Another recent case from the Tenth Circuit draws attention to current issues concerning employee use of prescription medications and related employer policies and practices, under the legal framework of the Americans with Disabilities Act (ADA). *Williams v. FedEx Corporate Services*, ___ F.3d ___ (10th Cir. 2017).

Steven Williams was a long-time employee of FedEx Corporate Services. He started taking OxyContin (a prescription painkiller) in 2008 for chronic neck pain and was later diagnosed with an addiction to narcotics, for which he was prescribed Suboxone to replace the OxyContin. In Fall 2011, he was treated for symptoms related to Suboxone withdrawal on multiple occasions. Williams requested a medical leave of absence from his job at FedEx and stated the reason for leave as work-related stress and anxiety (which was supported by medical documentation from his physician). In connection with his claim for short-term disability benefits, he also disclosed that his withdrawal from Suboxone was preventing him from working and the benefits plan administrator subsequently notified FedEx that Williams had "filed a disability claim for alcohol or substance abuse."

FedEx's drug and alcohol policy requires that employees who seek leave for substance abuse submit to mandatory testing before returning to work and participate in the company's follow-up testing program for five years (which additionally requires employees to disclose their use of prescription medications). FedEx advised Williams that the benefits plan administrator reported his leave as due to "an alcohol/drug related illness" and warned that his failure to comply with the drug and alcohol testing requirements would be a violation of company policy resulting in termination. Williams denied that his leave was related to substance abuse but nonetheless agreed to drug/alcohol testing pursuant to the policy because he felt his job was being threatened.

Williams filed a lawsuit alleging that FedEx violated the ADA by discriminating against him based on his actual and perceived disabilities and by requiring his enrollment in the company's substance abuse and drug testing program. Williams' traditional ADA claim based on his actual disability (anxiety disorder) is not particularly novel or unique and is not the subject of this article. However, his other allegations raise some interesting issues and warrant further discussion.

"Regarded As" Disabled

Williams claims that FedEx erroneously regarded him as a drug addict and discriminated against him on that basis. In addition to protecting employees from discrimination based on actual disabilities, the ADA also protects employees who are "regarded as" having a disability (even if they don't actually have the disability alleged). Notably, and as pertinent to this case, the Tenth Circuit specifically recognized that an individual may be protected under the "regarded as" prong of the ADA if he "is erroneously regarded [by his employer] as having engaged in illegal use of drugs" but is not actually "engaging in such use" or a current illegal drug user. Thus — at least initially — Williams could assert a claim that FedEx regarded him as being disabled because of an alleged substance abuse problem even though he did not actually suffer from one.

The Tenth Circuit also explained that requiring an employee to submit to (and pass) a return-to-work drug test and remain in the company's drug testing program for five years could constitute an adverse employment action under the ADA. This is true despite the fact that FedEx was merely enforcing a policy that applied universally to all employees taking a leave of absence for alcohol or substance abuse. (Note that this case originated in Utah federal court and did not involve Oklahoma state law. The legal
permissibility of FedEx's policy under Oklahoma's drug testing law is not the subject of this article, but employers should be aware of its restrictions.)

Improper Disability Related Inquiry

Williams also claimed that FedEx violated the ADA when it required him to submit to monthly drug tests and disclose his use of legally prescribed medications after he returned from leave. The court rejected the first part of Williams' argument; a test for illegal use of drugs (even if mandatory) is not considered an unlawful medical examination under the ADA. However, the Tenth Circuit did acknowledge that requiring employee disclosure of prescription drugs may violate the ADA and be considered an unlawful disability related inquiry. The Tenth Circuit did not definitively resolve the question of whether FedEx actually violated the ADA in this case, however, but merely recognized that such an inquiry might be unlawful in some circumstances.

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The law under the ADA is clear that an employer is liable for an improper disability related inquiry unless it "is shown to be job-related and consistent with business necessity." In the Tenth Circuit, "courts will readily find a business necessity if an employer can demonstrate that a medical examination or inquiry is necessary to determine whether the employee can perform job-related duties when the employer can identify legitimate, non-discriminatory reasons to doubt the employee's capacity to perform his or her duties." FedEx argued it satisfied the business necessity exception because its drug testing program ensures that employees who seek assistance for drug addiction or dependencies are no longer abusing the drug if they return to work at FedEx.

But the merits of FedEx's argument in this respect were not specifically addressed by the district court and the Tenth Circuit sent the case back for the issue to be decided. In so doing, the Tenth Circuit ordered the district court to determine whether FedEx improperly required Williams to disclose his use of prescription drugs and instructed the judge to "consider whether FedEx implemented its purported disclosure requirements to learn whether Mr. Williams was suffering from any health defects, or for some other business purpose" (noting that an employer's efforts to uncover health defects are precisely the harm that the ADA is designed to prevent).

The Tenth Circuit also rejected FedEx's argument that it did not improperly require Williams to disclose his prescription medications because he voluntarily agreed to participate in the drug testing program. The company asked Williams to sign a "Statement of Understanding" as to his drug testing obligations before he could return to work and the Court said it was reasonable to conclude that Williams signed the document only because he felt his job was threatened. Thus, there was a question whether or not FedEx actually (implicitly) required Williams' participation in the drug testing program as a condition of his continued employment.

What Does This Mean?

Though it is true employers may prohibit illegal drug use without running afoul of the ADA, the problem with the argument in this case is that FedEx admittedly never regarded Williams as an illegal drug user – it acknowledged that he was lawfully prescribed Suboxone. The Tenth Circuit stated that illegal drug use (as is not protected under the ADA) "does not include the use of a drug taken under the supervision of a licensed health care professional" (even if the employer takes issue with the particular medication).

While the final outcome is yet to be determined, employers should be extremely cautious in implementing policies and taking actions (including mandatory disclosures, drug testing, or substance abuse programs) that affect employees taking lawfully prescribed medications. So, too, should employers generally limit the medical information they require or obtain regarding employees – including from third parties – and be careful about acting upon such information in personnel decisions. In fact, EEOC guidance and some other courts have taken an even more restrictive approach, prohibiting employers from asking about prescription medications. 
drug use in all but the most restricted circumstances (if the employee's actual ability to perform particular job duties is directly impacted).

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