence is the temporary impairment of senses, dulled reactions, and the prospect of a restless sleep followed by an unpleasant morning.

Burch, 119 F.3d at 316.

91. See *Burch*, 119 F.3d at 316 (emphasizing court's focus on permanency, not frequency).

92. See *id.* at 316 n.9 (“[Plaintiff] offered no testimony that his alcoholism-induced inebriation permanently altered his gait, his ability to speak properly, his memory when sober, or produced long-term insomnia.”).

93. See 29 C.F.R. § 1630.2(i) (2007) (listing working as major life activity); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 492 (1999) (“[T]he EEOC has expressed reluctance to define ‘major life activities’ to include working and has suggested that working be viewed as a residual life activity, considered, as a last resort, only ‘[i]f an individual is not substantially limited in any other major life activity.’” (emphasis added) (quoting 29 C.F.R. § 1630.2(j) (1998))).

94. See 29 C.F.R. § 1630.2(j)(3)(i) (“[S]ubstantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities.”); *Sutton*, 527 U.S. at 492 (“To be substantially limited in the major life activity of working, then, one must be precluded from more than one type of job, a specialized job, or a particular job of choice.”).

cluded from performing.⁹⁵ An individual is not precluded from a class of jobs if jobs are available that utilize the individual's skills, but not necessarily a unique talent.⁹⁶ Likewise, an individual is not precluded from a broad range of jobs if numerous jobs are available that the individual is able to perform.⁹⁷

ii. Record of a Disability

The court ascertains whether the plaintiff has a record of an impairment that substantially limited a major life activity to determine whether the plaintiff is disabled within the ADA's second definition of a disability.⁹⁸ The record must illustrate that the impairment substantially limited a major life activity; a record of an impairment alone is insufficient.⁹⁹

The purpose of including individuals with an established record of a disability is to protect those who have recovered from an impairment that substantially limited a major life activity from discrimination because of their past impairment.¹⁰⁰ Hence, the ADA does not exclude from its protections a successfully rehabilitated individual who no longer abuses drugs or an individual currently in rehabilitation who no longer uses drugs.¹⁰¹ An individual must abstain from drug use for a considerable period, however, before the ADA protects the individual.¹⁰²

The court requires actual documentation of the impairment to constitute a record.¹⁰³ For instance, medical, educational, employ-

95. See 29 C.F.R. §§ 1630.2(j)(3)(ii)(A)-(C) (listing three factors courts use to determine if impairment substantially limits working).

96. See *Sutton*, 527 U.S. at 492 (explaining situation when individual is not precluded from class of jobs).

97. See *id.* (explaining situation when individual is not precluded from broad range of jobs).

98. See 29 C.F.R. § 1630.2(k) (2007) ("Has a record of such impairment means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.").

99. See *Bailey v. Georgia-Pacific Corp.*, 306 F.3d 1162, 1169 (1st Cir. 2002) (requiring record to show impairment substantially limited major life activity).

100. See *id.* ("The purpose of this provision is largely to protect those who have recovered or are recovering from substantially limiting impairments from discrimination based on their medical history.").

101. See 42 U.S.C. §§ 12114(b)(1)-(2) (1990) (including past drug users under ADA protection).

102. See *Koral, supra* note 86, at 369 ("An addict must abstain for a significant period of time in order to qualify for ADA protection.").

103. See *EEOC v. Exxon Corp.*, 124 F. Supp. 2d 987, 996 (N.D. Tex. 2000) (requiring documentation of history of impairment). "The plaintiffs' declarations merely recount their past problems with substance abuse, and in no way suggest the existence of a 'record' . . . that classifies . . . these plaintiffs as having a substantially limiting impairment." *Id.*

ment, treatment, counseling, or hospital records can establish a sufficient record.¹⁰⁴ The record still must indicate that the individual had an impairment that substantially limited a major life activity.¹⁰⁵

In *School Board Of Nassau County v. Arline*, for example, the Supreme Court held that the plaintiff's hospital stay was a sufficient record because it indicated that her tuberculosis was interfering with her breathing.¹⁰⁶ "This impairment was serious enough to require hospitalization, a fact more than sufficient to establish that one or more of her major life activities were substantially limited by her impairment."¹⁰⁷ In contrast, in *Goldsmith v. Jackson Memorial Hospital Public Health Trust*, a Florida District Court held that the plaintiff's sporadic attendance at Alcoholics Anonymous meetings was not a sufficient record.¹⁰⁸ History of treatment only constitutes a sufficient record if it demonstrates that the impairment substantially limited a major life activity.¹⁰⁹

iii. Regarded as Having a Disability

The court relies on *Sutton v. United Air Lines* to determine whether the plaintiff is disabled within the ADA's third definition of a disability.¹¹⁰ In *Sutton*, the Supreme Court listed two ways an individual can be regarded as having a disability.¹¹¹ First, an individual can be regarded as having a disability if an employer believes that the individual has an impairment that substantially limits a major life activity, when in fact, the individual does not have an impairment at all.¹¹² Second, an individual can be regarded as having a

104. *See id.* (listing records plaintiff failed to provide and thus did not meet burden of proving record of impairment).

105. *See Burch v. Coca-Cola Co.*, 119 F.3d 305, 321-22 (5th Cir. 1999) (stating record of treatment alone does not prove disability).

106. *See* 480 U.S. 273, 281-82 (1987) (finding hospital stay sufficient record because tuberculosis was affecting breathing). "[The plaintiff] suffered tuberculosis 'in an acute form in such a degree that it affected her respiratory system,' and was hospitalized for this condition." *Id.* at 281.

107. *Id.*

108. *See* 33 F. Supp. 2d 1336, 1342 (S.D. Fla. 1998) (emphasizing record must prove impairment substantially limited major life activity).

109. *See id.* ("History of treatment does not . . . establish that alcoholism substantially impacted a major life activity.").

110. *See* 527 U.S. 471, 489 (1999) (examining third definition of disability under ADA).

111. *See id.* (listing two ways individual can be regarded as having impairment); 29 C.F.R. §§ 1630.2(l)(1)-(3) (2007) (defining "regarded as having such an impairment").

112. *See Sutton*, 527 U.S. at 489 ("[An employer] mistakenly believes that an actual, nonlimiting [sic] impairment substantially limits one or more major life activities.")

disability if an employer believes that the individual has an impairment that substantially limits a major life activity, when the individual actually has an impairment that does not substantially limit a major life activity.¹¹³ In sum, the ADA prohibits an employer from using an individual's disability, real or perceived, as a factor when making employment decisions.¹¹⁴

If an individual claims that the employer regards the individual as limited in the ability to work, the court requires the same standard as when an individual alleges a limitation in the ability to work.¹¹⁵ The employer must regard the individual as limited in the ability to perform a class of jobs or a broad range of jobs, not just a particular job.¹¹⁶ For example, in *Moorer v. Baptist Memorial Health Care System*, the Sixth Circuit found that an employer's belief that the plaintiff's alcoholism rendered him unable to perform his job as a hospital administrator met the requisite burden.¹¹⁷ The court reasoned that the job of hospital administrator requires strong managerial skills, and a broad range of jobs require strong managerial skills.¹¹⁸

In contrast, in *Sutton v. United Air Lines*, the Supreme Court found that an employer's belief that the plaintiffs' poor vision precluded them from being global airline pilots did not meet the requisite burden.¹¹⁹ The court reasoned that global airline pilots

113. *See id.* (“[An employer] mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities . . .”).

114. *See id.* at 490 (“An employer runs afoul of the ADA when it makes an employment decision based on a physical or mental impairment, real or imagined, that is regarded as substantially limiting a major life activity.”).

115. *Compare Zenor v. El Paso Healthcare Sys., Ltd.*, 176 F.3d 847, 861 (5th Cir. 1999) (requiring plaintiff to show employer regarded him or her as precluded from performing class of jobs or broad range of jobs) with 29 C.F.R. § 1630.2(j)(3)(i) (2007) (requiring individual to show he or she was precluded from performing class of jobs or broad range of jobs).

116. *See* 29 C.F.R. § 1630.2(j)(3)(i) (explaining how individual can be substantially limited in ability to work).

117. *See* 398 F.3d 469, 484 (6th Cir. 2005) (holding employer's belief that plaintiff was unable to perform job as hospital administrator was sufficient to prove employer believed plaintiff was precluded from broad range of jobs).

118. *See id.* (finding job of hospital administrator requires strong managerial skills and jobs requiring strong managerial skills encompass broad range of jobs).

The fact that [the employer] believed that [the plaintiff's] alcoholism made him unable to perform his hospital administrator job, which required a broad range of managerial skills, permits the reasonable inference that [the employer] believed that [the plaintiff's] alcoholism rendered him incapable of performing a substantial number of managerial jobs.

Id.

119. *See* 527 U.S. 471, 494 (1999) (explaining plaintiffs' claim that employer believed their poor vision precluded them from being global airline pilots did not

encompass a single job, not a class or broad range of jobs.¹²⁰ The court noted that the plaintiffs could utilize their skills in a number of other occupations, including regional pilots and flight instructors.¹²¹ Similarly, in *Zenor v. El Paso Healthcare System*, the Fifth Circuit concluded that an employer's belief that the plaintiff's cocaine addiction limited his ability to work in a pharmacy did not meet the requisite burden.¹²² The court reasoned that pharmacists do not encompass a class of jobs or a broad range of jobs.¹²³

b. Qualified

The second element a plaintiff must establish is that he or she was qualified for the particular position.¹²⁴ The court applies a two-step test to determine whether an individual was qualified.¹²⁵ The first step requires the individual to possess the particular position's prerequisite qualifications.¹²⁶ An individual can show previous employment in the same or similar position to satisfy the first step of this analysis.¹²⁷ The second step requires the individual to be able

prove that employer believed plaintiffs were precluded from particular class of jobs or broad range of jobs).

120. *See id.* at 493 (finding global airline pilots do not encompass class or broad range of jobs).

[Plaintiffs] allege only that [their employer] regards their poor vision as precluding them from holding positions as a 'global airline pilot.' Because the position of global airline pilot is a single job, this allegation does not support the claim that [their employer] regards [them] as having a *substantially limiting* impairment.

Id.

121. *See id.* ("[T]here are a number of other positions utilizing [the plaintiffs'] skills, such as regional pilot and pilot instructor to name a few, that are available to them.").

122. *See* 176 F.3d 847, 861 (5th Cir. 1999) ("[The employer] felt that a recent cocaine addict was unqualified for one specific job: that of a pharmacist. [The employer] was entitled to conclude that if a person is a pharmacist, cocaine addiction is not acceptable.").

123. *See id.* (reasoning pharmacists encompass single job, not class of jobs or broad range of jobs).

124. *See* *Bailey v. Georgia-Pacific Corp.*, 306 F.3d 1162, 1166 (1st Cir. 2002) (requiring plaintiff to prove he was qualified).

125. *See* William H. Danne, Jr., Annotation, *Who is "Qualified Individual" Under Americans with Disabilities Provisions*, 146 A.L.R. FED. 1, § 4 (1998) (explaining court uses two-step analysis to determine whether individual is qualified).

126. *See id.* ("[T]he first step being to determine if the individual satisfies the prerequisites for the position, such as possessing the appropriate educational background, employment experience, skills, licenses, etc.").

127. *See* *McAlpin v. Nat'l Semiconductor Corp.*, 921 F. Supp. 1518, 1523 (N.D. Tex. 1996) (finding plaintiff satisfied prerequisites of position because plaintiff was satisfactorily employed in same position for almost two years prior to reporting impairment).

to perform the particular position's essential functions.¹²⁸ Essential functions are functions that are more than marginally related to the position.¹²⁹

c. Adverse Action

The third element a plaintiff must establish is that the employer took adverse action against the plaintiff because of his or her disability.¹³⁰ The plaintiff has the burden of demonstrating a causal connection between the employer's adverse action and the plaintiff's actual or perceived disability.¹³¹

The ADA permits an employer to take adverse action against an alcoholic or drug addicted employee so long as the employer would have taken the same action against any other employee for the same conduct.¹³² An employer may hold an alcoholic or drug addicted employee to the same standards as other employees, even if any sub par performance or inappropriate behavior is a consequence of the employee's alcoholism or drug addiction.¹³³ In *Wil-*

128. See Danne, *supra* note 125, § 4 (“[T]he second step being to determine whether the individual can perform the essential functions of the position.”).

129. See *Chandler v. City of Dallas*, 2 F.3d 1385, 1393 (5th Cir. 1993) (characterizing essential functions as those that “bear more than a marginal relationship to the job at issue”); Danne, *supra* note 125, § 18 (defining “essential functions”). To determine a position's essential functions, the court looks to factors such as:

- (i) The employer's judgment as to which functions are essential;
- (ii) Written job descriptions prepared before advertising or interviewing applicants for the job;
- (iii) The amount of time spent on the job performing the function;
- (iv) The consequences of not requiring the incumbent to perform the function;
- (v) The terms of a collective bargaining agreement;
- (vi) The work experience of past incumbents on the job; and/or
- (vii) The current work experience of incumbents in similar jobs.

29 C.F.R. §§ 1630.2(n)(3)(i)-(vii) (2007).

130. See *Bailey v. Georgia-Pacific Corp.*, 306 F.3d 1162, 1166 (1st Cir. 2002) (requiring plaintiff to show employer took adverse action against him because of disability).

131. See *Moorer v. Baptist Mem'l Health Care Sys.*, 398 F.3d 469, 484-85 (6th Cir. 2005) (requiring plaintiff to provide evidence showing connection between adverse action and plaintiff's disability or perceived disability).

132. See *Koral*, *supra* note 86, at 369-70 (stating employers can discipline alcoholics for misconduct, even if misconduct is alcohol related, so long as alcoholics do not receive harsher discipline than non-alcoholics for same misconduct).

133. See 42 U.S.C. § 12114(c)(4) (1990) (noting employer does not have to lower employment standards for alcoholic or drug addicted employees).

[An employer] may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such [employer] holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee.

liams v. Anheuser-Busch, Inc., for example, a Florida District Court found that an employer did not violate the ADA when it terminated the alcoholic plaintiff for demeaning behavior following a corporate happy hour, even though the plaintiff claimed his alcoholism caused his behavior.¹³⁴ The court reasoned that the employer would have terminated any employee, regardless of alcoholic status, for such conduct.¹³⁵

d. Burden Shifts

If a plaintiff establishes a *prima facie* ADA claim, the burden of proof shifts to the employer to provide a “legitimate non-discriminatory reason” for its adverse action.¹³⁶ For example, in *Pugh v. City of Attica*, an employer terminated the plaintiff for misappropriating funds.¹³⁷ The court found that the employer satisfied its burden because misappropriation of funds is a legitimate non-discriminatory reason for terminating an employee.¹³⁸

If the employer provides a legitimate non-discriminatory reason for its adverse action, the burden of proof shifts back to the plaintiff.¹³⁹ The plaintiff must then demonstrate that the employer’s stated reason for its adverse action is merely a pretext for discrimination.¹⁴⁰ In *Moorer v. Baptist Memorial Health Care Services*,

Id. Further, the ADA permits employers to prohibit all employees from using alcohol or illegal drugs at the workplace and to require that all employees refrain from being under the influence of alcohol or engaging in illegal drug use at the workplace. *See id.* §§ 12114(c)(1)-(2) (listing measures regarding alcoholics and drug addicts that ADA permits). The ADA also allows employers to test its applicants and employees for drugs and make employment decisions based on the test results. *See generally id.* § 12114(d)(2) (noting ADA does not prohibit employer from making decisions based on drug test results); *see also* QUESTIONS AND ANSWERS, *supra* note 84, at 10 (describing drug measures that ADA permits).

134. *See* 957 F. Supp. 1246, 1250 (M.D. Fla. 1997) (explaining employer terminated plaintiff for misconduct, not because of alcoholism).

135. *See id.* (finding employer did not violate ADA because it did not discipline alcoholic plaintiff any differently than it would discipline non-alcoholic employee for same conduct).

136. *See* *Raytheon Co. v. Hernandez*, 540 U.S. 44, 50 (2003) (explaining burden shifts to employer to provide legitimate non-discriminatory reason for adverse action if plaintiff demonstrates *prima facie* ADA claim).

137. *See* 259 F.3d 619, 628-29 (7th Cir. 2001) (stating employer terminated plaintiff for misappropriating funds).

138. *See id.* at 629 (holding employer met requisite burden because misappropriation of funds is legitimate non-discriminatory reason for terminating employee).

139. *See* *Monette v. Elec. Data Sys. Corp.*, 90 F.3d 1173, 1185-86 (6th Cir. 1996) (noting burden returns to plaintiff if employer provides legitimate non-discriminatory reason for adverse action).

140. *See id.* (requiring plaintiff to prove employer’s legitimate non-discriminatory reason for adverse action is pretext for discrimination).

for example, an employer claimed that it terminated the plaintiff based on a fire marshal's report of a workplace fire hazard; however, the fire marshal had no record of such report.¹⁴¹ The employer also claimed that it terminated the plaintiff because the state health facilities commission had reported concerns of workplace deficiencies; however, the state health facilities commission did not conduct a survey of the workplace until after the employer terminated the plaintiff.¹⁴² Accordingly, the court held that the plaintiff satisfied its burden of demonstrating a pretext because of the inconsistencies in the employer's proffered reasons for terminating the plaintiff.¹⁴³

C. National Basketball Players Association Anti-Drug Policy

The National Basketball Players Association ("NBPA") collective bargaining agreement prohibits players from using "drugs of abuse," marijuana, steroids, performance enhancing drugs, or diuretics.¹⁴⁴ The NBA enforces this policy in a number of different ways.¹⁴⁵

1. *Reasonable Cause Testing*

If the NBA or NBPA receives information that leads it to believe that a player is using, possessing, or distributing a prohibited substance, the NBA and NBPA will hold a meeting with an expert, independent of the league, to determine whether the belief is reasonable.¹⁴⁶ If the expert concludes that the belief is reasonable, the NBA is then authorized to test the player for prohibited sub-

141. See 398 F.3d 469, 481 (6th Cir. 2005) (explaining plaintiff proved employer's first reason for terminating plaintiff was pretext for discrimination).

142. See *id.* at 482 (illustrating plaintiff proved employer's second reason for terminating plaintiff was pretext for discrimination).

143. See *id.* at 485 (explaining court affirmed district court's finding of discrimination because plaintiff met burden of proving pretext by showing inconsistencies in employer's alleged reason for terminating plaintiff).

144. See NAT'L BASKETBALL PLAYERS ASS'N, COLLECTIVE BARGAINING AGREEMENT, Exh. I-2 (July 29, 2005), available at http://www.nbpa.com/cba_exhibits/exhibitI-2.php (prohibiting "drugs of abuse," marijuana, steroids and performance enhancing drugs, and diuretics). "Drugs of abuse" include amphetamines, cocaine, LSD, opiates, and PCP. *Id.*

145. See generally Art. XXXIII, *supra* note 8, §§ 5, 6, 7 & 14 (listing several methods NBA uses to enforce anti-drug policy).

146. See *id.* § 5(a) (describing how NBA and NBPA determine whether belief is reasonable).

stances.¹⁴⁷ If the player tests positive for a “drug[] of abuse,” the NBA will immediately dismiss the player from the league.¹⁴⁸

2. *Random Drug Testing*

The NBA also enforces its anti-drug policy through random drug testing.¹⁴⁹ An independent third party conducts the selection of players and the scheduling of the random drug tests.¹⁵⁰ If a player tests positive for a “drug[] of abuse,” the NBA will immediately dismiss the player from the league.¹⁵¹

3. *Drugs of Abuse Program*

Further, the NBA enforces its anti-drug policy through the Drugs of Abuse Program.¹⁵² A player can voluntarily enter the program to seek help, or the league can mandate a player to enter the program.¹⁵³ The program may require the player to enter in-patient and aftercare programs and to submit to random testing for alcohol and other prohibited substances.¹⁵⁴

The Drugs of Abuse Program has two stages.¹⁵⁵ The stages only differ in how the NBA disciplines a player for violating the terms of the program.¹⁵⁶ If a player tests positive for a “drug[] of abuse” while in the first stage of the program, the player moves to the second stage of the program.¹⁵⁷ If a player tests positive for a

147. *See id.* § 5(b) (describing consequences if expert finds belief is reasonable).

148. *See id.* § 5(d) (providing NBA will dismiss any player who played in league for one year or more for failing reasonable belief drug test). “A player who . . . is ‘dismissed . . .’ shall, without exception, immediately be so dismissed . . . for a period of not less than two years . . . dismissal . . . shall be mandatory and may not be rescinded or reduced . . .” *Id.* § 11(a).

149. *See generally id.* § 6(a) (including random drug testing as means for enforcing anti-drug policy).

150. *See id.* § 6(a) (explaining third party organization conducts scheduling of drug tests and urine sample collection).

151. *See id.* § 6(c) (stating NBA will dismiss any player who has played in league for one year or more for failing random drug test).

152. *See generally id.* § 7 (listing Drugs of Abuse Program as means to enforce anti-drug policy).

153. *See id.* § 7(a) (stating player can voluntarily enter program); *id.* §14(c) (explaining NBA can force player to enter program).

154. *See id.* § 7(d) (providing treatment and testing requirements of program).

155. *See id.* §§ 7(b)-(c), (describing program’s two steps).

156. *See id.* (explaining stages only differ in consequences of violating terms of program).

157. *See id.* § 10(a)(2)(i) (explaining failed drug test in stage one results in moving to stage two).

“drug[] of abuse” while in the second stage of the program, the NBA will immediately dismiss the player from the league.¹⁵⁸

4. *Additional Bases for Drug Testing*

The collective bargaining agreement also provides additional bases for drug testing to enforce the league’s anti-drug policy.¹⁵⁹ If a player seeks outside treatment for problems with a prohibited substance, the NBA can mandate drug testing.¹⁶⁰ If a player in the Drugs of Abuse Program is charged with a crime involving alcohol or an illegal substance, the NBA will mandate drug testing.¹⁶¹ If a player tests positive for a “drug[] of abuse,” the NBA will force the player to enter the second stage of the Drugs of Abuse Program; however, if the player has already entered the Drugs of Abuse Program, regardless of the stage, the NBA will immediately dismiss the player from the league.¹⁶²

5. *Reinstatement*

A dismissed player can apply for reinstatement to the NBA two years after the dismissal.¹⁶³ To be considered for reinstatement, the player must prove that he has remained drug-free for the previous twelve months, and, in addition, the player may also have to prove that he has remained alcohol-free for the previous six months.¹⁶⁴

158. *See id.* § 10(a)(2)(ii) (stating failed drug test in stage two results in dismissal from league).

159. *See generally id.* § 14 (listing additional bases for testing beyond reasonable belief testing, random testing, and Drugs of Abuse Program).

160. *See id.* § 14(a) (explaining NBA may require any player in outside treatment for prohibited substance to submit to drug testing).

161. *See id.* § 14(b) (describing consequence if player in Drugs of Abuse Program is charged with alcohol or drug related offense). “Any player who is subject to in-patient care or aftercare treatment in the Program and is formally charged with . . . any . . . crime or offense involving suspected alcohol or illegal substance use shall . . . be required to submit to a urine test . . .” *Id.*

162. *See id.* § 14(c) (explaining consequences if player tests positive for “drug[] of abuse”).

163. *See id.* § 12(a) (noting when player can apply for reinstatement).

164. *See id.* § 12(b) (providing reinstatement requirements).

[T]he NBA and [NBPA] will consider any application for reinstatement only if the player can demonstrate, by proof of random urine testing acceptable to the Medical Director (conducted on at least a weekly basis), that he has not tested positive (i) for a Prohibited Substance within the twelve (12) months prior to the submission of his application and during any period while his application for reinstatement is being reviewed, and (ii) if the Medical Director deems it necessary in his or her professional judgment, for alcohol for the six (6) months prior to the submission of his application for reinstatement and during any period while his application is being reviewed.

Id.

When determining whether to reinstate a player, the NBA and NBPA consider factors such as: the circumstances of the player's dismissal; the player's success in a rehabilitation or treatment program; the player's conduct after dismissal, in particular the extent to which the player has served as a role model; and the player's character and morality.¹⁶⁵ No player has a right to reinstatement, but the NBA and NBPA may not unreasonably deny reinstatement.¹⁶⁶ The NBA and NBPA hold all discretion in granting or refusing reinstatement, and their decision is final and unappealable.¹⁶⁷ Furthermore, the NBA and NBPA may condition a player's reinstatement upon random alcohol and drug testing.¹⁶⁸

III. LEGAL ANALYSIS OF TARPLEY'S CLAIM

Roy Tarpley must meet a high burden to win his claim that the NBA violated the ADA when it refused to reinstate him in 2003.¹⁶⁹ Tarpley must prove that he was disabled under the ADA, that he was qualified to play in the NBA, and that the NBA refused to reinstate him because of his disability.¹⁷⁰

A. Was Tarpley Disabled?

Tarpley must prove that he has a record of a physical or mental impairment that substantially limited a major life activity or that the NBA regarded him as having such an impairment to be disabled under the ADA.¹⁷¹ The ADA regards both alcoholism and drug addiction as mental or physical impairments.¹⁷² Therefore, the ques-

165. *See id.* § 12(a) (listing factors NBA and NBPA consider when deciding whether to grant reinstatement).

166. *See id.* (delineating rights of dismissed player and scope of NBA's and NBPA's discretion).

167. *See id.* (stating NBA and NBPA have exclusive discretion). The NBA and NBPA must both approve the reinstatement of a dismissed player. *See id.* (noting requirement of approval from NBA and NBPA for reinstatement).

168. *See id.* § 12(c) (articulating NBA and NBPA may condition reinstatement on random drug testing or other similar requirement).

169. *See Koral, supra* note 86, at 369 (explaining alcoholics must meet high burden to receive ADA protection).

170. *See Bailey v. Georgia-Pacific Corp.*, 306 F.3d 1162, 1166 (1st Cir. 2002) (listing prima facie ADA claim requirements). For a further discussion of a prima facie ADA claim, see *supra* notes 69-72 and accompanying text.

171. *See* 42 U.S.C. § 12102(2) (1990) (defining disability with respect to individual under ADA).

172. *See generally* 42 U.S.C. § 12114 (providing limited coverage to alcoholics and drug addicts); *see also* QUESTIONS AND ANSWERS, *supra* note 84, at 10 (explaining ADA's coverage of alcoholics and drug addicts). For a further discussion of alcoholism and drug addiction under the ADA, see *supra* notes 82-92 and accompanying text.

tion is whether Tarpley has a record that illustrates that his alcoholism and drug addiction substantially limited a major life activity, or whether the NBA regarded Tarpley as substantially limited in a major life activity due to his history of alcoholism and drug addiction.¹⁷³

1. *Did Tarpley Have a Record of a Disability?*

Tarpley must establish a record demonstrating that his alcoholism and drug addiction substantially limited a major life activity to successfully claim a record of a disability.¹⁷⁴ Tarpley can attempt to use his alcohol and drug counseling and treatment, his arrests, and his suspensions and dismissals as a record that his addictions substantially limited his ability to work.¹⁷⁵ The court is unlikely to find that Tarpley's counseling and treatment in the late-1980s are an adequate record because Tarpley's NBA career was flourishing during this time.¹⁷⁶ Tarpley's thriving career establishes that his alcoholism and drug addiction did not substantially limit his ability to play basketball.¹⁷⁷ The court is also not likely to find that Tarpley's two arrests are an adequate record because incarceration is short-term.¹⁷⁸ Furthermore, the court will not likely find Tarpley's suspensions adequate because the suspensions, like his incarceration, were short-term.¹⁷⁹ Thus, Tarpley will probably not succeed in proving that he has a record of an impairment that substantially

173. See 42 U.S.C. §§ 12102(2)(B)-(C) (defining disability with respect to individual under ADA).

174. See 29 C.F.R. § 1630.2(k) (2007) (defining "has a record of such an impairment"). In his lawsuit, Tarpley does not claim that he was disabled as an alcoholic or drug addict in 2003; he claims that he was recovering from alcoholism and drug abuse. See *Tarpley Sues Team*, *supra* note 12 (detailing Tarpley's legal claim). Therefore, determining whether Tarpley's impairment falls within the first definition of a disability is unnecessary because it only applies to individuals that are currently impaired. See generally 42 U.S.C. § 12102(2)(A) (providing first definition of disability applies to currently impaired individuals). For a further discussion of a record of impairment, see *supra* notes 98-109 and accompanying text.

175. See *Tarpley, Addiction*, *supra* note 1 (describing Tarpley's troublesome NBA career); see also 29 C.F.R. § 1630.2(i) (finding working may constitute major life activity).

176. See *Tarpley, Addiction*, *supra* note 1 (noting that Tarpley sought counseling and treatment when playing well in NBA).

177. See 29 C.F.R. §§ 1630.2(j)(1)(i)-(ii) (defining "substantially limits" as "[u]nable to perform" or "[s]ignificantly restricted").

178. See *Bailey v. Georgia-Pacific Corp.*, 306 F.3d 1162, 1169 (1st Cir. 2002) (explaining incarceration did not demonstrate inability to perform broad range of jobs because it was temporary).

179. See *id.* (emphasizing limitation must be permanent).

limited his ability to work.¹⁸⁰ Tarpley may still be able to claim that he was substantially limited in a major life activity other than working, but that may be particularly difficult for an alcoholic or drug addict because of the court's emphasis on permanency.¹⁸¹

2. *Did the NBA Regard Tarpley as Disabled?*

Tarpley must prove that the NBA mistakenly believed that his status as a recovering alcoholic and drug addict substantially limited a major life activity to successfully claim that the NBA regarded him as disabled.¹⁸² Tarpley can claim that the NBA mistakenly believed that his status as a recovering alcoholic and drug addict substantially limited his ability to work.¹⁸³ Tarpley must prove that the NBA believed that he was unable to perform either a class of jobs or a broad range of jobs, not just a particular job.¹⁸⁴

Tarpley can claim that the NBA perceived him as unable to perform as an NBA player.¹⁸⁵ The court, however, probably will not find that NBA players encompass a class of jobs because these highly skilled athletes utilize a unique talent, similar to global airline pilots and pharmacists, which are both single jobs, not a class of jobs or broad range of jobs.¹⁸⁶ Furthermore, Tarpley had other positions available to him that would have allowed him to utilize his

180. *See id.* (requiring that record show impairment substantially limited major life activity).

181. *Burch v. Coca-Cola Co.*, 119 F.3d 305, 316 n.9 (5th Cir. 1997) (noting alcoholic's short-term limitations were inadequate). For a further discussion of alcoholism limiting a major life activity, see *supra* notes 85-92 and accompanying text.

182. *See* 29 C.F.R. §§ 1630.2(1)(1)-(3) (2007) (defining "regarded as having such an impairment"). Tarpley passed all alcohol and drug tests for the four years before he applied for reinstatement. *See Tarpley Sues Team*, *supra* note 12 (noting Tarpley remained alcohol and drug free before applying for reinstatement). Therefore, determining whether the NBA mistakenly believed that Tarpley's alcohol and drug abuse substantially limited a major life activity or whether the NBA correctly believed that Tarpley abused alcohol and drugs but mistakenly believed that the abuse substantially limited a major life activity is unnecessary. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489-90 (1999) (explaining how employer can regard employee as disabled). For a further discussion of being regarded as disabled, see *supra* notes 110-23 and accompanying text.

183. *See Sutton*, 527 U.S. at 492 (noting EEOC regards working as major life activity if individual is not substantially limited in any other major life activity).

184. *See Zenor v. El Paso Health Care Sys., Ltd.*, 176 F.3d 847, 861 (5th Cir. 1999) (explaining plaintiff failed burden because plaintiff did not produce evidence that employer regarded him as limited in broad range of jobs).

185. *See* 29 C.F.R. § 1630.2(j)(3)(i) (referring to "class of jobs" as those utilizing similar training, knowledge, and skill).

186. *See Sutton*, 527 U.S. at 492 (holding global airline pilots do not encompass class of jobs); *Zenor*, 176 F.3d at 861 (finding pharmacists do not encompass class of jobs).

unique basketball skills.¹⁸⁷ For example, Tarpley could have coached basketball or played professional basketball in a different league.¹⁸⁸ Consequently, Tarpley will probably not be able to prove that the NBA regarded him as limited in his ability to work.¹⁸⁹

B. Was Tarpley Qualified?

Tarpley must demonstrate that he satisfied the NBA's prerequisites and that he could perform the essential functions of an NBA player to prove that he was qualified to be an NBA player.¹⁹⁰ The NBA previously employed Tarpley as a professional basketball player so the court will find that Tarpley satisfied the league's prerequisites.¹⁹¹ Therefore, the question is whether Tarpley was able to perform the essential functions of an NBA player in 2003.¹⁹²

1. Was Tarpley Physically Capable?

The foremost essential function of an NBA player is playing basketball at the NBA level, arguably the world's highest level.¹⁹³ Tarpley must demonstrate that he was physically capable of playing basketball at the NBA level in 2003 to prove that he was qualified.¹⁹⁴

Tarpley can claim that his performance in other professional basketball leagues demonstrates that he was qualified to play NBA

187. See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 493 (1999) (listing other available jobs that utilize plaintiffs' skills to support claim that airline pilots do not encompass class of jobs).

188. See *Tarpley, Addiction*, *supra* note 1 (noting Tarpley played professional basketball in Greece and CBL).

189. See 29 C.F.R. § 1630.2(j)(3)(i) (2007) (requiring employer to preclude individual from performing "class of jobs or a broad range of jobs in various classes" in order for employer to regard individual as substantially limited in ability to work).

190. See *Danne*, *supra* note 125, § 4 (stating two-step analysis that courts have consistently applied to determine if individual is "qualified" under ADA). For a further discussion of the definition of a qualified individual under the ADA, see *supra* notes 124-29 and accompanying text.

191. See *McAlpin v. Nat'l Semiconductor Corp.*, 921 F. Supp. 1518, 1523 (N.D. Tex. 1996) (concluding plaintiff satisfied prerequisites of position because she was satisfactorily employed in same position for almost two years prior to reporting impairment).

192. See *Bailey v. Georgia-Pacific Corp.*, 306 F.3d 1162, 1166 (1st Cir. 2002) (requiring individual to be qualified to satisfy *prima facie* ADA claim).

193. See *Chandler v. City of Dallas*, 2 F.3d 1385, 1393 (5th Cir. 1993) (defining "essential functions" as "functions that bear more than a marginal relationship to the job at issue").

194. See *Danne*, *supra* note 125, § 4 (requiring individual to perform essential functions of job at issue).

basketball.¹⁹⁵ Tarpley's performance in the CBL may support the argument that he had the ability to play basketball in the NBA; however, his CBL performance is not conclusive because the CBL's requisite skill level is inferior to the NBA's.¹⁹⁶ Likewise, Tarpley's performance in Greece is not conclusive because that league's requisite skill level is also inferior to the NBA's.¹⁹⁷ The inquiry will concentrate on whether Tarpley could play basketball at the NBA level in 2003.¹⁹⁸

Tarpley can seek help from former NBA coach, John Lucas ("Lucas"), to prove that he was able to play NBA basketball in 2003.¹⁹⁹ Lucas helped Tarpley enter an alcohol and drug recovery program,²⁰⁰ and avidly fought for his reinstatement.²⁰¹ In 2005, Lucas stated, "[s]kill-wise, absolutely [he could play in the NBA]. He could be a nice guy off the bench."²⁰² As a man with vast knowledge of both the NBA and alcohol and drug rehabilitation, Lucas could provide strong support for Tarpley in proving that he was qualified to play in the NBA in 2003.²⁰³

The NBA can counter that Tarpley was not qualified to play NBA basketball because of his age and proneness to injury.²⁰⁴ In 2003, Tarpley was thirty-eight years old and had a history of serious

195. See *Tarpley, Addiction*, *supra* note 1 (stating Tarpley played professional basketball in CBL and Greece).

196. See *id.* (explaining Tarpley played basketball in CBL after NBA refused to reinstate him). For a further discussion of Tarpley's experience in the CBL, see *supra* notes 49-51 and accompanying text.

197. See *Tarpley, Addiction*, *supra* note 1 (explaining Tarpley played professional basketball in Greece on two occasions). For a further discussion of Tarpley's basketball experience in Greece, see *supra* notes 35-36, 43 and accompanying text.

198. See Danne, *supra* note 125, § 17 (emphasizing second step inquiry concentrates on job at issue).

199. See Posting of Chuck Carlton to Dallas Mavericks Blog, <http://mavsblog.dallasnews.com/archives/2007/08/whatever-happened-to-1.html> (Aug. 2, 2007, 11:51 EST) [hereinafter Mavericks Blog] (noting Lucas helped rehabilitate Tarpley and supported his reinstatement).

200. See *Tarpley Sues Team*, *supra* note 12 ("Tarpley later entered a drug and alcohol recovery program in 2003 with the help of former NBA coach John Lucas, who has helped other athletes get clean."); Mavericks Blog, *supra* note 199 ("Tarpley has spent the last year in Houston under the care of John Lucas, who runs an drug-treatment aftercare program.").

201. See *Tarpley, Addiction*, *supra* note 1 (explaining NBA refused reinstatement even though Lucas advocated Tarpley's reinstatement).

202. Mavericks Blog, *supra* note 199.

203. See *Tarpley Sues Team*, *supra* note 12 (describing Lucas as former NBA coach); see also Mavericks Blog, *supra* note 199 (noting Lucas ran alcohol and drug recovery program).

204. See *Tarpley, Addiction*, *supra* note 1 (listing Tarpley's age and describing injuries).

knee problems.²⁰⁵ In the 2004-2005 season, the average age among NBA players was twenty-seven.²⁰⁶ Only one player in the league was older than Tarpley.²⁰⁷ Accordingly, Tarpley may have a difficult time proving that he was still physically capable of playing basketball at the NBA level in 2003.²⁰⁸

2. *Was Tarpley a Role Model?*

An NBA player can have more than one essential function.²⁰⁹ In addition to on the court performance, serving as a role model may also be an essential function of an NBA player. In a case challenging random drug testing of high school athletes,²¹⁰ the Supreme Court acknowledged that teenagers view professional athletes as role models, particularly in regard to drug use.²¹¹ Further, the league's collective bargaining agreement reflects the NBA's belief that a professional basketball player should be a role model.²¹² The collective bargaining agreement lists "the extent to which the player has since comported himself as a suitable role model for the youth" as a factor the NBA should consider when determining whether to reinstate a player.²¹³ Accordingly, the court could find that being a role model is an essential function of an NBA player.²¹⁴

205. *See id.* (providing Tarpley was forty-one in 2006 and suffered two season-ending knee injuries during NBA career and continued to suffer from injuries during CBL career).

206. *See* NBA.com, 2004-05 Player Survey: Age, http://www.nba.com/news/survey_age_2004.html (last visited May 1, 2008) (listing 27.02 years old as average age of active NBA players during 2004-2005 season).

207. *See id.* (listing Kevin Willis of Atlantic Hawks as oldest active player at forty-two and Reggie Miller of Indiana Pacers as second oldest current player at thirty-nine during 2004-2005 season). Tarpley was thirty-nine in 2004. *See Tarpley, Addiction*, *supra* note 1 (stating Tarpley was forty-one in 2006).

208. *See* Danne, *supra* note 125, § 4 (requiring individual to prove ability to perform essential functions of job at issue).

209. *See generally id.* (stating "essential functions" as plural).

210. *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 646 (1995) (explaining challenge was based on random drug testing of high school athletes).

211. *See id.* at 663 ("It seems to us self-evident that a drug problem largely fueled by the 'role model' effect of athletes' drug use, and of particular danger to athletes, is effectively addressed by making sure that athletes do not use drugs.").

212. *See* 29 C.F.R. § 1630.2(n)(3)(v) (2007) (listing "terms of collective bargaining agreement" as factor used to determine job's essential functions).

213. Art. XXXIII, *supra* note 8, § 12.

214. *See* 29 C.F.R. § 1630.2(n)(3)(v) (listing "terms of collective bargaining agreement" as source of evidence for determining job's essential functions).

If being a role model is an essential function of an NBA player, Tarpley must prove that he was a role model in 2003.²¹⁵ A role model is “a person who serves as a model in a particular behavioral or social role for another person to emulate.”²¹⁶ Tarpley can claim that he was a role model in 2003 because he was a successfully rehabilitated alcoholic and drug addict who could inspire others struggling with substance abuse problems.²¹⁷

Conversely, the NBA can claim that Tarpley was not a role model in 2003 because his claim that he was rehabilitated was not credible. Tarpley previously claimed he was rehabilitated, only for the NBA to dismiss him again for failing another drug test.²¹⁸ If the court finds that being a role model is an essential function of an NBA player, Tarpley may have trouble proving that he was qualified to be an NBA player in 2003.²¹⁹

C. Did the NBA Take Adverse Action Against Tarpley Because of His Disability?

Tarpley must demonstrate that the NBA took adverse action against him because of his disability.²²⁰ Tarpley claims that the NBA refused to reinstate him in 2003 because of his status as a recovering alcoholic and drug addict.²²¹ The court will probably find a causal connection between the NBA's refusal to reinstate Tarpley and his status as a recovering alcoholic and drug addict, particularly because the NBA previously disciplined Tarpley for his alcohol and drug problems.²²²

215. See *Chandler v. City of Dallas*, 2 F.3d 1385, 1393 (5th Cir. 1993) (defining “essential functions” as “functions that bear more than a marginal relationship to the job at issue”).

216. THE AM. HERITAGE DICTIONARY OF THE ENG. LANGUAGE (4th ed. Houghton Mifflin Co. 2000), available at <http://www.thefreedictionary.com/role+model>.

217. See *Tarpley, Addiction*, *supra* note 1 (describing Tarpley's successful rehabilitation); see also *Associated Press*, *supra* note 2 (noting goal of Tarpley's lawsuit was to help others with alcohol and drug problems).

218. See *Tarpley, Addiction*, *supra* note 1 (stating NBA granted Tarpley's reinstatement after first dismissal, but dismissed him again for failing another drug test).

219. See *Danne*, *supra* note 125, § 4 (requiring individual to be able to perform essential functions of job at issue).

220. See *Moorer v. Baptist Mem'l Health Care Sys.*, 398 F.3d 469, 484-85 (6th Cir. 2005) (emphasizing “because of his perceived disability” requirement (quoting 42 U.S.C. § 12112(a))). For a further discussion of the adverse action requirement, see *supra* notes 130-35 and accompanying text.

221. See *Tarpley Sues Team*, *supra* note 12 (providing basis of Tarpley's claim).

222. See *Tarpley, Addiction*, *supra* note 1 (explaining NBA previously suspended and dismissed Tarpley for alcohol and drug related misconduct).

D. Does the NBA Have a Legitimate Non-Discriminatory Reason For its Adverse Action?

If Tarpley satisfies the requirements of a prima facie ADA claim, the burden shifts to the NBA to provide a legitimate non-discriminatory reason for refusing to reinstate him.²²³ When determining whether to reinstate a previously dismissed player, the collective bargaining agreement suggests that the NBA consider factors such as: the circumstances surrounding the player's dismissal, the player's rehabilitation status, and the player's conduct after dismissal.²²⁴

Tarpley's rehabilitation status and conduct after dismissal support his claim for reinstatement because he repeatedly passed all alcohol and drug tests, entered a rehabilitation program, and continued playing professional basketball.²²⁵ The circumstances surrounding Tarpley's dismissal, however, evidence his repeated violations of the league's collective bargaining agreement, including two previous suspensions and one previous dismissal.²²⁶

The NBA can claim that Tarpley's repeated violations of the league's collective bargaining agreement was the reason for refusing to reinstate him.²²⁷ Even though Tarpley's violations of the league's collective bargaining agreement were related to his alcoholism and drug addiction, the court can still find the violations to be a legitimate non-discriminatory reason if it believes that the NBA would also refuse to reinstate any other player who had the same history of collective bargaining agreement violations.²²⁸ The ADA

223. See *Raytheon Co. v. Hernandez*, 540 U.S. 44, 50 (2003) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)) (explaining that burden shifts to employer if plaintiff proves prima facie ADA claim). For a further discussion of how the burden shifts to the employer to provide a legitimate non-discriminatory reason for its adverse action, see *supra* notes 136-38 and accompanying text.

224. See Art. XXXIII, *supra* note 8, § 12 (listing factors NBA should use when determining whether to reinstate player).

225. See *Tarpley, Addiction*, *supra* note 1 (stating Tarpley passed all alcohol and drug tests for previous four years and entered alcohol and drug rehabilitation program).

226. See *id.* (explaining NBA dismissed Tarpley in 1995 for failing drug test and previously suspended him twice and dismissed him once for alcohol and drug related conduct).

227. See *Hernandez*, 540 U.S. at 50 (citing *McDonnell Douglas*, 411 U.S. at 802) (explaining burden shifts to employer to prove legitimate non-discriminatory reason for adverse action if plaintiff proves prima facie ADA claim).

228. See Koral, *supra* note 86, at 369-70 (distinguishing legitimate non-discriminatory reasons). "[D]iscipline for behaviors attributable to alcoholism does not violate the ADA. However, the EEOC has cautioned that [sic] any employer may not discipline an alcoholic employee more severely than it does other employees for the same misconduct." *Id.*

does not require the NBA to lower its reinstatement standards for a recovering alcoholic or drug addict.²²⁹ Repeated violations of the collective bargaining agreement may be a legitimate non-discriminatory reason for refusing to reinstate Tarpley so long as the NBA did not treat Tarpley differently than it would any other player with the same history of violations.²³⁰

The NBA can also respond with other legitimate non-discriminatory reasons for rejecting Tarpley's application for reinstatement. For example, the NBA can claim that it believed that Tarpley was no longer capable of playing at the NBA level because of his age and proneness to injury.²³¹ So long as the NBA would have refused reinstatement to any other player with the same age and proneness to injury, the reason is legitimate and non-discriminatory.²³²

If the court finds that the NBA's reason for refusing to reinstate Tarpley is legitimate and non-discriminatory, the burden of proof shifts back to Tarpley.²³³ Tarpley must then prove, beyond a reasonable doubt, that the NBA's reason for refusing reinstatement is merely a pretext for discrimination.²³⁴ Tarpley will probably not be able to meet this burden.²³⁵

229. See 42 U.S.C. § 12114(c)(4) (1990) (explaining employer can hold alcoholic and drug abusing employees to same standards as other employees).

230. See Koral, *supra* note 86, at 369-70 (stating employers can discipline alcoholics for misconduct, even if misconduct is alcohol related, so long as alcoholics do not receive harsher discipline than non-alcoholics for same misconduct).

231. See *Tarpley, Addiction*, *supra* note 1 (providing Tarpley was forty-one in 2006 and suffered two season-ending knee injuries during NBA career and continued to suffer from injury during CBL career). For a further discussion of why Tarpley's age and proneness to injury may have rendered him incapable of performing in the NBA in 2003, see *supra* notes 204-08 and accompanying text.

232. See 42 U.S.C. § 12114(c)(4) (stating employer can hold alcoholic employees to same standards as other employees).

233. See *Monette v. Elec. Data Sys. Corp.*, 90 F.3d 1173, 1185-86 (6th Cir. 1996) (explaining burden returns to plaintiff to prove employer's reason is pretext for discrimination). For a further discussion of how the burden shifts back to the plaintiff to prove that the employer's legitimate non-discriminatory reason for its adverse action is a pretext for discrimination, see *supra* notes 139-43 and accompanying text.

234. See *id.* at 1186 (requiring plaintiff to provide evidence that employer's alleged legitimate non-discriminatory reason for adverse action is pretext for discrimination).

235. My research has not disclosed any information indicating that Tarpley can prove that the NBA's reason for refusing to reinstate him - either his repeated violations of the collective bargaining agreement or his age and proneness to injury - was a pretext for discrimination.

IV. POTENTIAL CONSEQUENCE OF A VERDICT IN TARPLEY'S FAVOR

A verdict in Tarpley's favor may lead other professional athletes who suffer from alcohol or drug problems to file discrimination claims. Tarpley's success in obtaining a right to sue letter from the EEOC has already inspired two National Football League ("NFL") players to file similar claims.²³⁶ Odell Thurman and Torrie Cox independently filed discrimination claims with the EEOC, alleging that the NFL violated the ADA.²³⁷

In 2005, the Cincinnati Bengals drafted Odell Thurman ("Thurman") out of the University of Georgia.²³⁸ In his rookie season, Thurman, a middle linebacker, led his team in tackles.²³⁹ Thurman's NFL career appeared promising.²⁴⁰ During the off-season, however, Thurman missed a mandatory drug test, and the NFL suspended him for four games.²⁴¹ While suspended, the police arrested Thurman for driving under the influence.²⁴² In response, the NFL increased his suspension from four games to one year.²⁴³ After Thurman served his one-year suspension, he applied for reinstatement, but the NFL denied his application without citing a reason.²⁴⁴ Thurman's agent claims that Thurman has since passed all league mandated alcohol and drug tests.²⁴⁵ In August of 2007, Thurman filed a discrimination claim with the EEOC in attempt to force the NFL to reinstate him.²⁴⁶

236. See Posting of Michael McCann to Sports Law Blog, *Odell Thurman and Torrie Cox Filed EEOC Claims Against NFL*, http://sports-law.blogspot.com/2007_08_01_archive.html (Aug. 28, 2007, 17:10 EST) [hereinafter *Odell Thurman*] (stating two NFL players used Tarpley's successful EEOC claim as support when filing own EEOC claims).

237. See *id.* (describing Thurman and Cox's EEOC claims).

238. See *id.* (explaining how Bengals acquired Thurman).

239. See *id.* ("Thurman . . . started as a rookie (middle linebacker) and led the team in tackles (148 tackles, one sack, five interceptions, nine passes defended and four forced fumbles).").

240. See *id.* (explaining Thurman appeared to have "[b]right future ahead of him").

241. See *id.* (stating NFL suspended Thurman after missing drug test).

242. See *id.* (stating police arrested Thurman during off-season for driving under influence).

243. See *id.* (explaining NFL's response to Thurman's arrest).

244. See Len Pasquarelli, *Bengals' Thurman, Bucs' Cox File Discrimination Claims Against NFL*, ESPN.COM, Aug. 17, 2007, <http://sports.espn.go.com/nfl/news/story?id=2978901> (noting NFL denied Thurman's application for reinstatement without explanation).

245. See *id.* ("Thurman's agent, John Michels, said that, even though his client acknowledged in court that he has a problem with alcohol, he has passed all the league-administered tests.").

246. See *id.* (stating Thurman filed EEOC claim hoping to have league sanctions overturned).

In 2003, the Tampa Bay Buccaneers ("Bucs") drafted Torrie Cox ("Cox") out of the University of Pittsburgh.²⁴⁷ Cox was a "key reserve and a standout special teams performer" for the Bucs.²⁴⁸ In 2005, the NFL suspended Cox for one game after the police arrested him for driving under the influence.²⁴⁹ In 2007, the NFL again suspended Cox for violating the league's substance abuse policy.²⁵⁰ In August of 2007, Cox filed a discrimination claim with the EEOC in attempt to get his suspension overturned.²⁵¹

Both Thurman and Cox filed claims shortly after the EEOC issued Tarpley's right to sue letter, and both used Tarpley as support for their own respective claims.²⁵² Tarpley's EEOC success already inspired Thurman and Cox,²⁵³ and the EEOC is only the first hurdle in an ADA claim.²⁵⁴ A verdict in Tarpley's favor would inspire even more professional athletes to file ADA claims, and these athletes would, presumably, face less resistance because Tarpley's case would provide favorable precedent.

V. CONCLUSION

Odell Thurman's and Torrie Cox's reliance on Tarpley appears premature.²⁵⁵ The United States District Court for the Southern District of Texas will not find in Tarpley's favor.²⁵⁶ Tarpley's burden of proof is too high.²⁵⁷

247. See *Agent Tells Paper Cox Will Appeal Four-Game Suspension*, ESPN.COM, July 6, 2007, <http://sports.espn.go.com/nfl/news/story?id=2928238> (explaining how Cox entered NFL).

248. *Id.*

249. See *id.* (describing Cox's first NFL suspension).

250. See *id.* (explaining Cox's suspension that led to ADA claim).

251. See Pasquarelli, *supra* note 244 (stating Cox filed EEOC claim with hopes to get suspension overturned).

252. See *Odell Thurman*, *supra* note 236 (noting similarities between Thurman's and Cox's claims and Tarpley's claim).

253. See *id.* (emphasizing Thurman's and Cox's reliance on Tarpley's claim).

254. See EEOC's Charge Processing Procedures, *supra* note 9 (explaining right to sue letter is only prerequisite for pursuing discrimination lawsuit).

255. See *Odell Thurman*, *supra* note 236 (stating Thurman and Cox filed EEOC claims after EEOC issued Tarpley's right to sue letter and both cited Tarpley's successful claim in their respective claims). The court must issue a verdict in Tarpley's favor in order for his claim to hold any precedent. See EEOC's Charge Processing Procedures, *supra* note 9 (explaining right to sue letter is only first step in discrimination lawsuit).

256. See *Tarpley Sues Team*, *supra* note 12 (noting where Tarpley filed lawsuit).

257. See *Bailey v. Georgia-Pacific Corp.*, 306 F.3d 1162, 1166 (1st Cir. 2002) (listing requirements of prima facie ADA claim).

Was Tarpley really disabled under the ADA?²⁵⁸ Tarpley will not succeed in claiming that he has a record of a disability because he does not have a record demonstrating that his alcoholism and drug addiction substantially limited a major life activity.²⁵⁹ Tarpley will also not succeed in claiming that the NBA regarded him as substantially limited in his ability to work because NBA players do not encompass a class of jobs or a broad range of jobs.²⁶⁰ Thus, the court will probably not find that Tarpley was disabled within the meaning of the ADA.

Was Tarpley qualified to be an NBA player in 2003?²⁶¹ Tarpley's previous experience in the NBA proves that he met the league's prerequisites,²⁶² and his experience in other professional basketball leagues coupled with John Lucas's support establishes that he could perform the essential functions of an NBA player.²⁶³ Consequently, the court will probably conclude that Tarpley was qualified to be an NBA player.

Did the NBA refuse to reinstate Tarpley because of his history of alcoholism and drug addiction?²⁶⁴ The NBA can claim that it refused to reinstate Tarpley because he had repeatedly violated the league's collective bargaining agreement.²⁶⁵ The NBA can also

258. See 42 U.S.C. § 12102 (1990) (defining disability with respect to individual under ADA). For a further discussion of the definition of a disability under the ADA, see *supra* notes 73-123 and accompanying text.

259. For a further discussion of Tarpley's record of a disability claim, see *supra* notes 174-81 and accompanying text.

260. For a further discussion of Tarpley's regarded as disabled claim, see *supra* notes 182-89 and accompanying text.

261. See Danne, *supra* note 125, § 4 (requiring individual to satisfy job prerequisites and be able to perform essential functions to be qualified). For a further discussion of the definition of a qualified individual under the ADA, see *supra* notes 124-29 and accompanying text.

262. For a further discussion of how Tarpley can prove he met the league's prerequisites, see *supra* note 191 and accompanying text.

263. For a further discussion of how Tarpley can prove that he could perform the essential functions of an NBA player, see *supra* notes 193-219 and accompanying text.

264. See *Moorer v. Baptist Mem'l Health Care Sys.*, 398 F.3d 469, 484-85 (6th Cir. 2005) (requiring causal connection between employer's adverse action and individual's disability); see also *Raytheon Co. v. Hernandez*, 540 U.S. 44, 50 (2003) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)) (requiring employer to provide legitimate non-discriminatory reason for adverse action if plaintiff demonstrates prima facie ADA claim). For a further discussion of the adverse action requirement and how the burden shifts to the employer to provide a legitimate non-discriminatory reason for its adverse action, see *supra* notes 130-38 and accompanying text.

265. For a further discussion of how the NBA can claim that it refused to reinstate Tarpley because of his repeated violations of the collective bargaining agreement, see *supra* notes 227-30 and accompanying text.

claim that it refused to reinstate him because his age and proneness to injury rendered him incapable of competing at the NBA level.²⁶⁶ The court will likely find that the NBA refused to reinstate Tarpley for a legitimate non-discriminatory reason.

Is the NBA's legitimate non-discriminatory reason for refusing to reinstate Tarpley merely a pretext for discrimination?²⁶⁷ This may be where Tarpley's greatest difficulty lies because he does not appear to have any evidence indicating that his repeated collective bargaining agreement violations or his age and proneness to injury were anything but legitimate and non-discriminatory reasons for refusing to reinstate him.²⁶⁸

Tarpley's claim is not strong enough to overcome the NBA's potential challenges.²⁶⁹ Therefore, the court will probably find in the NBA's favor. If, however, the court does find in Tarpley's favor, it should prepare for the wave of litigation from substance abusing professional athletes that will follow.²⁷⁰

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266. For a further discussion of how the NBA can claim that it refused to reinstate Tarpley because of his age and proneness to injury, see *supra* notes 231-32 and accompanying text.

267. See *Monette v. Elec. Data Sys. Corp.*, 90 F.3d 1173, 1185-86 (6th Cir. 1996) (requiring plaintiff to prove employer's reason was pretext). For a further discussion of how the burden shifts back to the plaintiff to prove that the employer's legitimate non-discriminatory reason for its adverse action is a pretext for discrimination, see *supra* notes 139-43 and accompanying text.

268. For a further discussion of why Tarpley will not meet this burden, see *supra* note 235.

269. For a further discussion of the legal analysis of Tarpley's claim, see *supra* notes 169-235 and accompanying text.

270. For a further discussion of how a verdict in Tarpley's favor will inspire other substance abusing professional athletes to file ADA claims, see *supra* notes 236-54 and accompanying text.

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